Nos. 18-36030, 18-36038, 18-36042, 18-36050, 18-36077, 18-36078, 18-36079, and 18-36080

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROW INDIAN TRIBE, et al.,

Plaintiff-Appellees,

v.

UNITED STATES OF AMERICA, et al.,

Defendant-Appellants,

and

STATE OF WYOMING,

Intervenor-Defendant-Appellants.

Appeal from the United States District Court for the District of Montana
Case Nos. 9:17-cv-00089-DLC, 9:17-cv-00117-DLC, 9:17-cv-00118-DLC, 9:17-cv-00119-DLC, 9:17-cv-00123-DLC, and 9:18-cv-00016-DLC
Hon. Dana L. Christensen, U.S. District Judge

OPENING BRIEF OF PLAINTIFF-APPELLEES NORTHERN CHEYENNE TRIBE ET AL.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, plaintiff-appellees Northern Cheyenne Tribe, Sierra Club, Center for Biological Diversity, and National Parks Conservation Association hereby certify that none of the plaintiff-appellee organizations has a parent corporation and that no publicly held corporation holds 10 percent or more of any plaintiff-appellee's organization's stock.

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
DPS	distinct population segment
DPS Policy	Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4,722 (Feb. 7, 1996)
ER	Excerpts of Record
ESA	Endangered Species Act
Farm Bureau Br.	Intervenor-Def.-Appellants Wyo. Farm Bureau et al.'s Opening Br.
Fed. Br.	Opening Br. for Fed. Appellants
Idaho Br.	Opening Br. for Appellant State of Idaho
JSER	Joint Supplemental Excerpts of Record
Safari Club Br.	Opening Br. of Intervenors-Defs.-Appellants Safari Club Int'l and Nat'l Rifle Ass'n of Am.
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Wyo. Br.	Opening Br. of Appellant State of Wyo.

INTRODUCTION

As this Court said the first time it addressed the federal government's effort to strip Endangered Species Act ("ESA") protections from grizzly bears in the area in and around Yellowstone National Park, "[t]his case involves one of the American West's most iconic wild animals in one of its most iconic landscapes." Greater Yellowstone Coal. v. Servheen, 665 F.3d 1015, 1019 (9th Cir. 2011). In Servheen, this Court faulted the U.S. Fish and Wildlife Service for "tak[ing] a full-speed ahead, damn-the-torpedoes approach" that defied "the ESA's policy of institutionalized caution" because the agency arbitrarily disregarded emerging evidence that one of the grizzly's critical food sources in the Yellowstone region—the seeds of the whitebark pine tree—was dramatically declining due to impacts of climate change and other factors. Id. at 1024-30.

Nevertheless, in a renewed attempt to remove the Yellowstone grizzly bear population from the ESA's list of threatened species—i.e., to "delist" this population—the Service has once again taken "a full-speed ahead, damn-the-torpedoes approach," id. at 1030, that violates ESA requirements and threatens grizzly conservation. First, the Service segregated and delisted the Yellowstone population from a larger, lower-48 threatened-species listing of grizzly bears without considering whether the remnant lower-48 listed entity left behind by that action is legally protectable under the ESA. In so doing, the Service disregarded

critical questions bearing directly on the availability of continued—and essential—ESA protections for grizzly bears in established recovery zones outside the Yellowstone region where grizzly populations continue to struggle. The agency also disregarded a 2014 D.C. district court decision that rejected a similarly truncated Service analysis in the context of Western Great Lakes wolf delisting. See Humane Soc'y of the U.S. v. Jewell, 76 F. Supp. 3d 69, 124 (D.D.C. 2014). The Service gambled that it would prevail in its appeal of that decision, but it did not do so. Instead, the D.C. Circuit affirmed that the ESA does not permit the Service to segregate and delist a population from a larger listed entity "without determining whether the remnant itself remains a species so that its own status under the Act will continue as needed." Humane Soc'y of the U.S. v. Zinke, 865 F.3d 585, 600 (D.C. Cir. 2017). The district court in this case correctly applied the D.C. Circuit's persuasive Humane Society ruling and the ESA itself to prevent the Service from ignoring the threat that its Yellowstone delisting might have the unintended consequence of derailing efforts to preserve the grizzlies in the remnant lower-48 listed population from extinction.

Second, the Service failed to rationally address a dramatic spike in Yellowstone-area grizzly bear mortalities that emerged as the agency attempted to put the finishing touches on its Yellowstone delisting decision. As Yellowstone-area grizzly bears have increasingly sought out meat to replace the vanishing

whitebark-pine-seed food source, bear mortalities due to conflicts with humans, including ranchers and hunters, have sharply escalated from fewer than 10 grizzlies per year in the early and mid-2000s to unprecedented levels of 45 conflict mortalities in 2015 and 35 in 2016, the year before the Service delisted the Yellowstone population. Yet the Service offered no rational response to this escalating mortality threat to Yellowstone-area grizzlies—despite this Court's explicit admonition in Servheen that the agency must "address the heart of the threat that whitebark-pine loss poses to the bears: increased proximity to humans when bears do adapt to seed shortages by seeking substitute foods." 665 F.3d at 1026 (emphasis in original). Although the court below did not address this issue, it offers an independent basis for this Court to affirm the district court's judgment vacating and remanding the Service's Yellowstone grizzly bear delisting decision. Accordingly, the judgment below should be affirmed.

STATEMENT OF JURISDICTION

Plaintiff-appellees Northern Cheyenne Tribe, et al., agree with the Statement of Jurisdiction set forth in the Opening Brief for the Federal Appellants except that plaintiff-appellees disagree that this Court has jurisdiction over these consolidated appeals. In the interest of efficiency and avoidance of duplication, plaintiff-appellees adopt and incorporate the argument offered by plaintiff-appellee WildEarth Guardians on this appellate jurisdiction issue.

STATEMENT OF THE ISSUES

1. Whether the Service violated the ESA by segregating and delisting the Yellowstone grizzly bear population from the larger, lower-48 listing of grizzly bears as a threatened species without considering whether the remnant lower-48 listed entity would continue to satisfy ESA listing requirements.

2. Whether the Service also violated the ESA by failing to rationally address an emerging threat to the Yellowstone-area grizzly bear population in the form of sharply escalating conflict mortalities arising from the bears' increasing reliance on meat-based food sources following the widespread loss of their traditional whitebark-pine food source.

STATEMENT REGARDING ADDENDUM

Pursuant to Circuit Rule 28-2.7, pertinent authorities are set forth in an addendum at the end of this brief.

STATEMENT OF THE CASE

I. THE THREATENED GRIZZLY BEAR

The grizzly bear, Ursus arctos horribilis, looms large in both the storied past of the American West and as a living embodiment of the wildness that remains in the Northern Rocky Mountains region. For this reason, the sighting of a grizzly represents a deeply meaningful and memorable experience for many people who live in and visit the Yellowstone region. JSER 0942-46; 0950-55; 0972-77; 0980-

82; 0987; 0991-96. In particular, the power and majesty of grizzly bears are well understood by members of plaintiff-appellee Northern Cheyenne Tribe, for whom grizzly bears have provided cultural and spiritual inspiration for centuries. JSER 1006-07.

The grizzlies remaining in the lower-48 United States today are a vestige of an era prior to European-American settlement when an estimated 50,000 grizzly bears roamed from Alaska south into Mexico, west to the coast of California, and east to the Great Plains. ER 89. Throughout the 19th and early 20th centuries, grizzly bears were "shot, poisoned, and trapped wherever they were found," eliminating them from 98 percent of their range by the 1930s and reducing their population to fewer than 1,000 individuals. Id.

Accordingly, when author and naturalist Peter Matthiessen described the grizzly's status in 1959, he predicted that "the time is not far off" when this "'monarch of the wild' will disappear. … For many of us, the great grizzly will always represent a wild, legendary America somewhere to the north and west which we were born too late ever to see." Peter Matthiessen, Wildlife in America 90 (rev. ed. 1987).

II. GRIZZLY BEAR PROTECTION UNDER THE ENDANGERED SPECIES ACT

That "somewhere" still exists, however, thanks to the Endangered Species Act. The Endangered Species Act is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1973). Acting, in part, specifically to ensure that the remaining grizzlies "'are not driven to extinction,'" Congress enacted the ESA in 1973 for the purpose of protecting and recovering threatened and endangered species and the ecosystems upon which they depend. Tenn. Valley Auth., 437 U.S. at 183-84 (emphasis omitted) (quoting 119 Cong. Rec. 42,913 (1973)); see 16 U.S.C. § 1531. The ESA represents a commitment "to halt and reverse the trend toward species extinction—whatever the cost" by rejecting the "economic growth and development untempered by adequate concern and conservation" that gave this country its legacy of extinctions. Tenn. Valley Auth., 437 U.S. at 154; see also 16 U.S.C. § 1531(a), (b).

To receive protection under the ESA, a species must first be listed as endangered or threatened. An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Id. § 1532(20). The term "species" includes "any subspecies

of fish or wildlife or plants." Id. § 1532(16). Since a 1978 amendment, a "species" under the ESA also includes "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." Id. The Service may list such a distinct population segment ("DPS") of a larger species upon finding that, in addition to being endangered or threatened, the segment is discrete—that is, "markedly separated from other populations of the same taxon"—and significant. Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4,722, 4,725 (Feb. 7, 1996) ("DPS Policy").

The Service must base its listing determinations on "the best scientific and commercial data available" considering the following five factors, which are set out in section 4(a)(1) of the Act: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence." 16 U.S.C. § 1533(a)(1), (b)(1)(A).

Applying these factors, the Service in 1975 protected the few remaining grizzly bears in the lower-48 United States from further human persecution by listing them as a threatened species under the ESA. See ER 441. As discussed, at

that time, Congress had not yet enacted the ESA provision allowing the Service to list a DPS; instead, the ESA provided for listing of species, subspecies, and "any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature." Endangered Species Act of 1973, Pub. L. No. 93-205, § 3, 87 Stat. 884, 886.

Following the listing, the Service identified six ecosystems that it considered necessary to recover or reestablish healthy grizzly bear populations. ER 89-90; see also ER 434-35. These were: (1) the Greater Yellowstone Ecosystem, encompassing Yellowstone National Park and surrounding lands in Montana, Wyoming, and Idaho; (2) the Northern Continental Divide Ecosystem of north-central Montana; (3) the Cabinet-Yaak area of northwest Montana and northern Idaho; (4) the Selkirk Mountains of northern Idaho, northeast Washington, and southeast British Columbia; (5) the North Cascades of north-central Washington; and (6) the Bitterroot ecosystem in the Bitterroot Mountains of western Montana and central Idaho. ER 90.

The first four ecosystems today contain a cumulative grizzly bear population of approximately 1,800 bears, ER 90—i.e., about 3.6 percent of the estimated historical population in the western contiguous United States, ER 89. In the North Cascades ecosystem, there have been only sporadic sightings of lone bears since

1996, JSER 0898, and the Bitterroot ecosystem "is not known to contain a population of grizzly bears at this time," ER 90.

In 2007, the Service for the first time declared that a grizzly bear population occupying one of these ecosystems—the Greater Yellowstone Ecosystem—was recovered and made its first attempt to remove that population from the ESA's list of threatened species. See Final Rule, Removing the Yellowstone Distinct Population Segment of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife, 72 Fed. Reg. 14,865 (Mar. 29, 2007). However, the Montana district court remanded and vacated that decision in 2009 based in part on its conclusion that the Service arbitrarily discounted the threat posed by recent declines in the whitebark pine tree, whose seeds traditionally constituted a key grizzly bear food source in the Yellowstone region. See Greater Yellowstone Coal. v. Servheen, 672 F. Supp. 2d 1105, 1120 (D. Mont. 2009). This Court affirmed the district court's ruling on that issue in 2011. See Servheen, 665 F.3d at 1024-30. In so doing, this Court cited record evidence that "[t]he pine seeds 'serve as an important fall food due to their high fat content and abundance as a pre-hibernation food,' and the bears consume them 'extensively' and even 'predominantly' when they are available," yet available evidence indicated "a high risk for loss" of whitebark pine "over much of its geographic distribution" in the Yellowstone area due to climate change and disease. Id. at 1025. In particular, the

Court faulted the Service for relying on the grizzly's omnivorous diet to buffer the impacts of whitebark-pine loss, stating that "the heart of the threat that whitebark-pine loss poses to the bears" is "increased proximity to humans when bears do adapt to seed shortages by seeking substitute foods." Id. at 1026 (emphasis in original). As the Court concluded, "[t]hat the bears are likely to seek alternate foods in the face of whitebark pine decline is a part of the problem, not an answer to it." Id.

III. ESCALATING GRIZZLY BEAR MORTALITIES

As demonstrated by recent events, this Court's comments in Servheen have proven to be prophetic. After recent catastrophic declines in whitebark-pine seeds, Yellowstone grizzly bears shifted to a diet based more extensively on wild ungulates, offal and wounded animals left by hunters, and livestock. See, e.g., JSER 1098-1100 (Ebinger, et al. 2016 study documenting increased grizzly reliance on ungulate carcasses coinciding with whitebark-pine decline). As bears have switched to meat in response to a dearth of whitebark-pine seeds, they increasingly have come into conflict with hunters and ranchers—conflict that often proves fatal to the bears when hunters shoot grizzlies in response to a perceived threat to their safety and government wildlife managers remove conflict-prone bears. JSER 1107-10 (Gunther et al. 2004, pp. 13-16); JSER 1147-48 (Schwartz

et al. 2010, pp. 664-665); JSER 1131 (Interagency Grizzly Bear Study Team 2009, p. 14).

As a result, bear deaths due to human conflicts have spiked in recent years. Forty-five bears died due to human conflicts in 2015 alone, up from 16 such deaths in 2014; 35 bears died due to conflicts in 2016. JSER 0905 (2015 annual report), 0923 (2016 annual report), 0914 (2014 annual report). Cub recruitment—the rate at which bear cubs survive to adulthood—has also recently decreased, likely because of predation by other bears, as grizzlies compete for meat food sources. JSER 1158.1 (peer review of delisting rule); ER 192.

This abrupt escalation in grizzly bear conflict mortality is unprecedented for the Yellowstone population:

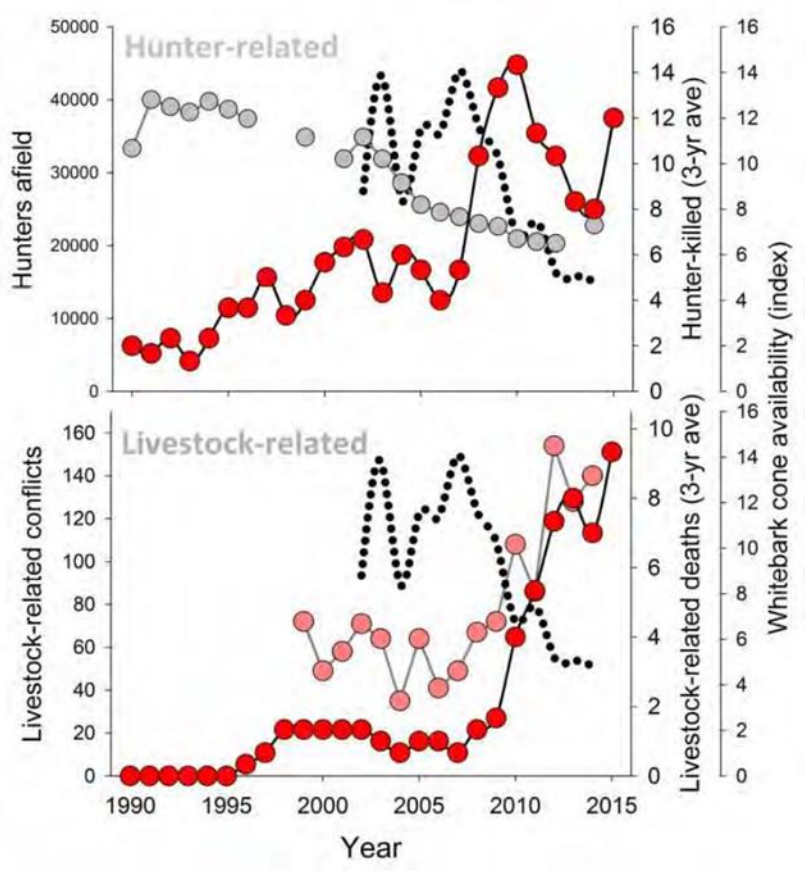


Figure 1: Trends in numbers of grizzly bears killed (top) because of conflicts with big game hunters (red dots) and (bottom) conflicts over livestock (red dots as well). Gray dots in the top graph show numbers of hunters afield and pink dots in the bottom graph, total numbers of livestock-related conflicts. The black dotted lines show trends in whitebark-pine cone availability since onset of losses to bark beetles (JSER 0934).

These increasing mortality levels have now reached a magnitude sufficient to impact the trajectory of the Yellowstone grizzly population as a whole. The record-setting 2015 mortality pushed the Service's annual point estimate for the population into decline over the three-year period from 2014-2016, which immediately preceded the Service's delisting action challenged in this case. See JSER 0913.1 (2014 estimate: 757 bears); JSER 0904.1 (2015 estimate: 717 bears); 0920 (2016 estimate: 695 bears).

IV. THE CHALLENGED RULE

Notwithstanding this dramatic increase in grizzly bear conflict mortalities, the Service resumed its effort to delist the Yellowstone grizzly population on March 11, 2016, when the agency published a proposed rule to designate the Yellowstone population as a DPS and remove it from the ESA list of threatened species. See Proposed Rule, Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife, 81 Fed. Reg. 13,174 (Mar. 11, 2016). In so doing, the Service chose to proceed with the delisting not only in the face of unprecedented grizzly mortalities, but also in the face of a legal development that was squarely adverse to the agency's proposal.

Before the Service published the proposed delisting rule, on December 19, 2014, the U.S. District Court for the District of Columbia issued a decision in Humane Society of the United States v. Jewell, 76 F. Supp. 3d 69, invalidating a similar Service effort to designate the Western Great Lakes population of the gray wolf, Canis lupus, a DPS and delist it from an already-listed entity, the lower-48 wolf population. The D.C. court rejected the Service's attempt to carve out a DPS and contemporaneously delist it under the ESA for a variety of reasons, including that, in taking any such action, the Service must review the status of the listed entity from which the DPS was carved. See id. at 124. The court stated that "[a]ny

reclassification or delisting of the species Canis lupus may only be undertaken after a review of the 'status' of Canis lupus, the 'species' that was listed on the List of Endangered and Threatened Wildlife," yet the Service failed to conduct any such review. Id. at 124 & n.31.

The Service appealed the Humane Society ruling, but—before any appellate decision had been rendered—the agency published the Final Rule at issue in this case on June 30, 2017. See ER 83. In the Final Rule, the Service recognized that the D.C. district court had disapproved an identical use of the ESA's DPS language in the Humane Society case, but stated that "[w]e respectfully disagree with the [D.C.] district court's interpretation of the DPS policy." ER 98. Further, the Service in the Final Rule explicitly—and repeatedly—declined to consider the status of the already-listed grizzly bear entity, i.e., the lower-48 grizzly population, or the impact of its Yellowstone delisting decision on the status or conservation of that entity, stating that "consideration and analyses of grizzly bear populations elsewhere in the lower 48 States is outside the scope of this rulemaking." ER 127; accord ER 133, 205.

The Service in the Final Rule also dismissed the significance of the Yellowstone grizzly population's increasing reliance on meat food sources and resulting conflict mortality. In so doing, the agency relied on data gathered from 2000 to 2012, before the unprecedented levels of grizzly bear conflict mortality

recorded in 2015 and 2016. See ER 118-19. This discussion therefore failed to assess the magnitude of the conflict-mortality threat demonstrated by more recent data.

Approximately one month after the Service published the Final Rule, the D.C. Circuit issued its decision in Humane Society. See Humane Soc'y, 865 F.3d at 585. Evaluating the text and structure of the ESA, the D.C. Circuit held that, while the Service has authority under the ESA to identify and assign a different conservation status to a DPS carved out of an already-listed species, it may not do so without considering the status of that listed species and "without determining whether the remnant itself remains a species so that its own status under the Act will continue as needed." Id. at 600. Otherwise, the Court wrote, the Service might "delist an already-protected species by balkanization … by riving an existing listing into a recovered sub-group and a leftover group that becomes an orphan to the law." Id. at 603. Accordingly, the D.C. Circuit affirmed the judgment of the D.C. district court vacating the Service's identification and delisting of the Western Great Lakes gray wolf population. See id. at 615.

V. THE DISTRICT COURT PROCEEDINGS

Plaintiff-appellees Northern Cheyenne Tribe, et al. filed this case on August 30, 2017, alleging that here—as in Humane Society—the Service violated the ESA by identifying and delisting a DPS of an already-listed species without considering the impact of its delisting decision on the remnant listed entity. See JSER 0938-39 (Complaint for Declaratory and Injunctive Relief, N. Cheyenne Tribe v. Zinke, No. CV 17-119-M-DLC, ¶¶ 78-81). Plaintiff-appellees further alleged that the Service violated the ESA by failing to rationally address the emerging threat of human conflicts associated with the grizzlies' greater dependence on meat food sources. JSER 936-37 (Id. ¶¶ 71-77). Several other plaintiffs also challenged the Final Rule in separate lawsuits, which were consolidated with Northern Cheyenne Tribe, et al.'s case in the district court.

Faced with the Humane Society decision and plaintiff-appellees' legal challenge invoking it against the Service, the agency on December 7, 2017 published in the Federal Register a notice seeking public comment concerning "the potential implications for the [Greater Yellowstone Ecosystem] final rule in light of the Humane Society ruling." Request for Comments, Possible Effects of Court Decision on Grizzly Bear Recovery in the Conterminous United States, 82 Fed. Reg. 57,698, 57,698 (Dec. 7, 2017). The Service acknowledged that Humane Society "may impact the [Greater Yellowstone Ecosystem] final rule, which also

designated a portion of an already-listed entity as a DPS and then revised the listed entity by removing the DPS due to recovery." Id. The Service stated that it "will address public comments and notify the public of our conclusions by March 31, 2018," but that the Final Rule "will remain in effect during this review process." Id. at 57,699. On April 30, 2018, the Service concluded this post-hoc review by publishing in the Federal Register a seven-page determination that the Yellowstone grizzly bear delisting did not require modification in light of Humane Society. See Review of 2017 Final Rule, 83 Fed. Reg. 18,737 (Apr. 30, 2018).

As litigation of this case proceeded, the states of Wyoming and Idaho announced plans to commence the first grizzly bear hunting seasons in the Yellowstone region in more than 40 years on September 1, 2018, collectively targeting 23 bears.[1] Accordingly, after briefing and oral argument on cross-motions for summary judgment, plaintiff-appellees requested a temporary restraining order to prevent the hunting seasons from going forward, with associated irreparable harm to themselves and their members, before the district court could rule on the merits of their challenge. See JSER 1059-65, 1066-81.

[1] See Wyo. Game & Fish Dep't, ch. 68: Grizzly Bear Hunting Seasons, at 68-6–68-7, https://wgfd.wyo.gov/Regulations/Regulation-PDFs/REGULATIONS_CH68.pdf (last visited August 4, 2019); Idaho Fish & Game Comm'n, Grizzly Bear 2018 Seasons & Rules, at 3, https://idfg.idaho.gov/sites/default/files/seasons-rules-grizzly-bear-2018.pdf (last visited August 4, 2019).

The district court granted that request on August 30, 2018, issuing a temporary restraining order with a term of 14 days and then extending it for an equal period on September 13, 2018 in response to plaintiff-appellees' motion. See JSER 1082-86, 1087-89.

On September 24, 2018, the district court issued an order vacating and remanding the Service's Final Rule on three grounds, including that "[t]he Service acted arbitrarily and capriciously by failing to consider the impact of delisting on both the Greater Yellowstone grizzly population and other members of the lower-48 grizzly population." ER 26. The district court did not address plaintiff-appellees' argument concerning the Service's failure to consider the impact of the bears' switch to a meat-based diet and associated rising conflict mortality in the region. See ER 3 n.2.

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment below for two reasons.

First, the district court correctly held that the Service violated the ESA by failing to consider the impact of its Yellowstone grizzly bear DPS delisting on the remnant of the lower-48 threatened-species listing of grizzly bears. As the D.C. Circuit held in Humane Society, 865 F.3d at 601-03, the ESA requires such analysis and, moreover, the impact of a DPS delisting on a remnant listed entity is an important factor that the Service must consider in such a delisting decision. The

Service's failure to undertake such analysis here left critical questions unanswered concerning the continued listing status of the lower-48 remnant. See Point II.A, infra.

The Service's appellate argument on this point does not contest the district court's central holding or remedy ruling, but instead asks this Court to line edit the decision below by vacating a few references that the Service speculates might impose an inappropriately burdensome remand obligation on the agency. The Service's argument fails because the district court imposed no inappropriate burden. See Point II.B, infra. The Service's supporting intervenors request broader appellate relief but their contentions are also meritless. See Point II.C, infra.

Second, the Service arbitrarily failed to address the threat to the Yellowstone grizzly population posed by sharply increasing mortality resulting from the bears' recent transition to a more meat-based diet. See Point III.A, infra. The Service offered no rational response to this threat in its Final Rule, instead principally relying on stale data that did not reflect the magnitude of recent mortality levels. See Point III.B, infra. While the Service also generally relied on a post-delisting conservation strategy to address the threat of excessive grizzly bear mortality, that strategy does not limit grizzly mortality resulting from conflicts with humans. See

Point III.C, infra. Although not addressed by the district court, this point offers an independent basis to affirm the judgment below.

ARGUMENT

This Court should affirm the district court's judgment vacating and remanding the Final Rule. The district court correctly applied the D.C. Circuit's persuasive Humane Society ruling and the ESA itself to hold that the Service arbitrarily failed to consider the impact of its Yellowstone delisting decision on the remnant of the lower-48 threatened-species listing of grizzly bears. Moreover, although unaddressed by the district court, the Service also acted arbitrarily in dismissing the threat of escalating conflict mortalities arising from the Yellowstone grizzly bears' transition to a more meat-focused diet following the widespread demise of their traditional whitebark-pine food source. Accordingly, the decision below should be affirmed.

I. STANDARD OF REVIEW

This Court reviews de novo the district court's grant of summary judgment. Servheen, 665 F.3d at 1023. The Service's decision to remove a species from the ESA's list of threatened species is reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Id. Under the APA, a reviewing court "shall" set aside agency actions, findings, or conclusions that are "arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

In conducting this review, the Court must "ensure that the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." Servheen, 665 F.3d at 1023 (quoting Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1140 (9th Cir. 2007)). Although this standard of review is narrow, it demands that this Court conduct a "searching and careful" review. Japanese Vill., LLC v. Fed. Transit Admin., 843 F.3d 445, 453-54 (9th Cir. 2016) (quoting Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 378 (1989)). Even where an agency with "technical expertise" acts "within its area of competence," the Court "need not defer to the agency when the agency's decision is without substantial basis in fact." Ariz. Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1163 (9th Cir. 2010). In particular, "agency action must be reversed when the agency has … entirely failed to consider an important aspect of the problem." Ctr. for Biological Diversity v. Zinke, 868 F.3d 1054, 1057 (9th Cir. 2017).

II. THE SERVICE VIOLATED THE ESA BY FAILING TO CONSIDER THE IMPACT OF ITS YELLOWSTONE DELISTING DECISION ON THE REMNANT LOWER-48 GRIZZLY BEAR LISTING

This Court should affirm the district court's ruling that the Service violated the ESA "[b]y refusing to analyze the legal and functional impact of delisting on

other continental grizzly populations." ER 48. The district court correctly held that the Service arbitrarily delisted the Yellowstone grizzly bear population without first considering the important question whether that delisting would "riv[e] an existing listing into a recovered sub-group and a leftover group that becomes an orphan to the law." Humane Soc'y, 865 F.3d at 603. The district court's ruling reflected an appropriate application of the ESA's statutory requirements and its "policy of institutionalized caution." ER 32 (quotations and citation omitted).

Despite seeking this Court's review of the district court's ruling on this issue, the Service does not contest that it violated the ESA and therefore the Final Rule was properly vacated and remanded. Specifically, the Service does not dispute that it failed to "resolve the legal question of whether, when a DPS of a listed species is delisted, the rest of the species continues to qualify as a 'species' within the meaning of the Act." Opening Br. for Fed. Appellants ("Fed. Br.") 22. Nor does the Service even dispute that the district court's vacatur and remand orders represented an appropriate remedy for this agency failure; to the contrary, the Service advises that it "is already working on the issues remanded in this case"

and that consideration of the question remanded by the district court "is underway." Id. 15; accord id. 22-23.[2]

Instead, the Service's entire appellate argument regarding this issue amounts to a quibble with two words used in the district court's opinion. The Service objects to a handful of references in the district court's legal analysis discussing the need for a "comprehensive review" of the lower-48 grizzly bear listing, and asks this Court to vacate those references. See Fed. Br. 16-28; ER 30. At the same time, however, the Service asserts that "[i]t is unclear" what the district court meant by this "comprehensive review" language. Fed. Br. 23. The Service speculates that it could mean "the five-factor analysis prescribed under the ESA when FWS determines whether a species is endangered or threatened," or, perhaps, "a different (but nonetheless comprehensive) examination of the entire listed species." Fed. Br. 23-24; see also id. 28 (requesting that this Court vacate a portion of the district court's opinion "to the extent that the district court directed FWS to conduct a 'comprehensive analysis'") (emphasis added). The Service thus essentially asks this Court to line edit the district court's opinion based on what the

[2] Consistent with the Service's acquiescence to the district court's judgment of remand and vacatur, the Service on July 31, 2019 published a notice in the Federal Register to restore the Yellowstone grizzly population to the agency's threatened-species list in response to the district court's order. See Reinstatement of ESA Listing for the Grizzly Bear in the Greater Yellowstone Ecosystem in Compliance With Court Order, 84 Fed. Reg. 37,144 (July 31, 2019).

Service speculates the district court might have meant in referring to a comprehensive review.

The Service's strained efforts to concoct an appellate argument on this subject imagine ambiguity where none exists and ultimately are unavailing. The district court correctly held that the Service's review must examine the functional and legal impact of the Yellowstone grizzly delisting on the remnant lower-48 listed entity to ensure that the remnant's "own status under the Act will continue as needed." Humane Soc'y, 865 F.3d at 600. The Service's challenge to that ruling is meritless and should be rejected.

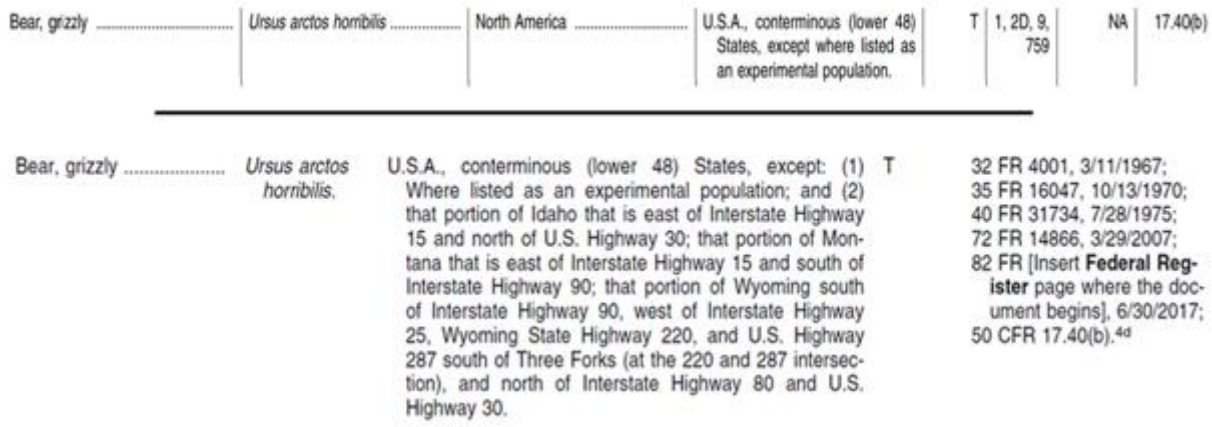
A. The Service Left Critical Questions Unanswered Concerning the Impact of the Yellowstone Delisting on the Lower-48 Remnant

The Service violated the ESA by delisting the Yellowstone grizzly DPS without considering the impact of the Yellowstone delisting on the remnant of the lower-48 listed entity. The Service failed to consider whether that remnant remains a listable entity under the ESA so that conservation and recovery actions for grizzlies within the remnant may continue as needed—or whether instead the remnant may become "an orphan to the law" such that needed protections could be lost. Humane Soc'y, 865 F.3d at 603. In all material respects, the Service's action parallels the agency action invalidated by the D.C. Circuit's 2017 Humane Society ruling, and the same result should apply—the Service's delisting rule violated the ESA.

As described above, the Service listed the entire lower-48 grizzly bear population as a single entity in 1975, at a time when the ESA contained no DPS language and instead provided for listing of species, subspecies, or "any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature." Pub. L. No. 93-205, § 3, 87 Stat. 884, 886; see ER 89. When the Service acted to segregate and delist the Yellowstone population through publication of the Final Rule, the agency explicitly—and repeatedly—declined to consider the status of the already-listed grizzly bear entity (the lower-48 grizzly population), or the impact of its Yellowstone delisting decision on the status or conservation of that entity, stating that "consideration and analyses of grizzly bear populations elsewhere in the lower 48 States is outside the scope of this rulemaking." ER 127; accord ER 133, 205.

The Service's truncated delisting analysis violated the ESA. As Humane Society observed, the ESA's "text requires the Service, when reviewing and redetermining the status of a species, to look at the whole picture of the listed species, not just a segment of it." 865 F.3d at 601. ESA Section 4(c)(1) requires that the Service "revise" its endangered and threatened species lists to reflect decisions made in "accordance with" Section 4(b), and that such revisions must "specify with respect to each such species over what portion of its range it is endangered or threatened." 16 U.S.C. § 1533(c)(1). Section 4(b)(1)(A), in turn,

requires the Service to make such determinations "after conducting a review of the status of the species." Id. § 1533(b)(1)(A). When the Service carves a DPS from an existing listing, Section 4(c)(1) necessarily requires the agency to revise the existing listing to exclude the delisted DPS—i.e., to exclude that portion of the existing listed species' range in which it is no longer endangered or threatened—thereby creating a new remnant entity of the listed species. Indeed, that is what the Service did here; the challenged Final Rule "revis[ed]" the lower-48 listing of the grizzly bear species to exclude the Yellowstone DPS, ER 84:



Bear, grizzly	*Ursus arctos horribilis*	North America	U.S.A., conterminous (lower 48) States, except where listed as an experimental population.	T	1, 2D, 9, 759	NA	17.40(b)

Bear, grizzly	*Ursus arctos horribilis.*	U.S.A., conterminous (lower 48) States, except: (1) Where listed as an experimental population; and (2) that portion of Idaho that is east of Interstate Highway 15 and north of U.S. Highway 30; that portion of Montana that is east of Interstate Highway 15 and south of Interstate Highway 90; that portion of Wyoming south of Interstate Highway 90, west of Interstate Highway 25, Wyoming State Highway 220, and U.S. Highway 287 south of Three Forks (at the 220 and 287 intersection), and north of Interstate Highway 80 and U.S. Highway 30.	T	32 FR 4001, 3/11/1967; 35 FR 16047, 10/13/1970; 40 FR 31734, 7/28/1975; 72 FR 14866, 3/29/2007; 82 FR [Insert **Federal Register** page where the document begins], 6/30/2017; 50 CFR 17.40(b).[4d]

Figure 2: Comparison of lower-48 United States grizzly bear listing entry in 2015 edition of Code of Federal Regulations (top; source: 50 C.F.R. § 17.11(h) (2015)) and 2017 Final Rule (bottom; source: ER 214)

Accordingly, the "species" affected by any such revision includes not just the DPS, but the revised remnant as well. Yet if the Service's status review "of the species" under Section 4(b)(1)(A) extends no further than the delisted DPS—as it did in the Final Rule here—the agency has no rational basis to ensure that the revision required by Section 4(c)(1) yields a remnant entity that is eligible for

listing under the ESA. Accordingly, "[t]he statute requires a comprehensive review of the entire listed species and its continuing status." Humane Soc'y, 865 F.3d at 601.

More fundamentally, and independent of ESA Section 4(c), the Service may lawfully delist the Yellowstone grizzly population only after rationally considering all important aspects of its decision. Ctr. for Biological Diversity, 868 F.3d at 1057. Such factors, at a minimum, include those that "the statute in question makes 'important.'" Lake Mohave Boat Owners v. Nat'l Park Serv., 138 F.3d 759, 763 (9th Cir. 1998) (citation omitted); see Or. Nat. Res. Council v. Thomas, 92 F.3d 792, 798 (9th Cir. 1996) ("Whether an agency has overlooked 'an important aspect of the problem' … turns on what a relevant substantive statute makes 'important.'"). The ESA's statutory text and design establish that the impact of a DPS delisting on the remnant listed entity is an important factor that the Service must consider in the delisting determination. That is because, under the ESA, the Service may delist a species only after determining that the species is no longer threatened or endangered based on an evaluation of the same factors the agency considers when listing a species. See 16 U.S.C. § 1533(a)(1); 50 C.F.R. § 424.11(d). This is the exclusive method the statute allows for delisting a species. See 16 U.S.C. § 1533(a)(1); 50 C.F.R. § 424.11(d). However, if the Service fails to consider the impact of designating and carving out a DPS from a larger listed

entity, then the agency's disregard of this impact could bypass the statutory process, "divest[ing] the extant listing of legal force" by creating a remnant that is not itself eligible for listing under the ESA. Humane Soc'y, 865 F.3d at 601-02. As the D.C. Circuit stated in Humane Society:

> [T]he Service's disregard of the remnant's status would turn that sparing segment process into a backdoor route to the de facto delisting of already-listed species, in open defiance of the Endangered Species Act's specifically enumerated requirements for delisting. See 16 U.S.C. § 1533(a)(1) (listing five mandatory criteria for altering a listing). Accordingly, as a matter of plain statutory design, the act of designating a segment cannot in one fell swoop make an already-listed species an unlisted and unlistable non-species, "sidestep[ping]" the process "Congress has plainly" prescribed for delisting.

Id. at 601-02 (citations omitted, alteration in original).

Requiring the Service to consider the potential impact of such delisting decisions serves not only to honor Congress's statutory design for the delisting process, but also to avoid a severe practical threat to species' survival from jettisoning protections for listed species in areas previously deemed essential for their survival and recovery in the absence of any rational determination that such protections are no longer needed. See id. at 602 (faulting Service for delisting Western Great Lakes wolf population while leaving "entirely unexplained how the remaining wolves' existing endangered status would continue" or "mak[ing] any finding that the remnant was no longer endangered").

The Service's Final Rule defies this requirement. When the Service published the Final Rule, the listed species under ESA Section 4 was the lower-48 grizzly bear population. See ER 89 (discussing lower-48 grizzly listing). Therefore, the ESA required the Service to review the status of that listed species before revising that listing. 16 U.S.C. § 1533(b)(1)(A), (c)(1). In addition, rational consideration of the Yellowstone delisting required the Service to consider its impact on the remnant lower-48 grizzly listing. Humane Soc'y, 865 F.3d at 601-02. The Service refused to do so, stating repeatedly that "consideration and analyses of grizzly bear populations elsewhere in the lower 48 States" was "outside the scope of" the Final Rule. ER 127; see also ER 133, 205.

As a result, the Service left critical questions unexamined concerning the viability of the remnant listing. As discussed, the Service's own recovery strategy for grizzly bears in the lower-48 United States focuses on conserving and restoring bear populations in six specified ecosystems that extend well beyond Yellowstone. See ER 434-35 (1993 Grizzly Bear Recovery Plan). Yet the Service has never considered whether "lower-48 grizzlies outside Yellowstone" are eligible for listing as a species or subspecies under the ESA. In this regard, lower-48 grizzly bears, including Yellowstone grizzlies, are all members of Ursus arctos horribilis, a brown bear subspecies that extends north through Canada and Alaska. ER 86, 98. Nor has the Service considered whether the lower-48 grizzly bear population

minus the Yellowstone subpopulation would satisfy the ESA's and the Service's own requirements for listing as a DPS. See 16 U.S.C. § 1532(16) (DPS provision); DPS Policy, 61 Fed. Reg. at 4,725. To the contrary, in the Service's August 2011 Five-Year Review of the lower-48 grizzly listing prepared under ESA Section 4(c)—which appears to mark the Service's only formal consideration whether the pre-1978 lower-48 grizzly listing would satisfy later-enacted DPS requirements—the Service repeatedly relied on the Yellowstone population to justify its determination that the lower-48 listing satisfied the DPS Policy's "significance criterion." See JSER 0879-883 (concluding, among other things, that Yellowstone "does represent an unusual and unique ecological setting for the taxon" and Yellowstone bears "are genetically divergent from nearby adjacent populations"). Now, however, the Service has carved the Yellowstone grizzly population from the lower-48 listing without even considering whether the remnant is still eligible for listing under DPS requirements.

Although the Service suggested in that same Five-Year Review that multiple lower-48 grizzly bear ecosystems might be segregated and listed as separate DPSs under the ESA, JSER 0895, this potential path also presents important, unexamined issues. There are, at a minimum, substantial questions whether the listings of the North Cascades and Bitterroot grizzly bear ecosystems could be sustained on this basis given that there have been only sporadic grizzly sightings in

the U.S. portion of the North Cascades ecosystem and no known grizzlies at all in the Bitterroot ecosystem. As the district court observed, the remnant lower-48 grizzly bear listing encompasses "one area where grizzlies have not been affirmatively located in over twenty years, and [another] area where grizzlies have not been seen since at least 1975. As the Service itself admits, 'it would be difficult to justify a distinct population segment in an area where bears … have not been located for generations.'" ER 25-26 (citation omitted, quoting Service summary judgment brief). Yet the Service has not wrestled with the question whether the North Cascades and Bitterroot ecosystems could be listed separately as DPSs without a grizzly population occupying them.

This threat to the foundational ESA listing underlying lower-48 grizzly conservation is not idle speculation. During the Yellowstone grizzly bear delisting process, the national leader of the Service's ESA program advised:

> The goal should be to modernize the description of "the remainder" so that if the [Yellowstone and Northern Continental Divide grizzly populations] are delisted we are left with a listed entity of grizzly bears that is compliant with the DPS policy and consistent with our overall recovery strategy. … If we don't take care of that concurrent with these upcoming delisting proposals, I worry that a future hostile administration would use the lack of sound legal standing to try to remove the remaining small populations from ESA protection.

JSER 0772 (emphasis in original). Even if this threat did not materialize, the ESA permits any "interested person" to petition "to remove a species from" the threatened-species list. 16 U.S.C. § 1533(b)(3)(A). Thus, the Service's action

created an opportunity for any opponent of grizzly conservation to petition for delisting of the lower-48 remnant on the basis that it does not qualify for listing as a species, subspecies, or DPS. See id. § 1532(16) (defining "species").

For all these reasons, "the Service must make it part and parcel of its segment analysis to ensure that the remnant, if still endangered or threatened, remains protectable under the Endangered Species Act." Humane Soc'y, 865 F.3d at 602. The Service failed to do so in the Final Rule and therefore violated the ESA.

B. The Service's Confusion Regarding Its ESA Obligations Fails to Justify Correction of the District Court's Ruling

The Service's assertion that it does not understand the district court's direction for the agency to undertake a "comprehensive review" that encompasses the lower-48 grizzly bear listing offers no legitimate basis for this Court to correct the district court's ruling. The Service claims the district court inappropriately required the agency on remand to conduct "the five-factor analysis prescribed under the ESA when FWS determines whether a species is endangered or threatened, 16 U.S.C. § 1533(a)(1)," or perhaps "a different (but nonetheless comprehensive) examination of the entire listed species." Fed. Br. 23-24; see also Opening Br. of Appellant State of Wyo. ("Wyo. Br.") 49-50; Opening Br. of Intervenors-Defs.-Appellants Safari Club Int'l and Nat'l Rifle Ass'n of Am. ("Safari Club Br.") 8-10. Yet despite harboring this concern and apparent

confusion, the Service made no request for the district court to clarify its ruling regarding the Service's remand obligation. Instead, the Service appealed directly to this Court for relief from an obligation that the Service speculates the district court may have imposed.

The Service fails to justify this unusual request. The Service's central concern appears to be that the district court's reference to a "comprehensive review" meant to require the Service to subject the lower-48 remnant listing to "the five-factor analysis" prescribed by ESA Section 4(a)(1) for determining whether a species is threatened or endangered. See 16 U.S.C. § 1533(a)(1). However, neither the district court's opinion nor the Humane Society decision on which it relied imposed any such analysis requirement, nor did plaintiff-appellees request it. In addressing the Service's obligation, the district court quoted the Humane Society ruling that, "'when a species is already listed, the Service cannot review a single segment with blinders on, ignoring the continuing status of the species' remnant. The [ESA] requires a comprehensive review of the entire listed species and its continuing status." ER 30 (quoting Humane Soc'y, 865 F.3d at 601). It was in this context—and, indeed, in the very next sentence of its opinion—that the district court concluded that the Service failed to "undertake the comprehensive review mandated by the ESA." Id. The logical reading of this discussion is that the district court intended its reference to a "comprehensive review" to mean the

type of review described in the immediately preceding passage—i.e., one under which the Service does not "review a single segment with blinders on, ignoring the continuing status of the species' remnant," id. (quotation omitted)—not a five-factor analysis of the remnant listed entity under ESA Section 4(a)(1).

The district court's other distillations of its holding support this reading. The district court concluded that "the Service arbitrarily and capriciously determined that it need not analyze the impact of delisting on grizzlies living outside the Greater Yellowstone Ecosystem," and that "Section 4 of the ESA demands that the Service consider the legal and functional effect of delisting a newly designated population segment on the remaining members of a listed entity." ER 31-32. In the final concluding section of its opinion, the district court summarized that the Service violated the ESA "[b]y refusing to analyze the legal and functional impact of delisting on other continental grizzly populations." ER 48. All of these statements focus on the Service's legal obligation to consider the impact of its Yellowstone delisting on the remnant of the already-listed lower-48

population, not to conduct a full five-factor threats analysis of the remnant under ESA Section 4(a)(1).[3]

Further, Humane Society does not require the five-factor analysis that the Service opposes. Like the decision below, Humane Society references a "comprehensive review" in the context of faulting the Service for "review[ing] a single [DPS] with blinders on, ignoring the continuing status of the species' remnant." 865 F.3d at 601. Humane Society makes clear that the D.C. Circuit's central concern was that the Service would delist a DPS of an already-listed species "without determining whether the remnant" of that species "itself remains a species so that its own status under the Act will continue as needed." Id. at 600. Nothing in the opinion indicates that the D.C. Circuit sought to require the Service to subject the remnant to an exhaustive five-factor analysis under ESA Section 4(a)(1).

[3] The district court intended its mandate for the Service to consider the "functional" as well as "legal" impact of the Yellowstone delisting on the remnant to encompass "all identified and reasonably identifiable threats" and to be based on the best available science, as required by the ESA. ER 30. As the district court explained, this means that, for example, the Service must examine whether "decreased protections in the Greater Yellowstone Ecosystem" would "translate to decreased chances for interbreeding" with other populations. Id. However, this examination still focuses on the impact of threats arising specifically from the Yellowstone DPS delisting, not an exhaustive Section 4(a)(1) analysis of any and all threats affecting the remnant listed entity. See id. (referencing requirement for Service to consider whether "the Greater Yellowstone grizzly delisting may influence the other continental populations").

Nor did plaintiff-appellees request such an analysis. Plaintiff-appellees' complaint in the district court alleged that the Service "failed to conduct any analysis of the status or sufficiency, for ESA listing purposes, of the remnant lower-48 grizzly bear listing. Thus, the Service failed to evaluate whether the remnant remains protectable under the ESA and, if so, on what basis." JSER 0938-39. Plaintiff-appellees' summary judgment briefing elaborated this same contention. See JSER 1016-28; JSER 1047-58. At no point did plaintiff-appellees ask the district court to order the Service to conduct a full "five-factor analysis" of the lower-48 remnant listing under ESA Section 4(a)(1). Fed. Br. 23-24.[4]

In sum, the Service fails to demonstrate that the district court imposed on the Service an obligation that the Service itself admits is not clearly stated in the ruling below, that was not imposed by the Humane Society opinion on which the district court relied, and that was never requested by plaintiff-appellees who raised the relevant DPS issue before the district court. Accordingly, there is no basis for this Court to vacate any aspect of the district court's ruling on this issue.

[4] Nor did the plaintiffs in any of the consolidated cases. In the interest of efficiency, plaintiffs in the consolidated cases adopted plaintiff-appellees' briefing of the issue addressed in Humane Society. JSER 1032 (Humane Society Br.); JSER 1010 (Aland Br.); JSER 1014 (Crow Indian Tribe Br.); JSER 1030 (Alliance for the Wild Rockies Br.); JSER 1012 (WildEarth Guardians Br.).

The Service's remaining criticisms of the district court's ruling are equally flawed. Although purporting not to appeal the district's order "to the extent that it requires FWS to 'consider the legal and functional effect'" of the Yellowstone delisting on the remnant of the lower-48 grizzly bear listing, Fed. Br. 15, the Service's brief nevertheless offers numerous critiques of, and misstatements about, the district court opinion and the related Humane Society ruling, many of which are argued even more vehemently by the Service's supporting intervenors. None of these contentions has merit.

First, the Service seeks to distinguish Humane Society on the basis that the D.C. Circuit in that case confronted a situation where the Service itself had proposed to delist the remnant left behind by its Western Great Lakes wolf delisting. See Fed. Br. 19-20; see also Opening Br. for Intervenor-Defs. / Appellants Sportsmen's All. Found. and Rocky Mountain Elk Found. ("Sportsmen Br.") 12-17. However, while the D.C. Circuit found the circumstances in Humane Society "[w]orse still" because the Service proposed to delist the remnant in that case, even before addressing that point the Court found that the Service violated the ESA by leaving "entirely unexplained how the remaining wolves' existing endangered status would continue." 865 F.3d at 602. The Service's equivalent failure is equally unlawful here.

Second, the Service tries to sidestep responsibility for this failure by claiming that its challenged Final Rule "naturally did not contain the analysis that Humane Society" deemed necessary because the Final Rule preceded the D.C. Circuit's opinion. Fed. Br. 20-21; see also Sportsmen Br. 28-29. As discussed, however, the D.C. district court issued its opinion in Humane Society well before the Service published the Final Rule—and, indeed, before the Service even proposed delisting the Yellowstone grizzly bear DPS. See 76 F. Supp. 3d at 69. While the D.C. district court devoted much of its analysis to the threshold question whether the ESA permits the Service to identify and delist a DPS from an already-listed species, that court also held that the Service cannot use the DPS tool "to circumscribe the status review required for a listing change in order to limit such review to only part of the listed species." Id. at 124. In issuing the Final Rule, the Service chose to gamble that it could reverse that ruling on appeal to the D.C. Circuit; it failed. In any event, the requirements of ESA Section 4(c)(1) and (b)(1)(A) apply independent of the Humane Society ruling, and the Service violated them in the Final Rule.

Third, the Service claims the district court erred in rejecting the Service's effort to salvage its ESA compliance through issuance of a post-hoc "regulatory review"—even though the agency admits that review was inadequate. Fed. Br. 20-23. As described above, after losing the Humane Society appeal and being

confronted with plaintiff-appellees' challenge in this case, the Service attempted to patch the hole in its ESA analysis by publishing a Federal Register determination that the Humane Society ruling did not justify any modification of the Yellowstone grizzly delisting. See Review of 2017 Final Rule, 83 Fed. Reg. at 18,737. The district court was appropriately "skeptical" of this "last-ditch attempt to prove to the Court that [the Service's] review was sufficient." ER 22 n.5, 30. Courts may consider an agency's post-hoc submission concerning an already-completed agency action only where it is "explanatory in nature, rather than a new rationalization of the agency's decision, and [is] sustained by the record." Kunaknana v. Clark, 742 F.2d 1145, 1149 (9th Cir. 1984); see also Sacks v. Office of Foreign Assets Control, 466 F.3d 764, 779-80 (9th Cir. 2006) (rejecting agency reliance on post-hoc Federal Register publication to justify challenged action). Here, the Service specifically prepared its "regulatory review" for the prohibited purpose of offering "a new rationalization of the agency's decision," Kunaknana, 742 F.2d at 1149, because the review was undertaken to "consider[] the impact of the [Yellowstone] delisting on the lower-48-States population of grizzly bears," Review of 2017 Final Rule, 83 Fed. Reg. at 18,739—a subject that the Service explicitly refused to consider in the Final Rule itself, see ER 127 (Final Rule: "consideration and analyses of grizzly bear populations elsewhere in the lower 48 States is outside the scope of this rulemaking").

In any case, even if the "regulatory review" were not an impermissible post-hoc rationalization for the Service's decision—which it is—it still fails to salvage the agency's analysis because, as the Service admits, it never addressed the critical question whether the lower-48 grizzly population minus the Yellowstone DPS remains eligible for listing, or whether all identified grizzly recovery areas in the lower-48 might themselves be independently listable under the ESA's DPS language. See Fed. Br. 22 (admitting that regulatory review "does not resolve" such questions). Although the review contained a section titled "Impact of [Greater Yellowstone Ecosystem] Delisting on the Lower-48-States Entity," it addressed limited biological factors and ignored the threshold legal issue of listing eligibility. Review of 2017 Final Rule, 83 Fed. Reg. at 18,739-41. Further, while the Service claims the district court "inaccurate[ly]" asserted that the review did not look beyond "'the continued listing of the lower-48 grizzly post-delisting" of the Yellowstone DPS, Fed. Br. 22 (quoting ER 26), the quoted district court language (accurately) characterized the Service's position in the litigation, not the review—and (accurately) deemed it "simplistic at best and disingenuous at worst," ER 26. In any event, the only attention the review devoted to the listing eligibility issue was to parrot the Final Rule's conclusory statement "that the grizzly bears occurring outside of the boundary of the [Greater Yellowstone Ecosystem] DPS in the lower 48 States remain threatened and therefore protected by the Act," without

any of the analysis demanded by the ESA as interpreted in Humane Society. See Review of 2017 Final Rule, 83 Fed. Reg. at 18,739; Fed. Br. 22 (admitting that such analysis was omitted). Further, although the Service emphasizes that the review discussed the Interior Department's interpretation that "DPSs are parts of a species," Fed. Br. 22 (emphasis in original), see also id. 21; Sportsmen Br. 20-21, that does not eliminate the threat that such a listed species, once a DPS is excised from it, may no longer constitute a listable entity under statutory language and the DPS Policy. Indeed, in Humane Society the Service itself found that to be the case once the Western Great Lakes wolf DPS was "carved out" of the larger listing of Canis lupus. 865 F.3d at 602. Accordingly, the Service's critique of the district court's reasoning is meritless.

C. The Intervenors' Independent Arguments Are Unpersuasive

The Service's supporting intervenors take their arguments farther than the Service, asking this Court not merely to delete the "comprehensive review" references from the district court's ruling but to reverse it. Yet their arguments ask this Court to accept that they have discovered in the record the analysis that the Service itself admits was omitted. None of their arguments justifies such an extraordinary conclusion.

1. Wyoming argues that the Service's "decision to perform a full delisting analysis for the Yellowstone Segment and not for the other populations is

entitled to deference under step two of the familiar Chevron framework." Wyo. Br. 45-50; accord Safari Club Br. 8-9. However, the Service admits that it did not consider the "legal question of whether, when a DPS of a listed species is delisted, the rest of the species continues to qualify as a 'species' within the meaning of the Act," Fed. Br. 22, and, as discussed, the record of the Service's repeated refusals to consider that question fully justifies this admission. Where, as here, an agency "has not offered any explanation of how [an] interpretation fits within the statutory scheme … or reflects the [agency's] considered policy judgment," there is no basis for deference to the agency's position. Hall v. U.S. Envtl. Prot. Agency, 273 F.3d 1146, 1156 (9th Cir. 2001); see also Lozano-Arredondo v. Sessions, 866 F.3d 1082, 1093 (9th Cir. 2017) (holding that agency's conclusory assertion is "not entitled to Chevron deference, because the agency did not provide any explanation for this decision") (quotations, alteration, and citation omitted).

Nor has Wyoming offered any persuasive statutory interpretation. Wyoming labors to demonstrate that, under the ESA's "species" definition, "a distinct population segment can be a 'species' independent of the broader species listing." Wyo. Br. 47; accord Intervenor-Def.-Appellants Wyo. Farm Bureau et al.'s Opening Br. ("Farm Bureau Br.") 22-24; Sportsmen Br. 20-21. However, that is not the issue in this case. Instead, the issue here is whether, when the Service designates and delists such a DPS, it must consider the impact of that delisting on

the remnant of the broader species listing. As Humane Society and the decision below persuasively demonstrate, the answer to that question is "yes." Wyoming's argument offers no justification for a different conclusion.

Wyoming also briefly suggests that the district court's ruling improperly "creates a new procedural requirement for the Service." Wyo. Br. 50. However, as discussed at Point II.A, supra, the requirement enforced by Humane Society and the decision below flows directly from the mandates of ESA Section 4(c)(1) and (b)(1)(A) and thus was not created by the district court. Moreover, the hornbook administrative-law mandate that an agency consider all "important aspect[s] of the problem" before it imposes no inappropriate procedural burden on the Service. Ctr. for Biological Diversity, 868 F.3d at 1057.

2. Idaho argues that the Service appropriately "addressed potential application of Humane Society by referring to the fact that the listed status of grizzly bears would continue in the remainder of the lower-48 states." Opening Br. for Appellant State of Idaho ("Idaho Br.") 17; accord Safari Club Br. 11-12; Sportsmen Br. 19. However, if it were sufficient for the Service merely to offer a conclusory assertion that grizzly bears in the lower-48 remainder would remain listed—accompanied by repeated refusals to consider "management and potential status of other grizzly bear populations" outside the Yellowstone region, ER 133; see also ER 127, 205—then the ESA's requirement for the Service to consider the

impact of its DPS delistings on the remnant listed entity would be meaningless. As the district court properly concluded, the Service's conclusory assertion "is not the end of the inquiry" because it "fail[ed] to grapple with the functional and legal impact of delisting on the listed entity." ER 25-26. The Service has admitted as much, Fed. Br. 22, and Idaho fails to demonstrate otherwise.

Idaho also argues that separate delistings of allegedly recovered grizzly bear populations were contemplated by the Service's 1993 Grizzly Bear Recovery Plan. Idaho Br. 15-17; accord Safari Club Br. 14-15. However, nothing in the recovery plan suggests that the Service could proceed with such piecemeal delistings in a manner that fails to examine critical questions concerning the continued listing status of the remnant listed population. See ER 431, 434-36. Nor could the plan authorize such a myopic approach, given that—unlike ESA Section 4's requirements—recovery plans "are not binding upon the agency in deciding whether a species is no longer endangered and therefore should be delisted." Friends of Blackwater v. Salazar, 691 F.3d 428, 432-34 (D.C. Cir. 2012); accord Conservation Cong. v. Finley, 774 F.3d 611, 614 (9th Cir. 2014).

3. Wyoming asks this Court to modify the district court's remedial order to provide for remand without vacatur. Wyo. Br. 50. However, Wyoming admits that "remand without vacatur applies only in rare or limited circumstances." Id. 51; see Pollinator Stewardship Council v. U.S. Envtl. Prot. Agency, 806 F.3d 520,

532 (9th Cir. 2015) (holding that remand without vacatur is appropriate "only in limited circumstances") (citation omitted). In particular, the decision whether to remand without vacatur must consider "whether vacating a faulty rule could result in possible environmental harm," such as by increasing threats to imperiled species. Id.; see Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405-06 (9th Cir. 1995) (ordering remand without vacatur to prevent harm to endangered species). Here, the opposite is true; remanding without vacatur would risk further harm to the Yellowstone grizzly bear population, including most immediately through Wyoming and Idaho's plans to implement recreational hunting seasons to kill as many as 23 grizzly bears in addition to the recent record-setting conflict mortality discussed above and at Point III, infra.[5]

Further, an analysis "weigh[ing] the seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed," Pollinator Stewardship Council, 806 F.3d at 532 (quotations and citation omitted), does not support remand without vacatur here. While Wyoming claims

[5] In the district court injunction proceedings, plaintiffs submitted declaration testimony from two eminent grizzly bear biologists, Drs. David Mattson and Barrie Gilbert, that the cumulative level of mortality threatened by Wyoming and Idaho's planned hunting seasons in conjunction with the ongoing unprecedented levels of grizzly bear conflict mortality in the Yellowstone region is unsustainable and threatens the Yellowstone grizzly population with decline. See JSER 0210-17 (Mattson Decl. at pp. 27-34); 1161-62 (Gilbert Decl., ¶¶ 6-7).

"the Service can readily cure the defect identified by the district court," Wyo. Br. 51, its argument relies on the Service's post-hoc "regulatory review," which the Service itself admits did not consider the relevant question. See Fed. Br. 22. Further, the Service in the review continued to ignore the critical questions left unexamined by the Final Rule, including, among others, how to maintain the grizzly bear's threatened-species listing status in the North Cascades and Bitterroot ecosystems, where bear populations are tenuous to non-existent, see ER 26 (quoting Service admission that "'it would be difficult to justify a [DPS] in an area where bears … have not been located for generations'"). Thus, Wyoming fails to justify remand without vacatur.

4. The supplemental arguments offered by the non-governmental intervenors are also meritless.

Safari Club attempts to distinguish Humane Society on the ground that, after the delisting challenged in that case, "no populations of wolves anchored the remaining lower-48 listing," thus creating "an arguably unlistable entity." Safari Club Br. 7. Safari Club is wrong because wolf populations existed in the remnant at issue in Humane Society, including in Washington, Oregon, and northern California. See Removing the Gray Wolf (Canis Lupus) From the List of Endangered and Threatened Wildlife, 78 Fed. Reg. 35,664, 35,675 (June 13, 2013) (cited in Humane Soc'y, 865 F.3d at 602). Safari Club also claims the district

court inappropriately relied on ESA Section 4(c)(2), which addresses five-year reviews of listed species. Safari Club Br. 9-10. However, while the district court discussed Section 4(c)(2) in canvassing Section 4's requirements, its ultimate determination that "the Service has an obligation to consider the already listed species" in taking actions under Section 4(c) was equally grounded in ESA Sections 4(c)(1) and (b)(1)(A), which it specifically cited for this conclusion and which mandate the analysis the Service omitted. ER 28-29 (emphasis in original). In any event, as a matter of administrative law, and regardless of Section 4(c), the Service could lawfully delist the Yellowstone grizzly bear population only after considering all important questions, and those include whether a DPS delisting may leave behind "a leftover group that becomes an orphan to the law." Humane Soc'y, 865 F.3d at 603; see also Point II.A, supra.[6]

The Wyoming Farm Bureau attempts to distinguish Humane Society on the ground that the Western Great Lakes gray wolf DPS in that case was "created from an amalgamation of separate listings under the ESA," creating "factual confusion." Farm Bureau Br. 19-20. However, the D.C. Circuit expressly examined that

[6] Safari Club concedes that "[t]he lower-48 bears are not an entire species or subspecies and may not qualify as a DPS." Safari Club Br. 14 n.4. Safari Club attempts to dismiss this concern on the ground that "any legal challenge to the lower-48 listing now would be well outside the statute of limitations," id., but ignores the ESA petition process, which provides a vehicle for those hostile to grizzly bear conservation to pursue delisting of the lower-48 remnant.

circumstance and deemed it irrelevant to the Humane Society holding. Noting that the Service claimed to be revising a Minnesota gray wolf listing even though it was sweeping non-Minnesota wolves into its delisting action, the D.C. Circuit stated that it "need not decide" whether this agency action represented a legitimate revision because "[w]hether labeled a revision or a segment-designation, the flaw is the same: the failure to address the status of the remnant is fatal." Humane Soc'y, 865 F.3d at 603. The same failure is fatal here.

Sportsmen's Alliance Foundation suggests that the Service actually considered the impact of delisting the Yellowstone grizzly DPS on the lower-48 remnant listing when it made passing reference to its previous determinations that lower-48 grizzly populations in the North Cascades, Selkirk, and Cabinet-Yaak ecosystems were warranted for separate new listings as endangered, rather than threatened, species. Sportsmen Br. 22. Even putting aside the fact that this terse reference offered no analysis of the relevant issues, see ER 98, Sportsmen ignore the Service's admission in the court below that an independent DPS listing for the North Cascades ecosystem would be difficult given the sporadic nature of grizzly sightings there, see ER 26, and the Service's withdrawal of the referenced determinations for the Cabinet-Yaak and Selkirk populations, see Annual Description of Progress on Listing Actions, 79 Fed. Reg. 72,450, 72,488 (Dec. 5, 2014) (subsequently, the Montana district court vacated and remanded that

withdrawal as it pertains to the Cabinet-Yaak population, see All. for the Wild Rockies v. Zinke, 265 F. Supp. 3d 1161 (D. Mont. 2017)).[7]

As for Sportsmen's suggestion that the threatened-species listing for the Bitterroot grizzly bear ecosystem is somehow secured by an experimental population designation under ESA Section 10(j), 16 U.S.C. § 1539(j), see Sportsmen Br. 22, an experimental-population designation is a recovery tool that the Service utilizes to reintroduce endangered and threatened species; it relies on, and does not substitute for, a legally sufficient predicate finding that any particular population satisfies ESA requirements for listing. See id. § 1539(j)(2)(A) (providing for release of experimental populations "of an endangered species or a threatened species").

In sum, neither the Service nor its supporting intervenors raise any legitimate challenge to the district court's ruling that "the Service arbitrarily and capriciously determined that it need not analyze the impact of delisting on grizzlies

[7] Sportsmen argue that the district court decision in National Wildlife Federation v. Norton, 386 F. Supp. 2d 553 (D. Vt. 2005), held that, when the Service carves out a DPS from a larger listed entity, "the remainder of the original listing may retain its original listing status." Sportsmen Br. 21. However, while that court stated that "[n]owhere in the ESA is the Secretary prevented from creating a 'non-DPS remnant' designation," 386 F. Supp. 2d at 565, it did not address the question whether the Service must examine the threat that a DPS delisting might render the remnant a non-listable entity under applicable ESA requirements.

living outside the Greater Yellowstone Ecosystem." ER 31. The district court's ruling should be affirmed.

III. THE SERVICE FAILED TO RATIONALLY ADDRESS THE MORTALITY CONSEQUENCES OF THE YELLOWSTONE GRIZZLIES' TRANSITION TO A MEAT-FOCUSED DIET

In addition to its failure to consider the impact of the Yellowstone grizzly bear DPS delisting on the remnant listed grizzly bear entity in the lower-48 states, the Service's Final Rule was unlawful for an additional reason: the Service failed to rationally address the emerging threat to the Yellowstone grizzly bear population itself posed by the escalating mortality consequences of the bears' recent transition to a more meat-based diet. The district court did not reach this issue, but it provides an independent ground for affirming the district court's judgment. See Ming Dai v. Sessions, 884 F.3d 858, 869 (9th Cir. 2018) (stating that this Court "may affirm on any ground supported by the record even if the district court did not consider the issue") (quotation omitted).

When this Court addressed the Service's 2007 effort to remove ESA protections from Yellowstone-area grizzly bears, the Court held that the Service acted arbitrarily because the agency "did not articulate a rational connection between the data before it and its conclusion that whitebark pine declines were not likely to threaten the Yellowstone grizzly bear." Servheen, 665 F.3d at 1030. As discussed above, this Court particularly faulted the Service for relying on the

grizzly's omnivorous habits to buffer the impact of whitebark-pine declines and thus "fail[ing] to address the heart of the threat that whitebark pine loss poses to the bears: increased proximity to humans when bears do adapt to seed shortages by seeking substitute foods." Id. at 1026 (emphasis in original).

In the challenged Final Rule in this case, the Service once again failed to address the "heart of the threat that whitebark pine loss poses" to the Yellowstone population. Id. While the Service recognized that Yellowstone-area grizzlies have adapted to the whitebark-pine loss through increased reliance on meat food sources such as livestock and the remains of hunter-killed elk, the agency failed to rationally grapple with the unprecedented mortality consequences of this meat-focused diet for the Yellowstone grizzly population. Accordingly, the Service again failed to rationally evaluate the critical point recognized by this Court in Servheen: "That the bears are likely to seek alternate foods in the face of whitebark pine decline is a part of the problem, not an answer to it." 665 F.3d at 1026.

A. Yellowstone Grizzlies' Shift to a More Meat-Reliant Diet Leads to Heightened Bear Mortality

The Service's analysis underlying the Final Rule principally focused on examining whether Yellowstone-area grizzlies could find enough to eat despite declines in whitebark pine and other traditional foods, including cutthroat trout, that appear to be chronic in nature. JSER 831 (conclusions of 2013 Food Synthesis

Report); ER 118 (noting recent cutthroat trout decline); see also JSER 0808-09; ER 196 (recognizing chronic nature of declines). The Service found that Yellowstone bears were able to find sufficient food, in particular by switching to meat sources such as livestock and remains left by hunters. JSER 0817-18 (2013 Food Synthesis Report, concluding that "animal matter can serve as an alternate fall food to whitebark pine for grizzly bears in the [Greater Yellowstone Ecosystem]"); ER 119 ("[I]n years with poor whitebark pine seed production, grizzly bears shifted their diets and consumed more meat.").

However, as the record before the agency also established, these food sources are not equivalent in terms of their mortality risk for grizzlies. That is because whitebark pine occurs in remote, high-elevation areas where bears are unlikely to encounter humans. JSER 0859 (study noting "whitebark pine's high elevation distribution, typically in areas more remote from human facilities"); JSER 0802 ("Whitebark pine occupies high-elevation sites …."). Bears seeking livestock and hunter remains, by contrast, necessarily venture closer to humans. JSER 0930-34. Thus, although livestock and carcasses left by hunters may, as the Service found in the Final Rule, be adequate to meet bears' nutritional requirements, grizzlies relying on these food sources risk more deadly conflicts with humans than bears relying on whitebark-pine seeds. ER 118 (noting that additional deaths in years with poor whitebark-pine-seed production "are primarily

due to defense of life encounters and wildlife management agency removals of conflict bears").

Consistent with this evidence, grizzly bear conflict mortality spiked to unprecedented levels in recent years as bears rely more heavily on a meat-focused diet. See Figure 1, supra. Conflict mortality averaged about nine grizzlies per year from 2000-2007, but began to increase in 2008, shortly before whitebark-pine mortality peaked across the Yellowstone ecosystem. See id.; see also, e.g., JSER 1156-58 (16 conflict mortalities in 2001); JSER 1153-54 (three conflict mortalities in 2006). Conflict mortality has risen since then, peaking in 2015 and remaining historically high in 2016 and 2017. See Figure 1, supra. Forty-five bears died due to human conflicts in 2015 alone, up from 16 such deaths in 2014; 35 died due to conflicts in 2016. JSER 0905 (2015 annual report), JSER 0923 (2016 annual report), JSER 0914 (2014 annual report).[8]

[8] Thirty-six bears died due to human conflicts in 2017. Interagency Grizzly Bear Study Team, Yellowstone Grizzly Bear Investigations 2017 at 28 (2018), available at https://prd-wret.s3-us-west-2.amazonaws.com/assets/palladium/production/s3fs-public/atoms/files/2017_AnnualReport_Final_tagged_Secured_v3.pdf (last visited August 4, 2019). The 2018 mortality data the Service has released to date do not specify how many bears died due to conflicts with humans in that year, but indicate that 41 bear deaths in 2018 were "attributable to human causes." Interagency Grizzly Bear Study Team, 2018 Annual Report Summary, available at https://prd-wret.s3-us-west-2.amazonaws.com/assets/palladium/production/atoms/files/IGBST%20Summary%20Report%202018%20v1.3.pdf (last visited August 4, 2019).

The majority of these deaths occurred because bears preyed on livestock or encountered hunters: in 2015, 15 bears were killed for preying on livestock, including one cub killed accidentally after its mother was captured at a "cattle depredation trap site," while 14 were killed by hunters claiming self-defense. JSER 0905. The remaining 16 were killed because of "site conflicts," which generally involved bears seeking and obtaining human food. JSER 0905, 0907-12 (Table 16, describing multiple bears killed because they caused property damage and obtained "food rewards"). The 2016 statistics are similar: wildlife managers killed 15 bears due to livestock conflicts, hunters killed seven in self-defense, and managers killed 13 due to site conflicts. JSER 0923.

B. The Service Arbitrarily Dismissed the Threat of Escalating Conflict Mortality in the Final Rule

Despite these unprecedented new mortality levels, the Service in the Final Rule failed to rationally examine whether conflict mortality presents a threat to the Yellowstone grizzly bear population. The Service admitted that Yellowstone-area grizzlies shift their diets and consume more meat in years with poor whitebark-pine-seed production, and that grizzly conflict mortalities increased during those years. ER 118-19. However, the Service dismissed any resulting threat to the Yellowstone DPS from such mortalities. See id.; ER 121. In so doing, the Service based its conclusion on stale data. Specifically, the Service acknowledged that "[a]pproximately six more independent females and six more independent males

die across the ecosystem in poor versus good whitebark pine years." ER 118. However, those mortality figures arose from a 2013 study evaluating data from 2000-2012, before the dramatic spike in conflict mortality in 2015. See JSER 0820-21 (2013 Food Synthesis Report, cited in ER 118 (Final Rule)). The Service's apparent worst-case analysis of whitebark-pine loss in the Final Rule "predicted an increase of 10 annual mortalities ecosystem-wide of independent females comparing 2000 with 2012," ER 119, but independent female mortalities increased by 18 (from seven to 25) between 2014 and 2015 alone, see JSER 0918 (2014 mortality); JSER 1133 (2015 mortality).[9]

The Service made no effort to address the unprecedented 2015 grizzly bear conflict mortality except in response to public comments, where the agency asserted that, although conflict mortality has increased since the 1990s, "so has the grizzly bear's population size." ER 149. However, the Service's own trend analysis for the Yellowstone-area grizzly bear population admits that bear population numbers within the core bear monitoring area have not measurably increased since 2002. ER 121 (noting "no statistical trend … within the

[9] Independent female mortalities dropped to 12 in 2016 but again spiked to 21 in 2017. See JSER 1158.2 (2016 annual report); Yellowstone Grizzly Bear Investigations 2017 at 37, available at https://prd-wret.s3-us-west-2.amazonaws.com/assets/palladium/production/s3fs-public/atoms/files/2017_AnnualReport_Final_tagged_Secured_v3.pdf (last visited August 4, 2019).

[Demographic Monitoring Area] for the period 2002 to 2014."); JSER 0775. Although comprehensive data is not available regarding grizzly population trend outside this monitoring area, data in the record concerning the trend of female bears with cubs—the most important cohort of the population, ER 158—similarly shows a flat population trajectory across the entire Yellowstone ecosystem since 2002. See JSER 0922. Population growth that ended in 2002 cannot explain unprecedented mortality levels peaking in 2015.

The Service's arguments in the district court failed to justify the agency's irrational analysis. Remarkably, the Service disputed any connection between whitebark-pine loss and increased conflicts with humans as grizzlies increasingly turn to meat as a substitute food source. JSER 1039-41. However, the Final Rule itself acknowledged that "[d]uring years of low availability of whitebark pine seeds," bears "consumed more meat" and "grizzly bear-human conflicts tend to increase," leading to additional deaths "primarily due to defense of life encounters and wildlife management agency removals of conflict bears." ER 118-19. The Service nevertheless disputed any connection between conflict mortality and meat consumption because "bear movements did not change during the period of whitebark pine decline." JSER 1039-40. Yet regardless whether bears increased their movements, the scientific literature cited by the Service to support this point confirms that bears' increased meat consumption caused them to die more often in

conflicts with humans. One study concluded that data indicating bears did not increase movements "suggest [bears] foraged on alternative foods within their fall ranges," including "'gut piles,' wounding loss, and other remains left by elk hunters." JSER 0785-86. As a result, "the reduction in risk of mortality and conflicts historically associated with use of secure, high-elevation [whitebark-pine] habitat, during years of good [whitebark-pine] productivity, may be diminishing among the subpopulation of bears residing in multiple-use areas." JSER 0787.

The Service also quoted a scientific report, JSER 1044-45, finding no heightened mortality risk in "anthropogenic areas"—e.g., "areas near roads"—but that same report discussed a separate finding of increased "human-caused mortalities … in areas away from roads, such as conflicts with ungulate hunters." JSER 0822; see also JSER 0820 (same scientific report stating that "annual cone production was predictive of human-caused fall mortalities"; acknowledging "an increase in annual mortalities over the study period" and that "whitebark pine decline may be a potential contributor to the increase in human-caused fall mortality" outside designated recovery zone).

The Service further argued that increasing mortality is due to the grizzly's range expansion into unsuitable habitat, JSER 1042, but 36 of the 45 conflict deaths in 2015 occurred inside the core Yellowstone-area grizzly monitoring area,

JSER 0907-12, which, according to the Service itself, is 92% suitable habitat, ER 94-95.[10]

The Service ultimately sought refuge in the Final Rule's finding that, historically, "increased mortality numbers during poor whitebark pine cone production years have not led to a declining population trend." ER 119 (citing study analyzing population trend from 2002-2011, see JSER 1136. To the contrary, the unprecedented mortalities experienced in 2015 did push the Service's own point estimate for the Yellowstone-area grizzly bear population into decline for the period from 2014-2016, which immediately preceded the Final Rule. See JSER 0913.1 (2014 estimate: 757 bears); JSER 904.1 (2015 estimate: 717 bears); JSER 0920 (2016 estimate: 695 bears). Although not definitive evidence of decline, the Service's decreasing annual estimate at a minimum shows that conflict mortality has reached a magnitude sufficient to impact the trajectory of the grizzly population as a whole. Given that the Service considers population trend "the ultimate metric to assess cumulative impacts to the population," ER 125, this only

[10] In 2017, 33 of 36 conflict deaths occurred inside this same area. See Yellowstone Grizzly Bear Investigations 2017 at 30-36, available at https://prd-wret.s3-us-west-2.amazonaws.com/assets/palladium/production/s3fs-public/atoms/files/2017_AnnualReport_Final_tagged_Secured_v3.pdf (last visited August 4, 2019).

underscores that the mortality consequence of grizzlies' shift to a meat-focused diet is an important factor that the Service failed to consider in the Final Rule.

C. The Service Ignored Critical Loopholes in the Post-Delisting Management Framework for Grizzly Mortality

Further, despite the Final Rule's general reliance on it as a panacea for all mortality threats to the Yellowstone grizzly population, the 2016 Conservation Strategy offers no adequate response to the heightened threat of conflict mortality. The 2016 Conservation Strategy is a multi-party federal and state agreement that "will guide post-delisting management of the [Greater Yellowstone Ecosystem] grizzly bear population for the foreseeable future," including by "specify[ing] and implement[ing] the population/mortality management, habitat, and conflict bear standards to maintain a recovered grizzly bear population for the future." ER 96. The Service claimed that the Final Rule and Conservation Strategy set limits on the total number of grizzly bears that may be killed in a given year and these limits will prevent any population decline. See, e.g., ER 107 (concluding that "mortality limits will preclude population-level impacts" due to bear deaths from livestock conflicts).

In this regard, the Final Rule and Conservation Strategy establish a set of criteria that purport to maintain grizzly mortality below certain thresholds with the ultimate goal of "maintain[ing] the population around the long-term average population size for 2002-2014 of 674" as determined by a population estimation

methodology known as the Chao2 method. ER 111-12; see also ER 118-19 (regardless of cause of change in population growth rate, "the management response would be the same: To carefully manage human-caused mortality based on scientific monitoring of the population.").

Although these thresholds may impose a ceiling on trophy hunting of grizzly bears under state management, they do not limit the number of bears that may be killed due to conflicts with human activities. According to the Conservation Strategy itself, "[a]ny mortality threshold will not affect the … management of conflict grizzly bears" and "[s]tate [bear management] plans provide for the take of conflict bears regardless of the current mortality quota upon consultation with all involved agencies." ER 271. Consistent with this statement, state management documents published with the Final Rule halt recreational hunting of grizzly bears when mortality thresholds are reached, but provide no similar limitation on management removals (i.e., bear killing by government agencies in response to conflicts with humans). JSER 0792 (Idaho Fish & Game Commission Proclamation governing grizzly bear management); JSER 0901 (Wyoming Grizzly Bear Management Regulation). This is not a minor omission. Management removals accounted for 43% of human-caused bear mortalities between 2002 and 2014, ER 110, and 58.5% of such mortalities in 2015, JSER 0905.

The Final Rule further touts a post-delisting management requirement that "[a]ny mortality that exceeds allowable total mortality limits in any year will be subtracted from that age/sex class allowable total mortality limit for the following year." ER 113 (emphasis added). But both Wyoming and Idaho's bear management plans state that only "hunting mortality that exceeds total mortality limits" will count against the following year's limit. JSER 0792 (Idaho Proclamation governing grizzly bear management), JSER 0901 (Wyoming Grizzly Bear Management Regulation) (emphasis added). Thus, where the majority of grizzly bears live and human-bear conflicts occur, conflict mortality may exceed the mortality limit without reducing allowable mortality in the following year.

The Conservation Strategy's only possible limit on management removals is a provision that "there will be no discretionary mortality unless necessary for human safety" if the annual bear population estimate falls below 600. ER 259. However, agency documents assert that many management removals—including removals of bears that prey on livestock—fall under the rubric of human safety. See ER 110 ("Conflict bears can become a threat to human safety … if they are not addressed."); JSER 0601 (Wyoming Grizzly Bear Management Plan) ("Grizzly bears involved in livestock depredation often times create human safety risks and may be handled as such if the circumstances warrant."). Such management removals would not be curtailed even by this lower limit. Self-defense kills by elk

hunters who encounter grizzly bears are further exempt from this lower limit because the Service does not consider such kills "discretionary mortality." ER 113 (defining "discretionary mortality" as "hunting allocation or management removals").[11]

At the same time, under the post-delisting framework, managers no longer need to address conflicts through non-lethal means where "reasonably possible," as was required under ESA management rules. Under the ESA regime, grizzly bears that preyed on livestock could be killed "only if … [i]t has not been reasonably possible to eliminate such threat or depredation by live-capturing and releasing unharmed in a remote area the grizzly bear involved." 50 C.F.R. § 17.40(b)(1)(i)(C). By contrast, the Conservation Strategy permits state wildlife managers to kill conflict bears at their discretion "after considering the cause, location, and severity of the incident(s)," without any requirement that they first attempt to address the conflict through relocation. ER 312.

In sum, the key post-delisting management measure that the Service relied on to sustain the Yellowstone-area grizzly bear population against the threat of excessive mortality provides no security against the threat posed by the

[11] To be clear, plaintiff-appellees do not oppose managing grizzly bears to protect human safety. But the Service cannot rely on its 2016 Conservation Strategy to prevent excessive conflict mortality where that management document places no meaningful limit on such mortality.

unprecedented levels of conflict mortality that arose as the Service was moving toward completion of its Final Rule.

In the proceedings below, the Service did not contest plaintiff-appellees' central point that the post-delisting Conservation Strategy expressly exempts "management of conflict grizzly bears" from otherwise-applicable mortality thresholds. ER 271. Instead, the Service invoked state proclamations and regulations to address conflict mortalities. See JSER 1034-38. Even though Wyoming and Idaho's commitments on this subject explicitly count only a given year's hunting mortality against the following year's limit, the Service argued that the states committed in a Memorandum of Agreement to account for all excess grizzly mortality in calculating the following year's mortality limit. JSER 1035-36. However, these states' proclamations and regulations explicitly provide that only "hunting mortality that exceeds total mortality limits" will be subtracted from the following year's limit. JSER 0792 (Idaho proclamation), JSER 0901 (Wyoming regulation) (emphasis added). Further, contrary to the Service's argument in the district court, JSER 1035-36, state pronouncements referencing the Memorandum do not resolve this issue. While these states offered general assurances to "coordinate management" pursuant to the Memorandum, JSER 0901 (Wyoming regulation); see also JSER 0792 (Idaho proclamation), they failed to reconcile these generalized statements with their specific direction to subtract only

excess hunting mortality—not all mortality—from the following year's total mortality limit. At a minimum, the Service should have considered the divergence between the Memorandum and the states' specific commitments, but failed even to mention this issue in the Final Rule. See ER 113.

Finally, the district court's finding on the adequacy of regulatory mechanisms to protect the Yellowstone-area grizzly bear population did not address, much less dispose of, plaintiff-appellees' argument that the 2016 Conservation Strategy offers an inadequate response to the escalating threat of conflict mortality. Without addressing plaintiff-appellees' contentions on the issue of conflict mortality, the district court rejected other plaintiffs' arguments that "existing regulatory mechanisms are inadequate" to prevent grizzly bear mortality because "the states now have exclusive or nearly exclusive control over discretionary mortality," concluding that these arguments are "foreclosed by the Ninth Circuit's opinion in Greater Yellowstone." ER 32, 34.

As Greater Yellowstone Coalition v. Servheen itself demonstrates, plaintiff-appellees' distinct arguments in this case are not similarly foreclosed. In Servheen, this Court concluded that, notwithstanding the regulatory mechanisms then in place, the Service failed to rationally consider whether the whitebark-pine decline threatened the Yellowstone grizzly bear population. 665 F.3d at 1030. Further, in response to the Service's argument that the "intensive management and monitoring

framework" established by the then-existing grizzly bear conservation strategy would address any mortality impacts caused by whitebark-pine loss, this Court stated that the strategy "was not developed to be responsive to whitebark pine declines" and therefore "its effectiveness as a response is speculative." Id. at 1029. Likewise, the 2016 Conservation Strategy cannot adequately address the emerging threat posed to the Yellowstone-area grizzly bear population by conflict mortality, see ER 118-19, because, as discussed above, it was developed without taking that threat into account and its measures offer no response to that threat. As this Court concluded in Servheen, the Service was required to "address the heart of the threat that whitebark pine loss poses to the bears: increased proximity to humans when bears do adapt to seed shortages by seeking substitute foods." 665 F.3d at 1026 (emphasis in original). Accordingly, this Court may appropriately assess, among other things, whether the Service's reliance on the 2016 Conservation Strategy fulfilled that obligation. For the reasons stated, it did not. For this reason too, the Service acted arbitrarily and capriciously in promulgating the Final Rule and this Court should affirm the district court's judgment.

CONCLUSION

For the foregoing reasons, plaintiff-appellees Northern Cheyenne Tribe, Center for Biological Diversity, National Parks Conservation Association, and

Sierra Club respectfully request that this Court affirm the judgment of the district court.

Respectfully submitted this 5th day of August, 2019.

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STATEMENT OF RELATED CASES

Counsel for plaintiff-appellees is unaware of any related cases, within the meaning of Ninth Circuit Rule 28-2.6, beyond those already consolidated in these appeals.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Signature s/ Timothy J. Preso **Date** August 5, 2019

*(use "*s/[typed name]*" to sign electronically-filed documents)*

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case will be served by the appellate CM/ECF system.

s/ Timothy J. Preso

ADDENDUM

TABLE OF CONTENTS

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1533

§ 1533. Determination of endangered species and threatened species

Effective: November 24, 2003
Currentness

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * *

(b) Basis for determinations

(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

* * *

(c) Lists

(1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b).

(2) The Secretary shall--

(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should--

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b).

* * *

Code of Federal Regulations
Title 50. Wildlife and Fisheries
Chapter IV. Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations
Subchapter A
Part 424. Listing Endangered and Threatened Species and Designating Critical Habitat (Refs & Annos)
Subpart B. Revision of the Lists

50 C.F.R. § 424.11

§ 424.11 Factors for listing, delisting, or reclassifying species.

Currentness

(a) Any species or taxonomic group of species (e.g., genus, subgenus) as defined in § 424.02(k) is eligible for listing under the Act. A taxon of higher rank than species may be listed only if all included species are individually found to be endangered or threatened. In determining whether a particular taxon or population is a species for the purposes of the Act, the Secretary shall rely on standard taxonomic distinctions and the biological expertise of the Department and the scientific community concerning the relevant taxonomic group.

(b) The Secretary shall make any determination required by paragraphs (c) and (d) of this section solely on the basis of the best available scientific and commercial information regarding a species' status, without reference to possible economic or other impacts of such determination.

(c) A species shall be listed or reclassified if the Secretary determines, on the basis of the best scientific and commercial data available after conducting a review of the species' status, that the species is endangered or threatened because of any one or a combination of the following factors:

(1) The present or threatened destruction, modification, or curtailment of its habitat or range;

(2) Overutilization for commercial, recreational, scientific, or educational purposes;

(3) Disease or predation;

(4) The inadequacy of existing regulatory mechanisms; or

(5) Other natural or manmade factors affecting its continued existence.

(d) The factors considered in delisting a species are those in paragraph (c) of this section as they relate to the definitions of endangered or threatened species. Such removal must be supported by the best scientific and commercial data available to the Secretary after conducting a review of the status of the species. A species may be delisted only if such data substantiate that it is neither endangered nor threatened for one or more of the following reasons:

(1) Extinction. Unless all individuals of the listed species had been previously identified and located, and were later found to be extirpated from their previous range, a sufficient period of time must be allowed before delisting to indicate clearly that the species is extinct.

(2) Recovery. The principal goal of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service is to return listed species to a point at which protection under the Act is no longer required. A species may be delisted on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer endangered or threatened.

(3) Original data for classification in error. Subsequent investigations may show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error.

(e) The fact that a species of fish, wildlife, or plant is protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (see part 23 of this title 50) or a similar international agreement on such species, or has been identified as requiring protection from unrestricted commerce by any foreign nation, or to be in danger of extinction or likely to become so within the foreseeable future by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish, wildlife, or plants, may constitute evidence that the species is endangered or threatened. The weight given such evidence will vary depending on the international agreement in question, the criteria pursuant to which the species is eligible for protection under such authorities, and the degree of protection afforded the species. The Secretary shall give consideration to any species protected under such an international agreement, or by any State or foreign nation, to determine whether the species is endangered or threatened.

(f) The Secretary shall take into account, in making determinations under paragraph (c) or (d) of this section, those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.