Nos. 18-36030, 18-36038, 18-36042, 18-36050,
18-36077, 18-36078, 19-36079, 18-36080

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CROW INDIAN TRIBE, et al.,
Plaintiffs – Appellees,

v.

UNITED STATES OF AMERICA, et al.,
Defendants – Appellants,

and

STATE OF WYOMING, et al.,
Intervenor-Defendants – Appellants.

On Appeal from the United States District Court
for the District of Montana, Nos. 9:17-cv-00089, 9:17-cv-00117,
9:17-cv-00118, 9:17-cv-00119, 9:17-cv-00123, 9:18-cv-00016
Honorable Dana L. Christensen, Chief District Judge

BRIEF OF AMICI CURIAE PACIFIC LEGAL FOUNDATION AND THE PROPERTY AND ENVIRONMENT RESEARCH CENTER IN SUPPORT OF DEFENDANTS – APPELLANTS/REVERSAL

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation is a nonprofit corporation organized under the laws of California that has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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Pacific Legal Foundation (PLF) and the Property and Environment Research Center (PERC) respectfully submit this amicus brief in support of the Defendants – Appellants the United States, et al., the states of Montana, Wyoming, and Idaho, Safari Club International, and National Rifle Association.

Statement of Interest of Amici

Founded in 1973, Pacific Legal Foundation (PLF) is a nonprofit legal foundation that protects private property rights and related liberties in courts throughout the country. In pursuing this mission, PLF and its attorneys have litigated many significant cases concerning the interaction of the Endangered Species Act, property rights, and federalism, including cases before this Court.[1] They have regularly appeared as witnesses in congressional hearings to share their expertise with policymakers.[2] And they have generated substantial

[1] *See, e.g.*, *WildEarth Guardians v. U.S. Dep't of Justice*, No. 17-16677 (9th Cir. decided Oct. 23, 2018) (mem.); *California Sea Urchin Comm'n v. Bean*, No. 15-56672 (9th Cir. decided Mar. 1, 2018).

[2] *See, e.g.*, *Tribal Heritage and Grizzly Bear Protection Act: Hearing on H.R. 2532 Before the House Natural Resources Committee, Subcommittee on Water, Oceans, and Wildlife*, 116th Cong. (2019) (statement of Jonathan Wood, Senior Attorney, Pacific Legal Foundation, Research Fellow, Property and Environment Research

scholarship on how the Endangered Species Act can encourage or discourage conservation, based on how it is implemented.[3]

PERC is the nation's oldest and largest institute dedicated to improving environmental quality through property rights and markets. It has produced extensive scholarship on the environmental benefits of clear and secure property rights.[4] PERC has also participated as amicus

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Center), *available at* https://naturalresources.house.gov/hearings/wow-legislative-hearing3.

[3] *See, e.g.*, Jonathan Wood, *Take It to the Limit: The Illegal Regulation Prohibiting the Take of Any Threatened Species Under the Endangered Species Act*, 33 Pace Envtl. L. Rev. 23 (2015); Damien M. Schiff, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence*, 37 Environs Envtl. L. & Pol'y J. 105 (2014).

[4] *See* Jonathan Wood, *The Road to Recovery*, PERC Policy Rep. (2018), *available at* https://www.perc.org/wp-content/uploads/2018/04/endangered-species-road-to-recovery.pdf; Steve J. Miller & Robert T. Deacon, *Mobilizing Markets to Reduce Bycatch in Marine Fisheries*, PERC Policy Rep. (2017), *available at* https://www.perc.org/wp-content/uploads/old/pdfs/Mobilizing%20Markets%20to%20Reduce%20Bycatch%20PDF.pdf; Hank Fischer, *Who Pays for Wolves?*, PERC Reports vol. 19 (2001), *available at* https://www.perc.org/2001/12/01/who-pays-for-wolves/.

in cases that involve property rights, individual liberty, and environmental stewardship.[5]

This case is of keen interest to PLF and PERC as it could significantly affect not only the continued conservation of the Greater Yellowstone Ecosystem grizzly but also the recovery and conservation of other imperiled species. As their brief explains, the district court's decision would alter the process for listing and delisting species under the Endangered Species Act in ways harmful to both property owners and species. Thus, PLF and PERC's unique public policy perspective will be useful to the Court as it considers this case.

Argument

The Eagles' song "Hotel California" is oft cited in Endangered Species Act debates. It seems that, even when species recover, they "can never leave" the endangered species list.

The Greater Yellowstone Ecosystem grizzly is a prime example. This population has experienced an impressive recovery, growing from a mere 136 animals in 1975 to nearly 700 today, likely the region's

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[5] *See, e.g.*, *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014); *Public Lands Access Ass'n v. Bd. of Cty. Commissioners of Madison Cty.*, 321 P.3d 38 (Mont. 2014).

carrying capacity for the species. *See* 82 Fed. Reg. 30,502, 30,512 (June 30, 2017). Recognizing this conservation success story, successive administrations have pursued this population's delisting. *See* 82 Fed. Reg. at 30,516, 30,517-19 (Trump administration delisting rule); 81 Fed. Reg. 13,174 (Mar. 11, 2016) (Obama administration proposed delisting rule); 72 Fed. Reg. 14,866, 14,875-78 (Mar. 29, 2007) (Bush administration delisting rule). Rather than celebrating this species' recovery, every effort to recognize it has led to litigation (a problem that has also affected many other species). If a defect is identified and cured, another will surely be asserted in an endless cycle.

For the Yellowstone grizzly, it's time for that cycle to end. A fair application of the Endangered Species Act's listing criteria reveals no defect in the U.S. Fish and Wildlife Service's decision. Plaintiffs have not shown and the district court did not find that the species, subspecies, or this distinct population segment is endangered or threatened. That compels the conclusion that the delisting decision was proper. *See* 16 U.S.C. § 1533(a)(1).

In holding to the contrary, the district court committed three clear errors: creating obstacles to delisting decisions that the statute does not

support, penalizing the agency for acknowledged uncertainty in the best scientific data available, and engaging in unjustified policy speculation.

Most concerning is the district court's unsupported speculation that delisting the population "necessarily translate[s]" to reduced prospects of additional conservation efforts. *See Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999, 1014 (D. Mont. 2018). Such speculation is outside the courts' proper role, but it is also wrong. Federal, state, and private conservation efforts led to the Yellowstone grizzly's recovery, and will continue after delisting. *See* 82 Fed. Reg. at 30,597

Nor is the district court's speculation necessarily true of endangered species generally. One of the Endangered Species Act's primary incentives for recovering protected species is the promise that regulatory burdens will be removed upon a species' delisting, an incentive that is undermined if species are not promptly delisted upon recovery. *See* Wood, *Road to Recovery*, *supra* n.4.

I. The Endangered Species Act does not impose a heightened standard to delist a species

Section 4 of the Endangered Species Act establishes the process for listing species, subspecies, or distinct population segments of species as endangered or threatened. 16 U.S.C. § 1533(a)(1). The same process is used to remove species[6] from these lists. *See id.*; *see also* 83 Fed. Reg. 35,193, 35,196 (July 25, 2018) ("[T]he five-factor analysis in section 4(a)(1) . . . establish[es] the parameters for both listing and delisting determinations without distinguishing between them.").

Using "the best scientific and commercial data available[,]" the U.S. Fish and Wildlife Service must consider whether a species should be listed based on: (a) loss of habitat; (b) overutilization; (c) disease or predation; (d) inadequate existing protections; or (e) other factors. 16 U.S.C. § 1533(a)(1), (b). If these factors show a species is currently in danger of extinction throughout all or a significant portion of its range, it must be listed as endangered. 16 U.S.C. § 1532(6). If they show that a species is likely to become endangered within the foreseeable future, it

[6] The Endangered Species Act defines "species" to include species, subspecies, and distinct population segments of species. Amici will follow that convention except where the differences in these categories is relevant.

must be listed as threatened. 16 U.S.C. § 1532(20). Otherwise, the species must not be listed or, if currently listed, must be delisted.

Whether a species was previously listed is irrelevant; the questions in cases challenging listing decisions or delisting decisions are the same. *See* 83 Fed. Reg. at 35,196 ("The standard for a decision to delist a species is the same as the standard for a decision not to list it in the first instance.").[7] (1) Did the agency consider the proper factors? *See Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 842-52 (9th Cir. 2003). And (2) are the agency's conclusions supported by the best commercial and scientific evidence, with deference to the agency's interpretation of complex science? *See Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 679 (9th Cir. 2016).

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[7] Congress' decision to impose the same standards on listing and delisting decisions is well founded. Errant listings based on bad data have been a recurring problem under the Endangered Species Act. *See* U.S. Fish and Wildlife Serv., *Delisted Species*, ECOS: Environmental Conservation Online System, https://ecos.fws.gov/ecp0/reports/delisting-report (last visited May 28, 2019) (reporting that a quarter of delistings have been due to errors in the original listing); *see also* Robert Gordon, *Correcting Falsely "Recovered" and Wrongly Listed Species and Increasing Accountability and Transparency in the Endangered Species Program*, Heritage Found. Backgrounder (Apr. 16, 2018), *available at* https://www.heritage.org/sites/default/files/2018-04/BG3300_0.pdf (suggesting the Service has underestimated the problem).

II. The Greater Yellowstone Ecosystem grizzly is no longer an endangered or threatened species

Neither the species (brown bear) nor the subspecies (ursus arctos horribilis) is endangered or threatened. 82 Fed. Reg. at 30,505; *see also* B.N. McLellan, et al., *Ursus arctos*, IUCN Red List of Threatened Species (2017) (describing the brown bear as a species of "least concern").[8] And the district court did not find otherwise. *Crow Indian Tribe*, 343 F. Supp. 3d at 999. Therefore, the Yellowstone grizzly can only remain listed if it is an endangered or threatened distinct population segment.

The U.S. Fish and Wildlife Service has consistently found the Yellowstone grizzly to be a distinct population segment. *See* 82 Fed. Reg. at 30,516, 30,517-19 (2017 delisting rule); 72 Fed. Reg. at 14,875-78 (2007 delisting rule). The district court agreed with this assessment. *See Crow Indian Tribe*, 343 F. Supp. 3d at 1009-10.

However, the U.S. Fish and Wildlife Service found that this distinct population segment has recovered, citing reductions in the threats facing it and consistent, stable population growth. 82 Fed. Reg.

[8] *Available at* https://www.iucnredlist.org/species/41688/121229971.

at 30,519-45. The only fault in this analysis asserted by the district court was the lack of clear scientific data on the minimum effective population size—the share of the population contributing to the breeding pool—necessary to maintain genetic diversity. *Crow Indian Tribe*, 343 F. Supp. 3d at 1020.

The district court's exclusive reliance on the lack of perfect scientific information was improper. The best scientific data available standard "does not require that the [agency] act only when it can justify its decision with absolute confidence. Although the [agency] cannot act on pure speculation or contrary to the evidence, the ESA accepts agency decisions in the face of uncertainty." *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1164 (9th Cir. 2010) (citations omitted).

Unlike the district court, the U.S. Fish and Wildlife Service relied on more than mere speculation, citing the fact that this population has maintained genetic diversity despite being geographically isolated for a century with, for most of that time, a far smaller population than today. 82 Fed. Reg. at 30,544. The court provided no reason to doubt the Service's reliance on this evidence; instead, it incorrectly held against

the agency an acknowledged uncertainty in the scientific literature. *Crow Indian Tribe*, 343 F. Supp. 3d at 1020. This was improper.

Ultimately, the principal basis for the district court's decision to overturn the delisting was a non sequitur. The court did not conclude that the best scientific or commercial evidence shows the Yellowstone grizzly to be an endangered or threatened distinct population segment. Instead, the district court erected obstacles to delisting species that the statute does not support. *See Crow Indian Tribe*, 343 F. Supp. 3d at 1010-15 (citing *Humane Society v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017)) (requiring a "comprehensive review" of all populations of a species to delist a recovered distinct population segment, including the effect of the delisting on populations not covered by it).[9]

But, as this Court has explained, "[t]he ability to designate and list DPSs allows the FWS to provide different levels of protection to different populations of the same species. The FWS does not have to list an entire species as endangered when only one of its populations faces

[9] After the D.C. Circuit issued its decision in *Humane Society*, the U.S. Fish and Wildlife Service voluntarily reviewed this delisting decision for consistency with that holding. 82 Fed. Reg. 57,698 (Dec. 7, 2017). The district court declined to credit this subsequent analysis, however. *See Crow Indian Tribe*, 343 F. Supp. 3d at 1014.

extinction." *Nat'l Ass'n of Home Builders*, 340 F.3d at 842 (citations omitted). The Fish and Wildlife Service properly concluded that the Yellowstone grizzly is no longer threatened with extinction. Nothing in the statute nor this Court's cases compels the listing (or maintaining on the list) of a healthy population where the extinction threat is limited to other populations of that species. *See id*. The district court's contrary conclusion was in error.[10]

That error derived from the court citing, out of context, this Court's recognition that the Endangered Species Act adopts of "policy of institutionalized caution" as support for imposing a heightened standard for delisting decisions. *See Crow Indian Tribe*, 343 F. Supp. 3d at 1014 (asserting that the standard is different "'when a species is already listed'" (quoting *Humane Soc'y*, 865 F.3d at 601)); *but see Ariz.*

[10] To be sure, the delisting does not—and should not—foreclose the Service from analyzing the status of other grizzly populations to determine whether they constitute one or several distinct population segments or the threats they face. *See, e.g.*, U.S. Fish & Wildlife Serv., *Grizzly Bear; 5-Year Review: Summary and Evaluation* (Aug. 2011), *available at* https://ecos.fws.gov/docs/five_year_review/doc3847.pdf. But, in light of the district court's acknowledgment that the Yellowstone grizzly is a proper distinct population segment, the statute does not make the delisting of this population contingent on that analysis. *But see Crow Indian Tribe*, 343 F. Supp. 3d at 1014.

Cattle Growers' Ass'n, 606 F.3d at 1166-67 (the "policy of institutionalized caution" allows the Service to designate habitat based on imperfect information but the statute's limits still apply).[11] On the contrary, the Endangered Species Act's text makes no distinction between the standards that apply to listing and delisting decisions. 16 U.S.C. § 1533(a)(1); *see* 83 Fed. Reg. at 35,196.

The error appears to have been influenced by the court's assuming—without analysis or support—that "decreased protections in the Greater Yellowstone Ecosystem necessarily translate to decreased chances for interbreeding." *Crow Indian Tribe*, 343 F. Supp. 3d at 1014. Such policy speculation is improper. *See Protect Our Communities Foundation v. Jewell*, 825 F.3d 571, 583 (9th Cir. 2016) (a reviewing court may not "substitute its judgment for that of the agency"). Besides, as explained below, there are significant reasons to doubt its accuracy.

[11] The policy of institutionalized caution is derived from the Supreme Court's opinion in *TVA v. Hill*, which stands for the proposition that policy concerns cannot justify departing from the text of the statute as written. 437 U.S. 153, 172-86 (1978). Thus, *TVA* also undermines the district court's conclusion that it should be harder to delist a species than to list it in the first place.

III. The Yellowstone grizzly's delisting does not spell the end of conservation efforts

Contrary to the district court's assumptions, delisting this distinct population segment, and transferring primary management authority for the grizzly bear to states and tribes, is not the end of conservation efforts for this species. Each of the range states has adopted a grizzly bear management plan or strategy to provide for continued conservation efforts. *See* 82 Fed. Reg. at 30,596-30,603 (describing post-delisting commitments for federal and state management).

These plans and strategies have benefitted from the input and expertise of state and federal wildlife managers, non-governmental organizations, and other stakeholders. *See id.* at 30,515. They build on decades of successful state-led management of hundreds of wildlife species, including large carnivores and omnivores such as mountain lions and black bears. *See id.* at 30,597. They include appropriate conservation measures, such as monitoring of habitat quality and population densities, facilitating grizzly access to private lands, and reducing human-grizzly conflicts, including by compensating landowners for losses due to grizzly predation. *See id.* at 30,621. These plans and strategies continue the states' commitment to grizzly bear

conservation that began in partnerships formed under federally led conservation efforts, partnerships that resulted in the recovery of the Yellowstone distinct population segment. *See id*. at 30,515.

The states have invested tens of millions of dollars and dedicated considerable staff time to recovering the Yellowstone grizzly. *See id.* at 30,597. Thus, they have strong incentives to ensure the continued success of their efforts. For instance, failure threatens to lead to the population being relisted, restoring extensive federal regulatory burdens. This is a powerful incentive, as no species recovered under the Endangered Species Act has been relisted due to backsliding under state management. *See* U.S. Fish & Wildlife Serv., *Delisted Species*, *supra* n.7.

Thus, the district court's speculation lacks foundation for the Yellowstone grizzly. It is also unsound for endangered species generally. In fact, the Endangered Species Act's primary incentive for recovery efforts is the prospect that recovery will lead to a return to state management and reduced regulatory burdens for landowners. *See*

Wood, *Road to Recovery*, *supra*. Unless delisting is a realistic prospect, the law's restrictions can paradoxically discourage the protection and restoration of habitat. *See* Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J. Law & Econ. 27 (2003). Thus, it is essential that courts and federal agencies not place a heavy thumb on the scale against delisting a recovered species. Doing so would fail to recognize the significant efforts leading to the recovery of that species and may discourage states and landowners from undertaking recovery efforts for other species.

Conclusion

The Yellowstone grizzly has recovered thanks to decades of work by federal agencies, states, tribes, and landowners. Its delisting was appropriate. The district court held to the contrary only by erecting barriers to delisting which find no support in the Endangered Species Act's text. It also misapplied the best scientific and commercial

information available test and engaged in imprudent policy speculation. The decision should be reversed.

DATED: May 30, 2019.

Respectfully submitted,

s/ Jonathan Wood
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s/ Jonathan Wood
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