



8:56 am, 5/17/22

Margaret Botkins
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

CENTER FOR BIOLOGICAL
DIVERSITY and SIERRA CLUB,

and

WESTERN WATERSHEDS PROJECT,
ALLIANCE FOR THE WILD ROCKIES,
and YELLOWSTONE TO UINTAS
CONNECTION,

Petitioners,

vs.

DEBRA A. HAALAND *et al.*,

Federal Respondents, and

STATE OF WYOMING and UPPER
GREEN RIVER CATTLE
ASSOCIATION *et al.*,

Respondent-Intervenors.

Lead Case No. 20-cv-231-NDF

Member Case No. 20-cv-234-NDF

OPINION AND ORDER

This consolidated matter comes before the Court upon the Amended Complaint/Petition for Review of Petitioners Center for Biological Diversity and Sierra Club (collectively, “CBD”), and the Supplemented and Amended Petition for Review of Agency Action of Western Watersheds Project, Alliance for the Wild Rockies, and

Yellowstone to Uintas Connection (collectively, “WWP”), against Respondents Debra A. Haaland in her official capacity as United States Department of Interior Secretary, United States Forest Service, and United States Fish and Wildlife Service (collectively, “Federal Respondents”). On July 29, 2020, the State of Wyoming was granted permission to intervene, as were the Upper Green River Cattle Association, Sommers Ranch, LLC, Price Cattle Ranch, Murdock Land and Livestock Co., and the Wyoming Stock Growers Association.

As an aid, the Court provides the following list of less familiar acronyms:

AMP – Allotment Management Plan

AOI – Annual Operating Instructions

BiOp – Biological Opinion

BTNF – Bridger-Teton National Forest

DMA – Demographic Monitoring Area

GYE – Greater Yellowstone Ecosystem

IGBST – Interagency Grizzly Bear Study Team

ITS – Incidental Take Statement

KWS – Kendall Warm Springs

PCA – Primary Conservation Area

ROD – Record of Decision

UGRA Project – Upper Green River Area Rangeland Project

After considering the administrative record, reading the briefs of the parties, reviewing the materials on file, and being fully advised in the premises, the Court **FINDS and ORDERS** as follows:

I. Introduction

On October 11, 2019, the United States Forest Service (USFS) signed the Record of Decision (ROD) for the Upper Green River Area Rangeland Project (UGRA Project). NFMA-FS-SAR-062815. The 170,643-acre project area is located in western Wyoming—and within the Greater Yellowstone Ecosystem (GYE) — approximately 30 miles northwest of Pinedale near the Green River Lakes. NFMA-FS-SAR-062816. The GYE is one of the largest intact ecosystems remaining in the temperate zones of the world. FS-012073.

There are six cattle and horse grazing allotments in the project area: Badger Creek, Beaver-Twin Creeks, Noble Pastures, Roaring Fork, Wagon Creek, and Upper Green River. FS-13686. The stated purpose of the UGRA Project is to “authorize livestock grazing in a manner that will maintain or improve resource conditions.” *Id.* Under the UGRA Project ROD, USFS will issue grazing permits for the project for a period of 10 years. FWS-664. The project allows approximately 8,819 livestock, including 8,772 cow/calf pairs and yearlings and 47 horses, to graze in the six allotments from June 14th to October 15th. FS-13699.

To assess the effects of the UGRA Project on the federally threatened grizzly bear, USFS requested consultation with the United States Fish and Wildlife Service (FWS). FWS-648. USFS also requested concurrence from FWS on its determination for the

endangered Kendall Warm Springs dace (KWS dace). *Id.* On April 29, 2019, FWS issued its biological opinion (BiOp) finding that the effects of livestock grazing as proposed in the UGRA Project are not likely to jeopardize the continued existence of the grizzly bear. FWS-706. As part of its informal consultation, FWS also concurred with USFS's determination that the project is not likely to adversely affect the KWS dace. FWS-653.

Petitioners CBD and WWP jointly argue that FWS's 2019 BiOp is arbitrary, capricious, and violates the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2), and the Administrative Procedure Act (APA), 5 U.S.C. § 706. Petitioners also jointly argue that USFS arbitrarily, unreasonably, and unlawfully relied on the BiOp when approving the UGRA Project. Petitioner WWP additionally argues that USFS and FWS unlawfully failed to engage in formal consultation regarding the UGRA Project's effects on the KWS dace. WWP also argues that, in violation of the National Forest Management Act (NFMA), the UGRA Project's ROD and associated Annual Operating Instructions (AOIs) and Allotment Management Plans (AMPs) do not prescribe the site-specific forage utilization levels needed to meet Bridger-Teton National Forest (BTNF) Plan objectives and fail to retain cover for sensitive amphibians and birds.

Petitioners request that the Court 1) set aside/vacate FWS's 2019 BiOp and Incidental Take Statement (ITS) for the UGRA Project as well as FWS's concurrence regarding the KWS dace; 2) set aside/vacate USFS's UGRA Project ROD and associated AOIs; 3) enjoin the lethal removal of grizzly bears from UGRA Project allotments until FWS and USFS complete consultation in compliance with the ESA; 4) enjoin cattle trailing through the KWS dace enclosure until FWS and USFS complete consultation in

compliance with the ESA; 5) enjoin grazing authorizations within the UGRA Project area until USFS ensures that such authorizations comply with the BTNF Plan's Forage Utilization Standard.

For the reasons that follow, the Court **AFFIRMS** the UGRA Project ROD, associated AOIs, and associated BiOp and ITS, as supported by substantial evidence, and neither arbitrary, capricious, an abuse of discretion, or inconsistent with law. Consequently, CBD's Amended Complaint/Petition for Review and WWP's Supplemented and Amended Petition for Review of Agency Action are **DISMISSED**.

II. Legal Background

A. *The Endangered Species Act*

The ESA defines an endangered species as one "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 one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20). Once FWS lists a species, Section 7 of the ESA dictates that federal agencies must ensure that any federal agency action is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species[.]" *Id.* § 1536(a)(2). To achieve this goal, an "action agency must first determine whether its proposed discretionary action may affect a listed species or a critical habitat." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1105 (10th Cir. 2010) (citing to 50 C.F.R. § 402.14(a), (c)). "If so, the agency must consult with the FWS." *Id.* The FWS then formulates a biological opinion, and, based on the best scientific and

commercial data available, determines whether the action is likely to jeopardize the continued existence of listed species. *Id.*

Section 9 of the ESA prohibits the “taking” of any endangered species. 16 U.S.C. § 1538(a)(1)(B). However, “[i]f the biological opinion concludes that jeopardy is not likely... the consulting agency can issue an ‘Incidental Take Statement.’” *Rio Grande*, 601 F.3d at 1106 (quoting *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008)); 16 U.S.C. § 1536(b)(4). An ITS “constitutes a permit authorizing the action agency to take the endangered or threatened species so long as it respects the [FWS’s] terms and conditions.” *Rio Grande*, 601 F.3d at 1106. (quoting *Bennett v. Spear*, 520 U.S. 154, 170 (1997)).

B. National Forest Management Act

NFMA requires the USFS to “develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System[.]” 16 U.S.C. § 1604(a). These “forest plans” must “provide for multiple use and sustained yield” and “include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness[.]” *Id.* § 1604(e)(1). A forest plan must also “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives.” *McKeen v. U.S. Forest Serv.*, 615 F.3d 1244, 1247 (10th Cir. 2010) (citing 16 U.S.C. § 1604(g)(3)(B)).

Projects approved by the USFS “must be consistent with the applicable forest plan.” *Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 427 (10th Cir. 2011) (citing *Utah Env’t Cong. v. Bosworth (UEC III)*, 443 F.3d 732, 737 (10th Cir. 2006); 16 U.S.C. §

1604(i)). Specifically, “AMPs must be consistent with the [f]orest [p]lan for the forest in which the allotment sits.” *McKeen*, 615 F.3d at 1247 (citing 36 C.F.R. § 222.2(c)). Grazing permits allow a recipient to graze livestock in accordance with policies including the relevant forest plan and any relevant AMPs. *Id.* (citing 36 C.F.R. § 222.3(c)(1); 43 U.S.C. § 1752(a), (d), (e)).

III. Factual Background

A. *The Grizzly Bear in the GYE*

Grizzly bears are among the largest terrestrial mammals in North America, and, in the lower 48 states, range from 250 to 600 pounds. FS-4198. They are omnivorous, opportunistic feeders and can live 25 years or longer in the wild. *Id.* Grizzlies originally inhabited a variety of habitats from the Great Plains to the mountains of western North America, and from central Mexico to the Arctic Ocean. FS-4201. South of Canada, the grizzly population has dropped from 50,000 to less than 1,000 over the last two hundred years, and they now occupy less than two percent of their former range. *Id.* Grizzlies have one of the lowest reproductive rates among terrestrial mammals, and a female grizzly requires a decade, at best, to replace herself. FWS-2424. The low survival rate of adult females was identified as the single most important factor in causing the decline in the Yellowstone population prior to the mid-1980’s. FS-4205. The two primary challenges in grizzly conservation lie in reducing human-caused mortality and conserving remaining habitat. FS-4201.

The grizzly bear was listed as a threatened species under the ESA in the lower 48 states on July 28, 1975. *Id.* Prior to listing, the Interagency Grizzly Bear Study Team

(IGBST) was formed in 1973 to further understanding of grizzly bear dynamics and centralize data collection and analysis. FS-3117. The IGBST is a cooperative effort between the USGS, NPS, USFS, FWS, and state wildlife agencies in Idaho, Montana, and Wyoming. *Id.*

FWS issued a “Grizzly Bear Recovery Plan” in 1982 and revised the plan in 1993. FWS-2405–2585. To facilitate consistency in the management of grizzly habitat across ecosystems, the Interagency Grizzly Bear Committee also developed the Interagency Grizzly Bear Guidelines in 1986. FS-4205. The most recent supplement to the recovery plan (“Revised Demographic Recovery Criteria for the Yellowstone Ecosystem”) was approved in 2017. FWS-6884. The supplement outlines specific recovery criteria for the GYE (such as minimum population size, female bear distribution, and mortality limits) that will be discussed in further detail *infra*. FS-4206.

The recovery plan identifies six recovery zones—the GYE recovery zone is one of them—which were established to include areas large enough and of sufficient habitat quality to support a recovered bear population. FS-4202. For each zone, the plan details recovery objectives and strategies. FS-4201. The 5,438,000-acre GYE recovery zone includes portions of Wyoming, Montana, and Idaho, portions of five National Forests, Yellowstone and Grand Teton National Parks, the John D. Rockefeller, Jr. Memorial Parkway, and adjacent Bureau of Land Management, state, and private lands. FS-4203-204. The GYE recovery zone lies within but does not constitute the whole of the broader GYE, which is substantially larger. As of 2017, the known area occupied by grizzlies in the entire GYE was 16,024,482 acres. FS-4204. Between the 1970s and early 2000s,

occupied range in the GYE increased by 48 percent; between 2000 and 2017, it increased another 51 percent. *Id.* In 2017, the estimated grizzly population in the GYE was 718. FWS-706. This number is likely an underestimate. FWS-682. Current population growth in the GYE is estimated at 0 to 2 percent annually. FWS-706.

Within the GYE, grizzlies are now managed using an inter-agency approach¹ that identifies a Primary Conservation Area (PCA) as well as adjacent areas where occupancy by grizzlies is anticipated and acceptable. FS-3020. The PCA is the area within the GYE recovery zone. *Id.* The PCA plus adjacent areas within the GYE form the Demographic Monitoring Area (DMA). *Id.* The DMA was delineated around suitable habitat in order to capture the extent of grizzly bear occupancy over time. FWS-686. The goal within the DMA is to manage grizzlies to ensure a recovered population in accordance with established recovery criteria (including those found in the Grizzly Bear Recovery Plan and the 2017 supplement). FS-3023.

All six of the grazing allotments in the UGRA Project area lie outside the bounds of the GYE recovery zone/PCA. FWS-687. However, all UGRA allotments are within the DMA. *Id.*

B. The Kendall Warm Springs (KWS) Dace

The only known location of the KWS dace—a small fish federally listed as endangered in 1970—is within the bounds of the Kendall Warm Springs located

¹ See 2016 Conservation Strategy for the Grizzly Bear in the GYE. FS-3013. The USFS, Idaho Department of Fish and Game, Montana Fish, Wildlife and Parks, Wyoming Game and Fish Department, National Park Service, BLM, and FWS were all signatories. FS-3032.

approximately 32 miles north of Pinedale. FS-12346, FS-4481, FS-4580. The springs are within the UGRA Project area. FS-4481. Originating at the base of a bluff, the springs flow through a braided channel for 328 yards and cascade into the Green River. *Id.* Fences currently exclude domestic livestock from the springs. FS-12357. However, native ungulates can easily navigate the fence and still have access to the springs. *Id.* A road and culvert built across the channel prior to 1934 (which fragmented the dace's habitat into two sections) was removed and replaced with a bridge in 1997, allowing reconnection of the habitat. FS-4588.

The dace utilize various habitats within the springs; adults favor shallow pools in the main channel while juveniles are found mostly in slower channels on the margins. FS-4481. Aquatic vegetation in the springs provides important hiding cover, and small pools created by large ungulates are believed to provide valuable habitat for the dace. *Id.* The USFS conducted surveys monitoring the dace population between 1995 and 2013. *Id.* The monitoring indicated a sharp decline in the dace population density between 2005 and 2007 but the population trend may have stabilized since that time. *Id.* The cause of this decline is unknown, but a narrowing and deepening of the stream has been noted which reduces the shallow, small pools valuable to dace. FS-12357. The channel changes may be related to the exclusion of domestic livestock from the springs. *Id.*

The UGRA Project excludes grazing livestock from the Kendall Warm Springs enclosure except when cattle are allowed through on their way to the allotments or back from the allotments. FS-12360. Cattle within the enclosure are required to be actively herded through to the other side. *Id.* Herding cattle through the enclosure will cause some

bank and channel alteration. *Id.* This could have a beneficial effect on the dace habitat but could also cause dace to temporarily switch habitat, elevate turbidity, and alter submergent vegetation cover. *Id.* Ultimately, USFS determined that the UGRA Project was not likely to adversely affect the KWS dace or their habitat. *Id.* FWS concurred with this determination, noting that any negative impacts to the dace are temporary and insignificant. FS-4172.

C. 2019 UGRA Project ROD and 1990 BTNF Forest Plan

The UGRA Project ROD authorized grazing on the six allotments using a management strategy that represents a modification of “Alternative 3” that includes some elements of Alternative 2 (as the alternatives are described in the 2017 FEIS). NFMA-FS-SAR-62818. The ROD allows a maximum of 8,819 head of livestock within the project area and a maximum 44,722 animal unit months of forage authorized for consumption. NFMA-FS-SAR-62829. Grazing was re-authorized on the allotments to “contribute to the accomplishment of Bridger-Teton Land and Resource Management Plan (Forest Plan) Goal 1.1 to support community prosperity and Objective 1.1(h) to provide forage for about 260,000 animal unit months of livestock grazing annually.” NFMA-FS-SAR-62816. The ROD states that “[t]here is also a need to avoid unacceptable effects from livestock use (Forest Plan Goal 4.7).” *Id.*

The ROD set maximum forage utilization percentages on key forage species for each pasture and for seven focus areas. NFMA-FS-SAR-62819. The key forage species are primarily Idaho fescue in the uplands and sedges or tufted hairgrass in riparian and meadow areas. *Id.* The Noble Pastures Allotment’s maximum forage utilization was set at 60% in

the uplands and 65% in riparian/meadow areas. *Id.* All other allotments have a maximum set at 50% forage utilization in both upland and riparian/meadow areas. *Id.*

The 1990 BTNF Forest Plan set Resource Management Prescriptions, Standards, and Guidelines. NFMA-FS-SAR-127. They “represent land management direction responsive to... the Bridger-Teton Management Problems, Challenges, Goals, and Objectives.” *Id.* Of relevance to this case, Objective 4.7(d) “require[s] that suitable and adequate amounts of forage and cover are retained for wildlife and fish.” NFMA-FS-SAR-126.

The Forage Utilization Standard imposes maximum utilization levels allowed for all herbivores on key vegetative species. NFMA-FS-SAR-133. The Forage Utilization Standard also states that “[d]uring AMP revision, the Interdisciplinary (ID) Team and livestock permittees will prescribe site-specific utilization levels needed to meet Forest Plan objectives.” NFMA-FS-SAR-134.

In the Forest Plan, by the Court’s count, there are 24 “Goals” and 73 “Objectives.” NFMA-FS-SAR-118–127.

IV. Standard of Review

Claims arising under the ESA and NFMA are reviewed under the Administrative Procedure Act (APA). *See Biodiversity Legal Foundation v. Babbitt*, 146 F.3d 1249, 1252 (10th Cir. 1998); *Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036, 1058-59 (10th Cir. 2014). Under the APA, a reviewing court 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 law.” 5 U.S.C. § 706(2)(A). An agency’s

decision is arbitrary and capricious if the agency (1) “entirely failed to consider an important aspect of the problem,” (2) “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,” (3) “failed to base its decision on consideration of the relevant factors,” or (4) made “a clear error of judgment.” *New Mexico 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)).

“The APA’s arbitrary and capricious standard is a deferential one; administrative determinations may be set aside only for substantial procedural or substantive reasons, and the court cannot substitute its judgment for that of the agency.” *Utahns for Better Transp. v. U.S. Dep’t. of Transp.*, 305 F.3d 1152, 1164 (10th Cir. 2002) (citation omitted). “A presumption of validity attaches to the agency action and the burden of proof rests with the appellants who challenge such action.” *Citizens’ Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008) (quoting *Colo. Health Care Ass’n v. Colo. Dep’t of Soc. Servs.*, 842 F.2d 1158, 1164 (10th Cir. 1988)). Further, a deferential approach to judicial review is particularly appropriate where the challenged decision implicates substantial agency expertise. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989) (“Because analysis of the relevant documents ‘requires a high level of technical expertise,’ we must defer to ‘the informed discretion of the responsible federal agencies.’” (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976))).

However, the presumption of validity does not shield the agency from a “thorough, probing, in-depth review.” *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574

(10th Cir. 1994). Further, the “[d]etermination of whether the agency acted within the scope of its authority requires a delineation of the scope of the agency’s authority and discretion, and consideration of whether on the facts, the agency action can reasonably be said to be within that range.” *Id.*

V. Discussion

A. FWS compliance with the ESA in issuing the 2019 BiOp

Petitioners argue that the FWS’s 2019 BiOp is arbitrary and capricious and violates the ESA. In support of this argument, they assert that 1) the 2019 BiOp and accompanying ITS do not specifically limit the number of female grizzly bears that can be removed under the ITS’s 10-year, 72-bear lethal removal limit, nor do they examine the effect of the project on female bears; 2) previous BiOps (1999, 2013, and 2014) included sex-based removal limits or reporting triggers for female bears, while the 2019 BiOp does not—rendering this departure without a reasoned explanation arbitrary and capricious; 3) the 2019 BiOp failed to address the likelihood that the project’s 72 lethal removals will perpetuate the UGRA Project allotments as mortality sinks; 4) the 2019 BiOp failed to consider other anticipated take of grizzlies within the GYE; and 5) the FWS arbitrarily relied on ineffective conservation measures that lack certainty and specificity to support its no jeopardy finding.

i. 2019 BiOp does not specifically limit female grizzly take

The 2019 BiOp states that “[t]he long-term survival of the Yellowstone grizzly bear population over the next 100 to 200 years is contingent upon minimizing average annual mortality within the total population and especially that of adult females,” FWS-681, and

that “female bears have established territories within the [UGRA Project] area.” FWS-689. The USFS’s Final Environmental Impact Statement (FEIS) for the UGRA Project notes that “[s]urvival of adult female grizzly bears in the Greater Yellowstone Area is the most important factor influencing population trend.” FS-12387.

The 2019 BiOp (in the associated ITS) exempts 72² lethal grizzly bear removals starting in 2019 and ending in 2028 (10 years) as a consequence of livestock grazing in the allotments in the UGRA Project. FWS-708. Of these 72, the ITS does not separately limit the number of female bears that can be removed during the period. *See* FWS-708–711. Petitioners argue—given the vital demographic role of female bears outlined above—that without a limit on the take of female bears, and without an examination of the Project’s effect on female bears, the 2019 BiOp cannot ensure against jeopardy and that its no-jeopardy determination is thus unsupported, unlawful, and failed to use best available science.

All Respondents variously assert that FWS manages the grizzly bear population at the GYE level, and that because female-specific take limitations exist on the GYE scale, Petitioners’ contentions are based on faulty premises.

The 2017 supplement to the Grizzly Bear Recovery Plan (FWS-6884) was appended to the Yellowstone chapter of the Grizzly Bear Recovery Plan as well as the 2016 Conservation Strategy. FWS-6890. The 2017 supplement revised three demographic criteria based on updated demographic analyses and the best available science. FWS-6885.

² For an explanation of how this number was generated, *see* FWS-708–709.

Demographic Recovery Criterion 1 requires a minimum grizzly population of 500 bears, and at least 48 females with cubs-of-the-year, within the DMA. *Id.* Criterion 2 requires that 16 of 18 bear management units within the GYE recovery zone³ be occupied by females with young, with no two adjacent units unoccupied. FWS-6887.

Perhaps most importantly, Criterion 3 imposes annual mortality limits within the DMA. FWS-6888. The mortality limits—which are on a sliding scale based on the total grizzly population in the DMA—were set to achieve/maintain the population goal within the DMA of 674 bears. FWS-6888–889. There are separately calculated limits for independent females, independent males, and dependent young, and take into account all known and probable grizzly mortality from all causes⁴. *Id.* If any of the sex/age class mortality limits are exceeded for three years and any annual population estimate falls below 612, Criterion 3 requires that the IGBST produce a “Biology and Monitoring Review” to inform the appropriate management response. *Id.* If any annual population estimate falls below 600, Criterion 3 requires a cessation of all discretionary mortality within the DMA except as necessary for human safety. *Id.*

The 2019 BiOp fully discusses the 2017 supplement and its demographic recovery criteria. FWS-677. It notes that—as per the data collected by the IGBST—none of the

³ As previously referenced, the GYE recovery zone is now also referred to as the “Primary Conservation Area” or PCA. FS-3020.

⁴ These causes include management removals, illegal kills, mistaken identity kills, self-defense kills, vehicle kills, natural mortalities, undetermined-cause mortalities, grizzly bear hunting, and a statistical estimate of the number of unknown or unreported mortalities. FWS-6889.

mortality thresholds for females, males, or young were exceeded in 2017⁵ (the first year that Criterion 3, as it appears in the 2017 supplement, was imposed) and that recent levels of mortality in the GYE (including those mortalities within the UGRA Project area) have been sustainable. FWS-682, 696. It also states that the anticipated level of grizzly bear mortality caused by the UGRA Project falls within the scope of the demographic recovery criterion 3. FWS-706. There is no assertion by Petitioners that the data used in these findings falls short of best available science.

In short, the criteria in the 2017 supplement supply a mechanism to remedy the possibility of an uptick in take of female bears. A lack of a female-specific take limit in the UGRA Project area does not connote with an absence of protections for female grizzlies within the DMA. There are female mortality limits in the DMA, and FWS states (see above) that projected take in the UGRA Project area will not cause those limits to be exceeded. Accordingly, the lack of female-specific take limits within the UGRA Project does not render the 2019 BiOp's determination (that the UGRA Project will not jeopardize the GYE grizzly population) arbitrary or capricious.

The Court 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. However, this lapse does not require a finding that FWS made a clear error in its determination that UGRA take would not cause

⁵ Although the recovery criterion were different prior to 2017, the 2019 BiOp also states that demographic recovery criteria (as they existed at the time) have been met for all age and sex classes since 2004. FWS-706.

GYE demographic recovery criteria to be exceeded, or that it would not jeopardize the continued existence of the grizzly bear in the GYE. A showing of error in this regard is Petitioners' burden, which they have not satisfied.

ii. Departure from previous BiOps with sex-based removal limits

Petitioners assert that previous BiOps for the project area (1999, 2013, 2014) included sex-based removal limits or reporting triggers for females, and that the 2019 BiOp's lack of this feature represents an arbitrary and capricious departure from agency past practice. *See Cotton Petro. Corp. v. U.S. Dep't. of Interior*, 870 F.2d 1515, 1526 (10th Cir. 1989) ("An administrative agency must explain its departure from prior norms (guidelines)"); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) ("Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure.")(citation omitted).

Respondents point to previous BiOps for the project area that did not include female-specific take limitations (2011, 2014). An examination of the 2011 BiOp shows this to be true (FWS-80–115); the 2014 BiOp does not set female-specific take limits but does require that USFS contact FWS if three or more females are lethally removed in a given year (FWS-209–272, 255). Given this, the Court finds that FWS imposing a female-specific take limit is hardly boilerplate past practice, and does not find the 2109 BiOp's lack of such a limit to be an arbitrary and capricious reversal.

iii. 2019 BiOp did not address existing sink habitat in the project area

As an additional argument that a female-specific take limitation is required, Petitioner WWP points to USFS's 2017 FEIS for the project area which identifies an existing mortality sink for female grizzly bears occurring throughout much of the project area, meaning female mortality exceeds or nearly exceeds survival.⁶ FS-012396. WWP argues that FWS failed to address the fact that the project would contribute to this existing "sink" habitat for females, thereby completely ignoring an important aspect of the problem before it. As support, WWP cites *Helena Hunters & Anglers Ass'n v. Marten*, 470 F.Supp.3d 1151 (D. Mont. 2020) for the proposition that this failure violates the ESA and the APA.

The *Hunters* case is not persuasive. *Helena Hunters* presented a grizzly bear consultation issue for a project which added non-motorized trails in grizzly bear "secure" areas, and grizzly bear survival was strongly linked to the availability of secure habitat. *Id.* at 1179. In the case before this Court, the purpose of the UGRA Project was to authorize livestock grazing through permits covering six cattle and horse grazing allotments, where most allotments do not qualify as source/secure habitat. The Wildlife Specialist Report for the project relies on a model (Schwartz et al. (2010)) which concludes that grizzly bear survival declined as road density, and number of homes and site developments increased, and the bear's "survival on the landscape [was] not explained by the amount of time bears spent on cattle or sheep allotments in the Yellowstone Ecosystem." FS-2822 (emphasis

⁶ "Source" and "sink" habitat are terms used to differentiate areas based on whether mean female survival estimates are over 91%. FS-2822. If the 91% threshold is satisfied, the habitat is source habitat. If it is not, the habitat is sink habitat. *Id.* Only the Badger Creek Allotment within the project area had mean female survival estimates over 91%; thus the remaining allotments are sink habitat. *Id.*

added). Therefore, the case at hand could not be more different than the *Hunters* case, as the UGRA Project does not add development features (such as trails), it is not primarily in source/secure habitat, and it constitutes a landscape where grizzly survival is unrelated to time bears spend on livestock allotments. WWP does not contest any of these facts, nor does it fault the conclusions of the Schwartz et al. (2010) model, or the science behind it.

Given all this, WWP fails in its burden to show that the BiOp's failure to address sink habitat for female grizzly bear survival within a grazing project violates the ESA or the APA, or that the failure renders the no jeopardy determination unlawful.

iv. 2019 BiOp failed to consider other anticipated take of grizzlies in GYE

WWP argues that FWS unlawfully failed to explain how anticipated take elsewhere in the GYE factors into the agency's conclusion that 72 lethal removals in the project area will not jeopardize the species. WWP cites to *Mayo v. Jarvis*, 177 F. Supp. 3d 91 (D.D.C. 2016) in support. *Mayo* held a FWS BiOp addendum to be arbitrary and capricious because the agency "failed to consider and evaluate the impact of the other incidental takes of the grizzly bear that had been authorized in the GYE since 2007 when making its 'no jeopardy' finding." *Id.* at 137. "The FWS must therefore evaluate the impact of an agency's action 'in light of the environmental baseline' even if the BiOp 'does not numerically add the takes from different sources together.'" *Id.* (citing *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 230 (D.D.C. 2005)).

Here, the 2019 BiOp does not add up all prospective anticipated take within the DMA. Yet it does consider the proportion of removals within the UGRA allotments compared to total grizzly mortality in the GYE due to livestock depredations. FWS-691. It

notes all known and probable grizzly bear mortalities in the GYE from 1997-2017. FWS-680. It discusses the 35 grizzly removals within the UGRA allotments from 2010 to 2018 (FWS-689) and explains (with a cite to the IGBST 2017 report) that those mortalities have not affected population growth at the level of the DMA. FWS-696. It explains that the 72 removal limit over 10 years allowed by the ITS (a larger number than the 2010-2018 period) was decided upon in light of increased conflicts due to a growing grizzly population within the project area. Lastly, and in general, the environmental baseline section of the BiOp (FWS-686–698) is robust and comprehensive.

In *Mayo*, the offending BiOp addendum contained no discussion of the environmental baseline at all. 177 F. Supp. 3d at 137. That is not the case here. Accordingly, the Court does not find that FWS “entirely failed to consider an important aspect of the problem.” *Richardson*, 565 F.3d at 704.

v. FWS reliance on conservation measures to support a no jeopardy finding

The 2019 BiOp reviewed “the Forest’s commitment to implement their Conservation Measures” when issuing its no-jeopardy opinion. FWS-706. There are nine measures, outlined briefly here: 1) sanitation guidelines, 2) rider requirement to watch livestock closely, 3) FS employees’ monitoring of allotments, 4) carcass removal requirements, 5) exception to carcass removal requirements if safety is a concern, 6) recommendation that grazing permittees carry bear spray, 7) further identification/implementation of grizzly conflict reducing opportunities, 8) permittee awareness of ESA responsibilities, and 9) a goal to continue to work in cooperation with FWS, Wyoming Game and Fish Department, and the IGBST to collect information on

grizzlies in the allotment areas. FWS-667–668. These measures can also be found in the UGRA Project ROD. NFMA-FS-62834. They are made enforceable by making them a term and condition of all grazing permits in the project area. FWS-701.

Petitioners argue that FWS’s reliance on the BiOp’s conservation measures to support a no-jeopardy finding was unlawful as the measures are ineffective, vague, and not certain to occur. Both WWP and CBD cite to *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139 (D. Ariz. 2002) in support. *Rumsfeld* involved a challenge to a BiOp which concluded that the Army’s activities at Fort Huachuca would not cause jeopardy to the Huachuca water umbel or the Southwestern willow flycatcher. *Id.* at 1143. After a draft BiOp included a number of reasonable and prudent alternatives to address a jeopardy finding, the Army entered into a memorandum of agreement (MOA) to avoid the jeopardy finding. *Id.* at 1144. The MOA, which outlined mitigation measures, provided the basis for the FWS’s later no jeopardy finding. *Id.* The court held the Final BiOp to be unlawful, stating that “[t]o avoid a substantive violation of the prohibition against jeopardy, the agency must develop mitigation measures” which must be “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.” *Id.* at 1152.

Petitioners’ reliance on this case is problematic as the facts are readily distinguishable from the case at hand. The Conservation Measures in the 2019 BiOp are intended to “help prevent conflicts with Grizzly Bears in the Upper Green Project Area.” FWS-667. They were not specifically designed to avoid a jeopardy finding (as in *Rumsfeld*)

but rather act to generally lower bear/human conflict and the number of management removals within the action area. The Court does not agree that the Conservation Measures in this case equate to the mitigation measures in *Rumsfeld*, and does not find the *Rumsfeld* case to be persuasive.

The Court notes that it has also reviewed *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020), in which the mitigation measures in question were found to be “too vague to enforce” but that such a finding had no legal consequence without evidence the FWS relied on the measures. *Id.* at 747. A “BiOp that integrates mitigation measures into its decision making is more likely to have relied upon those measures.” *Id.* The court then held that FWS did not rely on the measures in its no-jeopardy determination because it “appear[ed] to conclude that the [project], as a whole, will not significantly impact polar bears, with or without mitigation measures.” *Id.* at 748.

Here, the 2019 BiOp states that it reviewed the Conservation Measures when arriving at its opinion. FWS-706. It’s unclear, though, how the mitigation measures were integrated into FWS’s decision making beyond the act of review. The BiOp’s conclusion does make explicitly clear that the no-jeopardy determination was reached by considering: anticipated change in grizzly population in the project area; the rate of growth and expansion of the GYE population; overall GYE population density; anticipated levels of mortality in the project area and the demographic recovery criteria; that those criteria have been met since 2004; and that the level of projected mortality caused by the project will not appreciably reduce the population, distribution, or reproduction of GYE grizzlies. FWS-706. The Conservation Measures are not mentioned. *Id.* Thus, the BiOp appears to

conclude that, with or without the Conservation Measures, the project as a whole will not jeopardize GYE grizzlies.

This is not to downplay the significance of the Measures or the fact that FWS reviewed them in coming to its no-jeopardy determination. However, Petitioners' various objections that these measures are not certain to occur or are otherwise unlawful—even if such a standard should be rigidly applied here—are unconvincing. For instance, Measure 6 requires that the USFS recommend that all permittees carry bear spray while working within allotments. FWS-668. CBD argues that because permittees will not be required to carry bear spray, the measure is not certain to occur. Yet Measure 6 only requires that bear spray be recommended. CBD does not argue that the recommendation is uncertain to occur.

As another example, WWP argues that Measures 7-9 “do not require any substantive action whatsoever” and thus do not satisfy Section 7 of the ESA. However, the 2019 BiOp did not premise its no-jeopardy finding on Measures 7-9. It rather reviewed all the Conservation Measures as a whole and considered their implementation as a factor in its determination. That some of the measures are clearly aspirational (as FWS surely noticed when reviewing them) cannot coherently serve to invalidate the 2019 BiOp.

The Court finds similar deficiencies in Petitioners' remaining arguments regarding the Measures. In conclusion, the Court does not find that FWS's “reliance” on the Conservation Measures violates the ESA or the APA.

B. USFS reliance on the 2019 BiOp

The Court does not find the FWS's 2019 BiOp to be arbitrary, capricious, or otherwise unlawful. Accordingly, USFS did not unlawfully rely on the FWS's 2019 BiOp when approving the UGRA Project ROD.

C. Compliance with the ESA regarding the Kendall Warm Springs Dace

WWP argues that USFS and FWS unlawfully failed to engage in formal consultation regarding the UGRA Project's effects on the endangered KWS dace. The 2019 BiOp, through informal consultation, concurred with USFS's determination that the project is not likely to adversely affect the KWS dace. FWS-653. However, the Court finds that FWS's concurrence both considered important aspects of the risks to the dace and based its decision on consideration of relevant factors. *See Richardson*, 565 F.3d at 704.

Notably, FWS links a since-stabilized decline (1997-2007) in the dace's population to a "narrowing and deepening of the [KWS] stream" and discusses the potential that this change relates to the exclusion of domestic livestock from the KWS enclosure. FWS-653. FWS acknowledges that herding cattle through the enclosure (on the way to the allotments or back from them) may result in "a few" animals straying into the water leaving hoof prints. *Id.* The prints "could result in some bank and channel alterations" and cause "temporary displacement of dace, an elevation in turbidity, and alteration of submerged vegetation." *Id.* Yet FWS states that the prints could also act to counteract the stream's recent trend of narrowing and deepening. *Id.* Ultimately, FWS found that the negative impacts of a few stray animals in the stream (dace displacement, elevated turbidity, and

vegetation alteration) were temporary and would cause insignificant impacts. *Id.* Moreover, FWS states that livestock impacts on the stream channel could actually result in beneficial effects to the dace. *Id.*

WWP asserts that the concurrence failed to consider the following relevant considerations: 1) the total number of cattle trailed past the Springs, 2) how many “a few” animals straying into the stream actually means, and 3) whether FWS incorrectly stated that cattle would only be present in the KWS area “for one or two days.” These assertions do not show the 2019 concurrence to be unlawful. The total number of cattle herded through the KWS enclosure is variable and perhaps impossible to prospectively quantify. *See* FS-12360 (“Based on current management, the permittees would often opt to herd the cattle around the enclosure or allow them to drift around the enclosure.”) Short of *requiring* permittees to herd cattle through the KWS area, the total number of cattle herded through could range from zero to the entire permitted number of animals in the allotments. Similarly, a projection that “a few” animals may stray into the stream is acceptably precise and need not be specified down to the exact number to constitute a valid consideration of this factor.

As for WWP’s assertion that FWS was wrong in stating that cattle would only be present in the KWS for one or two days per season, the Court concludes WWP misapprehends the record. The UGRA FEIS states that “[c]attle would be confined to the roadway when they are actively herded through the Kendall Warm Springs enclosure. In the fall, cattle would be allowed to drift out towards the southern Forest Boundary and spend additional time grazing within the River Bottom Pasture and along the livestock

driveway.” FS-12174. WWP cites this language in support of their assertion that cattle would be present for longer periods. However, there is no evidence that allowing cattle to drift out towards the southern Forest boundary means that cattle will be allowed to remain within the KWS enclosure. The FEIS and the 2019 BiOp are clear that cattle in the KWS area will be actively herded to the other side, regardless of the season. FWS-653.

WWP asserts that no language in relevant permits requires cattle to be actively herded through the enclosure. But the grazing permits in the record “specify that the allotment management plan is part of the permit and that the permittee will carry out its provisions, other instructions, or both as issued by the Forest officer in charge for the area under permit[.]” NFMA-FS-SAR-63489. WWP does not assert that Forest officers have not been directing permittees to actively herd cattle through the KWS enclosure. The Court finds WWP’s argument unavailing.

Ultimately, FWS not only determined that cattle-related temporary impacts on the KWS dace would be insignificant but found that such impacts could be beneficial at the level imposed by the UGRA Project. WWP does not directly dispute the science that led FWS to this conclusion and only disagrees with the end result of the informal consultation. Accordingly, the Court finds that USFS and FWS did not unlawfully fail to engage in formal consultation regarding the UGRA Project’s effects on the endangered KWS dace.

D. WWP’s NFMA claims

WWP argues that the UGRA Project ROD (and associated AOIs and AMPs) do not prescribe site-specific forage utilization levels that are necessary to meet BTNF Plan Objectives and thus violate NFMA. The argument, as the Court understands it, is that

projects must adhere to Forest Plan standards, such as the Forage Utilization Standard.⁷ The Forage Utilization Standard in the 1990 Forest Plan states that “[d]uring AMP revision, the Interdisciplinary (ID) team and livestock permittees will prescribe site-specific utilization levels needed to meet Forest Plan objectives.” NFMA-FS-SAR-134. Objective 4.7(d) “require[s] that suitable and adequate amounts of forage and cover are retained for wildlife and fish.” NFMA-FS-SAR-126. WWP asserts that specialist reports, the FEIS, and other materials show that the selected grazing alternative in the UGRA Project ROD does not retain suitable cover for wildlife, and that the ROD thus violates NFMA.

As an initial matter, the State of Wyoming argues that Petitioners WWP waived all of their NFMA arguments that the UGRA Project ROD does not comply with the Forage Utilization Standard and Objective 4.7(d) related to Idaho fescue, migratory birds, or sensitive amphibians, by not raising specific concerns during public review of UGRA Project ROD.⁸ The State of Wyoming also argues that no other objector raised similar concerns.

“Persons challenging an agency’s compliance with NEPA must structure their participation so that it ... alerts the agency to the [parties’] position and contentions, in order to allow the agency to give the issue meaningful consideration.” *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 783 (10th Cir. 2006) (quotation simplified and citations omitted). As the State of Wyoming recognizes, this general rule

⁷ In support, WWP cites *Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1110 (9th Cir. 2018) (“The Forest Service must strictly comply with a forest plan’s ‘standards,’ which are considered binding limitations, but it may deviate from the forest plan’s ‘guidelines,’ so long as the rationale for deviation is documented.”)

⁸ In support, the State of Wyoming references NFMA-FS-SAR-060566-612 and 060629-52.

has exceptions. Claims are not waived if “the problems underlying the claim are obvious or otherwise brought to the agency’s attention.” *Forest Guardians*, 641 F.3d at 430 (internal quote and citation omitted).

The Court is satisfied that WWP’s claim is not waived as its comments to the agency complain that the Forage Utilization Standard and Objective 4.7 were ignored, and that the cattle’s use of forage in some pastures would not provide for the habitat needs of Sensitive Species. NFMA-FS-SAR-060663; *see also*, 060664 & 060671 (reference to herbaceous retention not meeting 70% retention objective). The Court concludes these comments by WWP are sufficient to alert the agency to the issue.

Turning to WWP’s substantive argument that the UGRA Project ROD does not comply with the Forage Utilization Standard and Objective 4.7(d), the Court finds that there are fatal problems with this argument. Objective 4.7(d) is somewhat vague—i.e., what exactly are suitable and adequate amounts of forage and cover—and including Objective 4.7(d), there are 73 objectives contained within the 1990 Forest Plan. NFMA-FS-SAR-118–127. Many of them conflict to a certain degree—which is to be expected given the USFS’s multiple use mandate. Objective 1.1(h) is to “[p]rovide forage for about 260,000 Animal Unit Months (AUMs) of livestock grazing annually.” NFMA-FS-SAR-119. Using WWP’s logic, the Forage Utilization Standard’s prescription of site-specific utilization levels needed to meet Forest Plan objectives must also take this into account.

The objectives in the Forest Plan apply to all land within the BTNF. Naturally, some sites within the BTNF will more fully accomplish some objectives at the expense of others. USFS’s site-specific management necessarily falls, then, within the realm of their agency

expertise. Accordingly, the Court does not find that the UGRA Project ROD violates NFMA.

VI. Conclusion

For the foregoing reasons, the Court **AFFIRMS** the UGRA Project ROD and its associated AOIs, along with the associated BiOp and ITS, as supported by substantial evidence, and neither arbitrary, capricious, an abuse of discretion, or inconsistent with law. Consequently, CBD's Amended Complaint/Petition for Review and WWP's Supplemented and Amended Petition for Review of Agency Action are **DISMISSED**.

Dated this 16th day of May, 2022.



NANCY D. FREUDENTHAL
UNITED STATES DISTRICT JUDGE

FILED

United States District Court
For The District of Wyoming



9:03 am, 6/1/22

Margaret Botkins
Clerk of Court

CENTER FOR BIOLOGICAL DIVERSITY
and SIERRA CLUB,

and

WESTERN WATERSHEDS PROJECT,
ALLIANCE FOR THE WILD ROCKIES,
and YELLOWSTONE TO Uintas
CONNECTION,

Petitioners,

Civil No. 20-CV-231-F
20-CV-234-F

vs.

DEBRA A. HAALAND, *et al.*,

Federal Respondents and

STATE OF WYOMING and UPPER
GREEN RIVER CATTLE ASSOCIATION,
et al.,

Respondent-Intervenors.

JUDGMENT IN A CIVIL ACTION

The Court having entered an Opinion and Order affirming the Upper Green River Area Rangeland Project Record of Decision and its associated Annual Operating Instructions, along with the associated Biological Opinion and Incidental Take Statement on May 16, 2022, has ordered that Center for Biological Diversity’s Amended Complaint/Petition for Review and Western Watersheds Project’s Supplemented and Amended Petition for Review of Agency Action is DISMISSED.

Dated this 1st day of June, 2022.



[Handwritten Signature]
Clerk of Court or Deputy Clerk