

Consolidated Appeal Nos. 22-8031 and 22-8043

**IN THE 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.*

On Appeal from the United States District Court for the District of Wyoming
Case Nos. 0:20-CV-231-NDF and 0:20-CV-234 (Hon. Nancy D. Freudenthal)

**PETITIONERS-APPELLANTS' OPENING BRIEF
(Oral Argument Requested)**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Petitioners-Appellants Western Watersheds Project, Alliance for the Wild Rockies, and Yellowstone to Uintas Connection are non-profit organizations recognized by the Internal Revenue Service as 501(c)(3) charities. None of the organizations issue public shares and none of the organizations have corporate parents or affiliates with public shares.

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GLOSSARY OF ACRONYMS AND TERMS

AMP – Allotment Management Plan

APA – Administrative Procedure Act

BiOp – Biological Opinion

BTNF – Bridger-Teton National Forest

EIS – Environmental Impact Statement

ESA – Endangered Species Act

FEIS – Final Environmental Impact Statement

FWS – U.S. Fish and Wildlife Service

GYE – Greater Yellowstone Ecosystem

ITS – Incidental Take Statement

NFMA – National Forest Management Act

ROD – Record of Decision

UGRA Project – Upper Green River Area Rangeland Project

USFS – U.S. Forest Service

INTRODUCTION

Wyoming's Bridger-Teton National Forest lies within the Greater Yellowstone Ecosystem, one of the only places in the Lower 48 United States that still supports a full complement of native wildlife. Within the national forest, the Upper Green River area provides valuable habitat for many animals, including rare amphibians like the boreal toad and Columbia spotted frog, numerous migratory birds, and grizzly bears, a species protected as "threatened" under the Endangered Species Act.

In 2019, the U.S. Forest Service signed a Record of Decision ("ROD") for the Upper Green River Area Rangeland Project ("UGRA Project"), which authorized domestic livestock grazing in six allotments of the national forest. As part of its decision, the Forest Service set forage utilization levels at 50% for most of the project area, despite acknowledging in its environmental analysis that such grazing levels would not retain the vegetation cover needed by sensitive amphibians and migratory birds.

Because livestock grazing in grizzly bear habitat inevitably results in conflicts between the native bears and domestic cattle, the Forest Service consulted with the U.S. Fish and Wildlife Service ("FWS") regarding the UGRA Project's effects on the listed species. FWS ultimately issued a biological opinion ("BiOp") concluding that the UGRA Project would not jeopardize grizzly bears' continued existence in

the Greater Yellowstone Ecosystem. In an incidental take statement (“ITS”) included with the BiOp, FWS also authorized the lethal removal of up to 72 grizzly bears over ten years.

In 2020, Petitioners-Appellants Western Watersheds Project, Alliance for the Wild Rockies, and Yellowstone to Uintas Connection (collectively “WWP”) challenged the Forest Service’s UGRA Project ROD and FWS’s 2019 BiOp in federal court, asserting that the agencies’ actions violated the Endangered Species Act (“ESA”) and the Administrative Procedure Act (“APA”) regarding grizzly bears. WWP further asserted that the Forest Service violated the National Forest Management Act (“NFMA”) by prescribing grazing levels that do not retain suitable and adequate amounts of forage and cover for migratory birds and sensitive amphibians.

WWP respectfully requests that this Court reverse the Wyoming District Court’s recent decision affirming the UGRA Project ROD and associated grazing authorizations issued by the Forest Service. WWP also respectfully requests that this Court reverse the district court’s decision affirming the 2019 BiOp and ITS prepared by FWS regarding the UGRA Project’s effect on threatened grizzly bears, as well as the Forest Service’s reliance on that BiOp to satisfy its own ESA obligations. WWP further requests that this Court hold unlawful and set aside the challenged ROD, grazing authorizations, BiOp, and ITS.

STATEMENT OF JURISDICTION

The Wyoming District Court had federal jurisdiction under the ESA, 16 U.S.C. §§ 1540(c) & (g), the APA, 5 U.S.C. §§ 701–706, and 28 U.S.C. § 1331. On May 17, 2022, the district court issued an Opinion and Order (ECF No. 147, Addendum A hereto) affirming the UGRA Project ROD, associated grazing authorizations, and the 2019 BiOp and ITS challenged by WWP. *See* 1-App-120.¹ On June 1, 2022, the district court entered a Judgment (ECF No. 148, Addendum B hereto) dismissing WWP’s Supplemented and Amended Petition for Review (“Petition”). *See* 1-App-150. Per Fed. R. App. P. 4(a)(1)(B), WWP timely filed its notice of appeal on June 10, 2022. 1-App-151. This Court has jurisdiction to review the district court’s final judgment under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court wrongly concluded that the Forest Service complied with NFMA and the APA by ensuring the consistency of the UGRA Project ROD and associated grazing authorizations with the Forage Utilization Standard and Objective 4.7(d) of the Bridger-Teton National Forest Plan (“Bridger-Teton Plan” or “Plan”).

2. Whether the district court wrongly concluded that FWS’s 2019 BiOp

¹ Per 10th Cir. R. 28.1(A)(1), “__-App-__” denotes the volume and page number where the cited materials are located in the accompanying Appendix. The district court’s Opinion and Order are thus found at Volume 1, page 120 of the Appendix.

and accompanying ITS regarding the UGRA Project complied with the ESA and the APA by applying the best available science, considering all relevant factors and important aspects of the question before the agency, and specifying impacts to the species before reaching a “no jeopardy” conclusion and authorizing the lethal removal of 72 grizzly bears.

3. Whether the district court wrongly concluded that FWS complied with the ESA and the APA by relying on conservation measures built into the UGRA Project to reach its “no jeopardy” conclusion in the 2019 BiOp, despite the measures’ failure to address the project’s threat to grizzly bears and without scrutinizing the measures’ effectiveness.

4. Whether the district court wrongly concluded that the Forest Service’s reliance on the 2019 BiOp did not violate the ESA and the APA.

STATEMENT OF THE CASE

This case is an appeal of the Wyoming District Court’s Opinion and Order and subsequent Judgment affirming the Forest Service’s UGRA Project ROD and associated grazing authorizations, as well as FWS’s 2019 BiOp and ITS regarding the UGRA Project’s effect on threatened grizzly bears. WWP’s Petition (ECF No. 111) challenged the UGRA Project ROD and associated grazing authorizations under NFMA, 16 U.S.C. § 1604(i), and the APA, 5 U.S.C. §§ 701–706. *See* 1-App-115–116. WWP’s Petition also challenged FWS’s 2019 BiOp and ITS under Section

7 of the ESA, 16 U.S.C. § 1536(a)(2), and the APA, 5 U.S.C. §§ 701–706. *See* 1-App-114. Finally, WWP’s Petition challenged the Forest Service’s reliance on the 2019 BiOp to satisfy its obligations under Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), and the APA, 5 U.S.C. §§ 701–706. *See* 1-App-115.

I. Background on the National Forest Management Act and the Bridger-Teton National Forest Plan

Enacted in 1976, NFMA requires the Forest Service to “develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System,” commonly referred to as “forest plans.” 16 U.S.C. § 1604(a). While coordinating the multiple uses of National Forest System units, forest plans must “provide for diversity of plant and animal communities” *Id.* §§ 1604(e)(1) & (g)(3)(B). NFMA requires that site-specific projects, “[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands . . . be consistent with [relevant] land management plans.” *Id.* § 1604(i).

Forest plans generally contain components such as standards and objectives. *See* 16 U.S.C. § 1604(g). Forest plan standards are binding and require strict compliance. *Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1110 (9th Cir. 2018). Where there is any question as to whether a plan component is binding, courts “look to whether language of the provision is mandatory by the use of ‘shall’ or ‘will’ or whether the language is merely suggestive, such as by the use

of ‘may.’” *Or. Natural Desert Ass’n v. Sabo*, 854 F. Supp. 2d 889, 917 (D. Or. 2012) (citing *W. Watersheds Project v. Bennett*, 392 F. Supp. 2d 1217, 1227 (D. Idaho 2005) (other citations omitted)).

Before implementing an action, the Forest Service must ensure forest plan consistency. *Ohio Forestry Ass’n, Inc. v. U.S. Forest Serv.*, 523 U.S. 726, 729–30 (1998); *Utah Env’tl. Cong. v. Bosworth*, 443 F.3d 732, 737 (10th Cir. 2006) (“Projects must comply with the applicable forest plan.”). This consistency mandate also applies to grazing authorizations issued by the Forest Service in the form of permits, annual operating instructions, and allotment management plans. *McKeen v. U.S. Forest Serv.*, 615 F.3d 1244, 1247 (10th Cir. 2010); 16 U.S.C. § 1604(i); 36 C.F.R. § 222.2(c).

The Bridger-Teton Plan contains mandatory standards directly relevant to the management of grazing. For example, the Allotment Planning Standard requires that “[a]ll livestock grazing will be managed under the direction of an allotment management plan.” 5-App-133. The Forage Utilization Standard, meanwhile, sets absolute maximum utilization levels that the Forest Service may authorize on Bridger-Teton allotments. 5-App-133–34. Crucial to this case, the Forage Utilization Standard also requires that the Forest Service and permittees “*will* prescribe site-specific utilization levels needed to meet Forest Plan objectives” during the revision of individual allotment management plans (“AMPs”). 5-App-134 (emphasis added).

The Bridger-Teton Plan includes approximately nine objectives directly relevant to the management of livestock grazing. *See* 5-App-119, 126–27. Most notably for purposes of this appeal, Objective 4.7(d) directs the Forest Service to “[r]equire that suitable and adequate amounts of forage and cover are retained for wildlife and fish” when authorizing livestock grazing. 5-App-126.

The Bridger-Teton Plan divides the Forest into roughly 12 geographic regions with specific “Desired Future Conditions” (“DFCs”). 5-App-151; 6-App-094. These DFCs provide “management area prescriptions” for the corresponding areas. 6-App-094. The Plan assigns each DFC a “management emphasis statement that ties the prescription to specific Land and Resource Management Objectives” and other plan components. 5-App-151. The Plan includes DFCs because “not all the Goals and Objectives can be achieved at the same time from the same land areas.” *Id.* Thus, to the extent any relevant objectives conflict in a particular area where an action is proposed, such “conflicts are resolved by application of the different Desired Future Conditions to different areas of the Forest.” 5-App-099.

II. Background on the Endangered Species Act

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). To receive ESA protections, a species must be listed as “endangered” or “threatened.” 16 U.S.C. § 1533. The ESA defines an “endangered

species” as “any species which is in danger of extinction throughout all or a significant portion of its range,” and a “threatened species” as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. §§ 1532(6) & (20). The ESA prohibits “take” of endangered species. *Id.* § 1538(a). Among other things, “take” means to “harm” and “kill.” *Id.* § 1532(19). The take prohibition has been extended to threatened grizzly bears. 50 C.F.R. § 17.40(b)(i)(A).

The ESA also requires every federal agency, in consultation with FWS,² to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence” of any listed species. 16 U.S.C. § 1536(a)(2). To carry out these obligations, agencies must “use the best scientific and commercial data available.” *Id.* The ESA requires formal consultation if an action agency determines a proposed action is likely to adversely affect a listed species. 50 C.F.R. §§ 402.14(a) & (b)(1).³ During formal consultation, FWS must consider all “relevant information,” evaluate the listed species’ “current status,” and evaluate the effects of the proposed action on the species. *Id.* §§ 402.14(g)(1)–(3).

² FWS has jurisdiction over terrestrial species, including the grizzly bear. *See Forest Guardians v. Johanns*, 450 F.3d 455, 457 n.1 (9th Cir. 2006) (citing 50 C.F.R. § 402.01(b)).

³ All references to ESA formal consultation regulations are to those in effect in when FWS produced the 2019 BiOp and ITS, and included as Addendum C to this brief.

At the conclusion of formal consultation, FWS must issue a “biological opinion” explaining in detail “how the agency action affects the species” and determines whether the action will jeopardize the listed species’ continued existence. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §§ 402.14(g)(4) & (h)(2). If FWS reaches a “no jeopardy” determination, it may exempt incidental take of the species through an ITS, but the ITS must “specif[y] the impact of such incidental taking on the species.” 16 U.S.C. § 1536(b)(4)(C)(i); 50 C.F.R. § 402.14(i)(1)(i).

III. Upper Green River Area Rangeland Project Area in the Greater Yellowstone Ecosystem

The UGRA Project area consists of six grazing allotments encompassing 170,643 acres of the Bridger-Teton National Forest in Wyoming. 11-App-165. The area lies within the Greater Yellowstone Ecosystem (“GYE”), one of the only places in the Lower 48 United States still supporting a full complement of native wildlife. *See id.* The region comprises one of Earth’s largest temperate-zone ecosystems still existing in a mostly-intact state. *See id.*

Under the Bridger-Teton Plan, the UGRA Project area overlays several different management areas with different “Desired Future Conditions”—*i.e.*, different management emphases. 11-App-190–92; *see* 5-App-094. In approximately ten percent of the UGRA Project area, the Plan directs the Forest Service to emphasize wilderness values (DFC 6A/B). 11-App-190; 5-App-193–94 (“Management emphasis is for the protection and perpetuation of pristine [or

natural] biophysical conditions”). Meanwhile, sixty-six percent of the project area is within DFC 10, where 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.” 11-App-180, 11-App-190–91; 5-App-234. Eighteen percent is within DFC 12, where the “[m]anagement emphasis is on providing such important habitat for big-game” 11-App-180, 11-App-191; 5-App-241.

A. Grizzly Bears in the GYE and UGRA Project Area

FWS listed grizzly bears (*Ursos arctos horribilis*) as “threatened” under the ESA in 1975. 40 Fed. Reg. 31,736 (July 28, 1975). Since then, grizzly bear numbers in the Lower 48 have increased to about 2,000 individuals within five isolated population areas, one of which is the GYE. 2-App-159–60. As of 2017, the estimated GYE grizzly bear population is 718, with between zero and two percent annual growth. 2-App-192.

Grizzly bears reproduce very slowly; most females do not give birth until the age of five years, and litter sizes are small. 2-App-158. Because cubs stay with the mother for up to two years, there are lengthy periods between litters. *Id.* FWS says “providing maximum protection for females is essential to [the] recovery” of grizzly bears because females and dependent cubs are key to the species’ survival. 2-App-

217. The GYE population is more sensitive to annual survival of adult females than to any other single vital rate. 12-App-181.

The UGRA Project area lies within the GYE Demographic Monitoring Area in which FWS must estimate the overall population and track annual mortality levels for specific grizzly bear demographics to determine if management changes are necessary to ensure the species' recovery. 2-App-167–68; 2-App-245–46. The annual mortality thresholds are 9% for independent females and dependent young, and 20% for independent males. 2-App-168; 2-App-246. Female mortality exceeded population-wide thresholds twice since 2000, and male mortality exceeded thresholds four times since 2008. 2-App-094. As recently as 2017, female mortality across the GYE came within just 0.6% of the annual mortality threshold. *See* 2-App-167–68 (8.4% mortality; 9% threshold).

Thirty-five grizzly bears were killed in response to livestock conflicts in the UGRA Project allotments between 1999 and 2019. 2-App-184. Between 2010 and 2014, over half of all cattle-related grizzly bear deaths in Western Wyoming occurred within the UGRA Project area, an alarmingly high concentration of grizzly mortality within just 170,643 acres of the 5.4 million-acre GYE bio-region. 12-App-180; 2-App-134, 161. Five of the six UGRA Project allotments are recognized “sink habitat” for female grizzly bears, meaning female mortality exceeds or nearly

exceeds survival within them. 3-App-023; 12-App-182; *see also* 2-App-240 (sink habitat explanation).

B. Sensitive Amphibians and Migratory Birds in the UGRA Project Area.

“Sensitive” species are those species identified by the Forest Service’s Regional Forester “for which population viability is a concern” due to downward trends in population or habitat. 12-App-169. Two sensitive amphibian species inhabit the UGRA Project area: boreal toads (*Anaxyrus boreas*) and Columbia spotted frogs (*Rana luteiventris*). 12-App-172. The project area is one of three important breeding areas for boreal toads on the Bridger-Teton National Forest, and the species has been detected within almost every allotment. 12-App-223, 226. Columbia spotted frogs have been detected in the Upper Green River and Beaver-Twin allotments. 12-App-229. Both species require herbaceous vegetation to avoid predators, to provide humidity and to avoid the drying effects of the sun, and to maintain soil moisture and porosity for burrowing. 12-App-220, 227, 237; 13-App-168.

The UGRA Project area also provides habitat for migratory birds, many of which require herbaceous vegetation for hiding, escape, and nesting cover, nectar and seeds, and prey habitat. 13-App-031–33; 9-App-023, 073. For example, raptors and owls prey on voles and other small mammals that rely on herbaceous vegetation

habitat. 9-App-045. Other migratory birds nest on the ground, using dense herbaceous vegetation to conceal eggs and nestlings from predators. 9-App-027–28.

IV. UGRA Project Environmental Analysis

Pursuant to the public processes required by the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, the Forest Service first proposed the UGRA Project in 2000 to develop and revise AMPs for the allotments. 6-App-096–97; 11-App-186. In 2004, the agency released a Draft Environmental Impact Statement (“EIS”) for the project analyzing three alternatives, but withdrew a subsequent ROD. 10-App-228–30; 10-App-231; 11-App-186. The Forest Service then released a Draft Supplemental EIS in 2010, also analyzing three alternatives, but did not issue an accompanying ROD. 10-App-236–48; 11-App-186.

In 2015, the Forest Service announced it would consider a fourth alternative for the UGRA Project to specifically “respond to concerns regarding amphibians and sage grouse” and to “provide an adequate amount of suitable habitat for riparian-dependent wildlife while providing livestock grazing opportunities.” 10-App-251; 10-App-268. The agency released another Draft EIS in September of 2016. 10-App-256. The Forest Service issued a Final EIS (“FEIS”) and Draft ROD in October of 2017. 11-App-123; 13-App-251.

The Final EIS for the UGRA Project analyzed the same four alternatives as the 2016 Draft EIS. 11-App-193. Alternative 1, the “no action” alternative, would

end livestock grazing in the project area. 11-App-193. Alternative 2 would continue current management, allowing 60–65% maximum forage utilization throughout most of the project area. 11-App-199–201. Alternative 3, the agency’s preferred alternative, would set a general maximum forage utilization level of 50%. 11-App-233. Alternative 4, meanwhile, would “provide habitat to meet the needs of riparian-dependent wildlife managed in balance with livestock grazing as described in the Forest Plan [] for Desired Future Condition 10.” 11-App-268. To accomplish this, Alternative 4 would limit forage utilization to 35% in all riparian areas except in the small Noble Pastures and Wagon Creek allotments. 11-App-273–74.

Within the “Purpose and Need” section of the FEIS, the Forest Service identified a need for the UGRA Project “to avoid unacceptable effects from livestock use” as described by “[t]he difference between the existing condition and desired condition in terms of resource objectives” within the project area. 11-App-166. The Forest Service used a 70% herbaceous vegetation retention objective to indicate desired conditions for amphibians as it analyzed the alternatives considered in the FEIS. 11-App-170, 181. The agency selected this retention level based on previous assessments, internal recommendations, extensive scientific literature review, and input and support from outside experts. 13-App-238; 8-App-001–02; 8-App-007–187; 10-App-015, 021–211. Within these materials, Forest Service biologists identified 70% retention as a minimum threshold to meet Bridger-Teton Plan

Objective 4.7(d) and ensure suitable and adequate amounts of cover for amphibians. 8-App-111, 136; 10-App-162.

In the FEIS, the Forest Service determined that Alternative 2 would result in 42–50% herbaceous retention, while Alternative 3 would result in 54%, and Alternative 4 would result in 66% retention in riparian areas. 12-App-240–41. Thus, the FEIS recognizes that Alternatives 2 and 3 “[w]ould not meet [the] retention objective of 70%,” while Alternative 4 “[m]eets or nearly meets” it. 12-App-026–27.

According to the amphibian report prepared to support the FEIS, “desired conditions for amphibian populations and habitats [under Alternative 3] would typically not be met under maximum allowable use of key forage because cover and cover benefits would not be adequate” for the species. 3-App-146. Stated differently, Alternative 3 would not meet the Forest Service’s stated need for the UGRA Project to “avoid unacceptable effects from livestock use” because under the alternative’s “maximum allowable use, there remains a gap between existing and desired conditions with respect to retention of herbaceous vegetation needed by amphibians.” 3-App-149; *see* 11-App-166. The report concluded that Alternative 3 would have “[n]egative effects on amphibians from inadequate cover and cover benefits” that are “likely to reduce amphibian breeding habitat and contribute negatively to their population trend at the forest scale.” 3-App-147, 178–79.

Meanwhile, the Forest Service’s migratory bird report prepared for the UGRA Project determined that “≥70% of herbaceous vegetation would need to be retained on a large majority of each major type of habitat . . . the meet the ‘adequate amount’ part of Objective 4.7(d) and to meet migratory bird requirements.” 9-App-076. The FEIS concedes that based on the report’s analysis, “[t]he key forage utilization limits of 50% in Alternative 3 is not expected to maintain suitable nesting cover” for birds. 13-App-035; *see also* 9-App-144, 151. Alternative 2 would retain even less cover. 9-App-144; 12-App-240–41.

All three action alternatives considered in the FEIS would require the Forest Service to prepare or update AMPs for the allotments. 11-App-196, 229, 270. Each action alternative also includes all the same “Grizzly Bear Conservation Measures.” 11-App-270; 12-App-011–012. Even with these measures, the Forest Service determined the action alternatives would adversely affect grizzly bears due to lethal removals in response to livestock conflicts. 12-App-024, 189–96.

The FEIS includes a table purporting to show consistency with Bridger-Teton Plan components. 13-App-118–21. The table indicates that Alternative 2 does not comply with the Forage Utilization Standard, while asserting that Alternatives 3 and 4 do. However, the table does not connect compliance with the Forage Utilization

Standard to meeting Plan objectives, as the standard requires.⁴ 13-App-119; 1-App-134.

V. 2019 Biological Opinion for the UGRA Project

The Forest Service sought formal ESA consultation with FWS regarding the UGRA Project’s effect on grizzly bears because all action alternatives would result in lethal removals. 2-App-068; 12-App-024, 189–96. FWS produced a BiOp in April of 2019, noting that since 2010, livestock-grizzly bear conflicts increased in the area on average 9% each year, and in the previous five years lethal removals had increased 8% each year, vastly outpacing the GYE grizzly bear population’s growth. 2-App-143, 175, 189, 192. FWS asserted that increased bear density within the allotments likely caused the sharp rise in conflicts. 2-App-175.

Although the Forest Service acknowledged that the UGRA Project allotments are “sink habitat” for female grizzly bears—where mortality exceeds or nearly exceeds survival—FWS failed to address this current status in the 2019 BiOp. 12-App-182. FWS also did not discuss grizzly bear take anticipated beyond the UGRA Project “action area” (the perimeter of the allotments plus a 7.5-mile buffer), despite relying on GYE-wide population metrics for its evaluation of the project’s effects.

⁴ Despite its applicability to the UGRA Project, the FEIS mentions the Forage Utilization Standard’s requirement to prescribe site-specific utilization levels needed to meet Plan objectives just once, in Appendix B, the Forest Service’s “Response to Comments” on the Draft EIS. 13-App-203. The agency never articulates Objective 4.7(d) in the FEIS.

2-App-154–55, 184, 192. FWS ultimately concluded that the UGRA Project would not jeopardize grizzly bears, noting the Forest Service’s “commitment to implement” specific conservation measures. 2-App-192; 12-App-011–012.

FWS included an ITS with the BiOp that authorized the lethal removal of up to 72 grizzly bears from the project area over ten years, more than double the 35 removals that occurred in the previous *twenty* years, and exponentially more than the previous five-year BiOp, which authorized 11 lethal removals within any consecutive three years. 2-App-184, 194; 2-App-112. Several bears have already been killed pursuant to the 2019 BiOp. *See* 15-App-110 (lethal removals near Wagon Creek and Green River within project area). Inexplicably, and unlike nearly every previous BiOp for the allotments since 1999, the 2019 BiOp and ITS did not place limits or reporting requirements on the take of female grizzly bears, despite females’ vital importance to the species’ survival. 2-App-116; 2-App-167, 184, 194.

VI. 2019 UGRA Project Record of Decision

In October of 2019, the Forest Service signed the UGRA Project ROD, selecting Alternative 3 with elements of Alternative 2 for implementation. 4-App-144. The ROD generally set maximum forage utilization levels at 50% across the project area except in the Noble Pastures Allotment, where 60–65% utilization would continue. 4-App-148–53. For most of the project area, the Forest Service selected Idaho fescue as the key forage species used for utilization monitoring. 4-

App-144. The ROD authorized the issuance of grazing permits for 8,772 cow/calf pairs across the six allotments, and stated that AMPs would be developed or revised for the allotments “to reflect the management described in this decision.” 4-App-154–55.

The ROD does not mention the herbaceous retention objective underpinning the Forest Service’s alternatives analysis, and omits any resource objective or numeric target for herbaceous retention from its adaptive management strategy. 4-App-145. The ROD admits that “desired conditions for utilization of key forage species may not be achieved in certain areas under maximum allowable utilization levels” 4-App-166. Despite failing to provide amphibians’ minimum cover needs as described by the Forest Service’s own analysis, the ROD inexplicably asserts that the “decision balances amphibian health with other socio-economic and multiple use considerations.” 4-App-166; *see* 8-App-111, 136; 10-App-162; 12-App-026–27.

The ROD also asserts that the “decision to authorize grazing use within the project area is consistent with the intent of the Forest Plan’s long term goals, objectives, standards, and guidelines,” but does not explain how the selected alternative complies with the Forage Utilization Standard’s requirement that site-specific utilization levels meet Bridger-Teton Plan objectives.⁵ 4-App-177. The

⁵ The ROD never mentions this requirement, and never articulates Objective 4.7(d).

ROD references the Forest Service’s consultation with FWS regarding grizzly bears, and contends that “[w]ith the incorporation of appropriate conservation measures, implementation of this decision is not expected to contribute to further decline of th[is] species.” 4-App-163.

VII. Grazing Authorizations for the UGRA Project Allotments

After signing the UGRA Project ROD, the Forest Service authorized grazing in the project area by issuing annual operating instructions to permittees for the 2020 season. 14-App-072–115. In 2021, the agency issued new permits for all allotments that reiterated the utilization levels stated in the ROD. 14-App-116–255; 15-App-065–84. In 2021, the Forest Service again issued annual operating instructions and also issued new Beaver-Twin and Badger Creek AMPs that adopt the ROD’s utilization levels. 15-App-085–108; 15-App-118, 124. The Roaring Fork and Upper Green River AMPs date to 1976 and 1978, respectively. 10-App-219; 10-App-220. The Forest Service has never completed AMPs for the Noble Pastures or Wagon Creek allotments.

SUMMARY OF THE ARGUMENT

The UGRA Project ROD and associated grazing authorizations are not consistent with the Bridger-Teton National Forest Plan, in violation of NFMA. The Plan’s Forage Utilization Standard requires the Forest Service to prescribe site-specific utilization levels that meet Plan objectives. Objective 4.7(d) directs the

agency to retain suitable and adequate amounts of forage and cover for wildlife and fish when authorizing livestock grazing. But the utilization levels prescribed for the UGRA Project allotments do not meet this objective. The agency's own experts concluded that 50% utilization will not, in fact, retain suitable and adequate amounts of forage and cover for sensitive amphibians and migratory birds. The Forest Service also wholly failed to consider whether 50% utilization as measured on the selected key forage species—short-statured Idaho fescue—would retain suitable and adequate forage and cover. The agency's determination that the UGRA Project ROD and grazing authorizations are consistent with Plan objectives is not supported by substantial evidence. The UGRA Project ROD and grazing authorizations are thus arbitrary and capricious in violation of NFMA, and must be set aside.

Next, FWS's 2019 BiOp regarding the UGRA Project's effect on threatened grizzly bears failed to consider all relevant factors and ignored important aspects of the problem before the agency. FWS did not address the lack of specific limits on female lethal removals among the 72 total authorized lethal grizzly bear removals allowed within the project area. FWS also ignored how lethal removals without such limits will contribute to the existing mortality sink for females in the project area. FWS thus failed to apply the best available science that shows maximizing the survival of female grizzly bears is key to the species' survival and recovery, and also failed to specify the impact of the lethal removals it authorized. Ignoring another

relevant factor, FWS failed to consider take of grizzly bears anticipated elsewhere in the GYE, despite relying on population-wide metrics in its analysis.

In addition, in reaching its “no jeopardy” conclusion in the 2019 BiOp, FWS improperly relied on conservation measures that lack specificity and certainty. Furthermore, FWS failed to assess the measures’ effectiveness at minimizing conflicts between grizzly bears and livestock, despite the same measures’ previous failure to slow the increase in conflicts and lethal removals in the UGRA Project allotments. In sum, the measures do not address the threats the UGRA Project poses to grizzly bears in a way that satisfies the ESA’s jeopardy standard. For these reasons, FWS’s 2019 BiOp and ITS are arbitrary and capricious in violation of the ESA and must be set aside.

Finally, the Forest Service violated the ESA by relying on FWS’s 2019 BiOp and ITS to satisfy its own statutory obligations. Among other flaws in the BiOp, FWS ignored the UGRA Project’s expected contribution to the existing mortality sink for female grizzly bears in the project area, and failed to assess the effectiveness of the conservation measures built into the UGRA Project before relying on them to reach a “no jeopardy” conclusion. For these and other reasons, the Forest Service’s reliance on the FWS’s flawed BiOp is arbitrary and capricious in violation of the ESA, and the UGRA Project ROD and the associated grazing authorizations must be set aside.

The Wyoming District Court erred by affirming the Forest Service’s UGRA Project ROD and associated grazing authorizations. The district court also erred by affirming FWS’s 2019 BiOp and improper ITS regarding the UGRA Project’s effect on threatened grizzly bears, as well as the Forest Service’s reliance on that inadequate BiOp to fulfill its own ESA obligations.

ARGUMENT

I. Standard of Review

This Court “give[s] no deference to a district court’s review of agency action, reviewing [the agency’s] decision de novo.” *WildEarth Guardians v. Nat’l Park Serv.*, 703 F.3d 1178, 1182 (10th Cir. 2013). This Court applies the APA’s “familiar ‘arbitrary and capricious’ standard” in reviewing challenges to federal agency action. *WildEarth Guardians v. Bureau of Land Mgmt.*, 870 F.3d 1222, 1233 (10th Cir. 2017) (citing *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704–05 (10th Cir. 2009)); *see also* 5 U.S.C. § 706(2)(A).

An agency action 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.’” *Richardson*, 565 F.3d at 704. Although “ideal clarity”

may not be required, an agency must explain its decision so that its analytical “path may be reasonably discerned.” *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974) (citation omitted).

An agency decision “will be set aside as arbitrary if it is unsupported by ‘substantial evidence’” in the record. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994) (citation omitted). To be substantial, record evidence must amount to “more than a mere scintilla.” *Id.* at 1581. In other words, the “record must contain enough facts supporting the decision that a ‘reasonable mind’ could accept it as ‘adequate to support [the] conclusion.’” *Blanca Tel. Co. v. Fed. Comm’n Comm’n*, 991 F.3d 1097, 1120 (10th Cir. 2021) (citing *Olenhouse*, 42 F.3d. at 1581)) (alteration in original). “Evidence is not substantial if it is overwhelmed by other evidence . . . or if it constitutes mere conclusion.” *Olenhouse*, 42 F.3d at 1581. (citations omitted).

A court “must not ‘rubber-stamp’ administrative decisions.” *Alaska Oil & Gas Ass’n v. Jewell*, 815 F.3d 544, 554 (9th Cir. 2016) (citation omitted); *see also U.S. Dep’t of Energy v. Fed. Labor Relations Auth.*, 880 F.2d 1163, 1165 (10th Cir. 1989) (citation omitted). A court’s review of an agency’s decision is deferential, but does not “shield” the agency from a “searching and careful,” “thorough, probing, and in-depth review.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1971).

“It is a ‘foundational principle of administrative law’ that judicial review of agency action is limited to ‘the grounds the agency invoked when it took the action.’” *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020). An agency’s decision can be upheld, if at all, based on “only the agency’s reasoning at the time of decisionmaking,” not “post hoc rationalizations concocted by counsel.” *Richardson*, 565 F. 3d at 704 (quoting *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002)). Similarly, a court “may not supply a reasoned basis for the agency’s action that the agency itself has not given.” *Bowman Transp.*, 419 U.S. at 285–86 (citing *Sec. Exch. Comm’n v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

II. The District Court Wrongly Affirmed the UGRA Project ROD and Associated Grazing Authorizations Despite Inconsistency with the Bridger-Teton Plan.⁶

Courts routinely set aside Forest Service decisions when the agency fails to ensure that a project is consistent with the applicable forest plan, as NFMA requires. 16 U.S.C. § 1604(i); *WildEarth Guardians v. Jeffries*, 370 F. Supp. 3d 1208, 1235 (D. Or. 2019); *Alliance for the Wild Rockies*, 907 F. 3d at 1112–18; *Sierra Club v. Martin*, 168 F.3d 1, 8 (11th Cir. 1999). A court “must be able to ‘reasonably discern

⁶ Before the district court, Intervenor-Respondent-Appellee the State of Wyoming asserted that WWP had waived its NFMA claim. *See* ECF No. 141, pp. 25–27. The district court correctly ruled that WWP had not waived its NFMA arguments. 1-App-148.

from the record that the Forest Service complied’ with the plan’s standards.” *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 947 (9th Cir. 2014) (citation omitted). The Forest Service “cannot ignore the requirements of the Forest Plan,” and actions that do not “scrupulously follow” the agency’s own requirements must be overturned. *Martin*, 168 F.3d at 4.

In the case at hand, substantial evidence does not support the Forest Service’s determination that the UGRA Project ROD and associated grazing authorizations are consistent with the Bridger-Teton Plan’s Forage Utilization Standard and Objective 4.7(d). The overwhelming weight of evidence in the record shows that the maximum forage utilization levels authorized under the selected alternative will not meet Objective 4.7(d)’s direction to retain suitable and adequate amounts of forage and cover for wildlife. In turn, this failure to meet Objective 4.7(d) violates the Forage Utilization Standard’s requirement that site-specific utilization levels be prescribed to meet Plan objectives. The district court erred by affirming the UGRA Project ROD and grazing authorizations and presuming the Forest Service ensured consistency with the Bridger-Teton Plan without even examining the evidence in the record.

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A. The District Court Wrongly Dismissed WWP’s NFMA Claim without Examining the Full Text of the Bridger-Teton Plan and the Record Before It.

The district court wrongly dismissed WWP’s claim that the UGRA Project violates NFMA because it does not comply with the Forage Utilization Standard’s requirement that site-specific utilization levels meet plan objectives, and thus is not consistent with the Bridger-Teton Plan. *See* 1-App-148–49. While noting that the Plan contains 73 objectives—but pointing only to Objective 1.1(h)—the district court incorrectly concluded that because “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.” *Id.*

Among the nine Bridger-Teton Plan objectives relevant to livestock grazing authorizations, Objective 1.1(h) aims to “[p]rovide forage for about 260,000 Animal Unit Months (AUMs) of livestock grazing annually” across the forest. 5-App-118–19. Objective 4.7(d), meanwhile, directs the Forest Service to “[r]equire that suitable and adequate amounts of forage and cover are retained for wildlife and fish” when authorizing livestock grazing. 5-App-126.

Nowhere in the FEIS or ROD did the agency assert that Objective 1.1(h)—or any other Plan objective—conflicts with Objective 4.7(d) in the UGRA Project area. In fact, the FEIS states that the 35% riparian forage utilization allowed under Alternative 4 “meets or nearly meets [the] desired condition for herbaceous

retention,” yet would result in no measurable change to “[a]griculture related employment, spending, and other impacts to the local community [].” 12-App-240–41; 13-App-042. Thus, even under the most restrictive grazing scheme considered for the UGRA Project, the FEIS identified no conflict between providing sufficient Animal Unit Months and adequate vegetation cover for wildlife. 12-App-240–41; 13-App-042.

By hastily deferring to agency expertise, the district court ignored both the Forest Service’s analysis in the FEIS and the full text of the Bridger-Teton Plan, which directs the agency to resolve conflicts between objectives “by application of the different Desired Future Conditions to different areas of the Forest.” 5-App-099. To the extent that any other objectives genuinely conflict with Objective 4.7(d)—which, again, the Forest Service never asserted—applicable DFCs for 94% of the UGRA Project area direct the agency to resolve conflicts in favor of wildlife habitat (DFCs 10 and 12) or “natural biophysical conditions” (DFC 6A/B). 11-App-190–91; 5-App-193–94, 234, 241. Furthermore, deference to agency expertise is only appropriate if the Forest Service adequately explained how the UGRA Project complied with the Forage Utilization Standard, but it did not. *See Klamath-Siskiyou Wildlands Ctr. v. Grantham*, No. 2:18-CV-2785-TLN-DMC, 2022 WL 397559, at *9 (E.D. Cal. Feb. 9, 2022) (citations omitted).

A court may not attempt to supply a reasoned basis for agency action that the agency itself has not given. *See Bowman Transp.*, 419 U.S. at 285–86. Neither may a court merely “rubber-stamp” an administrative decision, yet that is what the district court did here. *See Alaska Oil & Gas Ass’n*, 815 F.3d at 554. Had the district court properly engaged in the “thorough, probing, and in-depth review” required by the APA, it would not have prematurely ended its inquiry into the substantive merits of WWP’s claim that the Forest Service violated NFMA. *See Overton Park*, 401 U.S. at 416. Instead, it would have addressed the overwhelming weight of evidence in the record that shows the utilization levels prescribed by the agency will not retain suitable and adequate amounts of forage and cover for wildlife, contrary to Objective 4.7(d) and the Forage Utilization Standard.

B. The Forest Service Failed to Consider Whether 50% Utilization Measured on Idaho Fescue Will Retain Suitable and Adequate Amounts of Forage and Cover.⁷

The Forest Service selected Idaho fescue (*Festuca idahoensis*) as the key plant species for upland livestock utilization monitoring to determine the need for management changes in the UGRA Project area. 4-App-144, 146. Yet the agency never considered the effect that 50% utilization of Idaho fescue would have on

⁷ Per 10th Cir. R. 28.1(A), WWP raised this claim in its opening brief before the district court. ECF No. 133, pp. 24–26. The district court dismissed this claim in its Opinion and Order. 1-App-148–49.

wildlife habitat needs, despite the on-the-ground outcome's relevance under the Bridger-Teton Plan's Forage Utilization Standard and Objective 4.7(d).

According to monitoring data in the record, the average ungrazed Idaho fescue plant is less than six inches tall. *See, e.g.*, 15-App-002–033. Applying the “utilization gauge or wheel” monitoring method used by the Forest Service, 50% utilization on such short-statured Idaho fescue plants results in grazed heights less than 1.5 inches. 12-App-047; 14-App-268–70 (utilization gauge explanation and examples). Nothing in the record supports a finding that such a small amount of cover is adequate for vulnerable species' habitat needs. To the contrary, overwhelming record evidence shows such limited cover is not adequate. *See, e.g.*, 8-App-130 (vegetation below 1.5 to two inches “contributes little if anything to hiding cover, shading, or insect habitat”); 3-App-062–63 (survival of migrating amphibians tied to sufficient vegetation cover); 3-App-081 (70% minimum herbaceous retention needed to provide sufficient migration habitat for sensitive amphibians); 3-App-146 (50% utilization retains just 54% herbaceous cover); 12-App-266 (sage-grouse guideline for upland perennial grass height post-breeding and nesting is 4 inches within 5.3 miles of active breeding areas).

An agency must offer a reasoned basis for its decision supported by substantial evidence in the record. *Superior v. U.S. Fish & Wildlife Serv.*, 913 F. Supp. 2d 1087, 1101 (D. Colo. 2012) (citing *Olenhouse*, 42 F.3d at 1575). Yet in selecting Idaho

fescue as the key upland forage species, the Forest Service did not point to any such evidence. Neither did the agency articulate a rational connection between facts in the record—*i.e.*, average ungrazed heights, grazed heights at 50% utilization, and wildlife vegetation cover needs—and its decision to authorize 50% utilization measured on short-statured Idaho fescue.

The Forest Service failed to engage in any meaningful analysis or consideration of this relevant factor, ignored an important aspect of the problem before it, and failed to ensure compliance with the Forage Utilization Standard's requirement that site-specific utilization levels meet Bridger-Teton Plan objectives, including Objective 4.7(d). As a result, the UGRA Project ROD and associated grazing authorizations are arbitrary and capricious in violation of NFMA, and they must be set aside. *See* 16 U.S.C. § 1604(i).

C. The UGRA Project ROD and Grazing Authorizations Do Not Prescribe Site-Specific Utilization Levels Needed to Meet Objective 4.7(d), Contrary to the Forage Utilization Standard.

To reach a determination that the UGRA Project is consistent with Objective 4.7(d) and the Forage Utilization Standard, the Forest Service needed to consider if the alternatives would retain suitable and adequate amounts of forage and cover for wildlife, as the Bridger-Teton Plan directs. *See* 5-App-126. The Forest Service's own experts and the FEIS answered that question and concluded that neither Alternative 2 nor Alternative 3 will provide suitable and adequate amounts of forage and cover

for sensitive amphibians or migratory birds. 12-App-255; 13-App-035; 3-App-146, 149; 9-App-151. Still, in a decision that runs counter to the evidence before it, the agency selected Alternative 3 with elements of Alternative 2 for implementation on the UGRA Project allotments. 4-App-144. The Forest Service thus prescribed utilization levels that are not consistent with the Bridger-Teton Plan’s Forage Utilization Standard and Objective 4.7(d). This violates NFMA, and the UGRA Project ROD and grazing authorizations must be set aside. *See* 16 U.S.C. § 1604(i).

1. The UGRA Project ROD and Grazing Authorizations Do Not Provide Suitable and Adequate Forage and Cover for Sensitive Amphibians.⁸

The Forest Service used retention of herbaceous vegetation to assess the habitat conditions that UGRA Project alternatives would provide amphibians. *See* 11-App-181. The agency biologist’s amphibian report for the UGRA Project stated that “levels of cover associated with 70% minimum retention should . . . insure that ambient temperature, humidity, soil porosity (burrow habitat), cover for avoiding predation, and other cover benefits are *minimally* adequate for amphibians.” 3-App-081 (emphasis added).⁹

⁸ Per 10th Cir. R. 28.1(A), WWP raised this claim in its opening and reply briefs before the district court. ECF No. 133, pp. 24–25, 26–29; ECF No. 145, p. 9. The district court dismissed this claim in its Opinion and Order. 1-App-148–49.

⁹ The Forest Service’s “Sensitive Species Quantifiable Objectives” and Conservation Assessment for sensitive amphibians also call for 70–100% herbaceous retention to meet the species’ habitat needs. 6-App-103; 9-App-196.

According to an analysis by a second Forest Service biologist, “[t]he minimum of 70% retention of total herbaceous retention was the *lowest* retention level at which at least a moderate amount of information indicates the needs of both [boreal toads and Columbia spotted frogs] would still be met.” 8-App-107–08. Based on an in-depth review of relevant scientific literature, the agency biologist also found that “[t]here is moderate evidence that $\geq 70\%$ retention of herbaceous vegetation in and around breeding wetlands, summering wetlands, and in other summering and migration habitat . . . is sufficient to support the attainment of Objective 4.7(d) with respect to spotted frogs and boreal toads,” but little evidence that any lower level would do the same. 10-App-015–18. Thus, in order to meet Objective 4.7(d) and comply with the Forage Utilization Standard, the Forest Service’s own biologist determined that 70–100% of herbaceous vegetation must be retained. 10-App-215.

Additionally, an outside expert from the University of Wyoming’s Wyoming Natural Diversity Database agreed that 70% “likely is the *minimum* amount of retention that would be needed to maintain habitat for these species.” 8-App-184 (emphasis added). The same expert emphasized that “the evidence presented actually indicates that 70% retention likely is *barely adequate* to retain suitable moisture levels for these species and a higher retention rate is more scientifically justifiable as a means to maintain habitat for these species.” *Id.* (emphasis added).

In contrast to this minimum retention need, the 50% utilization level allowed under Alternative 3 would retain just 54% of herbaceous vegetation, according to the amphibian report and FEIS. 3-App-146; 12-App-240–41. The report thus found that “desired conditions for amphibian populations and habitats [under Alternative 3] would typically *not* be met under maximum allowable use of key forage because *cover and cover benefits would not be adequate . . .*” 3-App-146 (emphasis added). And despite purportedly moderating factors, the report still determined that Alternative 3 would have “[n]egative effects on amphibians from *inadequate* cover and cover benefits” that are “likely to reduce amphibian breeding habitat and contribute negatively to their population trend at the forest scale.” 3-App-147, 178–79 (emphasis added).

The Forest Service conceded in both the amphibian report and FEIS that the cover and cover benefits provided for amphibians under Alternative 3 are “inadequate.” 12-App-255; 3-App-146, 149. Herbaceous cover would be even less under the utilization levels allowed by Alternative 2. 12-App-240–41; 3-App-133, 138. Meanwhile, Alternative 4 is the only action alternative considered by the agency that would “meet[] or nearly meet[]” the herbaceous retention needs of amphibians and close the gap between existing and desired conditions. 12-App-240–41; 3-App-178.

The overwhelming weight of evidence before the Forest Service shows that retention of herbaceous vegetation under Alternatives 2 and 3 will not provide adequate cover for sensitive amphibians. The Forest Service’s selected alternative—Alternative 3 with elements of Alternative 2—thus does not meet Objective 4.7(d). In turn, the selected alternative does not comply with the Forage Utilization Standard’s requirement to prescribe site-specific utilization levels that meet Plan objectives. The Forest Service’s determination that the selected alternative is consistent with the Bridger-Teton Plan runs directly counter to the evidence before it. As a result, the UGRA Project ROD and grazing authorizations are arbitrary and capricious in violation of NFMA, and must be set aside. *See* 16 U.S.C. § 1604(i).

2. The UGRA Project ROD and Grazing Authorizations Do Not Provide Suitable and Adequate Amounts of Forage and Cover for Migratory Birds.¹⁰

The Forest Service’s migratory bird report for the UGRA Project directly addressed the alternatives’ compliance with the Forage Utilization Standard and Objective 4.7(d). 9-App-144, 151–52, 156. According to the report, “≥70% of herbaceous vegetation would need to be retained on a large majority of each major type of [migratory bird] habitat . . . to meet the ‘adequate amount’ part of Objective 4.7(d) and to meet migratory bird requirements.” 9-App-076. The report stated that

¹⁰ Per 10th Cir. R. 28.1(A), WWP raised this claim in its opening brief before the district court. ECF No. 133, pp. 24–25, 29–30. The district court dismissed this claim in its Opinion and Order. 1-App-148–49.

Alternative 2 “is the furthest of any alternative from meeting the stated requirements of the Forage Utilization Standard.” 9-App-144. Alternative 2’s maximum 60–65% utilization levels “would not retain an adequate amount of suitable forage and cover for migratory birds and, therefore, would not meet Forest Plan Objective 4.7(d).” *Id.*

As to Alternative 3, the migratory bird report noted it “was not designed or adjusted to meet Objective 4.7(d),” and that “there is only low to moderate scientific support for the assessment that a maximum utilization limit of 50% of key forage species (50–70% herbaceous retention) will retain an adequate amount of suitable forage and cover for migratory birds” 9-App-151. In contrast, the report found “a moderate [] to *large* [] amount of scientific information showing that a maximum 50% use of key forage species is *insufficient* to retain” cover for migratory birds. *Id.* (emphasis added). Based on this evidence, the Forest Service conceded in the FEIS that “the key forage utilization limit of 50% in Alternative 3 is *not expected to maintain suitable nesting cover*” for birds. 13-App-035 (emphasis added).

The record shows that the selected alternative—Alternative 3 with elements of Alternative 2—does not meet Objective 4.7(d) because it fails to require the retention of suitable and adequate amounts of cover for migratory birds. As such, the selected alternative does not comply with the Forage Utilization Standard’s requirement that site-specific utilization levels meet Plan objectives. The Forest Service’s determination that the selected alternative is consistent with the Bridger-

Teton Plan thus runs directly counter to the agency’s own conclusions in the migratory bird report and FEIS. The UGRA Project ROD and grazing authorizations are therefore arbitrary and capricious in violation of NFMA, and they must be set aside. *See* 16 U.S.C. § 1604(i).

III. The District Court Wrongly Affirmed FWS’s Arbitrary and Capricious 2019 BiOp and ITS for the UGRA Project.

The district court wrongly affirmed the 2019 BiOp and ITS. A court must set aside a biological opinion that fails to consider all relevant factors and important aspects of the problem, or is otherwise arbitrary, capricious, or not in accordance with the law. 5 U.S.C. § 706(2)(A); *see also Helena Hunters & Anglers Ass’n v. Marten*, 470 F. Supp. 3d 1151, 1178–79 & 1181 (D. Mont. 2020); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 698 F.3d 1101, 1124 (9th Cir. 2012); *Rocky Mountain Wild v. Dallas*, No. 15-CV-1342-RPM, 2017 WL 6350384, at *18 (D. Colo. May 19, 2017). In reviewing biological opinions, courts “rely only ‘on what the agency *actually said*’ in the BiOp to determine whether the agency considered the appropriate factors,” not “unstated assumptions” or “implicit[]” conclusions. *Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1091 (9th Cir. 2005) (emphasis in original) (citations omitted).

In the case at hand, FWS’s 2019 BiOp and ITS not only failed to apply the best available science to its authorization of 72 lethal grizzly bear removals, but the agency also failed to consider several relevant factors and important aspects of the

problem before it. The BiOp and ITS are thus arbitrary and capricious, in violation of the ESA. *See* 16 U.S.C. § 1536(a)(2).

A. FWS Failed to Apply the Best Available Science and Specify the Impact of 72 Lethal Removals on the Most Important Grizzly Bear Demographic, Females.¹¹

FWS recognizes 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* [].” 2-App-167 (emphasis added). Further, “[s]urvival of adult female grizzly bears in the [GYE] is the most important factor influencing population trend” 12-App-181 (citations omitted). Any female mortality thus has a greater impact on population stability than male mortalities.

Despite female grizzly bears’ importance, neither the 2019 BiOp nor the accompanying ITS evaluate the effect that any female proportion of the authorized 72 lethal removals might have on the GYE population. Further, unlike the 1999, 2013, and 2014 BiOps—which each included sex-based limits or reporting requirements for females—the 2019 BiOp and ITS do not impose any such limits or otherwise take lethal removal of females into account. 2-App-116; 2-App-184, 194–97.

¹¹ Per 10th Cir. R. 28.1(A), WWP raised this claim in its opening and reply briefs before the district court. ECF No. 133, pp. 14–16; ECF No. 145, pp. 1–3. The district court dismissed this claim in its Opinion and Order. 1-App-133–37.

Although the best available science shows that “providing maximum protection for females is essential to [the species’] recovery,” FWS failed to apply this science within its 2019 BiOp and ITS for the UGRA Project, in violation of the ESA’s mandate. *See* 16 U.S.C. § 1536(a)(2). Furthermore, without any sex-based mortality limits or reporting requirements within the UGRA Project allotments, FWS has not specified the impact of 72 lethal removals on the most important grizzly bear demographic—females—contrary to past practice and its ESA obligations. *See* 16 U.S.C. § 1536(b)(4)(C)(i).

In its opinion below, the Wyoming District Court conceded that FWS should have considered and evaluated a scenario in which all 72 grizzly bears lethally removed are female. 1-App-136. But the district court then erred by wrongly elevating petitioners’ burden to show arbitrary and capricious action by FWS. 1-App-136–37. According to the lower court, petitioners bear a burden of showing “clear error,” but under Supreme Court and Tenth Circuit precedent, that is just one of several manners in which arbitrary and capricious action may be shown. *Id.*; *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Richardson*, 565 F.3d at 704. Petitioners may also show arbitrary and capricious action under the APA by demonstrating that an agency failed to consider relevant factors or important aspects of the problem before it, or otherwise did not

act in accordance with the law, as WWP has done here. *Richardson*, 565 F.3d at 704; 5 U.S.C. § 706(2)(A).

The district court also erred by presuming population-wide mortality thresholds will sufficiently protect female grizzlies. *See* 1-App-136. Substantial evidence does not support a conclusion that the addition of 72 lethal removals will not potentially cause mortality limits to be exceeded.¹² *See* 2-App-192 (FWS assertion that authorized UGRA Project incidental take “falls within the scope of the demographic recovery criterion . . . by maintaining annual mortality limits”). In fact, the 2019 BiOp acknowledges that female mortality came close to exceeding the annual threshold in 2017 when many fewer lethal removals were authorized in the project area. *See* 2-App-167; *see also Olenhouse*, 42 F.3d at 1581 (“Mere conclusions” do not constitute substantial evidence on which an agency’s decision may be based).

By failing to consider and specify the impact of 72 lethal removals on female grizzly bears, FWS failed to consider all relevant factors and important aspects of the problem before it. Further, by failing to apply the best available science that shows a need to maximize female grizzly bear survival, FWS failed to act in

¹² Ignoring a relevant factor, FWS never considered take expected beyond the UGRA Project area that will contribute to annual mortality across the GYE, only past take within the allotments. *See* 2-App-184; *see also infra* Argument Section III.C.

accordance with the ESA. 16 U.S.C. § 1536(a)(2). Thus, the 2019 BiOp and ITS are arbitrary and capricious in violation of the ESA, and must be set aside.

B. FWS Failed to Consider the UGRA Project’s Contribution to the Existing Mortality Sink for Female Grizzly Bears in the Allotments.¹³

FWS’s failure to consider the effect of lethal removals on the female grizzly bear demographic is compounded by its failure to account for the allotments’ “existing mortality sink”—where female mortality exceeds or nearly exceeds survival—despite the Forest Service flagging the UGRA Project’s expected contribution to the sink. *See* 12-App-183, 190; 3-App-023. Where the Forest Service has “raise[d] concern that a certain aspect of a project has potential to harm an ESA-protected species, the biological opinion must address that factor; its failure to do so violates the ESA and the APA.” *Helena Hunters*, 470 F. Supp. 3d at 1178–79.

In *Helena Hunters v. Marten*, the Montana District Court determined that a biological opinion did not discuss the effect of a project’s addition of new trails in grizzly bear secure areas, despite the Forest Service flagging that such trails would adversely affect grizzly bears. 470 F. Supp. 3d at 1179. Because FWS ignored a relevant concern that the Forest Service had identified, the *Helena Hunters* court

¹³ Per 10th Cir. R. 28.1(A), WWP raised this claim in its opening and reply briefs before the district court. ECF No. 133, pp. 16–17; ECF No. 145, pp. 3–5. The district court dismissed this claim in its Opinion and Order. 1-App-137–39.

ruled that the biological opinion violated the ESA and the APA because it failed to analyze the effect of the entire agency action.

Here, the facts are directly analogous. In the UGRA Project FEIS and wildlife report, the Forest Service recognized that lethal grizzly bear removals associated with continued livestock grazing would contribute to the allotments' existing mortality sink for female grizzly bears. 3-App-023, 102; 12-App-181–82, 190, 193; *see also* 2-App-240 (sink habitat explanation). The Forest Service noted that lethal “removals were the most important effect of the grazing alternatives on grizzly bears” in the project area, and that “[s]urvival of adult female grizzly bears in the Greater Yellowstone Area is the most important factor influencing population trend.” 3-App-023, 039; 12-App-181. Despite this, the 2019 BiOp did not even acknowledge the existence of a mortality sink for female grizzly bears in the project area, let alone analyze the compounding effect of a significant increase in authorized lethal removals.

The district court erred by dismissing the applicability of *Helena Hunters* to the facts of the case at hand. Contrary to the district court's assertion, *Helena Hunters* did not turn on the fact that trails would be built in secure grizzly bear habitat, but on the fact that FWS ignored a relevant concern that the Forest Service had flagged. 1-App-138–39; *Helena Hunters*, 470 F. Supp. 3d at 1178–79. Similarly, here, the Forest Service flagged a concern about the UGRA Project's potential harm

to grizzly bears, and FWS ignored it. Just as trail-building in secure habitat would impact grizzly bear survival in *Helena Hunters*, lethal removals of females in the UGRA Project allotments will contribute to an existing mortality sink, also impacting grizzly bear survival and population trend. *See* 2-App-167 (minimizing female mortality key to long-term survival of grizzly bear).

FWS failed to evaluate the “current status” of grizzly bears in the project area when it ignored the existing mortality sink in its 2019 BiOp for the UGRA Project. 50 C.F.R. § 402.14(g)(2). FWS also failed to offer any evaluation or discussion of the project’s expected contribution to the sink, and failed to specify the impact of authorized incidental take, contrary to its ESA obligations. *See* 50 C.F.R. §§ 402.14(g)(3), (h)(2), & (i)(1)(i); 16 U.S.C. § 1536(b)(4)(C)(i). Without such consideration, FWS has not “analyzed the effect of the *entire* agency action” in detail—including “all the possible ramifications”—as the ESA requires. *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988) (emphasis in original) (citations omitted); *see also* 16 U.S.C. § 1536(b)(3)(A). For these reasons, the 2019 BiOp and ITS are arbitrary and capricious in violation of the ESA, and they must be set aside. *See* 16 U.S.C. § 1536(a)(2).

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C. FWS Failed to Consider Take Anticipated Elsewhere in the GYE, Despite Its Relevance to Population-Wide Metrics.¹⁴

The ESA requires FWS to specify the impacts of any exempted incidental take. 16 U.S.C. § 1536(b)(4)(C)(i); 50 C.F.R. § 402.14(i)(1)(i). Such impacts “cannot be determined or analyzed in a vacuum” by ignoring other take that is relevant to FWS’s analysis. *Mayo v. Jarvis*, 177 F. Supp. 3d 91, 137 (D.D.C. 2016) (quoting *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 127 (D.D.C. 2001)). In *Mayo v. Jarvis* the D.C. District Court recognized that when FWS has “chosen to rely on region-wide population levels and sustainable mortality limits to support its ‘no-jeopardy’” opinion, “it may be necessary for [FWS] to further explain whether the authorized incidental take” outside the action area “affects the GYE-wide mortality limits on which the agency has relied.” *Mayo*, 177 F. Supp. 3d at 141 n.41.

In the case at hand, the limited or non-existent growth of the GYE grizzly bear population highlights the relevance of take anticipated beyond the UGRA Project allotments to FWS’s analysis in the 2019 BiOp. FWS estimates the current GYE grizzly bear population to be 718 individuals. 2-App-192. If annual population growth is zero percent—as FWS acknowledges it may be—the lethal removal of 72 grizzlies could reduce the GYE population to just 646. *See id.* That leaves room for

¹⁴ Per 10th Cir. R. 28.1(A), WWP raised this claim in its opening and reply briefs before the district court. ECF No. 133, pp. 17–19; ECF No. 145, pp. 5–6. The district court dismissed this claim in its Opinion and Order. 1-App-139–40.

just 34 other mortalities across the entire GYE before reaching the low-end population threshold of 612 set by the Inter-Agency Grizzly Bear Study Team in the Demographic Recovery Criteria relied upon by FWS in the 2019 BiOp. 2-App-245; 2-App-192. Consideration of take anticipated elsewhere in the GYE is thus highly relevant to the likelihood that 72 lethal removals from the UGRA Project allotments could contribute to this low-end population threshold being crossed.

Furthermore, GYE-wide annual mortality thresholds have been exceeded multiple times since 2000 during which time FWS had limited incidental take to a much lower level on the UGRA Project allotments.¹⁵ 2-App-167–68, 184; 2-App-094. In light of this data in the record, FWS should have considered the potential for annual mortality thresholds to be exceeded by 72 lethal removals within the UGRA Project area combined with take anticipated outside the allotments. *See* 16 U.S.C. § 1536(a)(2) & (b)(4)(B)–(C)(i).

The Wyoming District Court erred by dismissing the applicability of the D.C. District Court’s *Mayo v. Jarvis* decision to the case at hand despite the relevance of take anticipated throughout the GYE to population-wide mortalities. 1-App-140. Focusing only on the “environmental baseline” analysis reviewed in *Mayo*, the

¹⁵ In the 2019 ITS, FWS authorized over twice the number of lethal removals over ten years than had occurred on the allotments in the previous *twenty* years. 2-App-184, 194.

district court deemed the comparable “section of the [2019] BiOp” to be “robust and comprehensive.” 1-App-140. Yet the breadth of the *Mayo* court’s opinion did not solely turn on the adequacy of FWS’s environmental baseline analysis.¹⁶ Rather, the *Mayo* court also recognized that “previously anticipated and exempted” take of grizzly bears elsewhere in the GYE—*i.e.*, take expected beyond the environmental baseline of the action area itself—is a relevant factor FWS should also discuss in a BiOp when it relies on population-wide metrics. *Mayo*, 177 F. Supp. 3d at 141 n.41; *see also* 50 C.F.R. § 402.14(g)(1) (FWS must “[r]eview all relevant information” during formal consultation).

The district court ignored this key aspect of the *Mayo* decision and wrongly pointed to the 2019 BiOp’s retrospective look at “all known and probable grizzly bear mortalities in the GYE from 1997–2017” and “the 35 grizzly removals within the UGRA allotment from 2010 to 2018”—*i.e.* past take—to brush aside *Mayo*’s direct application to the facts at hand. 1-App-138–39. Here, just as in *Mayo*, FWS ignored future incidental take outside the action area expected during the 2019 BiOp’s ten-year timeframe, all the while relying on region-wide population levels and mortality thresholds to support its “no jeopardy” conclusion. 2-App-184, 194.

¹⁶ ESA regulations define “environmental baseline” as “the condition of the listed species . . . in the action area, without the consequences . . . caused by the proposed action.” 50 C.F.R. § 402.02; *see also id.* § 402.14(g)(3).

By relying on GYE-wide population metrics but ignoring take expected throughout the GYE grizzly bear population, FWS did not consider all relevant information, evaluate all the effects of the action in detail, or specify the impact of 72 lethal removals on the species as the ESA requires. 16 U.S.C. §§ 1536(a)–(b); 50 C.F.R. §§ 402.14(g)(1), (g)(3), (h)(2), & (i)(1)(i). FWS’s 2019 BiOp and ITS and “no jeopardy” conclusion are arbitrary and capricious in violation of the ESA, and must be set aside. 16 U.S.C. § 1536(a)(2).

IV. The District Court Wrongly Affirmed the 2019 BiOp Despite FWS’s Improper Reliance on Insufficient Conservation Measures.

If FWS relies on conservation measures to support a “no jeopardy” conclusion, such “measures must be reasonably specific, certain to occur, and capable of implementation” *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002) (citing *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987) (abrogated on other grounds)). In addition, such measures “must be subject to deadlines or otherwise-enforceable obligations” *Id.* In sum, to support a “no jeopardy” conclusion, conservation measures “must address the threats to the [listed] species in a way that satisfies the jeopardy [] standard[.]” *Id.* Ineffective measures cannot support a “no jeopardy” opinion.” *See id.*

In the case at hand, the Wyoming District Court wrongly dismissed WWP’s claim that FWS improperly relied on the Forest Service’s “commitment to implement their Conservation Measures” set forth in the UGRA Project FEIS. 2-

App-192; 12-App-011–12. The Forest Service’s conservation measures lack the specificity and certainty needed to address the UGRA Project’s threats to grizzly bears in a manner that satisfies the ESA’s jeopardy standard. In addition, the same measures have previously proven ineffective at reducing the number of grizzly bear lethal removals in response to livestock conflicts on the UGRA Project allotments, yet FWS failed to consider the measures’ potential inadequacy in the 2019 BiOp. *See* 2-App-175, 189 (noting sharp annual increase in conflicts).

A. The District Court Erred by Prematurely Dismissing the *Rumsfeld* Decision’s Application to the Facts at Hand.

The Wyoming District Court erred when it deemed the *Rumsfeld* decision unpersuasive based on the court’s own assertion that the Forest Service’s conservation measures “were not specifically designed to avoid a jeopardy finding,” and thus do not “equate to the mitigation measures in *Rumsfeld*” 1-App-141–42 (emphasis in original). The district court focused narrowly on a single paragraph at the end of the 2019 BiOp that does not expressly identify the Conservation Measures as a consideration in FWS’s “no jeopardy” conclusion and wrongly assumed that FWS “conclude[d] that, with or without the Conservation Measures, the project as a whole will not jeopardize GYE grizzlies.” 1-App-142–43.

Yet to the contrary, FWS and the Forest Service identified the measures as “necessary to minimize potential adverse effects to grizzly bears” and to meet the Forest Service’s ESA Section 7 obligations. 2-App-080. Similar or identical

measures have been included in all previous BiOps for the UGRA Project allotments since 1999. 1-App-159–61; 1-App-241; 2-App-007–09; 2-App-080–83; 12-App-193. FWS’s “no jeopardy” conclusion in the 2019 BiOp is expressly predicated on the Forest Service’s “commitment to implement their Conservation Measures.” 2-App-192. And the measures are, in fact, integrated into the UGRA Project and inseparable from the action evaluated by FWS. 1-App-140; 2-App-192; 11-App-270; 12-App-011–12, 154; *see also Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 747 (9th Cir. 2020) (a “BiOp that integrates mitigation measures into its decision making is more likely to have relied upon those measures.”).

Thus, scrutiny of the Forest Service’s conservation measures under the standards outlined by the *Rumsfeld* court is appropriate. Other courts, including within the Tenth Circuit, have applied the *Rumsfeld* factors and set BiOps aside where such relied-upon measures do not meet the ESA’s jeopardy standard. *See Rocky Mountain Wild*, 2017 WL 6350384 at *15–17; *see also AquAlliance v. U.S. Bureau of Reclamation*, 287 F. Supp. 3d 969, 1071–74 (E.D. Cal. 2018). The district court here erred by prematurely deeming the *Rumsfeld* decision unpersuasive. *See* 1-App-142.

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B. FWS Improperly Relied on the UGRA Project’s Conservation Measures to Support Its “No Jeopardy” Conclusion.¹⁷

According to FWS, the purpose of the conservation measures is “to limit grizzly bear consumption of livestock carcasses” and to “minimize contact between bears and livestock carcasses . . . to reduce the likelihood of conflict.” 2-App-187. FWS acknowledges that “livestock carrion associated with livestock management[] could have detrimental effects to the grizzly bear[.]” 2-App-185. Yet the most substantive of the purported conservation measures, Conservation Measure 4, actually increases the likelihood of grizzly bears coming into contact with livestock carcasses.

Conservation Measure 4 directs the removal of carcasses “if possible,” or otherwise to be moved 0.25–0.5 mile away from infrastructure, including roads. 2-App-153. But bears prefer habitat away from roads. *See* 2-App-160. Moving livestock carcasses away from roads moves the food source deeper into grizzlies’ preferred habitat, thereby increasing the likelihood that grizzlies will encounter and consume livestock carcasses and be killed when subsequent conflicts inevitably arise. *See* 2-App-186–87. Conservation Measure 4 thus does not “offset the

¹⁷ Per 10th Cir. R. 28.1(A), WWP raised this claim in its opening and reply briefs before the district court. ECF No. 133, pp. 19–22; ECF No. 145, p. 6–9. The district court dismissed this claim in its Opinion and Order. 1-App-140–43.

environmental damage caused by the [UGRA] project,” but perpetuates and potentially increases it. 2-App-153, 160, 185–86; *see Bernhardt*, 982 F.3d at 743.

The carcass removal requirement is also riddled with exceptions that swallow the rules laid out in Conservation Measure 4. Under Conservation Measure 5, removal likely will not occur when carcasses are “located in hazardous terrain such that attempting to move or remove may not be possible or unsafe,” as determined by the Forest Service in its discretion. 2-App-153. Yet as FWS concedes, the project allotments are in notably vast, remote, and rough terrain, making it difficult to find and remove carcasses. 2-App-186. With such loopholes, carcass removal is unlikely to occur to an extent that will minimize (or even substantially reduce) the threat to grizzly bears posed by the UGRA Project.

The other conservation measures similarly lack specificity, certainty, and assurances of implementation. Conservation Measure 1 says “Bear Sanitation Guidelines will be followed,” and under Conservation Measure 2, “[r]iders are required to watch all livestock closely” 2-App-153. Conservation Measure 3, meanwhile, says the Forest Service “will monitor allotments on a regular basis.” *Id.* Conservation Measure 6 merely says the Forest Service “will recommend that all permittees and their representatives [] carry bear spray while working in the allotments.” 2-App-154. But the Forest Service has conceded that this measure is “discretionary, and thus, compliance is unknown.” 2-App-279. Conservation

Measures 7–9 do not require any substantive action whatsoever, only aspirations of cooperation, direction to attend meetings, and to keep *trying* to “reduce the potential for grizzly bear conflicts.” 2-App-154; *see also Bernhardt*, 982 F.3d at 743 (“Binding mitigation measures cannot refer only to generalized contingencies or gesture at hopeful plans”).

FWS has not shown that these measures are enforceable and “certain to occur” in a manner that addresses the UGRA Project’s threat to grizzly bears under the ESA’s jeopardy standard. *See Rumsfeld*, 198 F. Supp. 2d at 1152. None of the conservation measures identify mechanisms that assure implementation, and some by their very language are mere recommendations. Measures such as these that are too vague to enforce “cannot be properly relied upon” to support a BiOp. *Bernhardt*, 982 F.3d at 744. FWS thus improperly relied on the Forest Service’s purported commitment to implement these conservation measures in reaching its “no jeopardy” conclusion in the 2019 BiOp. As a result, the 2019 BiOp is arbitrary and capricious in violation of the ESA, and must be set aside. *See* 16 U.S.C. § 1536(a)(2).

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C. FWS Did Not Consider the Conservation Measures’ Effectiveness, Despite Their Past Failure to Minimize the Threat to Grizzly Bears.¹⁸

Before the district court, WWP also asserted that the 2019 BiOp is arbitrary and capricious because FWS failed to evaluate the measures’ effectiveness at addressing the UGRA Project’s threat to grizzly bears, and thus did not address an important aspect of the problem. *See* WWP Opening Br., ECF No. 133, p. 21. In the 20 years that similar or identical measures have been in place for the UGRA Project allotments, grizzly bear lethal removals have vastly outpaced population growth, indicating that the existing measures do not effectively minimize livestock conflicts in a manner that satisfies the ESA’s jeopardy standard. *See* 1-App-159–61; 1-App-241–42; 2-App-007–09; 2-App-080–83; 2-App-175, 189 (2019 BiOp noting annual increase in conflicts); *see Rumsfeld*, 198 F. Supp. 2d at 1152. Despite this history, FWS undertook no analysis of the measures’ adequacy. The district court erred by wholly ignoring this argument by WWP. *See* 1-App-140–43.

In *Save Our Cabinets v. U.S. Forest Service*, the Montana District Court addressed a parallel situation where plaintiffs asserted “that the mitigation measures proposed under [a p]roject are the same as those already implemented in the ecosystem that have not reduced the number of human-caused mortalities” of grizzly

¹⁸ Per 10th Cir. R. 28.1(A), WWP raised this claim in its opening and reply briefs before the district court. ECF No. 133, pp. 21–22; ECF No. 145, pp. 8–9. The district court dismissed this claim in its Opinion and Order. 1-App-140–43.

bears. 255 F. Supp. 3d 1035, 1063 (D. Mont. 2017). The Montana District Court held that by failing to “consider[] the potential inadequacy of the[] proposed measures, [FWS] failed to consider an important aspect of the problem,” resulting in an arbitrary BiOp. *Id.*

Here, as in *Save Our Cabinets*, data presented by FWS indicate that the conservation measures incorporated into the UGRA Project have not proven to effectively reduce grizzly bear deaths on the allotments. *See* 2-App-175, 189. The Forest Service presumed that the UGRA Project would result in “grizzly bear losses stemming from cattle depredation . . . at a similar rate [] despite the application of the current Forest Service conservation measures,” but the annual numbers of livestock conflicts and lethal removals have in fact increased sharply in the project area despite the agencies’ reliance on similar if not identical measures in past BiOps. *Id.*

Yet nowhere in the 2019 BiOp did FWS assess whether the measures have actually minimized conflicts between grizzly bears and livestock as intended, nor did FWS consider the measures’ potential inadequacy in the face of increased grizzly bear density within the allotments. *See* 2-App-175 (FWS assertion that increase in conflicts likely due to increase in bear density in project area); *see also* 2-App-188 (lethal removals expected to increase as grizzly bear density increases). FWS assumed that “[t]he risk of cattle/bear conflicts is minimized by implementation of

[the] conservation measures,” but failed to support this assumption with any analysis. *See* 2-App-187. “Mere conclusions” do not constitute substantial evidence on which an agency’s decision may be based. *Olenhouse*, 42 F.3d. at 1581; *see also Pac. Coast Fed’n of Fishermen’s Ass’ns*, 426 F.3d at 1091 (courts “cannot infer an agency’s reasoning from mere silence”) (citation omitted).

Without any scrutiny in the 2019 BiOp of the measures’ effectiveness to address threats to grizzly bears posed by the UGRA Project, FWS ignored an important an important aspect of the problem before it. FWS’s uncritical reliance on the Forest Service’s conservation measures to support a “no jeopardy” conclusion thus violates the ESA, and the 2019 BiOp must be set aside as arbitrary and capricious. *See* 16 U.S.C. § 1536(a)(2).

V. The Forest Service Unlawfully Relied on the Flawed 2019 BiOp to Satisfy Its ESA Obligations.¹⁹

The ESA requires each agency to independently ensure its actions will not jeopardize listed species. 16 U.S.C. § 1536(a)(2). “Consulting with FWS alone does not satisfy an agency’s duty under the [ESA].” *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1993) (citation omitted). The Forest Service “cannot ‘abrogate its responsibility to ensure that its actions will not jeopardize a listed

¹⁹ Per 10th Cir. R. 28.1(A), WWP raised this claim in its opening and reply briefs before the district court. ECF No. 133, p. 22; ECF No. 145, p. 9. The district court dismissed this claim in its Opinion and Order. 1-App-144.

species[.]” *Resources Ltd.*, 35 F.3d at 1304. An agency thus violates the ESA if it arbitrarily relies on a faulty BiOp produced by FWS. *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010) (citation omitted).

Here, evidence before both the Forest Service and FWS shows that the conservation measures intended to minimize conflicts between grizzly bears and livestock have failed to reduce grizzly bear deaths on the UGRA Project allotments. *See* 2-App-175, 187, 189. Further, FWS’s 2019 BiOp wholly ignored an important aspect of the problem that the Forest Service itself recognized in its own analysis: the UGRA Project’s expected contribution to the mortality sink for female grizzly bears existing on nearly all the allotments. 12-App-182, 190. Despite this “information [FWS] did not take into account” but that “challenges the [2019 BiOp’s] conclusions,” the Forest Service arbitrarily relied on the BiOp and conservation measures to justify its authorization of grazing on the UGRA Project allotments, in violation of its ESA obligations. *See Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990); 16 U.S.C. § 1536(a)(2); 4-App-163. As such, the UGRA Project ROD and associated grazing authorizations must be set aside.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court’s decision affirming the Forest Service’s UGRA Project ROD and associated grazing

authorizations, FWS's 2019 BiOp and ITS, and the Forest Service's reliance on that BiOp to satisfy its own ESA obligations. Instead, the Court should hold unlawful and set aside the challenged agency actions, and remand for Federal Respondents-Appellees to cure their statutory violations.

Respectfully submitted this 15th day of September, 2022.

/s/ John Persell

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STATEMENT OF RELATED CASES

This appeal has been consolidated by this Court with appeal No. 22-8043, *Center for Biological Diversity and Sierra Club v. Haaland et al.* Appeal No. 22-8043 raises similar issues to the present appeal regarding the 2019 BiOp and ITS prepared by FWS regarding the UGRA Project's effect on threatened grizzly bears, and the Forest Service's reliance on that BiOp to satisfy its own ESA obligations.

STATEMENT REGARDING ORAL ARGUMENT

Petitioners-Appellants Western Watersheds Project, Alliance for the Wild Rockies, and Yellowstone to Uintas Connection respectfully request the opportunity to present oral argument before this Court. This appeal involves claims under multiple statutes, a large administrative record, complex facts, and important issues about the management of federal public lands and wildlife. Therefore, the Court will be aided by oral argument.

CERTIFICATE OF COMPLIANCE

I hereby certify to the following:

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b), it contains 12,991 words. I relied on my word processor to obtain this word count.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately-spaced typeface—Times New Roman, 14-point font size—using Microsoft Word 2016 in plain, roman style.

Dated: September 15, 2022

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify to the following:

1. All required privacy redactions have been made per 10th Cir. R. 25.5.
2. This digital submission is an exact copy of the hard copies to be delivered to the Court within five business days of the Court issuing notice that the electronic version of Petitioners-Appellants' opening brief is compliant.
3. This digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program—Microsoft Defender, Version 4.18.2207.7, last updated September 15, 2022—and according to the program is free of viruses.

Dated: September 15, 2022

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CERTIFICATE OF SERVICE

I, John Persell, hereby certify that on September 15, 2022, I electronically filed the foregoing Opening Brief through the Court's CM/ECF system, which caused all counsel of record to be served by electronic means.

Dated: September 15, 2022

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