

Appeal No. 22-8043

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IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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CENTER FOR BIOLOGICAL DIVERSITY, et al., Petitioners-Appellants,  
v.  
DEBRA HAALAND, et al., Respondents-Appellees,  
and  
STATE OF WYOMING, Respondent-Intervenor-Appellee,  
and  
UPPER GREEN RIVER CATTLE ASSOCIATION, et al., Respondents-  
Intervenors-Appellees.

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On Appeal from the United States District Court for the District of Wyoming  
The Honorable Nancy D. Freudenthal, Civil Action No. 2:20-cv-00231-NDF

ORAL ARGUMENT REQUESTED

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**OPENING BRIEF OF APPELLANTS  
CENTER FOR BIOLOGICAL DIVERSITY AND SIERRA CLUB**

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**CORPORATE DISCLOSURE STATEMENT**

Plaintiffs-Appellants Center for Biological Diversity and Sierra Club certify that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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## RELATED PRIOR OR PENDING APPEALS

Before the U.S. District Court for the District of Columbia, *Western Watersheds Project et al. v. Haaland et al.*, 2:20-cv-860-APM was consolidated with *Center for Biological Diversity and Sierra Club v. Haaland et al.*, 2:20-cv-855-APM. 1-App-072. The cases were then transferred to the U.S. District Court for the District of Wyoming as a consolidated matter. 1-App-101 – 1-App-106. The U.S. District Court for the District of Wyoming’s Opinion and Order from which Center for Biological Diversity and Sierra Club now appeal addressed the consolidated cases. 1-App-102 – 1-App-149.

*Western Watersheds Project et al.* has also filed an appeal (1-App-151 – 1-App-153), docketed in the Tenth Circuit Court of Appeals as Appeal No. 2:22-cv-8031. Because these cases stem from the same district court order, they are related.

## **GLOSSARY OF TERMS**

APA - Administrative Procedure Act

BA – Biological Assessment

BiOp – Biological Opinion

CM – Conservation Measure

DMA – Demographic Monitoring Area

EIS - Environmental Impact Statement

ESA – Endangered Species Act

FWS - U.S. Fish and Wildlife Service

GTNP – Grand Teton National Park

GYE – Greater Yellowstone Ecosystem

ITS – Incidental Take Statement

ROD - Record of Decision

USFS – U.S. Forest Service



## **JURISDICTIONAL STATEMENT**

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 2201-2202 (declaratory judgment and further relief); 16 U.S.C. § 1540(c), (g)(1)(c) (action arising under the Endangered Species Act and citizen suit provision); and 5 U.S.C. § 702 (Administrative Procedure Act). This Court has jurisdiction under 28 U.S.C. § 1291.

The district court entered its order disposing of all claims on May 17, 2022. (1-App-120 – 1-App-149) and entered final judgment on June 1, 2022 (1-App-150). This appeal was timely filed on July 7, 2022, pursuant to Fed. R. App. P. 4. 1-App-154 – 1-App-156.

## **ISSUES PRESENTED**

1. Whether the U.S. Fish and Wildlife Service’s (“FWS”) failure to consider limiting lethal take of female grizzly bears in issuing a 2019 Biological Opinion (“2019 BiOp”) for the Upper Green River Area Rangeland Project (“Project”) was arbitrary and capricious in violation of the Endangered Species Act (“ESA”) and the Administrative Procedure Act (“APA”).

2. Whether FWS’s reliance on ineffective and unenforceable conservation measures in concluding that the Project would not jeopardize grizzly bears was arbitrary and capricious in violation of the ESA and the APA.

3. Whether the Forest Service’s reliance on FWS’s flawed 2019 BiOp to satisfy its own duties under the ESA in connection with the Project violated the ESA and the APA.

## STATEMENT OF THE CASE

### I. Legal Background: The Endangered Species Act

Enacted in 1973, the ESA 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 (1978). It is meant to provide a means to conserve the ecosystems upon which endangered and threatened species depend and to provide a program to conserve listed species. 16 U.S.C. § 1531(b). To “conserve” means “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary,” *id.* § 1532(3), *i.e.*, to bring about the recovery of a species listed as endangered or threatened.

To receive the full protections of the ESA, a species must first be listed by the Secretary of Interior as “endangered” or “threatened” pursuant to ESA section 4. *See id.* § 1533. An “endangered species” is “any species which is danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A “threatened species” is “any species which is likely to become endangered within

the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

Section 7 of the ESA requires federal agencies, in consultation with a federal wildlife agency (FWS for terrestrial mammals such as the grizzly bear), to insure that any proposed action is not likely to jeopardize the continued existence of a listed species. *Id.* § 1536(a)(2). To “jeopardize the continued existence of” under the ESA means “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

To carry out these mandates, if listed species may be present, the action agency must prepare a “biological assessment” to determine the impacts of the proposed action on the listed species. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If an agency determines that its action “may affect” but is “not likely to adversely affect” a listed species or its critical habitat, the regulations permit “informal consultation.” 50 C.F.R. §§ 402.14(a), (b). However, if the agency determines that the action is “likely to adversely affect” a listed species, the agency must engage in “formal consultation” with FWS. *Id.* §§ 402.02, 402.14(a).

During consultation, FWS must review all relevant information, evaluate the current status and environmental baseline of the species, and evaluate the effects of

the proposed action on the listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(1)-(3). For purposes of the ESA, “[e]ffects of the action’ refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.” 50 C.F.R. § 402.02. “The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.” *Id.* “Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.” *Id.* “Interrelated actions are those that are part of a larger action and depend on the larger action for their justification,” while “[i]nterdependent actions are those that have no independent utility apart from the action under consideration.” *Id.* Cumulative effects “are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” *Id.* Throughout its analysis, FWS must utilize the “best scientific

and commercial data available.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d).<sup>1</sup>

After FWS evaluates the current status of the listed species and the proposed action’s impacts on the species, FWS reaches a “biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species . . . .” 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.14(d), (g)(4). If FWS concludes that the proposed action “will jeopardize the continued existence of” a listed species, the biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A).

Section 9 prohibits the unauthorized “take” of any listed species by anyone, including federal agencies. *Id.* § 1538(a)(1)(B). “Taking” under the ESA “means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” *Id.* § 1532(19). Along with a biological opinion, FWS must issue an “incidental take statement” if it concludes that a federal action

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<sup>1</sup> FWS issued the 2019 BiOp at issue on April 29, 2019. In August 2019, FWS published a rule revising the regulatory definition of “effects of the action.” 84 Fed. Reg. 44,976 (Aug. 27, 2019). On July 5, 2022, the U.S. District Court for the Northern District of California vacated the 2019 regulations, effectively reinstating the regulations in place in 2018. *Ctr. for Biological Diversity v. Haaland*, No. 19-cv-05206-JST, 2022 U.S. Dist. LEXIS 121104 (N.D. Cal. July 5, 2022). Thus, the 2018 regulations are currently applicable and are the regulations that were in place when FWS issued the 2019 BiOp.

will take members of a listed species but is not likely to cause jeopardy. 50 C.F.R. § 402.14.

The incidental take statement must specify the amount or extent of such incidental taking on the listed species, any “reasonable and prudent measures” that FWS considers necessary or appropriate to minimize such impact, and the “terms and conditions” with which the action agency must comply to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)(i), (ii), (iv). Taking of listed species without, or in excess of, the coverage of an incidental take statement violates the ESA and requires reinitiation of consultation. 16 U.S.C. § 1538; 50 C.F.R. § 402.16(a)(1).

Even after the procedural requirements of consultation are complete, the ultimate duty to ensure that an activity does not jeopardize a listed species lies with the action agency. An action agency’s reliance on an inadequate, incomplete, or flawed biological opinion to satisfy its ESA section 7 duty is arbitrary and capricious. 16 U.S.C. § 1536(a)(2); *Defs. of Wildlife v. U.S. EPA*, 420 F.3d 946, 976 (9th Cir. 2005), *rev’d on other grounds sub nom., Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007).

## **II. Factual Background**

### **A. Grizzly Bears in the Greater Yellowstone Ecosystem**

An estimated 50,000 grizzly bears inhabited most of western North

American prior to European settlement. 2-App-219. By 1975, after decades of human persecution and loss of habitat, grizzly bears had been eliminated from all but less than two percent of their historic range in the lower 48 states and only approximately 700-800 bears remained. *Id.*; 2-App-215. As a result, in 1975, FWS listed the grizzly bear as a threatened species in the lower 48 states under the ESA. 40 Fed. Reg. 31,734 (July 28, 1975).

In 1982, FWS issued a Grizzly Bear Recovery Plan, which was revised in 1993. 2-App-213 (“Recovery Plan”). The Recovery Plan identifies six recovery zones, including the Yellowstone Grizzly Bear Recovery Zone, delineated within the Greater Yellowstone Ecosystem (“GYE”). *Id.* The Yellowstone Grizzly Bear Recovery Zone spans more than 5 million acres and includes portions of Wyoming, Montana, and Idaho, and portions of five National Forests. 2-App-161 – 2-App-162. It also includes Yellowstone and Grand Teton National Parks, John D. Rockefeller, Jr. Memorial Parkway (Bureau of Land Management land), and adjacent private and state lands. 2-App-162.

In the GYE, FWS and other agencies manage grizzly bears and their habitat by combining the “Primary Conservation Area” (the Yellowstone Grizzly Bear Recovery Zone) with adjacent areas where occupancy by grizzly bears is anticipated and acceptable. 4-App-008. Combined, these areas form the Demographic Monitoring Area (“DMA”) within which habitat is considered

suitable to support grizzly bears and recovery criteria for grizzly bears are assessed. 4-App-011. The Upper Green allotments all lie within the DMA. 2-App-173.

Although the number of grizzly bears in the GYE has increased under ESA protection, they still face a host of threats, including human-caused mortality, and grizzly bear mortalities have been on the rise. The 2019 Biological Opinion estimates that grizzly mortalities averaged 64 deaths per year between 2015 and 2018 compared with 28 grizzly bear mortalities in 2014 and 29 in 2013. 2-App-177. The Upper Green area consistently represents the highest number of grizzly bear conflicts in the entire GYE, and between 1999-2018, a total of 37 grizzly bears were killed in the action area identified for this Project. 2-App-184.

In the GYE, grizzly home range estimates are 81 square miles for females and 309 square miles for males. 2-App-158. Both males and females residing primarily in Grand Teton National Park may have home ranges that overlap with the project area. *See* 2-App-174 (discussing a bear in the action area that ranged northwest 29 air miles to near the east boundary of GTNP); *see also* 11-App-155 (vicinity map for Upper Green River project area in relation to GTNP).

Female survival is the primary factor impacting grizzly bear population trend because the survival of a female grizzly bear and her cubs enables the population to grow. 12-App-181. FWS has declared that “providing maximum



protection for females is essential to recovery.” 2-App-217. The Forest Service acknowledges that the project area contains ideal habitat for female grizzly bears because it has abundant and widely distributed food, provides adequate cover, is far from large human population centers, has very few roads, and supports little recreational activity. 3-App-020. Thus, it is unsurprising that females with cubs are increasingly occupying the area. 2-App-176. However, due to ongoing conflicts with livestock, the project area is considered a “sink habitat” for grizzly bears, indicating low female survival resulting in unsustainable mortality and potential population decline. 12-App-182; 2-App-012; 2-App-181.

The death of a female grizzly bear impacts the population because grizzly bears have one of the lowest reproductive rates of all terrestrial mammals in North America, resulting primarily from the late age at first reproduction, small average litter size, and long interval between litters. 2-App-216; 2-App-158. The average age at first reproduction is 5.5 years and the average litter size is two cubs. 2-App-216; 2-App-158 Due to the slow rate of reproduction, it takes approximately ten years for a breeding female to be replaced in the wild. 2-App-216.

## **B. The Upper Green Project**

The project area encompasses the headwaters of both the Green River and the Gros Ventre River and is within the Pinedale Ranger District of the Bridger-Teton National Forest. 11-App-164 – 11-App-165. The project area lies within the

GYE, which the Forest Service recognizes as one of the largest intact ecosystems remaining in the temperate zones of the world. 11-App-165. Of the 170,643-acre project area, 17,818 acres lie in designated Wilderness areas.<sup>2</sup> 11-App-165; 4-App-141.

The project area contains six grazing allotments and the decision at issue authorizes 8,819 head of livestock, including 8,772 cow/calf pairs or yearlings and 47 horses. 4-App-141; 4-App-154. The grazing season may vary slightly by allotment but generally occurs from June 14 to October 15.<sup>3</sup> 4-App-154 – 4-App-155. 21 people are authorized to graze livestock in the project area, for a maximum permitted use of approximately 44,722 animal unit months.<sup>4</sup> 4-App-154; 11-App-165. This decision permits ongoing grazing at high levels for up to 10 years, through the 2028 grazing season, despite previous and ongoing impacts to wildlife, fish, water quality, soil quality, and vegetation. *See, e.g.*, 11-App-138 – 11-App-151.

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<sup>2</sup> In the 2019 Biological Opinion, FWS incorrectly states that the allotments encompass 170,641 acres, two acres less than the Forest Service’s description. 2-App-155.

<sup>3</sup> The Forest Service is authorized to make adjustments to allow livestock to enter one week earlier or leave one week later. 4-App-154 – 4-App-155.

<sup>4</sup> An “animal unit month,” or AUM, is the amount of forage for one mature cow or equivalent for one month based upon an average daily forage consumption of 26 pounds of dry matter. 11-App-165.

### **C. The Forest Service’s Past Consultation History with FWS**

As required by section 7 of the ESA, the Forest Service has engaged in a series of consultations with FWS to assess the impacts of grazing activities on federally protected species, including grizzly bears, in the project area. To place the consultation at issue in context, it is helpful to summarize the repeated exceedances of incidental take limits set by FWS and the ever-increasing number of bears that FWS has authorized to be killed to accommodate grazing.

Such consultation began 25 years ago, in 1997, when the agency drafted a biological assessment (“BA”) to assess the impacts of grazing on grizzly bears on six permitted allotments in the Upper Green area. *See* 1-App-157 – 1-App-158. In 1999, the Forest Service amended that BA and initiated formal consultation with FWS. *See* 1-App-158. Following consultation, FWS issued a BiOp (“1999 BiOp”) permitting, through an incidental take statement (“ITS”), the lethal removal of up to five grizzly bears over an indefinite period of time. 1-App-157 – 1-App-176. The 1999 BiOp/ITS authorized the lethal removal of four males and one female grizzly bear. 1-App-170. FWS also concluded that an unquantifiable number of grizzly bears would suffer non-lethal take resulting from displacement. *Id.*

In 2009, the Forest Service reached the level of lethal take identified in the 1999 BiOp with the mortality of five bears. Consequently, in 2010, the Forest Service amended the 1999 BA and reinitiated consultation with FWS. 1-App-177 –

1-App-235 (“2010 Amendment to 1999 BA”). In its request for further consultation, the Forest Service expanded the area for consideration to encompass three new allotments in the Upper Green area. 2-App-075. In 2011, FWS issued an amended BiOp (“2011 BiOp”) and an ITS authorizing the killing of six grizzly bears within any consecutive three-year period. 1-App-236 – 1-App-271. Under the terms and conditions of the BiOp, the Forest Service was required to coordinate with FWS regarding the adequacy of existing measures to minimize take if more than two grizzly bears were killed in the project area in any given year. 1-App-262.

Less than two years later, in August 2012, the Forest Service again found it necessary to reinitiate formal consultation upon reaching the permissible level of incidental killing of six grizzly bears in a consecutive three-year period. 2-App-075. Later that month, a seventh grizzly bear was killed, thereby exceeding the level of authorized take. *Id.*

In June 2012, FWS stated in a meeting with the Forest Service that increasing the permitted level of incidental take was not appropriate because the Forest Service was not in compliance with its own conservation measures and the 2011 BiOp’s terms and conditions. 2-App-260. Nevertheless, rather than enforcing the conditions for authorized take, on September 5, 2012, FWS issued a short-term amended BiOp and ITS permitting the killing of an additional three grizzly bears in the project area during the 2012 grazing season. 2-App-075 – 2-App-076.

In March 2013, the Forest Service drafted the 2013 Supplement to the 1999 BA and reinitiated formal consultation in April 2013. 1-App-272 – 1-App-288; 2-App-076. In June 2013, FWS issued an Appended BiOp (“2013 BiOp”) and associated ITS. 2-App-001 – 2-App-021. In a now predictable pattern, FWS again increased authorized take, permitting the take of 11 grizzly bears in any consecutive three-year period and limiting take to no more than three female bears. 2-App-016.

By the end of the 2013 grazing season, four more grizzly bears had been killed, including two males and two females. 2-App-076. Seeking approval to kill more females before the end of the consecutive three-year period, the Forest Service yet again reinitiated formal consultation in January 2014 and drafted a new 2014 Supplement to its BA. 2-App-022 – 2-App-067; 2-App-076.

Unsurprisingly, in September 2014, FWS issued another BiOp (“2014 BiOp”) and associated ITS once again increasing the number of grizzly bears that could be killed in the Upper Green area in deference to the livestock industry. 2-App-70 – 2-App-133. The 2014 BiOp, valid through the end of 2019, exempted the lethal take of 11 grizzly bears and the relocation of 18 grizzly bears within any three-year period. 2-App-115.

From 2014 to 2018, 23 grizzly bears were killed in the Upper Green grazing allotments. 2-App-176. In 2017, however, the grizzly bear in the GYE had been

delisted and removed from the list of threatened and endangered species under the ESA. 82 Fed. Reg. 30,502 (June 30, 2017) (the delisting rule became effective July 31, 2017). In September 2018, the U.S. District Court for the District of Montana vacated the delisting rule and the grizzly bear was relisted as a threatened species. *Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999 (D. Mont. 2018), *aff'd*, 965 F.3d 662 (9th Cir. 2020). The Forest Service and FWS decided that lethal removals or relocations between July 31, 2017, and September 24, 2018, did not count against the incidental take limits set in the 2014 BiOp. 2-App-069. However, because the 2014 BiOp was set to expire in 2019, the Forest Service requested reinitiation in October 2018 (2-App-068 – 2-App-069) and FWS subsequently issued the 2019 BiOp (2-App-134 – 2-App-211), challenged here.

**D. FWS's 2019 BiOp**

Acknowledging that ongoing livestock grazing for the Project was likely to adversely affect grizzly bears, the Forest Service again reinitiated consultation with FWS. 2-App-068 – 2-App-069. The Forest Service committed to preparing a new BA to determine the impacts of the Project on grizzly bears and evaluate the effectiveness of past conservation measures (3-App-002), but never prepared one. Nevertheless, without the benefit of a BA, on April 29, 2019, FWS issued the 2019 BiOp. 2-App-134 – 2-App-211.

In the 2019 BiOp, FWS assessed the impacts of the Project in its defined

action area, which FWS delineated as the grazing allotments plus a 7.5-mile buffer, resulting in an action area of approximately 711,627 acres.<sup>5</sup> 2-App-154 – 2-App-155. FWS chose this action area boundary based upon its interpretation of a 1982 study finding that grizzly bears may generally be drawn to livestock carcasses from a distance of 7.5 miles away, though some were drawn to carcasses from much further away. *Id.* (noting one adult moved 18.6 miles to a carcass).

FWS predicts in the 2019 BiOp that grizzly bear occupancy and conflicts in the action area are likely to increase, noting that the number of conflicts in the area increased by an average of nine percent per year from 2010 to 2014 and eight percent per year from 2014 to 2018. 2-App-175; 2-App-189. Using the eight percent growth rate observed from 2014 to 2018, FWS approved an ITS permitting the lethal take of 72 grizzly bears over the ten-year life of the Project. 2-App-190; 2-App-194 – 2-App-195. Thus, the 2019 ITS authorizes the killing of nearly double the number of bears that have been killed in the project area over the past 20 years (37 bears) in just half the time. 2-App-184.

As FWS notes in the BiOp, “the long-term survival of the Yellowstone grizzly bear population over the next 100 to 200 years is contingent upon

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<sup>5</sup> In accordance with ESA regulations, the identified action area is meant to reflect “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02.

minimizing average annual mortality within the total population *and especially that of adult females.*” 2-App-167 (emphasis added). Although FWS states that management removals of grizzly bears on the allotments have not detrimentally impacted the GYE grizzly bear population to date (2-App-176; 2-App-191), most previous removals targeted male grizzly bears. *See, e.g.*, 1-App-213 (noting all five removals between 1999-2009 were male). This is consistent with the fact that subadult males disperse great distances and males occurred in the action area more often than females. 1-App-197 (USFS noting males are responsible for most cattle depredations); 2-App-158; 2-App-162. But now, as FWS recognizes, patterns have changed from dispersing males occupying the action area to females with cubs increasingly establishing home ranges in the project area. 2-App-176. *See also* 2-App-212 (FWS recognizing that breeding occurs in the project area). As a result, more females are being killed. *See* 2-App-074.

Despite acknowledging that females with cubs are increasingly occupying the action area and that more females may be killed in the future than in past years, not only did FWS fail to include a limit on female grizzly bear take in the BiOp, but FWS never even considered whether including a female take limitation would be consistent with grizzly bear conservation. 2-App-193 – 2-App-195. Therefore, a high number of female grizzly bears could be killed—theoretically all 72 grizzly bears killed could be females—without FWS even having considered that scenario



or what it could portend for the species' survival and recovery.

Notwithstanding FWS's authorization of killing up to 72 grizzly bears, and the absence of a limit on how many female grizzly bears may be killed or any analysis on how that may impact the population, FWS concludes that the Project will not jeopardize grizzly bears. 2-App-192; 2-App-195. In reaching this no-jeopardy opinion, FWS relies in part on the Forest Service's commitment to implement conservation measures in the BiOp. 2-App-192. The measures are meant to prevent grizzly bear-livestock conflicts and thus limit management removals. 2-App-153. They generally include sanitation guidelines, monitoring recommendations, watching for sick or injured cattle, moving carcasses in some circumstances, and meeting with permittees. 2-App-153 – 2-App-154.

FWS assumed that the conservation measures will effectively protect grizzly bears even though many of the same measures have been in place for years with the number of conflicts only increasing. *See, e.g.*, 1-App-159 – 1-App-161 (showing the 1999 BiOp contained nearly identical conservation measures to those in the 2019 BiOp). Moreover, FWS must rely upon the Forest Service and permittees to implement and enforce most of the measures, despite past issues with compliance. *See, e.g.*, 2-App-160 (FWS noting the Forest Service's noncompliance). Most violations are likely not even documented, given that the Forest Service itself has failed to comply with monitoring requirements in the past.

*See, e.g.*, 2-App-258 (noting that despite a measure requiring the Forest Service to monitor allotments on a regular basis, the Forest Service only visited allotments twice that year).

Directly following the release of the 2019 BiOp, the Forest Service issued a Record of Decision (“ROD”) approving the Project. 4-App-140 – 4-App-194. The ROD incorporates the conservation measures from the 2019 BiOp and relies on them to minimize grizzly bear removals. 4-App-159 – 4-App-160; *see also* 4-App-164 – 4-App-165.

### **III. Procedural Background**

On March 31, 2020, Plaintiffs filed suit against Defendants challenging the lawfulness of the 2019 BiOp under the ESA and the APA, as well as the Forest Service’s reliance on the BiOp. 1-App-022 – 1-App-050. On July 29, 2020, the State of Wyoming and the Green River Cattle Association *et al.* were granted the right to intervene in the case.

The district court’s Opinion and Order dismissing Plaintiffs’ claims was signed on May 16, 2022 and docketed on May 17, 2022. 1-App-120 – 1-App-149. Judgment was entered on June 1, 2022. 1-App-150. Plaintiffs timely filed this appeal on July 7, 2022. 1-App-154 – 1-App-156.

## SUMMARY OF THE ARGUMENT

FWS's 2019 BiOp, and the Forest Service's reliance on it, violates the ESA and APA in two important ways.

First, FWS entirely failed to consider limiting the lethal removal of female grizzly bears, even though female survival is necessary to sustain the species, previous biological opinions had done so, and females are increasingly occupying the project area. FWS therefore failed to consider an important aspect of the problem, in violation of the APA. *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Moreover, contrary to section 7 of the ESA, the unanalyzed level of female take means that FWS and the Forest Service have not ensured that the action at issue is not likely to jeopardize the continued existence of the species. *See* 16 U.S.C. § 1536(a)(2).

Second, FWS arbitrarily and capriciously relied on mitigation measures to determine the Project will not jeopardize grizzly bears. Precedents construing the ESA establish that purported mitigation measures cannot be relied upon to reach a no-jeopardy conclusion if the measures are vague, unenforceable, uncertain to occur, or ineffective at protecting the listed species, as is the case here. *See, e.g., Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 743 (9th Cir. 2020); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935 (9th Cir. 2008).

Because the 2019 BiOp was flawed and unlawful, the Forest Service could not reasonably rely upon it to satisfy its own ESA obligations. As such, the 2019 BiOp and the Forest Service’s authorization of the Upper Green Project should be set aside.

### STANDARD OF REVIEW

In examining whether the Service violated the ESA, the Court applies the APA standard of review and reviews the district court’s grant of summary judgment de novo. *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1252 (10th Cir. 1998). Under de novo review, this Court owes no deference to the legal or factual decisions of the district court. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1186 (10th Cir. 1998) (citations and quotations omitted).

Under the APA, courts “shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). An action is arbitrary and capricious,

if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*State Farm*, 463 U.S. at 43. It is the duty of the reviewing court to “ascertain whether the agency examined the relevant data and articulated a rational

connection between the facts found and the decision made. In reviewing the agency's explanation, the reviewing court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (citing *State Farm*, 463 U.S. at 43). This includes a "thorough, probing, and in-depth review" of the administrative record. *Wyoming v. United States*, 279 F.3d 1214, 1238 (10th Cir. 2002).

## ARGUMENT

### **I. FWS's Failure to Consider Limiting Lethal Take of Females was Arbitrary and Capricious.**

FWS's unexplained failure to even consider limiting the authorized killing of female grizzly bears in connection with the Project is arbitrary and capricious and contrary to the ESA's mandate that federal agencies insure that their actions do not jeopardize the continued existence of listed species. Female survival is the primary factor impacting grizzly bear population trends (12-App-181), and FWS acknowledged in the 2019 BiOp that the long-term survival of the Yellowstone grizzly bear population relies upon minimizing mortality of adult female grizzly bears. 2-App-167. *See also* 2-App-217 (FWS stating "providing *maximum protection* for females is essential to recovery.") (emphasis added). For these reasons, in previous BiOps authorizing grazing in the Upper Green project area, FWS often included a limitation on lethal take of females. *See* 1-App-170 (1999

BiOp allowed take of four males and one female grizzly bear); 2-App-016 (2013 BiOp allowed take of 11 bears in a consecutive three-year period but no more than three female bears); 2-App-116 (2014 BiOp requiring a conference between USFS and FWS to discuss adequacy of existing mechanisms to minimize take if three or more females are lethally removed in one year).

Moreover, while FWS declined to specify a female take limitation in the 2014 BiOp, the agency at least fully explained why it made its decision—it was deemed to be unnecessary at that time given the small number of females in the area. *See* 2-App-132 (FWS explaining that it did not delineate the anticipated level of incidental take by gender in large part because take of females on the allotments generally numbered two or less individuals per year). By contrast, FWS included no such consideration in the 2019 BiOp. For example, there is no discussion of whether reinstating a female take limitation would be prudent and consistent with grizzly bear recovery given the increasing presence of females with cubs on the allotments, no indication as to whether female take has increased since the 2014 BiOp, and no explanation as to why FWS declined to include a female take limitation. In fact, while FWS includes a table listing the number of conflicts and removals on the allotments within the action area from 2010 to 2018, nowhere does FWS reveal how many of those removals were female bears. *See* 1-App-186. FWS's failure to include this crucial information is insufficient to comply with the

mandates of the ESA and APA. At the very least, whether the take of females should be specifically limited is a highly relevant factor that the agency is obligated to address. *See State Farm*, 463 U.S. at 43.

The district court held that because FWS discussed the ecosystem-wide female mortality thresholds contained within the 2017 Supplement to the 1993 Grizzly Bear Recovery Plan, FWS satisfied its duty to consider female mortality. 1-App-134 – 1-App-137. However, ecosystem-wide mortality thresholds are not a substitute for discussing female take in a site-specific and project-specific biological opinion. *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1075 (9th Cir. 2004) (“Focusing solely on a vast scale can mask multiple site-specific impacts that, when aggregated, do pose a significant risk to the species.”) (citation omitted); *Pac. Coast Fed’n of Fishermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, 265 F.3d 1028, 1035-37 (9th Cir. 2001) (focusing only on watershed-scale impacts while failing to analyze “site-specific degradation that could lead to a jeopardy finding contradicts the purpose of the ESA and is arbitrary.”).

Moreover, FWS did not itself rely on a broad-scale assessment to explain its failure to impose—or even consider imposing—a female take limit. Thus, this is an illegitimate post hoc rationalization on which the agency cannot rely. *See Utahns v. United States DOT*, 305 F.3d 1152, 1165 (10th Cir. 2002) (citing *Olenhouse*, 42

F.3d at 1565). It also conflicts with the fact that previous biological opinions *both* discussed ecosystem-wide mortality thresholds that were recommended or in place at the time and *also* included a discussion of female take in the project area. *See, e.g.,* 2-App-094 – 2-App-095 (FWS discussing ecosystem-wide mortality limits in 2014 BiOp); 2-App-010 & 2-App-014 (FWS discussing ecosystem-wide female mortality limits in 2013 BiOp). Furthermore, these ecosystem-wide mortality thresholds are sometimes exceeded, rendering it even more problematic for FWS to assert reliance on them in the context of the BiOp at issue here. *See, e.g.,* 2-App-010 (noting both male and female mortality in the GYE exceeded sustainable limits in 2011).

Even the district court said that it “agrees with Petitioners that it may have been better had the 2019 BiOp directly discussed the possible effects of a worst-case scenario in which as an example—all 72 authorized removals were female grizzlies.” 1-App-136. However, the court held that “this lapse does not require a finding that FWS made a *clear error* in its determination that UGRA take would not cause GYE demographic recovery criteria to be exceeded, or that it would not jeopardize the continued existence of the grizzly bear in the GYE.”

1-App-137 – 1-App-137 (emphasis added). But the district court was mistaken in applying a “clear error” standard. It is correct that the Tenth Circuit has held that an agency decision is arbitrary and capricious if the agency made a clear error of



judgment. *See N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 704 (10th Cir. 2009) (quoting *Utah Env't Cong. v. Troyer*, 479 F.3d 1269, 1280 (10th Cir. 2007)). But as the Supreme Court held and the Tenth Circuit confirmed, an agency action is also considered arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem.” *State Farm*, 463 U.S. at 43; *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1233 (10th Cir. 2017) (citations and quotations omitted). Here, FWS entirely failed to consider an important aspect of the problem when it neglected to address whether to include a female take limitation.

Because FWS entirely failed to consider an important aspect of the problem by failing to consider whether to impose a female lethal take limitation and, in turn, this failure implicates the Forest Service’s obligation to ensure that the Project is not likely to jeopardize the continued existence of the grizzly bear population, the biological opinion is arbitrary and capricious in violation of the ESA and APA. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(3); 5 U.S.C. § 706(2)(A).

## **II. FWS’s Reliance on Conservation Measures to Support Its No-Jeopardy Conclusion is Arbitrary and Capricious.**

The 2019 BiOp contains nine conservation measures that FWS relies upon to supports its conclusion that the Project will not jeopardize grizzly bears. 2-App-153 – 2-App-154. In construing section 7 of the ESA, courts have held that FWS

cannot rely on conservation measures to reach a no-jeopardy conclusion unless those measures are “reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards.” *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002) (citing *Sierra Club v. Marsh*, 816 F.2d 1376, 1379-80 (9th Cir. 1987), *abrogated on other grounds as recognized by Cottonwood Env’t Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1088-91 (9th Cir. 2015)). “Binding mitigation measures cannot refer only to generalized contingencies or gesture at hopeful plans; they must describe, in detail, the action agency’s plan to offset the environmental damage caused by the project.” *Bernhardt*, 982 F.3d at 743.<sup>6</sup>

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<sup>6</sup> The district court cites *Bernhardt* to hold that FWS did not *rely* on the conservation measures to make its no-jeopardy finding. 1-App-142 – 1-App-143. In *Bernhardt*, the court found that FWS did not explicitly rely on mitigation measures in making its no-jeopardy finding because FWS “[a]ppeared to conclude that the [project], as a whole, will not significantly impact polar bears, with or without mitigation measures,” and thus the flawed mitigation measures did not render the biological opinion fatally flawed. 982 F.3d at 748. In that case, FWS stated only that it “review[ed] the current status of the species, environmental baseline, effects of the action, and cumulative effects” in reaching its no-jeopardy determination. *Id.* By contrast, in the 2019 BiOp here, FWS specifically stated that it reached its no-jeopardy determination “[a]fter reviewing . . . *the Forest’s commitment to implement their Conservation Measures*,” amongst other factors. 2-App-192 (emphasis added).

The conservation measures here do not satisfy those criteria. First, some of the measures are not implemented by the action agency (the Forest Service). Rather, implementation requires the permittees to take action. For example, CM 4 requires permittees to move carcasses from campgrounds and roads. 2-App-153. CM 1 relies on permittees to follow food storage orders and to bear-proof toilets, and CM 2 relies on permittees to ensure range riders monitor livestock herds for sick, injured or stray animals. *Id.* Because these measures require implementation by the permittees, they are not “under agency control or otherwise reasonably certain to occur.” *See Nat’l Wildlife Fed’n.*, 524 F.3d at 935.

“[E]ven a sincere general commitment” to implement the conservation measures is insufficient “absent specific and binding plans.” *Id.* at 935-36. This is especially true here because the Forest Service has demonstrated that it cannot be relied upon to enforce permittees’ failure to implement mitigation measures. *See, e.g.*, 2-App-260 (FWS declaring USFS was not in compliance with the conservation measures in place); 2-App-019 (FWS expressing concern about noncompliance).

Second, many of the conservation measures are vague and would be difficult to enforce even if the Forest Service endeavored to do so. Vague mitigation

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measures are additionally problematic because they create difficulty in knowing at which point the action agency has failed to comply with the measures, and thus at which point reinitiation of consultation is required. *Bernhardt*, 982 F.3d at 744. For example, CM 2 requires range riders to watch livestock closely (2-App-153) but does not specify how many riders should be on the landscape at any given time nor how often they should be checking on the livestock. To rely on such a measure, it was incumbent on FWS to require the Forest Service to at least set forth a specific and enforceable measure specifying how many riders are appropriate to cover more than 170,000 acres.

Similarly, CM 3 calls on Forest Service employees to “monitor” allotments “on a regular basis.” 2-App-153. But FWS does not explain what type of monitoring is required or what “on a regular basis” means. In 2012, FWS expressed the need to define “regular basis” after the Forest Service only visited allotments twice the previous year to comply with this measure. 2-App-258. *See also* 2-App-263 (same). For this reason, in the 2014 BiOp’s terms and conditions, FWS required the Forest Service to “define what ‘regular’ monitoring schedule would be for the upcoming season,” including “documentation explaining how and when this monitoring will be conducted.” 2-App-117. However, this important

requirement appears nowhere in the 2019 BiOp.<sup>7</sup>

Finally, many of the measures are demonstrably ineffective to protect grizzly bears. For example, CMs 4 and 5 include requirements to move carcasses away from roads, trailheads and campgrounds. 2-App-153. However, there is no requirement to move carcasses off of allotments, even though FWS notes in the 2019 BiOp that grizzlies can be drawn to carcasses from seven miles away. 2-App-153 – 2-App-155. As an alternative to protect grizzly bears, FWS could have required that carcasses be removed from the project area or be destroyed using proven methods including using dynamite or lime. *See, e.g.*, 4-App-135 (Montana’s Livestock Loss Board explaining that removal of carcasses can be useful to prevent grizzly bear-livestock conflicts). But FWS and the Forest Service declined to include such a requirement to appease the permittees. *See* 2-App-267 (USFS informing FWS it is modifying the carcass removal requirement to include exceptions as requested by permittees). Moreover, while the 2014 BiOp also required that all sick or injured animals be removed or treated because they can

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<sup>7</sup> The district court held that the conservation measures are certain to occur, citing only CM 6 requiring that the Forest Service recommend that permittees carry bear spray and CMs 7-9 requiring monitoring and reporting. 1-App-143. The court failed to address any of the conservation measures described as vague and unenforceable as discussed above.

also attract predators (*see* 2-App-595 – 2-App-596), this requirement has been inexplicably removed from the 2019 BiOp. Because these measures are not aimed at protecting grizzly bears, they do not sufficiently “address the threat to the species.” *Rumsfeld*, 198 F. Supp. 2d at 1152.

In sum, because the conservation measures are not certain to occur, are vague and not reasonably specific, are difficult or impossible to enforce, and are ineffective at protecting grizzly bears, FWS’s reliance on these measures in making its no-jeopardy determination is arbitrary and capricious, rendering the 2019 BiOp unlawful. 16 U.S.C. § 1536(a)(2); 5 U.S.C. § 706(2)(A).

### **III. The Forest Service’s Reliance on the Faulty Biological Opinion to Approve the Upper Green Project is Unlawful.**

The Forest Service has its own duty under the ESA to ensure that the Project will not jeopardize grizzly bears. 16 U.S.C. § 1536(a)(2). “Consulting with FWS alone does not satisfy an agency’s duty under the Endangered Species Act.” *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994). Because “[a]n agency cannot abrogate its responsibility to ensure that its action will not jeopardize a listed species[,] its decision to rely on a FWS biological opinion must not have been arbitrary and capricious.” *Id.* at 1304 (citations and quotations omitted). The Forest Service’s unreasonably reliance on the unlawful 2019 BiOp to discharge its ESA duties violates the ESA and the APA. 16 U.S.C. § 1536(a)(2); 5 U.S.C. § 706(2)(A).

## **THE COURT SHOULD VACATE THE 2019 BIOP AND ROD**

This Court should vacate the Record of Decision if it finds that FWS's 2019 BiOp is unlawful. Vacatur is the presumptive remedy for arbitrary agency action, 5 U.S.C. § 706(2)(A) (providing that courts "shall" set aside arbitrary agency action), and the Supreme Court has stated that "[t]he [APA] requires federal courts to set aside federal agency action that is 'not in accordance with law.'" *FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003). Here, vacatur will serve the ESA's purpose by ensuring FWS and the Forest Service fully comply with the ESA before implementing the Project. Where FWS has authorized the killing of 72 grizzly bears in connection with the Upper Green Project, the nature of the violations and the resulting impacts are significant. Because it would serve the ESA's fundamental purpose to protect listed species, this Court should vacate the 2019 BiOp and the associated ROD.

## **CONCLUSION**

For the foregoing reasons, Appellants respectfully request that this Court: (1) reverse and vacate the district court's decision; (2) declare that the Fish and Wildlife Service's 2019 BiOp violates the ESA and the APA; (3) declare that the Forest Service's reliance on the unlawful 2019 BiOp is arbitrary and capricious; and (4) vacate and set aside the 2019 BiOp and associated ROD.

## STATEMENT REGARDING ORAL ARGUMENT

Appellants believe that oral argument would be beneficial because this case involves significant issues regarding ESA compliance.

Respectfully submitted, September 15, 2022

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,319 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2016 in 14 point font size and Times New Roman.

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## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Emsisoft Business Security, version 2022.9.1.11645, last updated September 6, 2022, and according to the program are free of viruses.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 15, 2022, I electronically filed the foregoing OPENING BRIEF OF APPELLANTS CENTER FOR BIOLOGICAL DIVERSITY AND SIERRA CLUB, with attached Appendices, using the court's CM/ECF system, which will send notification of this filing to counsel for all parties.

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