

Nos. 22-8031, 22-8043

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

and

CENTER FOR BIOLOGICAL DIVERSITY and SIERRA CLUB
Petitioners/Appellants,

v.

DEBRA A. HAALAND, et al.,
Federal Respondents/Appellees

and

STATE OF WYOMING and UPPER GREEN RIVER CATTLE ASSOCIATION,
et al.,
Intervenor Respondents/Appellees

Appeal from the United States District Court for the District of Wyoming
Nos. 20-cv-231, 20-cv-234 (Hon. Nancy D. Freudenthal)

BRIEF FOR FEDERAL RESPONDENTS-APPELLEES

Oral argument is requested.

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PRIOR OR RELATED APPEALS

There are no prior or related appeals in this matter.

GLOSSARY

CBD	Plaintiffs Center for Biological Diversity and Sierra Club
ESA	Endangered Species Act
FWS	Fish and Wildlife Service
NFMA	National Forest Management Act
WWP	Plaintiffs Western Watersheds Project, Alliance for the Wild Rockies, and Yellowstone to Uintas Connection

INTRODUCTION

In 2019, the United States Forest Service decided to authorize continued livestock grazing in the Upper Green River area of the Bridger-Teton National Forest in Wyoming. Grazing has occurred in the Upper Green River area for over 100 years, and it helps support the surrounding communities' economies. As part of its decision, the Forest Service imposed stringent requirements to protect grizzly bears and wildlife. Its decision was the result of years of analysis and coordination with the United States Fish and Wildlife Service (FWS). Pursuant to the Endangered Species Act (ESA), FWS reviewed extensive scientific data and issued a Biological Opinion. FWS concluded that grazing, as authorized under the decision, would not jeopardize the grizzly bear population, which has recovered dramatically and is now a conservation success story. In addition to protections for grizzlies, the Forest Service also mandated various protective measures to improve forest resources, such as forage and riparian areas.

Plaintiffs challenged FWS's Biological Opinion and the Forest Service's decision, bringing claims under the ESA and the National Forest Management Act (NFMA). The district court upheld the agencies' decisions because the decisions were reasonable, based on scientific evidence, and the agencies had considered all the relevant factors. This Court should affirm.

STATEMENT OF JURISDICTION

(A) The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs’ claims arose under the ESA, 16 U.S.C. §§ 1531 et seq., and NFMA, 16 U.S.C. §§ 1600 et seq. 1-App-43–46; 1-App-114–16.

(B) This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment. 1-App-150.

(C) That judgment was entered on June 1, 2022. *Id.* Plaintiffs timely filed their notices of appeal on June 10, 2022 and July 7, 2022, or 9 and 36 days later. 1-App-152, 1-App-155; *cf.* Fed. R. App. P. 4(a)(1)(B).

(D) The appeal is from a final judgment that disposes of all parties’ claims.

STATEMENT OF THE ISSUES

1. With respect to the ESA:

A. Whether FWS reasonably relied on demographic parameters that are continuously monitored, that include mortality limits for female bears, and that reflect all causes of mortality.

B. Whether FWS comprehensively considered grizzly bear mortality throughout the Greater Yellowstone Ecosystem.

C. Whether FWS evaluated “sink” habitat in the grazing area.

D. Whether the conservation measures are reasonable because they are enforceable permit terms, certain to occur, specific, and effective.

2. Whether the Forest Service reasonably relied on the Biological Opinion when it was facially valid and when Plaintiffs did not identify any new information that the agencies failed to consider.

3. With respect to NFMA:

A. Whether the Forest Service is entitled to deference in its implementation of the Forest Plan, which provides for multiple uses and contains competing objectives.

B. Whether the Project is consistent with the Forest Plan because it improves habitat for wildlife through various protective measures.

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. National Forest Management Act

NFMA establishes a two-step process for forest planning and management. *Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1049 (10th Cir. 2014). The Forest Service must first develop a land and resource management plan—also known as a “forest plan”—for each National Forest. 16 U.S.C. § 1604(a). Forest plans do not authorize any ground-disturbing activities. *See Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 733–34 (1998). Instead, they are “broad, programmatic

document[s].” *McKeen v. U.S. Forest Serv.*, 615 F.3d 1244, 1247 (10th Cir. 2010) (quoting *Colo. Env’tl Coal. v. Dombeck*, 185 F.3d 1162, 1167–68 (10th Cir. 1999)). Forest plans “provide for multiple use and sustained yield” of the forests and for the “coordination of outdoor recreation, range [i.e., grazing], timber, watershed, wildlife and fish, and wilderness.” 16 U.S.C. § 1604(e)(1). The applicable forest plan here is the Bridger-Teton Land and Resource Management Plan. 5-App-001.

Once a forest plan is developed, the Forest Service develops site-specific projects consistent with the plan. *Ohio Forestry*, 523 U.S. at 734. The agency must ensure that any site-specific project—like the grazing authorization here (the Project)—is “consistent with” the applicable forest plan. 16 U.S.C. § 1604(i).

2. Endangered Species Act

The ESA protects species that have been listed as endangered or threatened. 16 U.S.C. § 1533(c); 50 C.F.R. § 402.01. An “endangered species” is any species “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A “threatened species” is any species “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20). In 1975, the FWS listed the grizzly bear as threatened under the Endangered Species Act. *Amendment Listing the*

Grizzly Bear of the 48 Conterminous States as a Threatened Species, 40 Fed. Reg. 31,734 (July 28, 1975).

The ESA prohibits “take,” which means harassing, harming, hunting, shooting, wounding, or killing, of endangered species. 16 U.S.C. §§ 1532(19), 1538(a)(1)(B). FWS can issue regulations prohibiting take of threatened species. 16 U.S.C. § 1533(d). FWS has promulgated such a regulation prohibiting take of grizzly bears with limited exceptions, such as safety. 50 C.F.R. § 17.40(b)(i).

Federal agencies must ensure that their actions are “not likely to jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C. § 1536(a)(2), (4). The ESA and its implementing regulations detail a process for agencies that want to conduct specific actions (such as the Forest Service seeking to authorize grazing) to consult with FWS. 16 U.S.C. § 1536; 50 C.F.R. pt. 402. The consultation process concludes when FWS issues a biological opinion that assesses the likely effects of the agency’s actions on the species and explains the scientific basis for FWS’s conclusions. 16 U.S.C. § 1536(b)(3)(A). If an action will not jeopardize a species’ continued existence, FWS may allow take that is incidental to the federal action in a document called an incidental take statement. 16 U.S.C. § 1536(b)(4). Any take that occurs in compliance with the terms and conditions specified in an incidental take statement is not prohibited under the ESA. 16 U.S.C. § 1536(o)(2).

B. Factual background

1. Grazing

The Project involves six livestock grazing areas called allotments in western Wyoming within the Bridger-Teton National Forest and within the Greater Yellowstone Ecosystem. 4-App-141. Since the early 1900s, livestock grazing on the Project allotments has played a key role in maintaining communities in the Upper Green River area. 13-App-36. Most local ranches depend upon the National Forest for summer forage. 5-App-44. The Forest Service has reduced livestock grazing over time to improve rangeland soil and vegetation conditions. 5-App-44.

In 2019, the Forest Service issued a decision (the decision at issue in this litigation) authorizing continued livestock grazing on the Project allotments. 4-App-141. The Forest Service's purpose was to authorize grazing in a manner that would maintain or improve resource conditions. 4-App-141. The Forest Service decision allowed it to issue grazing permits for a maximum of 8,819 head of livestock for grazing between June 14 and October 15. 2-App-185, 4-App-154.

Consistent with the National Environmental Policy Act, the Forest Service prepared an environmental impact statement which analyzed and disclosed the potential impacts from the proposed project and provided opportunities for public participation. 4-App-175–76; *see Colorado Env't Coal. v. Dombeck*, 185 F.3d

1162, 1171 (10th Cir. 1999) (explaining requirements for an “environmental impact statement” under the National Environmental Policy Act).

Before making its decision, the Forest Service evaluated different options—including eliminating livestock grazing entirely, maintaining grazing as currently permitted, or modifying grazing in various ways. 4-App-141, 4-App-172–73.

Ultimately, the Forest Service selected an approach that combined elements from two different alternatives to provide the best balance between protection of resources and successful grazing management. 4-App-144.

The “need” for the Project was to contribute to Forest Plan Goal 1.1 to support community prosperity and Forest Plan Objective 1.1(h) to provide a minimum amount of livestock grazing every year. 4-App-141. The Forest Service also sought to avoid unacceptable effects from livestock grazing per Forest Plan Goal 4.7, which provides that grazing sustains or improves range, soils, water, and wildlife.

The Forest Service included various protections in its decision, such as restrictions on forage utilization, which is the amount of forage that livestock are allowed to consume in addition to wildlife. 4-App-144. The Forest Service also imposed minimum stubble height requirements along streams, which means that it allowed livestock to graze forage down only to a certain height in order to promote stream bank stability and leave a minimum amount of vegetation in place for

wildlife. 4-App-144. In addition, the Forest Service changed the season-long grazing system to a deferred or rotational grazing system, which adjusts the timing of grazing in certain pastures and rotates pastures to protect resources. 4-App-169. It also reduced cattle numbers in one area to improve vegetation and streambank stability and adopted various structural improvements, such as building or repairing fences. 4-App-144, 4-App-147, 4-App-169–170. Finally, the Forest Service incorporated an adaptive management strategy, which allows for additional grazing restrictions if monitoring shows a decline in resource conditions. 4-App-144.

2. Grizzly bears

Beginning in the early nineteenth century, grizzly bear numbers in the lower 48 states diminished from over 50,000 to less than 1,000. 2-App-159. The causes of this population decline included habitat deterioration, commercial trapping, hunting, protecting human life, and protecting livestock. 2-App-219. After FWS listed the grizzly bear as threatened under the ESA in 1975, it took steps to recover the grizzly bear population—an effort that is “widely regarded as a success.” *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1020 (9th Cir. 2011).

In 1982, FWS issued a Recovery Plan (an ESA-required plan outlining actions to recover or protect the species) for the grizzly bear. 2-App-242, USA-Supp-App-52. It revised the plan in 1993 and then issued supplements in 2007 and

2017. 2-App-242. The plan defines the grizzly bear Recovery Zone, which is the area in which recovery efforts are focused. 2-App-172. The Recovery Zone is 9,209 square miles and includes portions of Wyoming, Montana, and Idaho. 2-App-161. Agencies manage conditions in the Recovery Zone to maintain a recovered population and allow bears to continue to expand outside the Zone. 4-App-164.

Surrounding the Recovery Zone is the Demographic Monitoring Area, which is 19,279 square miles. 4-App-164, 2-App-172, 4-App-31. In the Demographic Monitoring Area, the objective is to maintain various land uses, such as livestock grazing; consider grizzly bear needs along with those other uses; and allow agencies to respond to grizzly problems as needed. 4-App-164. The Project grazing allotments are outside the Recovery Zone and inside the Demographic Monitoring Area. 4-App-164.

Since it was listed as threatened, the grizzly population has “rebounded” due to “unprecedented efforts to study the bear and to change those human attitudes and behaviors that unnecessarily threaten it.” *Greater Yellowstone Coal.*, 665 F.3d at 1019. Scientists estimate that the Greater Yellowstone Ecosystem’s grizzly population increased at an average rate of 4.2 to 7.6 percent per year between 1983 and 2002 and expanded its range by 48 percent between the 1970s and 2000. *Id.* at 1020. By 2006, the total grizzly population in the Greater Yellowstone Ecosystem

was estimated at more than 500 bears, and scientists concluded that grizzlies were approaching Yellowstone National Park's carrying capacity. *Id.*

Because the grizzly bear population has recovered, FWS has twice tried to delist it (i.e., remove the grizzly bears' threatened status). Courts vacated both delisting efforts. *See Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999, 1003 (D. Mont. 2018), *aff'd in part, remanded in part*, 965 F.3d 662 (9th Cir. 2020); *Greater Yellowstone Coal.*, 665 F.3d at 1032.

3. Consultation with FWS about grazing

The Forest Service has repeatedly consulted under the ESA with FWS about the effects on grizzlies from livestock grazing in the Project area. 2-App-184. FWS issued the first biological opinion for grazing on the Project allotments in 1999 and then issued subsequent biological opinions for grazing on the Project allotments in 2010, 2013, and 2014. 2-App-184.

In 2018, the Forest Service requested formal consultation with FWS for the grizzly bear because the 2014 Biological Opinion was going to expire in 2019. 2-App-69. That consultation request culminated in the 2019 Biological Opinion, which is at issue here.

To analyze effects on grizzly bears in the 2019 Biological Opinion, the FWS first defined an action area, i.e., the area directly or indirectly affected by the action. *See* 50 C.F.R. § 402.02 (defining "action area"). The FWS defined the

action area as the area 7.5 miles beyond the perimeter of the grazing allotments. 2-App-154. It chose this distance based on scientific studies regarding the maximum distances that grizzly bears may smell and travel to carcasses. 2-App-154, 2-App-173. The allotments encompass 170,641 acres and the action area (the allotments plus the 7.5 mile margin in all directions) encompasses 711,627 acres. 2-App-155.

There have been increasing conflicts with livestock and grizzly bears in the action area. 2-App-174. Conflicts are incidents where bears kill or injure humans or livestock, damage property, or obtain anthropogenic foods. 4-App-94. Since 2010, the number of conflicts in the action area has increased, likely due to an increase in the number of bears in the area, with bears moving into less suitable habitats. 2-App-175. Because more bears are moving into areas with more human and livestock use, FWS expects conflicts to continue increasing in the grazing allotments. 2-App-175, 2-App-188.

When conflicts occur, human welfare is the priority. The Wyoming Game and Fish Department and FWS determine the appropriate response to conflicts. Potential responses include no action, deterrence (such as using bear proof containers), aversive conditioning (such as scare devices), relocating bears, or lethally removing bears. 2-App-179–80, USA-Supp-App-80–81. Lethal removal becomes necessary when other options are not feasible, particularly when bears

have become food-conditioned,¹ human-habituated,² or aggressive toward humans. 2-App-180. In some circumstances, lethal removal may be necessary because a bear is injured or sick. 2-App-180. All removals and other management actions are tracked and reported. 2-App-180.

In the 2019 Biological Opinion, FWS estimated the amount of lethal removals that were likely to occur because of the Project between 2019 and 2028. FWS used past data plus trends to estimate future removals. Between 2014 and 2018, an average of 4.6 grizzly bears per year were removed from the allotments. 2-App-189. Lethal removals increased eight percent annually. 2-App-189. In 2017 and 2018, twelve bears were removed. 2-App-189. Based on the five-year average, FWS expected five bear removals during the 2019 grazing season. 2-App-189. Starting with five bear mortalities in 2019, with an average growth rate of eight percent, FWS estimated 72 bear mortalities over the next ten years. 2-App-189. It thus set an incidental take limit of 72 bears. 2-App-194.

In addition to setting the take limit of 72 bears over ten years, FWS also imposed annual check-ins and limits for take that can occur within any three-year

¹ A bear becomes food-conditioned when it has received significant human food rewards, such as garbage, camp food, or processed livestock feed, and when it seeks out such foods. 4-App-94.

² A bear is habituated when it does not display avoidance behavior around humans or in human-use areas such as camps. 4-App-94.

period. 2-App-196. At those check-ins, FWS and the Forest Service will analyze incidental take that occurred the prior three years and determine whether additional conservation actions are warranted. 2-App-189–90, 2-App-189–90, 2-App-196. These annual meetings include all interested parties (not just FWS and the Forest Service) and provide a forum to discuss new information, monitoring results, and management options. USA-Supp-App-65.

Aside from limiting take and imposing annual check-ins, FWS also considered various conservation measures that the Forest Service will implement to minimize conflicts. 2-App-153–54. These measures included requiring permittees to follow sanitation guidelines for food and to make outdoor toilets as “bear proof” as possible (Conservation Measure 1); watch all livestock closely for sick, injured, or stray animals (Conservation Measure 2); and remove livestock carcasses unless it is impossible to do so for safety reasons (in which case permittees must obtain an exception from the Forest Service) (Conservation Measures 4 and 5). 2-App-153–54. Conservation Measure 3 mandates that the Forest Service must monitor the grazing allotments “on a regular basis.” 2-App-154.

FWS concluded that the expected mortality from the Project would not appreciably reduce the population, reproduction, and distribution of grizzly bears in the Greater Yellowstone Ecosystem recovery area. 2-App-192. Therefore, after

considering the current status of the grizzly bear, the extensive record, various scientific studies, and the conservation measures, FWS determined that an incidental take limit of 72 bears would not jeopardize the grizzly bears' continued existence. 2-App-192.

C. Proceedings below

In March 2020, Plaintiffs Center for Biological Diversity and Sierra Club (collectively CBD) and Plaintiffs Western Watersheds Project, Alliance for the Wild Rockies, and Yellowstone to Uintas Connection (collectively WWP) filed two ESA suits in the District Court for the District of Columbia challenging FWS's issuance of the 2019 Biological Opinion and the Forest Service's reliance on that Opinion. 1-App-43–46, D.D.C. No. 20-860, ECF No. 1. The State of Wyoming and a group of ranchers (the Upper Green River Cattle Association, Sommers Ranch, Price Cattle Ranch, Murdock Land & Livestock, and the Wyoming Stock Growers Association) intervened in both cases to defend the 2019 Biological Opinion and the Forest Service's reliance on it. D.D.C. No. 20-855, Minute Order (July 29, 2020); D.D.C. No. 20-860, ECF No. 36.

WWP moved to preliminarily enjoin all lethal removal of grizzlies from the Project area, and the district court denied the motion. *WWP v. Bernhardt*, 468 F. Supp. 3d 29, 33 (D.D.C. 2020). The court consolidated the two cases under the first-filed case. D.D.C. Civ. No. 20-855, ECF No. 25; D.D.C. No. 20-860, ECF

No. 50. The district court then granted the United States’ motion to transfer the suit to the District of Wyoming. ECF Nos. 13, 46.

WWP amended its complaint to add NFMA claims challenging the Forest Service’s decision. ECF No. 66. Next, the district court adjudicated several disputes about the administrative record. ECF Nos. 73, 98, 130.

After summary judgment briefing, the court upheld the agencies’ decisions. It rejected Plaintiffs’ argument that FWS acted arbitrarily by not identifying a specific take limit for female bears. 1-App-136. Because the grizzlies are managed on an ecosystem-wide scale and because there are ecosystem-wide limits on female mortality, FWS did not act arbitrarily in omitting a female-take limit from the 2019 Biological Opinion. 1-App-136. The court said that it might “have been better” if the 2019 Biological Opinion had “directly discussed the possible effects of a worst-case scenario in which—as an example—all 72 authorized removals were female grizzlies,” but held that “this lapse does not require a finding that FWS made a clear error in its determination that [Project] take would not cause [Greater Yellowstone Ecosystem] demographic recovery criteria to be exceeded, or that it would not jeopardize the continued existence of the grizzly bear.” 1-App-136–37.

Plaintiffs pointed to some previous biological opinions in the Project area that had a female take limit. But the court found that “FWS imposing a female-

specific take limit is hardly boilerplate past practice,” and it did not find “the 2019 [Biological Opinion]’s lack of such a limit to be an arbitrary and capricious reversal.” 1-App-137.

The district court rejected WWP’s argument about sink habitat and also rejected WWP’s argument that FWS failed to consider mortality throughout the Greater Yellowstone Ecosystem. 1-App-139–140. It noted that the FWS considered the removals in the Project area compared to total mortality in the Greater Yellowstone Ecosystem, determined that past removals in the Project area had not affected overall population growth, and produced a “robust and comprehensive” environmental baseline. 1-App-140.

Plaintiffs claimed that the conservation measures in the Biological Opinion were “ineffective, vague, and not certain to occur.” 1-App-141. The court held, however, that the conservation measures were not designed to avoid a jeopardy finding and that they “generally lower[ed] bear/human conflict and the number of management removals.” 1-App-141–42.

The district court also denied Plaintiffs’ claim challenging the Forest Service’s reliance on the 2019 Biological Opinion. Because the 2019 Biological Opinion was not “arbitrary, capricious, or otherwise unlawful,” the Forest Service “did not unlawfully rely on” it. 1-App-144.

Finally, the court rejected WWP’s NFMA argument that the Forest Service’s decision did not comply with Forest Plan Objective 4.7(d), which requires suitable and adequate amounts of forage and cover for wildlife and fish. 1-App-148. “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.” 1-App-148. Those objectives also include Objective 1.1(h), which requires a minimum amount of livestock grazing. 1-App-148. The court deferred to the Forest Service’s expertise because “[n]aturally, some sites within the [Bridger-Teton National Forest] will more fully accomplish some objectives at the expense of others.” 1-App-148.³

SUMMARY OF ARGUMENT

1. FWS satisfied the ESA’s requirements. The 2019 Biological Opinion did not need a female-specific limitation because there are specific mortality limits that apply across the Greater Yellowstone Ecosystem, that consider all sources of mortality, that limit female mortality, and that are continuously monitored and recalibrated as necessary. FWS reasonably relied on those comprehensive limits. FWS considered female mortality specifically and mortality throughout the Greater Yellowstone Ecosystem. It also considered whether the Project allotments and the

³ The district court also held that the Forest Service and FWS were not required to engage in formal consultation under the ESA regarding the Kendall Warm Springs dace. 1-App-144. Plaintiffs have not raised this issue on appeal.

action area are “sink” habitat, i.e., an area with female survival rates below a certain threshold. FWS reasonably considered the conservation measures as one part of its no-jeopardy determination because they are incorporated into the grazing permits as enforceable terms and conditions. If permittees do not comply with the measures, the Forest Service can suspend or cancel their permits. In addition, the conservation measures are reasonable because they are certain to occur, specific, and effective.

2. The Forest Service reasonably relied on the Biological Opinion because it was facially valid and because Plaintiffs did not identify any new information that FWS or the Forest Service failed to consider.

3. The Project is consistent with the Forest Plan, and, thus, the Forest Service complied with NFMA. First, the Forest Service is entitled to deference in its interpretation of the Forest Plan, which involves balancing competing goals and objectives. The Forest Service reasonably balanced grazing and the associated economic benefits with resource impacts. Second, the decision is consistent with the Forest Plan because it imposes various protective measures, such as limiting forage utilization, that will improve resource conditions.

STANDARD OF REVIEW

The Court reviews the district court’s decision de novo. *WildEarth Guardians v. Nat’l Park Serv.*, 703 F.3d 1178, 1182 (10th Cir. 2013).

The Administrative Procedure Act standard of review applies to NFMA and ESA claims. *Biodiversity Conservation All.*, 762 F.3d at 1058 (NFMA); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1106 (10th Cir. 2010) (ESA). “[T]he standard of review is very deferential to the agency.” *Hillsdale Env'tl. Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, 702 F.3d 1156, 1165 (10th Cir. 2012). “This deference means [the Court] may set aside an agency action only if it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *WWP v. Bureau of Land Mgmt.*, 721 F.3d 1264, 1273 (10th Cir. 2013) (quoting 5 U.S.C. § 706(2)(A)). When examining “scientific determination[s]” made within an agency’s “area of special expertise,” a reviewing court “must generally be at its most deferential.” *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983).

ARGUMENT

I. FWS complied with the ESA.

FWS comprehensively analyzed the Project’s effects on grizzlies in the 2019 Biological Opinion. It assessed all relevant issues, including female mortality, mortality through the Greater Yellowstone Ecosystem, whether the allotments are “sink” habitat, and the efficacy of the conservation measures.

A. Ecosystem-wide mortality limits obviate the need for a female take limit.

1. Ecosystem-wide management

The grizzly bear population in the Greater Yellowstone Ecosystem is carefully managed and monitored, and that management includes limits on female mortality across the entire Demographic Monitoring Area—limits that eliminate the need to have a female take limit in the 2019 Biological Opinion, as Plaintiffs suggest. *See* WWP Opening Br. 40–41 (arguing that a female take limit is required); CBD Opening Br. 21–25 (same).

The Recovery Plan includes demographic parameters that allow FWS to “objectively measure and monitor the recovery” of the grizzly bears. 2-App-163, USA-Supp-App-55. FWS bases the parameters on the best available scientific data and reevaluates and refines the population criteria over time. USA-Supp-App-57, 2-App-224. Before revising the parameters in 2017 (the most recent revision), FWS released the draft parameters for public comment and peer review. 2-App-242.

As of 2017, the parameters for grizzly bears are: (1) within the Demographic Monitoring Area, population size must be a minimum of at least 500 bears and at least 48 females with cubs born that year; (2) 16 of the 18 bear management units⁴

⁴ Bear management units are analysis areas that approximate the lifetime size of a female’s home range. *Removing the Greater Yellowstone Ecosystem Population of*

in the Recovery Zone must be occupied by females with cubs and no two adjacent bear management units may be unoccupied; and (3) the population within the Demographic Monitoring Area must be maintained through annual mortality limits (that can vary depending on population size) for females, males, and young. 2-App-242–46; 2-App-163–64 (2019 Biological Opinion explaining the parameters). If mortality limits for any sex or age class are exceeded for three years and if the annual population estimate falls below 612, the Interagency Grizzly Bear Study Team⁵ will determine the appropriate response. 2-App-245; 2-App-164. If the annual population estimate falls below 600, no discretionary mortality will be allowed except as necessary for human safety. 2-App-245; 2-App-164.

When FWS revised the demographic criteria in 2017, it noted that the new parameters reflected the fact that the grizzly bear population was already at or approaching carrying capacity. 2-App-249. It based the 2017 criteria on the level of mortality that would maintain the population size (as opposed to prior criteria that focused on increasing the population size). 2-App-249. As of 2017, FWS

Grizzly Bears From the Federal List of Endangered and Threatened Wildlife, 81 Fed. Reg. 13,174, 13,182 (Mar. 11, 2016).

⁵ There are different interagency groups guiding grizzly bear conservation efforts. The Interagency Grizzly Bear Study Team collects, analyzes, and distributes scientific information about grizzly bears and demographic parameters on which to base management and recovery decisions. 2-App-168. The Interagency Grizzly Bear Committee coordinates management efforts across federal and state lands. 2-App-168.

estimated that the grizzly bear population in the Greater Yellowstone Ecosystem was 718 bears⁶ with zero to two percent annual growth. 2-App-160.

Based on that population size, the current mortality limit for females is nine percent of female bears per year. 2-App-168. That limit encompasses known and probable grizzly bear mortalities from *all* causes, including management removals, illegal kills, self-defense kills, vehicle kills, natural mortalities, undetermined-cause mortalities, and a statistical estimate of unknown mortalities. 4-App-43. The Study Team calculates the population estimate every year and then recalibrates the mortality limits—based on the most recent population estimates—to ensure a recovered grizzly bear population. 4-App-43.

2. Female take

FWS reasonably did not include a female take limit in the 2019 Biological Opinion because there are female mortality limits—reflecting *all* types for mortalities—for the entire Demographic Monitoring Area, as explained above (pp. 22–22).

Contrary to Plaintiffs’ claims, this is not an unexplained deviation from past practice. CBD Opening Br. 21–22; WWP Opening Br. 38. The 2019 Biological

⁶ That number is likely an underestimate because the population estimation method is conservative and does not account for bears outside the Demographic Monitoring Area. 2-App-168; *see also Crow Indian Tribe v. United States*, 965 F.3d 662, 674 (9th Cir. 2020) (“FWS relies upon a method,” which “is known to be a conservative method of estimating the grizzly population.”).

Opinion was not the first time FWS decided not to include a female take limit; in fact, it did not do so twice before when considering grazing in the Project area. In 1999, FWS issued a biological opinion and allowed incidental take of five grizzly bears (four males and one female). 2-App-184. In 2010, FWS allowed incidental take of a total of six grizzly bears (with no limit on females) within any three-year period. 2-App-184. In 2013, FWS allowed incidental take of a maximum of eleven grizzly bears within any three-year period and specified that no more than three of the eleven bears could be females. 2-App-184. In 2014, FWS allowed incidental take of eleven grizzly bears (with no limit on females) within any three-year period.⁷ 2-App-184. Thus, half of the previous biological opinions (the 2010 and 2014 Opinions) for grazing on the Project allotments did not limit female take.

In the 2014 Opinion, FWS explained why it was not including a take limit specific to females. FWS-271. FWS said that female mortalities in the Greater Yellowstone Ecosystem have remained below established mortality limits, the population is stable to increasing slightly, and recovery goals have been obtained despite past take of male and female bears. FWS-271. Moreover, any take relating to grazing in the Project area was “accounted for in the established mortality thresholds” in the demographic parameters. FWS-271.

⁷ The 2014 Biological Opinion did not specify a female take limit, but it did require the Forest Service to contact FWS if three or more females are lethally removed in any given year. 2-App-116.

The 2019 Biological Opinion similarly said that “[a]lthough conflicts with livestock have the potential to result in mortality for grizzly bears, . . . specific total mortality limits will preclude population-level impacts.” 2-App-169. FWS reasonably relied on the demographic parameters to ensure that any take associated with the Project would not jeopardize the species. Plaintiffs assert that this explanation (that the demographic parameters obviate the need for a Project-specific female take limit) is an “illegitimate post hoc rationalization.” CBD Opening Br. 23. To the contrary, this explanation is evident from the 2014 and 2019 Biological Opinions and is not post hoc.

Insofar as Plaintiffs suggest that FWS failed to explicitly consider female take and ignored an important aspect of the problem, that is incorrect. CBD Opening Br. 21–25; WWP Opening Br. 40. In the 2019 Biological Opinion, FWS acknowledged that the low survival of female bears was the “single most important factor” in causing the grizzly population decline before the mid-1980s. 2-App-163. It then discussed the Recovery Plan’s demographic parameters and said that the expected amount of grizzly bear mortality fell within the parameters’ annual mortality limits for *females*, males, and young. 2-App-167–68, 2-App-192; *see also* 2-App-169 (“[T]otal mortality limits will preclude population-level impacts.”).

In addition, the Forest Service must submit an annual report to FWS listing the number, *gender*, and locations of any lethal removals—which means that FWS will be monitoring any female take. 2-App-197; *see also* 2-App-211 (form for reporting take). And FWS’s annual monitoring of the Project will be in addition to the region-wide monitoring that the Study Team conducts of all mortalities from all causes, which ensures that no mortalities (of females or any other bears) will be overlooked. 4-App-43.

CBD contends that an ecosystem-wide approach may not substitute for discussing female take in the 2019 Biological Opinion. CBD Opening Br. 23. But the cases it cites show that FWS’s approach was reasonable here. CBD cites *Gifford Pinchot Task Force v. FWS*, CBD Opening Br. 23, which states that “[f]ocusing solely on a vast scale *can* mask multiple site-specific impacts that, when aggregated, do pose a significant risk to a species,” 378 F.3d 1059, 1075 (9th Cir.), *amended*, 387 F.3d 968 (9th Cir. 2004) (emphasis added). But *Gifford Pinchot* then rejects the same argument Plaintiffs make here: “Appellants do not show that material local effects were missed, but merely point out that large scale analysis *can* pose a risk of masking. . . . Without evidence in the record supporting that some localized risk was improperly hidden by use of large scale analysis, we will not second-guess the FWS.” *Id.* (emphasis added). *Gifford Pinchot* merely states that a broad-scale approach can have problems, but the plaintiffs in that case

did not establish that such problems existed. Here too, Plaintiffs have not shown that FWS's reliance on the demographic parameters "improperly hid[]" any risk (nor could they). *Id.*

CBD also cites *Pacific Coast Federation of Fishermen's Ass'n, Inc. v. National Marine Fisheries Service*, CBD Opening Br. 23, which involved claims that the National Marine Fisheries Service (which handles ESA consultations for marine species) did not examine site-specific degradation from timber sales because it relied on a broad, watershed-based conservation strategy. 265 F.3d 1028, 1035 (9th Cir. 2001). The court held that the National Marine Fisheries Service "assum[ed] away site-specific degradations" and "ignore[d] the cumulative impact of individual projects." *Id.* at 1036–37. Here, however, there is no allegation that the demographic parameters ignore mortalities from individual projects. To the contrary, the parameters incorporate mortalities from *all* causes, even including a statistical estimate of unknown mortalities. 4-App-43. Plaintiffs do not challenge the demographic parameters; nor could they as the demographic parameters are based on extensive scientific research, are updated with the most current information, incorporate all sources of mortality, *and* were subject to public notice and comment. FWS's approach was entirely reasonable.

Finally, aside from the overall incidental take limit in the 2019 Biological Opinion and the region-wide demographic parameters, it is important to note that

lethal removal is a last resort, and there are many safeguards to ensure that killing a bear, especially a female, occurs only when absolutely necessary. Lethal removal is a management tool available for specific, chronic depredation situations, to be used along with other measures to prevent and minimize livestock-grizzly bear conflicts. 2-App-190–91. The Wyoming Game and Fish Department’s conflict management program focuses on education and preemptive management strategies and uses non-lethal control measures “whenever appropriate and practical.” 2-App-179–80. As explained above (pp. 11–12), these potential non-lethal responses include no action, deterrence, aversive conditioning, or relocating bears. 2-App-179–80, USA-Supp-App-80–81. Lethal removal occurs only when these other options are “not practical or feasible.” 2-App-180. Further, the agencies consider multiple factors, including the bears’ sex, in choosing management responses: “location, cause of incident, severity of incident, history of the offending grizzly bear(s), and bear’s health, age, and sex will be considered in any decisions about appropriate management actions.” 2-App-180. FWS’s Grizzly Bear Recovery Coordinator coordinates with the Wyoming Game and Fish Department to ensure that removal is necessary, which means that multiple agencies participate in the decision making process before lethal removal occurs. 2-App-190.

In sum, there are many safeguards in place to prevent unnecessary or excessive take of female grizzlies. FWS's decision not to include a female take limit in the 2019 Biological Opinion was reasonable.

B. FWS considered mortality throughout the Greater Yellowstone Ecosystem.

WWP contends that FWS failed to consider take that will occur elsewhere in the Greater Yellowstone Ecosystem, but this argument fails. WWP Opening Br. 44–47. First, ESA regulations require FWS to consider impacts of federal, State, or private actions in the action area, which is the area affected directly or indirectly by the action. 50 C.F.R. § 402.02. The action area does not cover the entire Greater Yellowstone Ecosystem, so the regulations do not require consideration of take in the entire Greater Yellowstone Ecosystem. And as explained above (pp. 10–11), FWS broadly defined the action area here, including a perimeter that stretched 7.5 miles beyond the Project allotments. 2-App-154.

In any event, FWS did not limit its analysis to the action area; the agency extensively discussed the grizzly bears' status throughout the Greater Yellowstone Ecosystem. *E.g.*, 2-App-172–76 (discussing slowing rate of population growth in the Greater Yellowstone Ecosystem and expanding grizzly range within the Ecosystem). FWS said, “[a]s the population grows, we must consider possible future mortalities in the action area relative to the entire [Greater Yellowstone Ecosystem] and that mortality thresholds are in place to ensure all mortalities

remain within a sustainable level.” 2-App-176. FWS explained that lethal removals in the allotments comprised 7.28 percent of all mortality in the Greater Yellowstone Ecosystem between 2010 and 2018. 2-App-177. It determined that there was “no evidence” that removals in the action area contributed to a detectable change in grizzly bear survival. 2-App-176. Between 1999 and 2019, 37 grizzly bears were lethally removed from the action area due to conflicts with livestock. 2-App-181, 2-App-184. These mortalities did not affect population growth or the sustainability of the population in the Greater Yellowstone Ecosystem. 2-App-182. Thus, contrary to WWP’s assertion, FWS considered mortality throughout the Greater Yellowstone Ecosystem.

WWP relies on an out-of-Circuit, district court case, *Mayo v. Jarvis*, 177 F. Supp. 3d 91, 137 (D.D.C.), *amended*, 203 F. Supp. 3d 31 (D.D.C. 2016), to support its argument. WWP Opening Br. 44–46. But *Mayo* is inapposite. *Mayo* held that a 2013 addendum to a 2007 biological opinion assessing the effects on grizzlies of an elk hunting program was insufficient. *Mayo* said “the 2013 Addendum contains no discussion of the environmental baseline at all, nor does it update the discussion contained in the 2007 [biological opinion].” *Mayo*, 177 F. Supp. 3d at 137. This case is quite different since, as the district court explained, the 2019 Biological Opinion contains a “robust and comprehensive” discussion of the grizzlies’ condition in the action area (i.e., the environmental baseline). 1-App-140. In

addition, unlike *Mayo*, there is no allegation that FWS failed to use the most current information in the 2019 Biological Opinion (nor could there be).

C. FWS considered whether the allotments are “sink” habitat.

WWP contends that FWS failed to address the “mortality sink” in the allotments, but this argument fails because (1) grazing does not cause mortality sinks and (2) FWS did consider this issue. WWP Opening Br. 41.

“Sink” habitats are habitats where female survival rates are below 91 percent; “source” habitats are habitats where female survival rates exceed 91 percent. 3-App-23. A source-sink dynamic exists “across the [Greater Yellowstone Ecosystem],” with positive population growth inside the Recovery Zone and negative rates outside the Recovery Zone. 2-App-240. Studies have shown that survival of grizzly bears improves as secure habitat increases, but declines as road density, homes, and developments increase. 3-App-23.

Grazing does not cause sink habitat. Modeling shows that the grizzlies’ “survival on the landscape [is] *not explained* by the amount of time bears spent on cattle or sheep allotments in the Yellowstone Ecosystem.” 3-App-23 (emphasis added). The Project allotments are near places where grazing is not allowed and that are also sink habitat. USA-Supp-App-60, Fig. 5. For example, livestock grazing does not occur in the National Elk Refuge and most of the Grand Teton National Park, but both locations are sink habitats. *Id.* So even though most of the

allotments qualify as sink habitat because they are under the 91 percent threshold, the record shows that grazing is not the cause of the population sink and that sink habitats exist in many areas outside the Recovery Zone. 3-App-23, 2-App-240.

Contrary to WWP's assertion, FWS did consider the "sink" issue. WWP Opening Br. 41. FWS noted data showing the importance of secure habitat with limited road density for grizzly bear survival. *E.g.*, 2-App-169. FWS acknowledged that grizzly bear conflicts have been increasing in the Greater Yellowstone Ecosystem because of the increasing bear population and increasing human use and development. 2-App-169. FWS explained that "[i]solation from human activities is extremely important for bear survival, as grizzly bears can habituate to humans and/or become conditioned to anthropogenic foods quickly, subsequently leading to conflict bears." 2-App-169. FWS specifically discussed sink habitat, saying that "[w]hile translocation of bears from population sinks may remove them temporarily from situations of high risk of death, the best management strategy remains elimination [of] the sources that attract bears in the first place." 2-App-181. FWS thus addressed sink habitat by emphasizing the importance of minimizing attractants, which is exactly what the science recommends. *See* USA-Supp-App-70–74 (study FWS reviewed titled "Mortality Patterns and Population Sinks for Yellowstone Grizzly Bears," advising "elimination of those food sources that attract bears to sinks"). And FWS and the

Forest Service did exactly that with the conservation measures by, for example, mandating proper food storage. 2-App-187.

The 2014 Biological Opinion also discussed sink habitat and noted that most of the Project allotments are below the 91 percent threshold for female survival. 2-App-103. The 2014 Opinion said that FWS “could infer from model results that landscape features important for grizzly bears are inadequate across most of the . . . allotments and therefore, we would expect lower survival of female grizzly bears.” 2-App-103. Those “landscape features” include “road densities.” 2-App-104. FWS considered grazing-related “conflicts, relocations, and some lethal removals of bears concurrent with associated sink habitat.” 2-App-104. It explained that the Project area plus the action area (which extends 7.5 miles in all directions from the Project area) are outside of the Recovery Zone, which means that there are no limits on road densities and secure habitat loss in the Project area (unlike the Recovery Zone). 2-App-104. While the 2014 Biological Opinion is not at issue in this litigation, it shows that FWS has been considering the sink habitat dynamic for years.

WWP cites another out-of-Circuit, district court case to support its sink argument, *Helena Hunters v. Marten*, 470 F. Supp. 3d 1151, 1164 (D. Mont. 2020). WWP Opening Br. 42–43. But *Helena Hunters* is inapt. First, *Helena Hunters* found that the Forest Service had acted in bad faith and “inten[ded] to

conceal the scope” of the project, which involved roadwork to transport heavy equipment into a secure area for grizzlies. *Helena Hunters*, 470 F. Supp. 3d at 1167–69. Second, *Helena Hunters* found that FWS failed to address the effects on grizzlies from adding and improving trails in the grizzlies’ secure area even though the record showed that grizzly bear survival was linked to having secure habitat. *Id.* at 1178–80. But, in this case, as explained above (pp. 30–31), grizzly bear survival is not linked to the amount of time bears spend in grazing areas. 3-App-23. Therefore, as the district court explained, “the case at hand could not be more different than the *Hunters* case” because the Project “does not add development features (such as trails), it is not primarily in source/secure habitat, and . . . grizzly survival is unrelated to time bears spend on livestock allotments.” 1-App-139. FWS reasonably considered the mortality sink issue.

D. The conservation measures are reasonable.

Plaintiffs contend that FWS’s reliance on the conservation measures was unreasonable because the measures are unenforceable, not certain to occur, vague, and ineffective. CBD Opening Br. 25–30; WWP Opening Br. 50–54. These arguments fail.

First, the conservation measures were one component—out of several components—of FWS’s jeopardy analysis. 2-App-192. FWS said:

After reviewing the specialists report, the current status of the grizzly bear in the action area, previous sources of information incorporated

by reference (see literature cited), and the Forest's commitment to implement their Conservation Measures, and cumulative effects, it is [FWS]'s biological opinion that the effects of livestock grazing on the Allotments . . . are not likely to jeopardize the continued existence of the grizzly bear.

2-App-192. The conservation measures were not the sole basis for FWS's no-jeopardy conclusion; they were one of several factors FWS examined. As the district court explained, the conservation measures "were not specifically designed to avoid a jeopardy finding . . . but rather act to generally lower bear/human conflict and the number of management removals within the action area." 1-App-141–142. The conservation measures reduce conflicts because they are enforceable, certain to occur, specific, and effective.

Second, the conservation measures are enforceable because they are terms and conditions of the grazing permits, and permittees must implement the measures to maintain good standing on their grazing permits. 2-App-187. If permittees do not comply with permit terms and conditions, then they will not be in good standing and the Forest Service can cancel or suspend their permits. *See* 36 C.F.R. § 222.4 (giving Forest Service authority to "[c]ancel or suspend the permit if the permittee does not comply with provisions and requirements in the grazing permit"). FWS relied on this fact in the Biological Opinion: "The risk of cattle/bear conflicts is minimized by implementation of conservation measures that are part of the grazing permit as a term and condition of the permits; this allows the

Forest the ability to enforce these stipulations . . . and must be followed to maintain good standing on their permit.” 2-App-187. The conservation measures are enforceable through the permit terms.

CBD contends the conservation measures are impermissible because they are not “under agency control or otherwise reasonably certain to occur.” CBD Opening Br. 27 (citing *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 935 (9th Cir. 2008)). In *National Wildlife Federation*, the National Marine Fisheries Service relied on future installation of infrastructure at a dam in its no-jeopardy determination. *National Wildlife Federation* said that “such improvements may not be included as part of the proposed action without more solid guarantees that they will actually occur.” 524 F.3d at 935. The significant difference between this case and *National Wildlife Federation* is that, in *National Wildlife Federation*, the agencies said they “lack[ed] the power to guarantee the improvements in question.” *Id.* at 936 n.17. Here, there is no question that the Forest Service has the “power to guarantee” permittees’ compliance with the conservation measures because the measures are terms and conditions of the permits. *Id.* If the permittees do not comply, then the Forest Service can cancel or suspend the permits. See 36 C.F.R. § 222.4.

Third, the conservation measures are certain to occur. Plaintiffs argue that the conservation measures are not certain to occur because the permittees must

implement many of them as opposed to the Forest Service. *E.g.*, CBD Opening Br. 27. But the Forest Service’s action here was authorizing grazing, which permittees will conduct. The permittees are necessarily the ones who must implement the measures (for example by properly storing their food and monitoring their livestock) and past practice shows that they have done so. 4-App-159–60.

The same conservation measures were in place with prior grazing permits, and the record shows that permittees complied with them. For example, the Forest Service found that the permittees on the Project allotments have shown a consistent pattern of compliance with the permit terms implementing the conservation measures. USA-Supp-App-39; *see also* 2-App-257 (“Cattle allotment permittees appear to be complying with their permits and all Terms & Conditions in the Biological Opinion (BO), including food storage, moving carcasses, reporting conflicts in a timely manner, and maintaining a good line of communication with both [Forest Service] and [Wyoming Game and Fish Department] staff.”). In 2016, the Forest Service inspected all cow camps two to three times during the grazing season and did not find any violations. USA-Supp-App-30. It found that riders monitored the herds regularly and it did not observe any instances of “too few” herders. USA-Supp-App-35. Riders acted quickly to remove carcasses as required. USA-Supp-App-35. Thus, the permittees have a history of compliance.

CBD cites meeting notes from 2012 referencing non-compliance, but all of those notes appear to be about a sheep permittee who no longer has a grazing permit (and this Project does not authorize any sheep grazing).⁸ CBD Opening Br. 27 (citing 2-App-260). For example, the notes from that meeting say that the sheep permittee “doesn’t always provide required staff,” “is not removing dead sheep as required,” “did not move herd to different pasture when directed,” and “needs improvement” in communication. 2-App-257–258. The notes emphasize that “there have been problems with the sheep permittee in particular.” CBD cites a statement from those notes that says “the Forest must be in compliance with its own [conservation measures].” 2-App-260. The only references to non-compliance in those meeting notes involve the sheep permittee, which suggests that the statement about the Forest Service’s compliance is also referring to issues with the sheep permittee. *See* 2-App-257–61. Those same meeting notes state that “[c]attle allotment permittees appear to be complying with their permits and all Terms & Conditions.” 2-App-257 (emphasis added).

Fourth, the conservation measures are not vague. For example, the permittees must follow specific bear sanitation guidelines per Forest Food Storage Order 04-03-330 (Conservation Measure 1). 2-App-153. This Order provides

⁸ *See* USA-Supp-App-82 (letter noting that several allotments “will not be restocked with domestic sheep”).

detailed requirements for food storage. USA-Supp-App-43–46. “Acceptably stored” means, inter alia, stored in a bear-resistant container that has been certified by the Interagency Grizzly Bear Committee Courtesy Inspection Program or stored suspended at least 10 feet off the ground and four feet horizontally from tree trunks or poles. USA-Supp-App-43. As another example, the conservation measures mandate distances that carcasses must be removed (or moved if removal is impossible) depending on location (Conservation Measure 4).⁹ 2-App-153. Permittees must comply with Conservation Measure 4 unless they obtain an exception from the Forest Service. Per Conservation Measure 5, exceptions are allowed only for safety reasons (such as when a bear is too close to the carcass). 2-App-153. In addition, contrary to CBD’s suggestion that Conservation Measure 4

⁹ Conservation Measure 4 specifically says:

- a) all carcasses **located within 0.5 mile** of Green River Lakes Road, Union Pass Rd, FS 605, 660, 663B and 663C, GRL and Whiskey Campgrounds, private cabins, Kendall and Fish Creek guard station, permitted cow camps, permitted outfitter camps, Waterdog Lakes, and North Beaver and Tosi trailheads will be removed if possible or moved so that the carcass is at least **0.5 mile away** from the above described facilities, trailheads or roads; b) all carcasses in locations not described in 1 above that pose a health or safety hazard to the public or to the environment will be removed if possible or moved so that the carcass is at least **0.25 mile from** live streams, springs, lakes, riparian areas, system roads and trails, developed recreation areas, dispersed camping sites, and picnic sites.

2-App-153 (emphasis in original).

requires only moving carcasses within allotments, CBD Opening Br. 29, this measure repeatedly states that carcasses “will be removed if possible,” 2-App-153.

CBD argues that Conservation Measure 2 is vague because it requires range riders to watch livestock closely, but does not specify how many riders should be working at any time or how often they should check the livestock. CBD Opening Br. 28. But as noted above (p. 36–37), the Forest Service’s past monitoring has shown that riders monitored the cattle herds regularly, and it did not observe any instances of “too few” herders. USA-Supp-App-35. In addition, FWS noted in the 2019 Biological Opinion that the permittees hire five to six season-long range riders, use five-rider camps, and hire day help as needed. 2-App-179, 2-App-188.

CBD cites *CBD v. Bernhardt*, 982 F.3d 723, 744 (9th Cir. 2020) to support its vagueness argument. CBD Opening Br. 28. In that case, FWS was evaluating the impacts on polar bears of an offshore, crude oil drilling and production facility along the coast of Alaska. In concluding that the oil project would not jeopardize polar bears, FWS “rel[ie]d principally on yet unapproved and undefined mitigation measures.” *CBD v. Bernhardt*, 982 F.3d at 744. *CBD* held that FWS had a “responsibility to include the mitigation measures that it relies upon in a biological opinion” and it criticized FWS for referring only to “possible” strategies without committing the oil company or the action agency “to carrying out any specific number of measures.” *Id.* at 745–46. By contrast, here, FWS ensured that the

Forest Service and the permittees committed to the specific measures in the 2019 Biological Opinion. 2-App-153–54 (2019 Biological Opinion stating that “[t]o help prevent conflicts with grizzly bears in the Upper Green Project Area, the Forest will require implementation of the grizzly bear conservation measures listed below” and then listing measures).

Fifth, the conservation measures are effective. WWP argues that the conservation measures are ineffective because lethal removals of grizzly bears have increased. WWP Opening Br. 53–54. The conservation measures reduce conflicts by “reducing the availability of anthropogenic food; decreasing the number of sick, injured, isolated livestock in the allotments; and by removing livestock carcasses.” 2-App-153.¹⁰ The increase in conflicts in the action area is not due to the inadequacy of the conservation measures; it results from an increase in the number and density of grizzlies in the action area. 2-App-175, 2-App-188. Grizzly bears are expanding into less suitable habitats and moving into areas with more human and livestock use. 2-App-175, 2-App-177. One study in the record said that “[t]he increasing trend in human-grizzly bear conflicts in the Greater Yellowstone Ecosystem, including livestock depredations, is largely a function of

¹⁰ CBD asserts that the 2019 Biological Opinion “inexplicably removed” the requirement “that all sick or injured animals be removed or treated.” CBD Opening Br. 29–30. But that requirement is in Conservation Measure 4: “all sick or injured animals will be removed or treated.” 2-App-153.

growing bear numbers and their distribution into areas more intensively used by humans, including public land grazing allotments.” USA-Supp-App-50.

Plaintiffs rely on yet another out-of-Circuit, district court case, *CBD v. Rumsfeld*, 198 F. Supp. 2d 1139, 1144 (D. Ariz. 2002), to generally support their arguments that the conservation measures are inadequate. CBD Opening Br. 26; WWP Opening Br. 52. In *Rumsfeld*, the biological opinion had relied on the action agency developing a mitigation plan *after* the biological opinion was issued. *Rumsfeld* held that the biological opinion was arbitrary because FWS expected that this undeveloped plan would “identify the necessary mitigation measures” to prevent adverse impacts. *Rumsfeld*, 198 F. Supp. 2d at 1154. “These measures, however, have to be identified and included in the Final [biological opinion].” *Id.* The *Rumsfeld* biological opinion did not identify the conservation measures because they did not exist yet, but that is not the situation here. *See* 2-App-153–54 (2019 Biological Opinion identifying the measures). Moreover, *Rumsfeld* criticized the biological opinion at issue because that the measures were not “incorporated into the [action agency’s] proposed action, to support a ‘no jeopardy’ decision.” *Id.* Here, the Forest Service decision explicitly discussed the conservation measures and incorporated the conservation measures as terms and conditions in the grazing permits. *E.g.*, 4-App-159.

* * *

FWS satisfied the ESA’s requirements in issuing the 2019 Biological Opinion and the Court should uphold it.

II. The Forest Service reasonably relied on the Biological Opinion.

Contrary to Petitioners’ arguments, the Forest Service reasonably relied on the 2019 Biological Opinion. WWP Opening Br. 55–56; CBD Opening Br. 30.

When reviewing an agency’s decision to rely on a biological opinion, “the critical question is whether the agency’s *reliance* was arbitrary and capricious, not whether the [biological opinion] itself is somehow flawed.” *City of Tacoma, Washington v. FERC*, 460 F.3d 53, 75 (D.C. Cir. 2006) (emphasis in original). In deciding whether to rely on a biological opinion, the action agency “need not undertake a separate, independent analysis.” *Aluminum Co. of Am. v. Adm’r, Bonneville Power Admin.*, 175 F.3d 1156, 1161 (9th Cir. 1999). Undertaking such an analysis would “seriously undermine[]” the expertise of FWS and contravene the purpose of the ESA consultation. *City of Tacoma*, 460 F.3d at 76. Instead, an action agency satisfies its obligations if the biological opinion is not “facially flawed” and if the action agency does not fail to consider *new* information that the consultant agency did not consider. *Id.* at 75–76.

As explained above, the 2019 Biological Opinion is facially valid. *Supra* pp. 19–42. And Plaintiffs “made no showing that the [Forest Service] overlooked new information or evidence in the record that had been unavailable to [FWS].” *Shafer*

& Freeman Lakes Env't Conservation Corp. v. FERC, 992 F.3d 1071, 1093 (D.C. Cir 2021). Plaintiffs could not make such a showing because the agencies did not overlook any information. But Plaintiffs have waived such an argument in any event because they did not mention it in their Opening Briefs or in district court.

WWP reargues some of its points about the conservation measures and the mortality sink to challenge the Forest Service's reliance on the Biological Opinion. WWP Opening Br. 56. But "[i]t does not suffice, when urging an action agency to reject the [biological opinion] of a consultant agency, simply to reargue factual issues the consultant agency already took into consideration." *City of Tacoma*, 460 F.3d at 76. The Biological Opinion was valid, FWS considered all the relevant factors, and the Forest Service reasonably relied on the Biological Opinion.

III. The Forest Service complied with NFMA.

WWP asserts that the Forest Service violated NFMA because the Project is inconsistent with the Forest Plan, specifically Objective 4.7(d), which requires forage and cover for wildlife and fish. WWP Opening Br. 25–37. This argument fails for two reasons. First, the Forest Plan contains many different, competing goals and objectives. The Forest Service is entitled to deference as it balances competing goals and objectives and prioritizes different uses in different areas. Second, the Forest Service appropriately considered and satisfied Objective 4.7(d) by ensuring that the Project will improve conditions on the allotments.

A. The Forest Service is entitled to deference in its interpretation and implementation of the Forest Plan.

In making its decision, the Forest Service reasonably balanced competing Forest Plan objectives in accordance with NFMA’s mandate to use forest lands for multiple purposes.

The Forest Service has a multiple-use mandate calling for different, sometimes competing, uses of Forest Service land. *See* 16 U.S.C. § 1604(e)(1) (requiring forest plans to provide for “multiple use,” including recreation, grazing, timber, and wildlife). Because of this multiple-use mandate, there is “inherent flexibility” in implementing NFMA. *Colorado Env’t Coal. v. Dombeck*, 185 F.3d 1162, 1171 (10th Cir. 1999) (quoting *Seattle Audubon Soc. v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996)). The Court gives the Forest Service’s “interpretations of its own regulations, in this case the provisions of the . . . Forest Plan, ‘controlling weight unless [they are] plainly erroneous or inconsistent with the regulation[s].’” *Lamb v. Thompson*, 265 F.3d 1038, 1047 (10th Cir. 2001) (quoting *Stinson v. United States*, 508 U.S. 36, 45 (1993)); *see also Oregon Nat. Desert Ass’n v. U.S. Forest Serv.*, 957 F.3d 1024, 1035 (9th Cir. 2020) (“[I]n reviewing the grazing authorizations’ consistency with the Forest Plan, we ask whether, ‘[b]ased on the record before us, the [Forest] Service’s actions reflect a clear error of judgment.’” (quoting *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1098 (9th Cir. 2003))).

The Bridger-Teton Forest Plan has many different components to guide future site-specific projects, including 25 “goals” and 73 “objectives.” 5-App-118–27. “Goals” are “the desired end result,” and “objectives” are “accomplishment steps or points designed to achieve a goal.” 5-App-10–11. The Project contributes to Forest Plan Goal 1.1 (“[c]ommunities continue or gain greater prosperity”) and Objective 1.1(h) (“[p]rovide forage for about 260,000 Animal Unit Months (AUMs) of livestock grazing annually”¹¹) as well as Goal 4.7 (“[g]razing . . . sustains or improves overall range, soils, water, wildlife, and recreation values.”). 4-App-141, 5-App-118, 5-App-126.

The Forest Plan goals and objectives can and often do conflict. The Forest Plan recognizes that “some objectives conflict with others,” 5-App-99; “some objectives will not be met on all areas” of the Forest, 5-App-99; and “not all the Goals and Objectives can be achieved at the same time from the same land areas,” 5-App-151.

WWP claims that the Forest Service never asserted that it was resolving conflicts between different objectives, but, in fact, the Forest Service said it was balancing different priorities, namely livestock grazing and wildlife habitat. WWP Opening Br. 27–28. For example, the Forest Service said that it “recognize[d] that

¹¹ An “animal unit month” is the amount of forage required by an animal such as a cow for one month. 5-App-18.

desired conditions for utilization of key forage species may not be achieved in certain areas under maximum allowable utilization levels; however, the livestock management strategy in this decision *balances* amphibian health with other socio-economic and multiple use considerations.” 4-App-166 (emphasis added). The Forest Service acknowledged that it was balancing grazing and the associated economic benefits with resource impacts. As the district court explained, “[n]aturally, some sites within the [Forest] will more fully accomplish some objectives at the expense of others.” 1-App-148. The Forest Service’s “site-specific management necessarily falls, then, within the realm of their agency expertise.” 1-App-148–49.

The Forest Plan directs the Forest Service to resolve any conflicts between different objectives through “application of the different Desired Future Conditions to different areas.” 5-App-99. “Desired future conditions” are “general descriptions of desired land and resource conditions to be created over the 50-year planning horizon” of the Forest Plan. 5-App-151. Various desired future conditions apply to the Project area. Most of the Project area (66 percent) is classified under Desired Future Condition 10 and the next largest amount (18 percent) is under Desired Future Condition 12. 11-App-190–91. Desired Future Condition 10 areas are managed for “some resource development and roads while having no adverse and some beneficial effects on wildlife.” 5-App-232. Desired

Future Condition 12 areas are managed for “high-quality wildlife habitat and escape cover, big-game hunting opportunities, and dispersed recreation activities.” 5-App-240.¹²

WWP claims that Desired Future Conditions 10 and 12 direct the Forest Service “to resolve conflicts in favor of wildlife habitat.” WWP Opening Br. 28. But this is not true. The Forest Plan says that, for Desired Future Condition 10 (which covers 66 percent of the Project area), the “[m]anagement emphasis is to provide long-term and short-term habitat to meet the needs of wildlife managed *in balance with* timber harvest, grazing, and minerals development.” 5-App-234 (emphasis added). For Desired Condition 12, the Forest Plan provides that “[m]anagement emphasis is on providing such important habitat for big-game as winter ranges, feedgrounds, calving areas, and security areas.” 5-App-241. The Forest Plan does not direct the Forest Service to prioritize wildlife habitat over other uses. It directs the Forest Service to *balance* myriad uses. That is exactly what the Forest Service reasonably did here, and its decision is entitled to deference.

¹² As for the remainder of the Project area, five percent of the Project area is Desired Future Condition 2A (non-motorized recreation), one percent is Desired Future Condition 3 (river- and scenic-recreation experiences), ten percent is Desired Future Condition 6A/B (wilderness), and less than one percent is Desired Future Condition 9A (campgrounds, other noncommercial areas, and Forest Service administrative sites). 11-App-190–91, 5-App-166, 5-App-176, 5-App-187, 5-App-222.

B. The Forest Service satisfied Objective 4.7(d).

Even if the Forest Service were required to provide suitable forage and cover for wildlife with this Project, the Project satisfies Objective 4.7(d) because it improves resource conditions.

The Forest Service evaluated whether the Project would satisfy Goal 4.7 (“[g]razing . . . sustains or improves overall range, soils, water, wildlife, and recreation values”) and Objective 4.7(d) (“[r]equire that suitable and adequate amounts of forage and cover are retained for wildlife and fish”). 13-App-118, 5-App-126. It determined that the Project will satisfy Goal 4.7 and Objective 4.7(d) because it will “improv[e] the overall resource conditions.” 13-App-118.

Resources are already meeting desired conditions in most of the Project area, but the Forest Service mandated further improvements and targeted areas that were not meeting desired conditions. 11-App-166. The Forest Service limited forage utilization in riparian and meadow areas. 4-App-166. The Forest Plan allows forage utilization up to 65 percent in those areas but, with this Project, the Forest Service reduced the maximum forage utilization to 50 percent (except for one location). 4-App-167. It determined that reducing forage utilization by 15 percent from the amount allowed in the Forest Plan, along with maintaining minimum stubble height requirements, would maintain or improve riparian and wetland habitats. 4-App-166–67. Except for the trail used to drive cattle between different

seasonal grazing locations, livestock grazing will not be allowed on areas with less than 60 percent ground cover. 4-App-158. To protect resources, the Forest Service eliminated season-long grazing and replaced it with rotating pastures or deferring livestock use. 4-App-169. The Forest Service also limited the amount of ground cover loss that will be acceptable across the Project area. 4-App-169. And it reduced by 270 the number of cattle authorized in one area (Mosquito Lake) to address concerns about streambank stability and the composition of vegetation species in that location. 4-App-154, 4-App-170.

The Forest Service will monitor to determine whether it needs to adjust grazing requirements. 4-App-160. In order to monitor impacts from grazing, the Forest Service identified species of forage to track (such as the grass species Idaho fescue), specific monitoring locations, and minimum stubble height requirements for different areas. 4-App-160. If monitoring shows that streambank stability or riparian functions are declining, then the Forest Service will use adaptive management to decrease forage utilization and increase minimum stubble heights. 4-App-167. If conditions are unsatisfactory, then the Forest Service will reduce the maximum allowed use of forage in ten percent increments. 4-App-146. If necessary, it can also reduce the number of livestock through adaptive management. 4-App-154.

WWP challenges the Forest Service’s selection of Idaho fescue as the key species to track. WWP Opening Br. 29–31. It argues that the minimum stubble height requirements are too low because Idaho fescue is “short-statured.” WWP Opening Br. 30. But this type of scientific determination—namely choosing which grass species to use to monitor grazing—is precisely the type of decision in which the Court’s “deference is most pronounced.” *WWP v. Bureau of Land Mgmt.*, 721 F.3d 1264, 1273 (10th Cir. 2013). “Key forage species” are plant species that the Forest Service uses to monitor the extent of grazing. 13-App-168. The Forest Service chose Idaho fescue as a key indicator of grazing use because it is prevalent in the Project area and desirable to cattle. 12-App-40. Moreover, Idaho fescue is a typical key forage species; the Forest Service Range Plant Handbook explains that Idaho fescue decreases in abundance under heavy grazing and is highly-rated for palatability and nutritional value. 13-App-168; 13-App-212. The Forest Service’s selection of Idaho fescue as a key species for monitoring grazing levels was reasonable.¹³

WWP also emphasizes reports from Forest Service biologists asserting that higher percentages (up to 100 percent) of vegetation must be retained for amphibians and migratory birds. WWP Opening Br. 32–37. First, as explained

¹³ Moreover, separate from monitoring key forage species, the Forest Service does additional monitoring to evaluate cover and habitat for various wildlife species. *E.g.*, USA-Supp-App-83–89 (sage grouse habitat suitability worksheets).

above (pp. 45–48), the Forest Service was balancing competing Forest Plan objectives, such as economic prosperity and amphibian health. It was not required to abandon the grazing and economic prosperity goals to protect amphibians and migratory birds.

Second, the Forest Service designed the Project to *improve* conditions, and it accomplishes that aim, particularly for amphibians and migratory birds. 4-App-166 (“This decision improves range condition in breeding habitat for amphibians.”); 13-App-240 (referencing “multiple use missions” and saying that although the chosen alternative “may not provide as many benefits to migratory birds as” a different alternative, “it does move the area towards better habitat conditions.”); 12-App-254 (“[D]esign features, changes in grazing systems, focus area prescriptions, and range improvements . . . would maintain or improve riparian function and cover for amphibians . . . and reduce the number of unsuitable sites for amphibians.”). For example, the migratory bird report that WWP cites noted that herbaceous nesting cover would be suitable during the nesting season on 67 percent of the Project area because of the rotation and deferred grazing systems that the Forest Service was implementing. 9-App-119. Forest Plan Goal 4.7 states that grazing “sustains or improves” range, soils, water, and wildlife values. 5-App-118. This Project does just that because it improves

conditions. The Forest Service reasonably concluded that the Project is consistent with the Forest Plan. 4-App-177; 12-App-35–36.

Finally, WWP’s citations to biologist reports about the adequacy of vegetation for amphibians and birds do not invalidate the agency’s final decision. “[A] diversity of opinion by local or lower-level agency representatives will not preclude the agency from reaching a contrary decision, so long as the decision is not arbitrary and capricious and is otherwise supported by the record.” *WildEarth Guardians v. Nat’l Park Serv.*, 703 F.3d 1178, 1186–87 (10th Cir. 2013); *see also Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658–59 (2007) (“[T]he fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious.”).

* * *

The Forest Service decision here was reasonable, balanced competing goals, is consistent with the Forest Plan—and thus satisfied NFMA. The Court should uphold it.

IV. Remedy

The Court should uphold the agencies’ actions. If, however, it rules in Plaintiffs’ favor, it should not vacate the Biological Opinion and Forest Service decision and should instead remand to the agencies for further proceedings. In

deciding whether to vacate agency actions, courts consider “the seriousness of the [action’s] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.” *Allied-Signal v. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (citations and quotations omitted); *see also WildEarth Guardians v. U.S. Bureau Land Mgmt.*, 870 F.3d 1222, 1239–40 (10th Cir. 2010) (listing several considerations when an agency action has been found to be arbitrary or capricious and deciding against vacatur).

Courts should remand without vacatur when it is “reasonably likely that on remand the [agency] can redress its failure of explanation . . . while reaching the same result.” *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1332 (D.C. Cir. 2021). Here, if the Court were to find that the 2019 Biological Opinion or the Forest Service decision failed to sufficiently explain any issues (which it should not), FWS or the Forest Service would be able to cure such deficiencies on remand.

Further, if the Court vacates the agencies’ decisions, there would be “disruptive consequences.” *See Allied Signal*, 988 F.2d at 151. For example, “[r]educing livestock numbers and placing further restrictions on livestock grazing can adversely affect permittees and local communities.” 4-App-167. Therefore, if the Court does not affirm, it should remand without vacatur.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's decision upholding the 2019 Biological Opinion and the Forest Service decision.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Forest Service and Fish and Wildlife Service respectfully suggest that oral argument would assist the Court, particularly given the complex factual record.

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Rule 32(f), this document contains 11,825 words.

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s/ Rebecca Jaffe

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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; and
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s/ Rebecca Jaffe
REBECCA JAFFE

Counsel for Federal
Respondents/Appellees

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2022 I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to counsel of record.

s/ Rebecca Jaffe
REBECCA JAFFE

Counsel for Federal
Respondents/Appellees

