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United States Court of Appeals
Tenth Circuit

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

May 25, 2023

Christopher M. Wolpert
Clerk of Court

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WESTERN WATERSHEDS PROJECT;
ALLIANCE FOR THE WILD ROCKIES;
YELLOWSTONE TO UNTAS
CONNECTION,

Petitioners - Appellants,

and

CENTER FOR BIOLOGICAL
DIVERSITY; SIERRA CLUB,

Petitioners,

v.

DEBRA A. HAALAND, in her official
capacity as Secretary of the United States
Department of the Interior; UNITED
STATES FOREST SERVICE; UNITED
STATES FISH AND WILDLIFE
SERVICE,

Respondents - Appellees,

and

STATE OF WYOMING; UPPER GREEN
RIVER CATTLE ASSOCIATION;
SOMMERS RANCH, LLC; PRICE
CATTLE RANCH; MURDOCH LAND
AND LIVESTOCK CO.; WYOMING
STOCK GROWERS ASSOCIATION,

No. 22-8031

Intervenor Respondents - Appellees.

CENTER FOR BIOLOGICAL
DIVERSITY; SIERRA CLUB,

No. 22-8043

Petitioners - Appellants,

and

WESTERN WATERSHEDS PROJECT;
ALLIANCE FOR THE WILD ROCKIES;
YELLOWSTONE TO UNTAS
CONNECTION,

Petitioners,

v.

DEBRA A. HAALAND, in her official
capacity as Secretary of the United States
Department of the Interior; UNITED
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SERVICE,

Respondents - Appellees,

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STATE OF WYOMING; UPPER GREEN
RIVER CATTLE ASSOCIATION;
SOMMERS RANCH, LLC; PRICE
CATTLE RANCH; MURDOCH LAND
AND LIVESTOCK CO.; WYOMING
STOCK GROWERS ASSOCIATION,

Intervenor Respondents - Appellees.

**Appeals from the United States District Court
for the District of Wyoming
(D.C. Nos. 2:20-CV-00231-NDF & 2:20-CV-00234-NDF)**

Andrea Zaccardi, Center for Biological Diversity, Victor, Idaho (William John Snape, III, Center for Biological Diversity, Washington, D.C. with her on the briefs) for Petitioners – Appellants Center for Biological Diversity and Sierra Club.

Megan Backsen, Western Watersheds Project, Reno, Nevada (John Persell, Western Watersheds Project, Hailey, Idaho with her on the briefs), for Petitioners – Appellants Western Watersheds Project.

Rebecca Jaffe, Attorney (Todd Kim, Assistant Attorney General with her on the brief), U.S. Department of Justice, Washington, D.C.; Heather Hinton, Attorney, U.S. Department of Agriculture, Washington, D.C.; and Dana Jacobsen, Attorney, U.S. Department of the Interior with her on the brief) for Federal Respondents – Appellees.

Joseph A. Bingham, Mountain States Legal Foundation, Lakewood, Colorado, argued for Intervenor Respondents – Appellees Upper Green River Cattle Association, Sommers Ranch, LLC, Price Cattle Ranch, Murdoch Land and Livestock Co., and Wyoming Stock Growers Association.

Jay A. Jerde, Special Assistant Attorney General, Wyoming Attorney General’s Office, Cheyenne, Wyoming filed a brief for Intervenor Respondent – Appellee.

Before **MATHESON**, **BRISCOE**, and **MORITZ**, Circuit Judges.

MATHESON, Circuit Judge.

GLOSSARY

This opinion uses the following acronyms:

APA	Administrative Procedure Act
BiOp	Biological Opinion
BTNF	Bridger-Teton National Forest
CBD	Petitioners-Appellants Center for Biological Diversity and Sierra Club
CM	Conservation Measure
DFC	Desired Future Condition
DMA	Demographic Monitoring Area
DRC	Demographic Recovery Criterion
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FS	United States Forest Service
FUS	Forage Utilization Standard
FWS	United States Fish and Wildlife Service
GYE	Greater Yellowstone Ecosystem
IGBST	Interagency Grizzly Bear Study Team
ITS	Incidental Take Statement
NFMA	National Forest Management Act

ROD	Record of Decision
UGRA	Upper Green River Area Rangeland
WWP	Petitioners-Appellants Western Watersheds Project, Alliance for the Wild Rockies, and Yellowstone to Uintas Connection

INTRODUCTION

In 2019, the United States Forest Service (“FS”) issued a Record of Decision (“ROD”) authorizing livestock grazing for 10 years on land in the Upper Green River Area Rangeland (“UGRA”) in Wyoming. The UGRA Project lies within the Bridger-Teton National Forest (“BTNF”), which is part of the Greater Yellowstone Ecosystem (“GYE”).

Before issuing the ROD, the FS prepared a Final Environmental Impact Statement (“FEIS”), which drew from two of FS’s Wildlife Specialist Reports on sensitive amphibians and migratory birds. The FS then consulted with the Fish and Wildlife Service (“FWS”) regarding the Project’s effects on the grizzly bear population. The consultation resulted in the FWS producing a Biological Opinion (“BiOp”). The BiOp concluded that the UGRA Project would not jeopardize the continued existence of grizzly bears in the GYE. The BiOp included an incidental take statement (“ITS”) authorizing the “lethal take”—killing by humans—of 72 grizzly bears in the Project area over a 10-year period. The FS next issued the ROD approving the UGRA Project.

Two sets of Petitioners-Appellants—(1) Center for Biological Diversity and Sierra Club (collectively, “CBD”); and (2) Western Watersheds Project, Alliance for the Wild Rockies, and Yellowstone to Uintas Connection (collectively, “WWP”)—have challenged the UGRA Project under the Endangered Species Act (“ESA”), the National Forest Management Act (“NFMA”), and the Administrative Procedures Act (“APA”).

The Respondents-Appellees are the Secretary of the Interior, FWS, and FS (the “Federal Appellees”); and intervenors the State of Wyoming and the “Ranchers”—the Upper Green River Cattle Association, Sommers Ranch, Price Cattle Ranch, Murdock Land & Livestock, and the Wyoming Stock Growers Association.

In district court, CBD and WWP claimed that (1) FWS violated the ESA because its BiOp was deficient regarding grizzly bears, (2) FS violated the ESA by relying on the BiOp in its ROD, and (3) FS violated the NFMA because the ROD failed to adequately consider the project’s impact on sensitive amphibians and migratory birds. The district court consolidated the cases into one action and rejected all claims. CBD and WWP appeal. Exercising discretion under 28 U.S.C. § 1291, we affirm in part and reverse in part.

First, on the ESA claims, we hold the FWS’s failures in the BiOp to consider (1) a limit on lethal take of female grizzly bears, and (2) the UGRA Project’s likely contribution to the already-existing mortality sink (where mortality exceeds or nearly exceeds survival) for female grizzly bears in the Project area were arbitrary and capricious. We further hold (1) the BiOp’s reliance on Conservation Measures (“CM”) was not arbitrary and capricious, and (2) the BiOp did not fail to adequately consider anticipated lethal take elsewhere in the GYE.

Second, we hold that the FS’s reliance on the FWS’s BiOp was arbitrary and capricious.

Third, on WWP’s NFMA claims, we hold (1) the ROD’s analysis of forage and cover for sensitive amphibians in the Project area was not arbitrary and

capricious, but (2) its failure to consider the adequacy of forage and cover for migratory birds in the Project area was arbitrary and capricious.

We remand without vacatur to the agencies to address the deficiencies identified in this opinion.

I. BACKGROUND

A. Legal Background

1. The Endangered Species Act

Congress enacted the ESA in 1973 “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b).

Section 7 of the ESA requires federal agencies to consult with the relevant Secretary to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species.” *Id.* § 1536(a)(2). To “[j]eopardize the continued existence” means “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02 (2019).

The ESA duty to avoid jeopardy “is policed by a procedural consultation requirement.” *Appalachian Voices v. United States Dep’t of Interior*, 25 F.4th 259, 264 (4th Cir. 2022) (citing 16 U.S.C. § 1536(a)(2)). When an agency action “may

affect listed species,” that agency—the “action agency”—must formally consult with the FWS—the “consultant agency.” 50 C.F.R. § 402.14(a) (2019); *City of Tacoma v. FERC*, 460 F.3d 53, 75-76 (D.C. Cir. 2006); see *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1105 (10th Cir. 2010).¹ As part of the consultation, the FWS must formulate a BiOp on whether the proposed action “is likely to jeopardize the continued existence of [those] species.” 50 C.F.R. § 402.14(g) (2019). In making this determination, the FWS must (1) “[r]eview all relevant information provided by the Federal agency or otherwise available,” which “may include an on-site inspection of the action area”; (2) “[e]valuate the current status . . . of the listed species”; (3) “[e]valuate the effects of the action and cumulative effects on the listed species”; and (4) “use the best scientific and commercial data available.” *Id.*

“If the [FWS] determines that an agency action is not likely to jeopardize a listed species but is ‘reasonably certain’ to lead to incidental ‘take’ of that species,” it then must also provide an ITS. *Appalachian Voices*, 25 F.4th at 264-65 (quoting 50 C.F.R. §§ 402.14(g)(7), (i) (2019)).² An ITS specifies the “amount or extent” of

¹ The FWS is the relevant consultant agency in this case, but it is not always the consultant agency under the ESA. The FWS and the National Marine Fisheries Service share responsibility for administering the ESA. 50 C.F.R. § 402.01(b). The “FWS has jurisdiction over freshwater and terrestrial species while the National Marine Fisheries Service is responsible for anadromous and marine species.” *Rio Grande*, 601 F.3d at 1105 n.2 (quoting *Forest Guardians v. Johanns*, 450 F.3d 455, 457 n.1 (9th Cir. 2006)).

² The ESA broadly prohibits “taking” a member of any endangered species. 16 U.S.C. § 1538(a)(1)(B). To “take” means to “harass, harm, pursue, hunt, shoot,

incidental take, “reasonable and prudent” mitigation measures, and “terms and conditions” to implement those measures. 50 C.F.R. § 402.14(i)(1)-(2). “Any incidental take consistent with these limits is [exempted under] Section 9 [of the ESA].” *Appalachian Voices*, 25 F.4th at 265 (citing 50 C.F.R. § 402.14(i)(5)). “But whenever these limits are exceeded the action agency must ‘reinitiate consultation immediately.’” *Id.* (quoting 50 C.F.R. § 402.14(i)(4)).

2. The National Forest Management Act

The NFMA establishes a framework to “develop, maintain, and . . . revise land and resource management plans for units of the National Forest System.” 16 U.S.C. § 1604(a). It “requires the [FS] to manage forests using a two-step process.” *Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1049 (10th Cir. 2014). “First, the [FS] must develop a Land and Resource Management Plan (‘forest plan’) for each national forest unit.” *Id.* “Second, it must implement the forest plan through site-specific projects.” *Id.*

“When we review a challenge to a . . . site-specific project, we must determine whether . . . the project meets [the] NFMA.” *Id.* “It is well-settled that the Forest Service’s failure to comply with the provisions of a Forest Plan is a violation of NFMA.” *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 961

wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19). This prohibition applies to individuals, corporations, state and federal agencies, government employees, and state and local governments. *Id.* § 1532(13). A main focus of this appeal is on lethal take of grizzly bears.

(9th Cir. 2005). Thus, if the FS approves a project that is inconsistent with the Forest Plan, it violates the NFMA.

3. The Administrative Procedure Act

The ESA and the NFMA do not provide a private cause of action for the claims asserted by the Appellants—courts consider such claims through the APA. *Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1320 (10th Cir. 2007); *Jiron*, 762 F.3d at 1059.³ “We review a district court’s resolution of APA claims de novo, applying the same deferential standard toward the agency’s decisions that the district court applies.” *Diné Citizens Against Ruining Our Env’t v. Haaland*, 59 F.4th 1016, 1029 (10th Cir. 2023). “[W]e will not overturn an agency’s decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” *Id.* (quotations omitted).

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

Wyoming v. U.S. Dep’t of Agric., 661 F.3d 1209, 1227 (10th Cir. 2011) (quoting *Copar Pumice Co. v. Tidwell*, 603 F.3d 780, 793-94 (10th Cir. 2010)).

³ The ESA authorizes a private cause of action under its citizen-suit provision, 16 U.S.C. § 1540(g)(1), but it does not cover claims alleging violations of § 7 of the ESA, such as the claims brought here. Instead, courts review such claims under the APA. *See Bennett v. Spear*, 520 U.S. 154, 174 (1997).

We “accord agency action a presumption of validity.” *Id.* (quotations omitted). And our deference to the agency “is especially strong where the challenged decisions involve technical or scientific matters within the agency’s area of expertise.” *Diné*, 59 F.4th at 1029-30 (quotations omitted).

B. Administrative Proceedings

1. The Upper Green River Area Rangeland Project

Livestock grazing has occurred on the UGRA Project land since the early 1900s. *See App.*, Vol. 13 at 36. The FS has previously approved and issued permits for livestock grazing there. *See, e.g., App.*, Vol. 1 at 157-73.

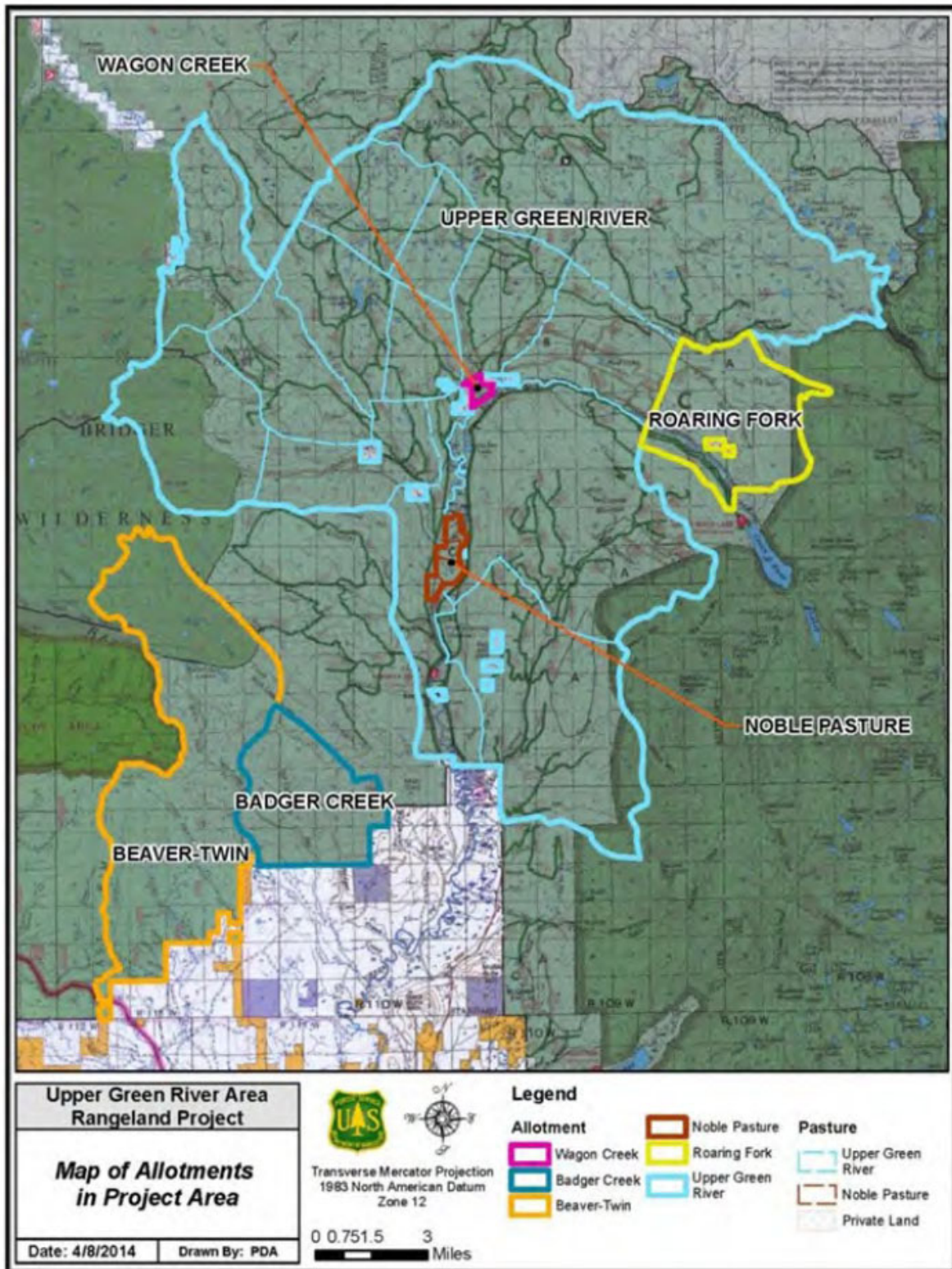
On October 11, 2019, the FS issued a ROD authorizing the latest iteration of the UGRA Project. It allows livestock grazing on the six allotments comprising the UGRA Project, which covers 170,643 acres within the GYE in western Wyoming.⁴

The map below shows the following six allotments within the UGRA Project:

- 1) Wagon Creek
- 2) Badger Creek
- 3) Beaver-Twin
- 4) Noble Pasture
- 5) Roaring Fork

⁴ “The GYE is a 9,209-square mile region that spreads across northwest Wyoming and parts of Idaho and Montana.” *W. Watersheds Project v. Bernhardt*, 468 F. Supp. 3d 29, 35 (D.D.C. 2020). “The ecosystem is made up of national forests, wildlife refuges, public, private, and tribal lands, and the Yellowstone and Grand Teton national parks.” *Id.*

6) Upper Green River



App., Vol. 11 at 156.

“The stated purpose of the [2019] UGRA Project is to ‘authorize livestock grazing in a manner that will maintain or improve resource conditions.’” App., Vol. 1 at 122 (quoting App., Vol. 4 at 141 (ROD)). To carry out the Project, the FS issued 10-year grazing permits allowing “approximately 8,819 livestock, including 8,772 cow/calf pairs and yearlings and 47 horses, to graze in the six allotments” from “June 14th to October 15th” each year. *Id.*

2. The Administrative Record

The administrative record contains documents prepared by the FWS and the FS that we reference throughout the opinion. The documents comprise four sets as described below.

a. *The 1990 Bridger-Teton National Forest Plan*

As noted, the UGRA Project falls within the Bridger-Teton National Forest. The FS manages the BTNF under the BTNF Plan. *See* App., Vol. 1 at 130-31. The BTNF Plan, promulgated in 1990, sets “Resource Management Prescriptions, Standards, and Guidelines,” which “represent land management direction responsive to . . . the Bridger-Teton Management Problems, Challenges, Goals, and Objectives.” *Id.* (quotations omitted).

Two Objectives are relevant here. Objective 4.7(d) “require[s] that suitable and adequate amounts of forage and cover are retained for wildlife and fish.” App., Vol. 1 at 131 (quotations omitted). And Objective 1.1(h) is to “[p]rovide forage for about 260,000 Animal Unit Months [] of livestock grazing annually.” *Id.* at 148 (quotations omitted).

b. *The Forest Service’s 2016 Sensitive Amphibians Report, Migratory Birds Report, and 2017 Final Environmental Impact Statement*

The FS prepared two Wildlife Specialist Reports in 2016 and a FEIS in 2017. All three considered four potential alternatives for the UGRA Project.⁵ The “Supplemental Wildlife Specialist Report: Federally listed species, Sensitive amphibians, Management indicator amphibians” (“the Sensitive Amphibians Report”) evaluated the effects of the various alternatives on sensitive amphibians, among other animals. *See App.*, Vol. 3. The “Supplemental Wildlife Specialist Report—Migratory Birds—” (“the Migratory Birds Report”) considered the alternatives’ impacts on migratory birds. *See App.*, Vol. 9. The FS included the findings of these Reports in the FEIS.

⁵ “Under [the National Environmental Policy Act (‘NEPA’)], when a federal agency undertakes a major Federal action significantly affecting the quality of the human environment, it must prepare an environmental impact statement (‘EIS’) that details, among other things, the environmental impacts of the proposed action, any adverse environmental effects that would occur as a result, and alternatives to the proposed action.” *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004) (quotations, citations, and alterations omitted); *see also Catron Cnty. Bd. of Comm’rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1439 (10th Cir. 1996) (when an agency makes decisions implicating the ESA, an EIS is often required). “An environmental impact statement must study in detail alternatives to the proposed action.” *BioDiversity Conservation All. v. Bureau of Land Mgmt.*, 608 F.3d 709, 712 (10th Cir. 2010) (quotations omitted).

The purpose of these procedural requirements is to force “agencies [to] take a hard look at environmental consequences” and “provide for broad dissemination of relevant environmental information.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quotations omitted). Thus, “[w]hile [other statutes] impose[] substantive restrictions on agency action, NEPA imposes procedural requirements aimed at integrating environmental concerns into the very process of agency decision-making.” *Greater Yellowstone Coal.*, 359 F.3d at 1273-74 (quotations, citations, and alterations omitted).

c. *The 2019 Biological Opinion and Incidental Take Statement*

The FWS completed the BiOp and associated ITS in 2019 as part of its formal consultation with the FS. The ESA required this consultation to evaluate the Project’s effects on endangered and threatened species.

The BiOp was titled “Effects to the Grizzly Bear from the Upper Green River Area Rangeland Project.” App., Vol. 2, at 144-211. It “set[] forth a number of conservation measures to help prevent conflicts between livestock and grizzly bears,” “look[ed] at historical data for grizzly mortalities,” “evaluate[d] threats to the bear population,” “consider[ed] past numbers of management removals,” and “predict[ed] future removals over the next decade.” *W. Watersheds Project v. Bernhardt*, 468 F. Supp. 3d 29, 38 (D.D.C. 2020). The BiOp reached a “no-jeopardy conclusion”—“that the anticipated adverse effects resulting from the issuance of grazing permits by [the FS] for the [UGRA] Project . . . will not jeopardize the continued existence of the grizzly bear.” App., Vol. 2 at 147.

Because the FWS concluded that the UGRA Project was reasonably certain to lead to incidental take of the species, it also included an ITS in the BiOp specifying the “amount or extent” of incidental take, “reasonable and prudent” mitigation measures, and “terms and conditions” to implement those measures. 50 C.F.R. § 402.14(i)(1). The BiOp stated, “Based on population trends and the number of removals over the last nine years, the [ITS] exempt[ed] a total of 72 grizzly bear mortalities over the 10-year timeframe of the proposed action.” App., Vol. 2 at 147. Thus, the ITS provided that if 72 or fewer grizzly bear fatalities occur over the

Project’s 10-year lifespan, no ESA violation would occur. The limit of 72 mortalities is approximately twice the number of lethal removals in the area in the previous 20 years. *Id.* at 184, 194.

d. *The 2019 Record of Decision*

On October 11, 2019, the FS, relying on the FWS’s BiOp and ITS, issued a ROD authorizing the UGRA Project. As noted above, the FEIS set out four alternatives for the Project. The ROD adopted a combination of two of them.

* * * *

We will provide more detail from these documents as appropriate later in the opinion.

C. *Procedural History*

1. U.S. District Court for the District of Columbia

On March 31, 2020, CBD filed suit in the U.S. District Court for the District of Columbia challenging the UGRA Project under the APA and the ESA. The complaint alleged that (1) the “FWS’s no jeopardy conclusion [with respect to the grizzly bear population] is arbitrary and capricious” in violation of the ESA and the APA, and (2) the FS’s “reliance on that conclusion and the invalid 2019 [BiOp] is unlawful.” App., Vol. 1 at 25 ¶ 10.

On the same day, WWP filed suit in the same court. Complaint, *W. Watersheds Project v. Bernhardt*, 468 F. Supp. 3d 29 (D.D.C. 2020) (No. 1:20-cv-00860-APM). WWP raised the same issues as the CBD complaint. *Id.* at ¶¶ 8-10.

The district court (1) denied WWP’s motion to preliminarily enjoin all lethal removal of grizzlies from the UGRA Project, *W. Watersheds Project*, 468 F. Supp. 3d at 48-50; (2) consolidated the cases under the first-filed case; (3) allowed the State of Wyoming and the group of Ranchers to intervene; and (4) granted the Federal Appellees’ motion to transfer the consolidated case to the District of Wyoming.

2. U.S. District Court for the District of Wyoming

On August 9, 2021, WWP filed an “Amended Petition for Review of Agency Action,” adding claims challenging the FS’s ROD under the NFMA. App., Vol. 1 at 107-119.

The district court upheld the agencies’ decisions and denied the petitions.⁶ It held the BiOp complied with the ESA and the APA. Because it did “not find the FWS’s 2019 BiOp to be arbitrary, capricious, or otherwise unlawful,” the court held the “[FS] did not unlawfully rely on the FWS’s 2019 BiOp when approving the UGRA Project ROD.” App., Vol. 1 at 144. The court also held that the UGRA Project does not violate the NFMA.

⁶ CBD called its pleading a “Complaint.” App., Vol. 1 at 22-50. WWP called its initial pleading in the U.S. District Court for the District of Columbia a “Complaint,” but it called a later pleading in the U.S. District Court for the District of Wyoming an “Amended Petition for Review of Agency Action.” Complaint, *W. Watersheds Project*, 468 F. Supp. 3d 29 (No. 1:20-cv-00860-APM); App., Vol. 1 at 107-119. In its judgment, the district court referred to the operative pleadings as CBD’s “Amended Complaint/Petition for Review” and WWP’s “Supplemented and Amended Petition for Review of Agency Action.” App., Vol. 1 at 150. We refer to them as the “petitions.”

II. DISCUSSION

CBD's and WWP's arguments on appeal fall into three categories. First, they contend the 2019 BiOp is arbitrary and capricious under the ESA because it (1) lacked a limit on lethal take of female grizzly bears, (2) failed to consider the Project's impact on an already-existing mortality sink for female grizzly bears in the Project area, (3) relied on flawed Conservation Measures, and (4) failed to consider anticipated take throughout the GYE. Second, they argue that the FS's ROD was unlawful under the ESA and the APA because it relied on the FWS's BiOp. Third, WWP claims the FS violated the NFMA, arguing that the ROD arbitrarily and capriciously failed to comply with the BTNF Plan because it does not provide adequate forage and cover for sensitive amphibians and migratory birds.

A. The Fish and Wildlife Service's 2019 Biological Opinion

We reverse in part and affirm in part the district court's determination that the FWS's 2019 BiOp was not arbitrary and capricious. We reverse and hold that the BiOp was arbitrary and capricious for failing to consider (1) a limit on lethal take of female grizzly bears in the Project area, and (2) the Project's contribution to the mortality sink for female grizzly bears. But we affirm that the BiOp was not arbitrary and capricious for its (3) reliance on Conservation Measures, and (4) consideration of anticipated take elsewhere in the GYE.

1. The Biological Opinion's Failure to Consider Including a Lethal Take Limit for Female Grizzly Bears

a. Grizzly bears and the Greater Yellowstone Ecosystem

“In the 1970s, the grizzly bear population in the United States had dwindled to a fraction of its original size due to hunting, government-sponsored eradication efforts, and habitat loss.” *W. Watersheds Project*, 468 F. Supp. 3d at 35. The population had dropped from approximately 50,000 bears to fewer than 1,000. App., Vol. 1 at 126. Grizzly bears have “one of the lowest reproductive rates among terrestrial mammals, and a female grizzly [bear] requires a decade, at best, to replace herself.” *Id.* Biologists identified the “low survival rate” of adult female grizzly bears “as the single most important factor in causing the decline in the Yellowstone population prior to the mid-1980’s.” *Id.*; App., Vol. 2 at 163.

In 1975, the grizzly bear was first listed as a threatened species under the ESA. App., Vol. 1 at 126. “Since receiving federal protection, the grizzly bear population has grown to more than 2,000 individuals.” *W. Watersheds Project*, 468 F. Supp. 3d at 36. “Today’s grizzly bear population is spread among five distinct population areas, one of which is the GYE.” *Id.* The grizzly bear population in the GYE was estimated to be 718 in 2017. App., Vol. 1 at 128. “Current population growth in the GYE is estimated at 0 to 2 percent annually.” *Id.*

b. *The Fish and Wildlife Service's Grizzly Bear Recovery Plan*

The FWS first issued a “Grizzly Bear Recovery Plan” in 1982 and has since revised the plan. App., Vol. 1 at 127. It “represent[s] the official position” of the FWS. Fed. Aplee. Suppl. App. at 52.⁷

The Recovery Plan identified six “recovery zones,” which are “areas large enough and of sufficient habitat quality to support a recovered bear population.” App., Vol. 1 at 127. The Yellowstone Recovery Zone is one such area, and that zone “lies within but does not constitute the whole of the broader GYE, which is substantially larger.” *Id.*

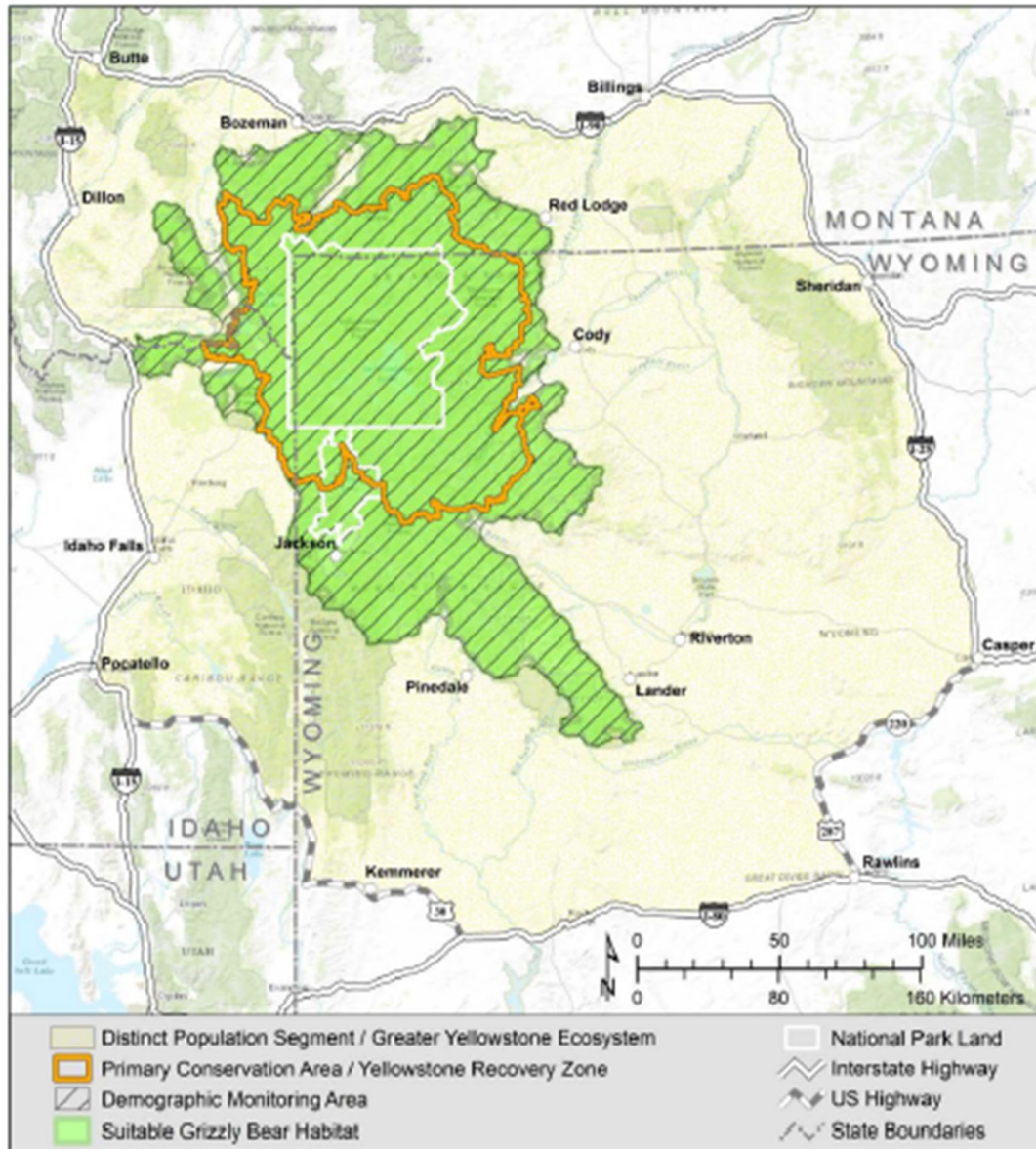
The GYE also contains a Demographic Monitoring Area (“DMA”) for the grizzly bear population, which the Interagency Grizzly Bear Study Team (“IGBST”)⁸ uses “to capture the extent of grizzly bear occupancy over time.” *Id.* at 128; *W. Watersheds Project*, 468 F. Supp. 3d at 36. “The goal within the DMA is to manage grizzlies to ensure a recovered population in accordance with established

⁷ The Recovery Plan “delineate[d] reasonable actions that are believed to be required to recover and/or protect” grizzly bears. Fed. Aplee. Suppl. App. at 52. It binds only the FWS, and is “contingent upon appropriations, priorities, and other budgetary constraints.” *Id.*

⁸ In response to the grizzly bears’ plight, the Department of the Interior formed the IGBST in 1973 to monitor and research the species. *W. Watersheds Project*, 468 F. Supp. 3d at 35. It “consists of scientists and biologists from [the] FWS, [the FS], the United States Geological Survey, the National Park Service, the Eastern Shoshone and Northern Arapaho Tribal Fish and Game Department, and the state wildlife agencies of Wyoming, Idaho, and Montana.” *Id.*

recovery criteria[,] including those found in the [FWS] Grizzly Bear Recovery Plan” App., Vol. 1 at 128.

The map below shows the GYE, the DMA within the GYE, and the Recovery Zone within the DMA. It does not depict the six UGRA Project allotments, which “lie outside the bounds of the [Yellowstone] recovery zone” but “are within the DMA.” *Id.* The UGRA Project accounts for slightly more than 1 percent of the DMA. *Compare* App., Vol. 11 at 165, *with* App., Vol. 4 at 31.



App., Vol. 4 at 24.

The most recent supplement to the Grizzly Bear Recovery Plan was approved in 2017. It “outline[d] specific recovery criteria for the GYE,” including “minimum population size, female bear distribution, and mortality limits.” App., Vol. 1 at 127; *id.* at 134-35. It also reviewed updated demographic analyses and issued Demographic Recovery Criteria (“DRC”). *Id.* at 134-35. Relevant here,

Demographic Recovery Criterion 3 (“DRC 3”) “impose[d] annual mortality limits within the DMA.” *Id.* at 135. These limits “are on a sliding scale based on the total grizzly population in the DMA” and are set to “achieve/maintain the population goal within the DMA of 674 bears.” *Id.* “There are separately calculated limits for independent females, independent males, and dependent young, and [these limits] take into account all known and probable grizzly mortality from all causes.” *Id.* (emphasis omitted). The current mortality limit for female grizzly bears set by DRC 3 for the DMA is 9 percent. App., Vol. 3 at 7.

The supplement further provided, “If any of the sex/age class mortality limits are exceeded for three years and any annual population estimate falls below 612, Criterion 3 requires that the IGBST produce a ‘Biology and Monitoring Review’ to inform the appropriate management response.” App., Vol. 1 at 135. “If any annual population estimate falls below 600 [bears in the DMA], Criterion 3 requires a cessation of all discretionary mortality within the DMA except as necessary for human safety.” *Id.*

c. *The 2019 Biological Opinion and Incidental Take Statement lethal take allowance for grizzly bears*

The 2019 BiOp said, “[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,” and noted that “female bears have established territories within the [UGRA Project] area.” App., Vol. 1 at 133-34 (quotations omitted).

The 2019 BiOp also discussed the 2017 Supplement to the Recovery Plan and its DRC, including the 9 percent mortality threshold for female grizzly bears in DRC 3. *See* App., Vol. 2 at 163-64, 168. The BiOp stated that the anticipated level of grizzly bear mortality caused by the UGRA Project was expected to fall within the scope of that allowed by DRC 3. *Id.* at 192.

For the UGRA Project, the ITS “exempt[ed] 72 lethal grizzly bear removals starting in 2019 and ending in 2028 (10 years) as a consequence of livestock grazing in the allotments in the UGRA Project.” App., Vol. 2 at 194. The ITS did not impose a separate quota for female bears: “Of these 72, the ITS [did] not separately limit the number of female bears that can be removed during the period.” App., Vol. 1 at 134.

d. Female lethal take limits in prior biological opinions for the UGRA Project

Previous FWS BiOps evaluated the effects of livestock grazing on grizzly bears in the UGRA Project, and some imposed take limits on female grizzly bears. The 1999 BiOp set a lethal take limit of only one female grizzly bear. App., Vol. 1 at 170. The 2011 BiOp did not include a female lethal take limit. *Id.* at 260. The 2013 BiOp set a limit of no more than three female grizzly bears. App., Vol. 2 at 16. The 2014 BiOp did not set a female lethal take limit, but it did require the FS to contact the FWS if three or more females were killed during any given year. *Id.* at 116.

e. *Analysis*

The 2019 BiOp’s failure to consider including a limit on the lethal take of female grizzly bears for the UGRA Project was arbitrary and capricious.

The BiOp recognized the negative impact of female grizzly bear mortality on population maintenance: “The 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” App., Vol. 2 at 167.

But nothing in the BiOp or the ITS evaluated whether the authorized 72 lethal grizzly bear takes could result in enough female takes to jeopardize the grizzly bear population in the Project area. The BiOp did not attempt to predict what proportion of the 72 lethal takes would be female bears. App., Vol. 2 at 189. Lethal takes of 72 bears would be approximately double the number of bears that had been killed in the Project area in the prior 20 years. The record’s most recent (2017) GYE grizzly bear population estimate was 718 bears. *See* App., Vol. 2 at 192. If, as the BiOp states, survival of the species depends on “minimizing” annual female grizzly bear mortality, it should at least have considered whether a female lethal take limit should be included.

Of the four previous BiOps for the Project area, only the 2011 BiOp did not include a limit for female grizzly bears or specific consideration of female bear lethal takes. App., Vol. 1 at 260; *id.* at 170 (1999 BiOp) (lethal take limit of only one female grizzly bear); App., Vol. 2 at 16 (2013 BiOp) (lethal take limit of no more

than three female grizzly bears). Although the 2014 BiOp declined to set a female take limit, it required the FS to contact the FWS if three or more female grizzly bears were lethally removed during any given year. App., Vol. 2 at 116. And the FWS explained in the 2014 BiOp that it imposed a special reporting requirement rather than a female take limit because of the low level of female take in the area at the time. *See* App., Vol. 2 at 132.⁹

In contrast, the 2019 BiOp lacked a female lethal take limit or a discussion comparable to the 2014 BiOp's of why one was unnecessary. The female bear conditions differ from 2014—the FWS acknowledged in the 2019 BiOp that more female bears inhabit the Project area and are being killed as a result. *See* App.,

⁹ The FWS's 2014 BiOp provided the following explanation of its decision to impose a reporting requirement rather than a female lethal take limit:

Note: In the previous 2013 [BiOp and] ITS, we delineated the anticipated level of [incidental take] by gender, which we believed was an appropriate approach based on the best available science at the time. The 2013 [BiOp] included 3 female bears in the ITS, and it was because the level of [incidental take] for females was being approached that the Forest [Service] reinitiated consultation. However, female mortalities in the [GYE] have, overall, remained below the established mortality thresholds and take of females on the allotments, while increasing slightly, continues to number two or less individuals per year Furthermore, the population is stable to slightly increasing and recovery goals have been attained despite [incidental take] of both male and female grizzly bears. These factors lead us to believe we do not need to specify a level of [incidental take] by gender for this project.

App., Vol. 2 at 132 (2014 BiOp).

Vol. 2 at 176, 189-90. The 2019 BiOp and ITS lacked any explanation for the FWS's failure to consider a limit on female lethal take.

The Federal Appellees argue that “[e]cosystem-wide mortality limits obviate the need for a female take limit” because DRC 3 for the DMA set a level of mortality that “would maintain the population size” of grizzly bears. Fed. Aplee. Br. at 20-22 (citing App., Vol. 2 at 249). They posit that DRC 3’s “current mortality limit for females is 9 percent of female bears per year,” and that the 9 percent limit “encompasses known and probable grizzly bear mortalities from all causes, including management removals, illegal kills, self-defense kills, vehicle kills, natural mortalities, undetermined cause mortalities, and a statistical estimate of unknown mortalities.” *Id.* at 22 (emphasis omitted) (citing App., Vol. 4 at 43). The Federal Appellees conclude the “FWS reasonably did not include a female take limit in the 2019 Biological Opinion because there are female mortality limits [in DRC 3]—reflecting *all* types for mortalities—for the entire Demographic Monitoring Area.” *Id.*

This argument fails to explain why the 2019 BiOp’s discussion of the DRC lacked consideration of whether to impose a female lethal take limit. The BiOp did not contain the explanation now offered in the Federal Appellees’ brief that DRC 3 obviated the need for a female lethal take limit. And without such an explanation in the BiOp itself, we cannot credit a “post-hoc rationalization” stated by counsel in briefs. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009).

Unlike the 2019 BiOp, previous BiOps discussed both DRC mortality thresholds and anticipated lethal female take in the Project area. For example, the 2014 BiOp addressed the DRC mortality limits and considered whether to include a female lethal take limit. As explained previously, it gave a rationale for not including a female lethal take limit (the low number of female grizzly bear lethal takes in the area at the time). It thus chose a reporting requirement over a lethal take limit to guard against excess female grizzly bear mortality in the Project area. App., Vol. 2 at 94-95 (2014 BiOp); *see also, e.g., id.* at 14-16 (2013 BiOp) (discussing DRC mortality limits and anticipated female take).

Moreover, exceeding the DRC 3's mortality limits does not, by itself, trigger any agency response, which is required only if the mortality limits are (1) exceeded for any sex or age class for three consecutive years and (2) the annual population estimate in the DMA falls below 612. App., Vol. 2 at 245. Even if those conditions are met, DRC 3 requires only that the IGBST convene and "produce a Biology and Monitoring Review to inform the appropriate management response." *Id.*

By contrast, an ITS female lethal take limit would have a stronger enforcement mechanism. When female lethal take exceeds an ITS limit, the FS must immediately reinstitute consultation with the FWS to avoid incurring ESA liability. 50 C.F.R. § 402.14(i)(4).

The FWS's failure to consider whether to limit the lethal take of female grizzly bears was therefore arbitrary and capricious. *See Wyoming*, 661 F.3d at 1227.

2. The Biological Opinion’s Failure to Consider the Project’s Impact on the Existing Mortality Sink for Female Grizzly Bears in the Project Area

The 2019 BiOp’s failure to consider the Project’s impact on the existing mortality sink in the Project area for female grizzly bears was arbitrary and capricious.¹⁰

A “mortality sink” occurs when “mortality exceeds or nearly exceeds survival.” App., Vol. 1 at 138. The FEIS said the UGRA Project would “further contribute to the existing mortality sink for female grizzly bears that occurs throughout much of the project area” because of the “additional female mortality” expected during the Project. App., Vol. 12 at 190.

WWP points out that “the *only* sentence in the entire 2019 BiOp where the word ‘sink’ is found” was the following: “‘While translocation of bears from population sinks may remove them temporarily from situations of high risk of death, the best management strategy remains elimination [of] the sources that attract bears in the first place, thus supporting efforts to minimize food availability through carcass removal.’” WWP Reply Br. at 7 (quoting App., Vol. 2 at 181 (2019 BiOp)). This single sentence did not address the concern raised in the FEIS. As WWP notes, “[n]ot only [did] the sentence fail to acknowledge that a population sink for female

¹⁰ Only WWP raised this issue. WWP Appt. Br. at 41.

grizzly bears exists on these particular allotments, it is not accompanied by any further analysis specific to female bears or otherwise.” *Id.* (emphasis omitted).¹¹

Cases from outside our circuit are instructive. In *Center for Biological Diversity v. U.S. Bureau of Land Management*, 698 F.3d 1101 (9th Cir. 2012), environmental groups sued under the APA and the ESA regarding the FWS’s BiOp and ITS for a natural gas pipeline project and its impact on fish species. *Id.* at 1106. The Ninth Circuit held the BiOp was arbitrary and capricious for its failure to consider the effects of the project’s anticipated groundwater withdrawal on the fish species. *Id.* In reaching this conclusion, the court noted that the FS’s Biological Assessment and FEIS for the pipeline project had explicitly flagged this issue.

¹¹ The Federal Appellees and the Ranchers both argue that the UGRA Project will not worsen the mortality sink because the expanding grizzly bear population, not grazing, causes sink habitat, as more bears in the area leads to more conflict. To support this argument, Appellees cite a study by Schwartz et. al (2010) (“the Schwartz study”) analyzed in the 2017 FEIS. Fed. Aplee. Br. at 30 (citing App., Vol. 3 at 23); Ranchers Aplee. Br. at 19 (citing App., Vol. 2 at 51). This citation is misplaced.

The Schwartz study did not include so-called “conflict” bears in its analysis. “[N]uisance (conflict) bears” are grizzly bears “constituting a demonstrable but non-immediate threat to human safety or committing significant depredations to lawfully present livestock, crops, or beehives.” App., Vol. 2 at 171. (quoting 50 C.F.R. § 17.40(b)(i)(C) (2023)). As explained in the FEIS, “[t]he survival estimates used in [the Schwartz] model were estimated using grizzly bears that were not involved in conflicts” because “[c]onflict’ bears were considered a biased subset, and were not used to infer female survival in the population.” App., Vol. 3 at 23; *see also* Ranchers Aplee. Br. at 19 (“[C]onflict bears have been specifically excluded from source-sink population analysis, because they form a biased sample.” (emphasis omitted)).

The Schwartz study is therefore not a meaningful response to the female mortality sink issue because it excluded from its analysis the cause of mortalities that WWP claims the Project will increase.

Id. at 1124-25. Because the FWS’s BiOp failed to discuss this issue raised in the FS’s Biological Assessment and FEIS, the court found the BiOp was arbitrary and capricious. *Id.*

Relying in part on *Center for Biological Diversity*, 698 F.3d at 1101, the District of Montana considered a similar issue in *Helena Hunters v. Marten*, 470 F. Supp. 3d 1151 (D. Mont. 2020). In *Helena Hunters*, one of the claims was that FWS’s BiOp for a project violated the ESA because it did “not adequately discuss the impact on grizzly bears from the Project’s addition of recreational trails.”

Id. at 1178. The court found that, because FS’s Biological Assessment “recognized that the Project’s addition of [recreational] trails . . . was one of the Project’s ‘effects’” on bears, the FWS’s “failure to recognize—much less analyze—the effects of building and improving recreational trails [in the BiOp] violate[d] the ESA and the APA.” *Id.* at 1179. The court said, “When the [FS] raises concern that a certain aspect of a project has potential to harm an ESA-protected species, the [BiOp] must address that factor; its failure to do so violates the ESA and the APA.” *Id.* at 1178-79 (citing *Ctr. for Biological Diversity*, 698 F.3d at 1121).¹²

¹² The district court rejected WWP’s reliance on *Helena Hunters* “for the proposition that th[e] failure [to address the female mortality sink] violates the ESA and the APA,” stating that *Helena Hunters* “could not be more different” on the facts. App., Vol. 1 at 138-39. The court said that unlike *Helena Hunters*, “the UGRA Project does not add development features (such as trails), it is not primarily in source/secure habitat, and it constitutes a landscape where grizzly survival is unrelated to time bears spend on livestock allotments.” *Id.*

But as WWP argues, “[c]ontrary 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 [the] FWS ignored a relevant concern that the Forest

Here, the FEIS recognized the Project’s likely contribution to the already-existing mortality sink for female bears in the Project area. The BiOp’s failure to address this issue was thus arbitrary and capricious.

3. The 2019 Biological Opinion’s Reliance on Conservation Measures

The FWS’s reliance in the BiOp on Conservation Measures for its “no-jeopardy conclusion” was not arbitrary and capricious.

a. *Conservation Measures*

The FS developed Conservation Measures to “contribute to the recovery of the grizzly bear” by “help[ing to] prevent conflicts with grizzly bears in the Upper Green Project Area.” App., Vol. 2 at 153 (2019 BiOp). The BiOp cited the FS’s “commitment to implement their Conservation Measures” as one factor supporting its conclusion that the Project would not jeopardize grizzly bear survival. App., Vol. 2 at 192.

The BiOp listed the FS’s nine Conservation Measures:

CM 1 - sanitation guidelines for food storage and outdoor toilets;

CM 2 - requirement that riders “watch all livestock closely for sick, injured, or stray animals”;

CM 3 - requirement that the FS “monitor allotments on a regular basis”;

CM 4 - requirement to “remove[] if possible or move[]” livestock carcasses away from facilities, recreation areas, campsites, trails, roads, streams, springs, lakes, and riparian areas;

Service had flagged.” WWP Aplt. Br. at 42. We agree. Here, the FS raised the concern regarding the female mortality sink in the FEIS, and the 2019 BiOp ignored it.

- CM 5** - exception to the carcass removal requirements in CM 4 if human safety is a concern;
- CM 6** - recommendation that grazing permittees carry bear spray;
- CM 7** - goal to further identify and implement opportunities to reduce grizzly bear conflicts;
- CM 8** - requirement that the FS make permittees aware of ESA responsibilities; and
- CM 9** - goal to continue to work in cooperation with the FWS, Wyoming Game and Fish Department, and the IGBST to collect information on grizzly bears in the allotments.

App., Vol. 2 at 153-54.

The FS included these nine CMs “as a term and condition of the [grazing] permits” so the FS would have “the ability to enforce [the CMs] during livestock grazing administration” and ensure the CMs “must be followed [for a permittee] to maintain good standing on their permit” and avoid permit revocation. App., Vol. 2 at 187.

b. *Analysis*

The BiOp reached its no-jeopardy determination “[a]fter reviewing the specialists report, the current status of the grizzly bear in the action area, previous sources of information incorporated by reference . . . , and the [FS’s] commitment to implement their Conservation Measures, and cumulative effects.” App., Vol. 2 at 192 (emphasis added). It thus relied on the CMs as a whole. CBD and WWP argue that the FWS was arbitrary and capricious—not only because the BiOp relied on all the CMs together to support its no-jeopardy conclusion, but also because the

BiOp relied on certain individual CMs. The latter argument does not accurately describe the BiOp, which relied on the CMs as a package.

CBD nonetheless contends that we must review each of the nine CMs for possible remand, arguing that “[u]nder elementary APA principles, if one of the reasons essential to the no-jeopardy determination is invalid, the agency decision itself must, at minimum, be revisited on remand.” CBD Reply Br. at 8.¹³ But the BiOp did not single out a particular CM as “essential” to its determination. We leave open whether a challenge to a single CM may be eligible for APA relief when the agency relied on the aggregate of CMs for its decision. We need not decide that question because we do not find CBD’s or WWP’s challenges to any given CM satisfies the arbitrary and capricious standard.

Based on the foregoing, we consider each CM singled out by CBD and WWP. Although they advance plausible criticisms, we do not find a single CM to have been essential to the no-jeopardy determination or otherwise arbitrary and capricious. We

¹³ CBD relies on *Zzyym v. Pompeo*, 958 F.3d 1014 (10th Cir. 2020), where we held that the State Department acted arbitrarily and capriciously when it denied Zzyym’s request for a passport with an “X” designation for sex. *Id.* at 1017-18. Zzyym is intersex and could not accurately fill out the State Department’s passport application, which asked only whether the applicant was male or female. *Id.* at 1017-19. Of the five reasons the State Department offered to justify its denial of Zzyym’s request, “[t]wo of the reasons were supported by the administrative record, but three others weren’t.” *Id.* at 1018. Applied here, *Zzyym* does not directly support CBD’s argument because the FWS relied on the CMs as one factor, not nine, to justify the no-jeopardy conclusion.

then consider whether the BiOp's reliance on the CMs, taken as whole, was arbitrary and capricious, and conclude it was not.

i. Individual Conservation Measures

CBD and WWP mount challenges to some but not all of the CMs on an individual basis. In evaluating each CM, we view it in the context of the other CMs and the administrative record.

1) CMs 1, 2, and 3

CBD and WWP contend that CMs 1, 2, and 3 are vague to the point that each one is arbitrary and capricious. We disagree.

CM 1 states that "Bear Sanitation Guidelines will be followed." App., Vol. 2 at 153. It is not vague because it specifically incorporates the sanitation guidelines in Forest Food Storage Order 04-03-330 and its detailed requirements. *Id.*

CM 2 states that "[r]iders are required to watch all livestock closely." *Id.* Although lacking specifics, it directs riders to watch livestock "closely." CBD and WWP have not shown how reliance on this CM was essential to the no-jeopardy determination.

CM 3 says the FS "will monitor allotments on a regular basis," with no additional specifications. App., Vol. 2 at 153; *see* WWP Aplt. Br. at 51; CBD Aplt. Br. at 28. CBD points to meeting notes in the administrative record from 2012 indicating that an FWS employee said the FS "needs to clarify [the] definition of 'regular basis' monitoring" because the FS only visited the allotments twice in the year before the meeting, which suggested the CM "was not fully implemented."

App., Vol. 2 at 258. As a result of this statement, the 2014 BiOp required the FS to “define what their ‘regular’ monitoring schedule would be for the upcoming grazing season,” and produce “additional documentation explaining how and when this monitoring will be conducted.” App., Vol. 2 at 117. Despite the foregoing, no specifics for CM 3 appeared in the 2019 BiOp.

Although CM 3 lacks specifics, CBD and WWP again have not shown how CM 3 was essential to the no-jeopardy determination. We thus do not find FWS acted arbitrarily and capriciously by relying on CM 3 in the context of the CMs as a whole.

2) CMs 4 and 5

CBD and WWP argue CMs 4 and 5 are arbitrary and capricious because they are ineffective. CM 4 states that livestock carcasses must be “removed if possible or moved.” App., Vol. 2 at 153. If moved, they must be moved a certain distance away from roads, trailheads, and campgrounds. *Id.* CM 5 provides exceptions to the carcass removal requirements for “human rider or herder safety.” *Id.*

CBD argues CMs 4 and 5 are “demonstrably ineffective to protect grizzly bears” because they do not have a “requirement to move carcasses off of [grazing] allotments, even though [the] FWS notes in the 2019 BiOp that grizzlies can be drawn to carcasses from seven miles away.” CBD Aplt. Br. at 29 (citing App., Vol. 2 at 153, 155). CBD overstates its point because CM 4 states that carcasses must be “removed if possible.” App., Vol. 2 at 153.

WWP argues CM 4 “actually increases the likelihood of grizzly bears coming into contact with livestock carcasses.” WWP Aplt. Br. at 50. “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.” *Id.* (citing App., Vol. 2 at 153). “But bears prefer habitat away from roads.” *Id.* (citing App., Vol. 2 at 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.” *Id.* (citing App., Vol. 2 at 186-87).

WWP also argues that due to CM 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,’” which further renders these measures ineffective because “[w]ith 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.” *Id.* at 51 (quoting App., Vol. 2 at 153).

Although placing livestock in grizzly bear habitat may increase bear contact with livestock, leaving carcasses on roads or near infrastructure may increase bear contact with humans—which could lead to conflict removals (killings)—of grizzly bears. Neither CBD nor WWP have addressed this countervailing factor, nor have they shown any more than an undetermined “likelihood” of more bear-carcass contact off-road. And, as noted, CM 4 calls for carcass removal “if possible”—neither CBD nor WWP address this preference in the CM for removal of a carcass over moving it.

Nor do they address how often removal will not be “possible.” App., Vol. 2 at 153.

As to WWP’s statement about CM 5 that “removal likely will not occur when carcasses are located in hazardous terrain,” WWP only speculates about the extent to which hazardous terrain would affect carcass removal and fails to acknowledge the CM’s reasonable safety concerns. WWP Aplt. Br. at 51 (quotations omitted).

In sum, although WWP reasons that moving a carcass away from the road may increase the likelihood of attracting a bear to the carcass, leaving the carcass on the road might subject the bear to the peril of human conflict. In view of the competing and speculative probabilities, we cannot say CMs 4 and 5 are arbitrary and capricious in the context of the administrative record.

ii. Conservation Measures as a whole

CBD’s and WWP’s failure to show that any individual CM is arbitrary and capricious likely precludes a finding that the CMs as a whole violate the APA, but we will address the appellants’ remaining arguments.

First, CBD and WWP claim the CMs are unenforceable because they rely on implementation by the third-party permittees. We disagree. First, not all of the CMs rely on third-party permittees to implement. Second, for the CMs that do, the FS made them enforceable by incorporating them into the grazing permits. App., Vol. 2 at 187. As the Federal Appellees explain, the CMs are enforceable because “[i]f the permittees do not comply, then the [FS] can cancel or suspend the permits.” Fed. Aplee. Br. at 35 (citing 36 C.F.R. § 222.4 (2022)); App., Vol. 2 at 187.

CBD counters with *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917 (9th Cir. 2008). There, the Ninth Circuit found that a BiOp violated the ESA when, in support of its no-jeopardy conclusion, it relied on environmental mitigation measures that were not “binding.” *Id.* at 936. But here, the CMs are binding as a term and condition of the grazing permits.

For these reasons, CBD’s and WWP’s arguments that the CMs were not enforceable fail.

Second, CBD points to enforcement problems in the past with similar CMs in the Project area. CBD Aplt. Br. at 27. The Federal Appellees explain that these issues were associated with a sheep grazer, not a livestock grazer, who no longer has a permit. Fed. Aplee. Br. at 37. In any event, the question of whether the enforcement mechanisms are working goes to effectiveness, not enforceability. And, as noted, the CMs are enforceable because the government can revoke a grazing permit if a permittee fails to comply with the CMs.

Third, WWP argues that the FWS cannot rely on the CMs because, “[i]n 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.” WWP Aplt. Br. at 53 (citing App., Vol. 2 at 175, 189). “Despite this history, [the] FWS undertook no analysis of the measures’ adequacy.” *Id.* We find this argument unpersuasive because the number of lethal removals and population growth depend on a multitude of factors.

WWP provides no analysis showing the impact of past conservation measures compared to other factors.

* * * *

Even assuming CBD and WWP have raised plausible criticisms of some of the CMs or of the CMs as a whole, arbitrary and capricious review does not require perfection from the agency. *Jiron*, 762 F.3d at 1074 (“An agency’s actions need not be perfect; we may only set aside decisions that have no basis in fact, and not those with which we disagree.” (quotations and citations omitted)). We affirm the district court’s denial of the APA challenge to the CMs.

4. The Biological Opinion’s Consideration of Anticipated Take Elsewhere in the Greater Yellowstone Ecosystem

WWP argues that the 2019 BiOp was arbitrary and capricious in failing to consider anticipated take of grizzly bears elsewhere in the GYE.¹⁴ It contends that “a failure to consider all concurrently authorized lethal removals could result in lethal removal authorizations [in the DMA] that exceed [the DRC mortality] thresholds.” WWP Reply Br. at 9. WWP notes that the UGRA Project is only 1 percent of the DMA, and that FWS “knows precisely how many lethal removals it has authorized throughout the remaining 99% of the DMA.” *Id.* at 11.

The BiOp’s consideration of the potential mortality of grizzly bears in areas of the GYE other than the UGRA Project was sufficient. It included (1) an

¹⁴ Only WWP raised this argument. WWP Aplt. Br. at 44-47.

“environmental baseline” section discussing population trends in the GYE and the grizzly bear’s expanding range within the ecosystem, App., Vol. 2 at 172-76; (2) an analysis of lethal removals in the UGRA Project from 2010 to 2018 compared to all the mortality in the GYE, *id.* at 177; and (3) a discussion of whether the UGRA mortalities affected population sustainability in the GYE, concluding that they did not, *id.* at 182.

The BiOp noted that, in the UGRA Project, “bear conflicts with livestock increased an average of 10 percent each year,” a trend that is “likely to continue within the action area.” *Id.* at 181. But even with this trend, the BiOp said that the level of mortality has been “sustainable,” and data did “not suggest these mortalities are affecting the survival rate of independent-aged bears or population growth at the level of the DMA or ecosystem-wide.” *Id.* at 182. The BiOp also “analyzed the last five years of the [] dataset [from 2010 to 2018], because [the FWS] believe[d] it is a better representation of the current grizzly bear population, the conflicts with livestock in the Allotments, and the possible future trends.” *Id.*

The BiOp thus considered grizzly bear mortality outside the UGRA Project by evaluating the proportion of GYE lethal removals that occurred on the UGRA allotments from 2010 to 2018 and predicting future trends. As the district court stated, the 2019 BiOp did “not add up all prospective anticipated take within the DMA,” but it did “consider the proportion of removals within the UGRA allotments compared to total grizzly mortality in the GYE due to livestock depredations.” App., Vol. 1 at 139.

Although the BiOp could have been more complete by including an accounting of all concurrently authorized lethal takes in the GYE, this deficit does not amount to the FWS's "entirely fail[ing] to consider" anticipated take elsewhere in the GYE. *Wyoming*, 661 F.3d at 1227. WWP, pointing to *Mayo v. Jarvis*, 177 F. Supp. 3d 91 (D.D.C. 2016), argues the FWS needed to analyze more fully the Project's impact on the anticipated authorized take in the GYE, WWP Aplt. Br. at 44. But *Mayo* said otherwise—"nothing in the statute or regulation requires the FWS to rigidly add up each incidental take" anticipated throughout the GYE. 177 F. Supp. 3d. at 138-39. And the *Mayo* record is distinguishable. As the district court stated, "[i]n *Mayo*, the offending BiOp addendum contained no discussion of the environmental baseline at all," and "[t]hat is not the case here." App., Vol. 1 at 140 (citing 177 F. Supp. 3d at 137).¹⁵

The FWS adequately considered the Project's effect on incidental take elsewhere in the GYE. This portion of the BiOp was therefore not arbitrary and capricious.

¹⁵ We also discount WWP's criticism given the BiOp's primary focus on the UGRA Project, which is 1 percent of the DMA and an even smaller portion of the GYE. Again, although the BiOp's discussion of potential grizzly bear mortality in the GYE beyond the UGRA Project was not comprehensive, it was not arbitrary and capricious.

B. The Forest Service's Reliance on the Fish and Wildlife Service's Biological Opinion

As noted, the FS's ROD authorizing the Project relied in part on the BiOp. CBD and WWP claim that because the BiOp is arbitrary and capricious, the FS's reliance on the BiOp was arbitrary and capricious. We agree.

“[W]hen we are reviewing the decision of an action agency to rely on a BiOp, . . . the critical question is whether the action agency's *reliance* was arbitrary and capricious, not whether the BiOp itself is somehow flawed.” *City of Tacoma v. FERC*, 460 F.3d 53, 75 (D.C. Cir. 2006).

Here, the FS's reliance on the BiOp was arbitrary and capricious. The BiOp failed to consider (1) a limit on lethal take of female grizzly bears, and (2) the UGRA Project's likely contribution to the already-existing mortality sink for female grizzly bears in the Project area.

The FWS's failure to address these two important issues was “apparent on the face of the Biological Opinion.” *Shafer & Freeman Lakes Env't Conservation Corp. v. Fed. Energy Reg. Comm'n*, 992 F.3d 1071, 1096 (D.C. Cir. 2021); *see also Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 531-32 (9th Cir. 2010) (action agency's reliance on a BiOp was arbitrary and capricious where the incidental take statement contained apparent flaws); *Ctr. for Biological Diversity*, 698 F.3d at 1127-28 (action agency's reliance on consulting agency's BiOp was arbitrary and capricious where the BiOp was “inadequate with regard to evaluating the potential impacts of the

Project’s groundwater withdrawals,” which were raised in the FEIS and the Biological Assessment).

We therefore reverse the district court’s determination that the FS’s reliance on the FWS’s 2019 BiOp was not arbitrary and capricious.

C. The Forest Service’s Record of Decision

The FS’s ROD approved the UGRA Project. WWP appeals the district court’s ruling upholding the Project under the NFMA.¹⁶ First, we affirm that the ROD was not arbitrary and capricious in determining whether the Project provided adequate forage and cover for sensitive amphibians. Second, we reverse the district court’s holding that the ROD was not arbitrary and capricious. The FS failed in the ROD to consider the Migratory Birds Report and the FEIS, which explained the Project would not provide adequate forage and cover for migratory birds.

1. Additional Background

a. The Bridger-Teton National Forest Plan

The UGRA Project falls within the BTNF, which is managed under the National Forest Management Act via a Forest Plan, the BTNF Plan. *See App.*, Vol. 1 at 130. The BTNF Plan “set[s] Resource Management Prescriptions, Standards, and Guidelines,” which “represent land management direction responsive to . . . the Bridger-Teton Management Problems, Challenges, Goals, and Objectives.” *Id.* at 131 (quotations omitted).

¹⁶ Only WWP raises a NFMA challenge to the ROD. WWP *Aplt. Br.* at 25-37.

The relevant emphasis here is on (1) two of the Plan’s “Objectives”—4.7(d) and 1.1(h); (2) the Plan’s mechanism for resolving conflicts between Objectives called the Desired Future Conditions (“DFCs”); and (3) the Plan’s Forest Utilization Standard (“FUS”).

i. Objectives and Desired Future Conditions

The parties’ arguments largely focus on how two of the Plan’s Objectives apply to the UGRA Project. Objective 4.7(d) “require[s] that suitable and adequate amounts of forage and cover are retained for wildlife and fish.” App., Vol. 1 at 131 (alterations in original) (quotations omitted). Objective 1.1(h) is to “[p]rovide forage for about 260,000 Animal Unit Months (AUMs) of livestock grazing annually.” *Id.* at 148 (alterations in original) (quotations omitted).

The BTNF Plan describes how conflicts between Plan objectives are resolved:

[S]ome objectives conflict with others. Consequently, some objectives will not be met on all areas of the Bridger-Teton National Forest. For example, lands used for timber production may not help re-establish historic elk migration routes as stated in Objectives 1.1(a) and 1.1(g). The conflicts are resolved by application of the different Desired Future Conditions to different areas of the National Forest.

App., Vol. 5 at 99. The Plan defines “Desired Future Conditions”:

[T]he Desired Future Conditions (DFCs) describe land management direction intended to accomplish the Goals and Objectives. In one sense, the DFCs are consequences of the response to demands, public issues, resource productivity potential, and the need for environmental standards found in the Goals and Objectives. That the DFCs exist at all is in recognition that not all the Goals and Objectives can be achieved at the same time from the same land areas. Therefore, 17 DFCs . . . have been developed

to accomplish multiple, compatible Goals and Objectives
. . . . Each Desired Future Condition will be achieved over
the 50-year planning horizon

App., Vol. 5 at 151.

DFC 10 governs most of the UGRA Project area (66 percent). App., Vol. 11 at 190-91. DFC 10 areas are managed for “some resource development and roads while having no adverse and some beneficial effects on wildlife.” App., Vol. 5 at 232.

DFC 12 governs the next largest amount of the UGRA Project area (18 percent). App., Vol. 11 at 191. DFC 12 areas are managed for “high-quality wildlife habitat and escape cover, big-game hunting opportunities, and dispersed recreation activities.” App., Vol. 5 at 240.

ii. Forage Utilization Standard

The BTNF Plan also includes a FUS, which requires the FS to “prescribe site-specific utilization levels needed to meet Forest Plan objectives.” App., Vol. 5 at 134. The FUS “imposes maximum utilization levels allowed for all herbivores on key vegetative species.” App., Vol. 1 at 131. We discuss below the forage utilization levels that the FS selected in its ROD for the UGRA Project.

b. *The Record of Decision and the Final Environmental Impact Statement alternatives*

As noted, the 2017 FEIS and the Amphibians and Migratory Birds Reports considered four alternative plans for the UGRA Project.

Alternative 1 - Eliminate livestock grazing entirely from the Project area.
App., Vol. 4 at 171.

Alternative 2 - Maintain the “current management plans that authorize livestock grazing [and] continue to guide management of the project area.” *Id.*

In its ROD, the FS did not select this alternative because “livestock grazing under this alternative . . . would likely add to and exacerbate” issues in the UGRA Project “regarding ground cover, vegetative species composition, stream bank stability, riparian function, and soil quality.” *Id.* at 172.

Alternative 3 - Provide “a livestock grazing strategy that would be more conservative than allowable use proposed in Alternative 2.” *Id.* “In general, a maximum of 50 percent forage utilization on key forage species would be permitted in upland, riparian, and wetland areas and a 4-inch stubble height minimum would be retained at the greenline of streams across the project area where rangeland and riparian objectives are being met.” *Id.*

Alternative 4 - Provide “a livestock grazing strategy designed to generally promote healthy riparian and wetland conditions and improve existing conditions at certain areas.” *Id.* at 173. “The management emphasis of this alternative is to provide habitat to meet the needs of fish and riparian-dependent wildlife in balance with livestock grazing as described in the Forest Plan for Desired Future Condition 10.” *Id.* “It is similar to Alternative 3 with the primary difference being a lower forage utilization level permitted in riparian and meadow areas across four allotments,” permitting a “35% maximum forage utilization on key forage species in riparian and meadow areas for [four of the] allotments compared with the 50% in Alternative 3.” *Id.*

The UGRA Project ROD authorized grazing on four of the six allotments using a management strategy “similar to Alternative 3.” *Id.* at 172. In the remaining two allotments, the ROD, drawing from Alternative 2, “allow[ed] up to 65 percent [utilization] in riparian meadow areas and 60 percent in uplands” in the Noble Pastures allotment, and raised the “average forage utilization of 30 percent in the

upland and riparian/meadows areas” in some pastures of the Upper Green River allotment to “50 percent utilization.” *Id.* at 172.

2. The Record of Decision’s Analysis of Adequate Forage and Cover for Sensitive Amphibians

The ROD’s treatment of forage and cover for sensitive amphibians was not arbitrary and capricious.

a. The Sensitive Amphibians Report

The FS’s Sensitive Amphibians Report, prepared for the FEIS, addressed the UGRA Project’s effects on sensitive amphibians. It summarized its conclusions on each alternative’s “[c]ompliance with the Forest Plan and Relevant Law, Regulation, and Policy.” *See App.*, Vol. 3 at 145, 149.

The Report concluded that Alternative 2 “carries substantial negative effects on [(1)] riparian function and [(2)] [herbaceous] cover needed by amphibians,” and thus “does not meet the standard for fish, wildlife, threatened, endangered, and sensitive wildlife species; the standard for allotment management planning; the guideline for habitat diversity (DFC 2A and 3), the fisheries and wildlife prescription (DFC 10 and 12), and the management emphasis statement for DFC 10.” *Id.* at 145. It found that Alternative 2 would contravene the BTNF Plan by not resolving the conflict between Objectives 1.1(h) and 4.7(d) in line with the guiding DFCs. *See id.*

The Report concluded that Alternative 3 would lead to unsatisfactory “conditions with respect to retention of herbaceous vegetation needed by amphibians.” *Id.* at 149. It also would (1) allow satisfactory “riparian function” (as

opposed to Alternative 2’s failures in that regard), and (2) meet “the standard for fish, wildlife, threatened, endangered, and sensitive wildlife species, the standard for allotment management planning; the guideline for habitat diversity (DFC 2A and 3), the fisheries and wildlife prescription (DFC 10 and 12), and the management emphasis statement for DFC 10.” *Id.* But the Report still anticipated “[n]egative effects on amphibians stem[ming] from inadequate cover and cover benefits, but the severity of their effect on amphibian populations is uncertain” and ultimately not enough to predict it would endanger the viability of the species in the Project Area. *Id.*

b. *WWP’s arguments*

WWP asserts generally that “[t]he 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.” WWP Aplt. Br. at 26. “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.” *Id.* WWP thus argues that in resolving conflicting Objectives 4.7(d) and 1.1(h), the FS chose to satisfy Objective 1.1(h)’s requirement to provide forage for livestock grazing at the expense of meeting Objective 4.7(d), in contravention of the BTNF Plan. WWP urges that the Report showed “Alternative 3 with elements of Alternative 2” would not provide enough forage and cover for sensitive amphibians. *See* WWP Aplt. Br. at 32.

c. *The Record of Decision's analysis was not arbitrary and capricious and did not violate the National Forest Management Act*

The ROD explained that, by adopting a combination of Alternatives 2 and 3, the FS “recognize[d] that desired conditions for utilization of key forage species may not be achieved in certain areas under maximum allowable utilization levels; however, the livestock management strategy in this decision balances amphibian health with other socio-economic and multiple use considerations.” App., Vol. 4 at 166. In particular, the “strategy” chosen “positively affects riparian function through the design features and a mix of effects associated with range improvements and permittee travel.” *Id.* “This decision improves range condition in breeding habitat for amphibians.” *Id.*

The ROD’s discussion addressed the Sensitive Amphibians Report’s conclusions that (1) neither Alternatives 2 nor 3 would provide adequate forage and cover, and (2) Alternative 3 would provide adequate riparian function but Alternative 2 would not. App., Vol. 3 at 145-49. Due to the importance of riparian function on amphibian breeding, the Report ultimately concluded that Alternative 3 would meet DFCs 10 and 12 and provide suitable habitat for the sensitive amphibians. *Id.*

Because the ROD recognized the concerns regarding forage and cover but also explained that improved riparian function led to the combination of Alternatives 2

and 3, App., Vol. 4 at 166, the FS satisfactorily considered the issue, articulated a defensible position, and was not arbitrary and capricious.¹⁷

3. The Record of Decision's Failure to Consider Adequate Forage and Cover for Migratory Birds

In contrast with the ROD's discussion of forage and cover for sensitive amphibians, it was silent about the concerns raised in the Migratory Birds Report and the FEIS about inadequate forage and cover for migratory birds, rendering the ROD arbitrary and capricious on this point.

a. The Migratory Birds Report

The Migratory Birds Report summarized its conclusions on the "Forest Plan Forage Utilization Standard and Objective 4.7(d)." App., Vol. 9 at 144. The Report was highly critical of Alternative 2. It explained that "Alternative 2 would not meet [the Forage Utilization] standard because" it "would not retain an adequate amount of suitable forage and cover for migratory birds." *Id.*

A large volume of scientific information demonstrates that this utilization level is insufficient to retain suitable nesting cover, hiding cover, invertebrate habitat, and small mammal habitat for migratory birds; that they would result in negative effects on migratory birds due to these insufficiencies; and would subject a large proportion of

¹⁷ WWP also argues that Alternative 4 "shows precisely how the Forest Service could satisfy both" Objective 1.1(h) and Objective 4.7(d), as it is the only alternative considered that the FS's experts deemed would satisfy both objectives. WWP Reply Br. at 20. Based on the foregoing analysis, we conclude the FS was not obligated to adopt Alternative 4 to avoid a successful arbitrary and capricious challenge.

ground nests and nests low in shrubs to being trampled or knocked down

Id. “Alternative 2 is the furthest of any alternative from meeting the stated requirements of the Forage Utilization Standard,” and would not “stri[k]e the balance” between Objectives 4.7(d) and 1.1(h) in a way that would satisfy the “management emphasis of DFC 10” and “DFC 12 areas.” *See id.*

According to the Report, Alternative 3 was slightly better than Alternative 2:

Although there is no indication that the maximum utilization limit of 50% of key forage species (55-70% herbaceous retention) in upland rangelands was designed to meet Objective 4.7(d) with respect to migratory birds, actual use of $\leq 35\%$ of key forage species ($\geq 70\%$ herbaceous retention) in these upland rangelands would retain an adequate amount of suitable forage and cover for migratory birds, and this utilization level likely would continue under this alternative, as explained in the analysis.

App., Vol. 9 at 152. The Report concluded that maximum utilization would not leave an adequate amount of forage and cover for migratory birds, but if actual use were less than the maximum allowed, the birds would retain sufficient forage and cover. It noted, however, that “[s]etting the maximum forage utilization limit at 50% in riparian areas would allow negative impacts on migratory birds to occur” in conflict with (1) the “management emphasis of DFC 10 . . . to have no affect or beneficial effects on wildlife,” and (2) the management “emphasis of DFC 12 . . . on non-game wildlife over livestock grazing use.” *Id.* at 151, 152.

b. *The Final Environmental Impact Statement's discussion of migratory birds*

The FEIS confirmed the Migratory Birds Report's finding that Alternatives 2 and 3 would adversely affect the migratory birds. It presented information on the Project's effect on migratory birds "summarized from the Migratory Bird Specialist Report." App., Vol. 13 at 30. The FEIS explained that "Alternative 2 would continue to contribute to [] negative impacts" on migratory birds, that "Alternative 3 would contribute to offsetting the impacts by a small degree, compared to existing conditions and Alternative 2," but that "some effects of Alternative 3 would continue to contribute substantively to [the negative impacts]." *Id.* at 35.

c. *WWP's arguments*

WWP argues the FS's "own experts . . . concluded that neither Alternative 2 nor Alternative 3 will provide suitable and adequate amounts of forage and cover for . . . migratory birds." WWP Aplt. Br. at 31-32 (citations omitted). "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." *Id.* at 32.

d. *The Record of Decision's failure to address concerns about migratory birds was arbitrary and capricious and violated the National Forest Management Act*

The ROD did not explain how the Project could be reconciled with the concerns about migratory birds identified in the Migratory Birds Report and the FEIS. Instead, the ROD summarily stated the FS must "provide for the protection of migratory birds," and that "[b]ased on discussions in . . . the FEIS," which we

recounted above, the UGRA Project provides this protection. App., Vol. 4 at 178.

This statement conflicted with the Migratory Birds Report and the FEIS about how the Project would produce inadequate forage and cover for the migratory birds. It also said nothing about balancing Forest Plan objectives consistent with the DRCs.¹⁸

The Federal Appellees argue the Migratory Birds Report “do[es] not invalidate the agency’s final decision” because “[a] diversity of opinion by local or lower-level agency representatives will not preclude the agency from reaching a contrary decision, so long as the decision is not arbitrary and capricious and is otherwise supported by the record.” Fed. Aplee. Br. at 52 (quoting *WildEarth Guardians v. Nat’l Park Serv.*, 703 F.3d 1178, 1186-87 (10th Cir. 2013)). But this was not a matter of “diversity of opinion” among the FS’s experts. Rather, as WWP noted, the FS “ignored its own expert[]” by failing to address the concerns regarding forage and cover in the Migratory Birds Report and FEIS. *Id.*

This part of the ROD was arbitrary and capricious. It violated the BTNF Plan and the NFMA. We reverse.¹⁹

¹⁸ The Federal Appellees argue generally that DFCs 10 and 12 for the Project area “do[] not direct the Forest Service to prioritize wildlife habitat over other uses”; rather, they “direct[] the Forest service to *balance* myriad uses,” which is “exactly what the Forest Service reasonably did here.” Fed. Aplee. Br. at 47. But the ROD gave no indication that it balanced conflicting Objectives 4.7(d) and 1.1(h) in line with the guiding DFCs. In fact, the ROD’s failure to acknowledge its expert’s concerns in the Migratory Birds Report that neither Alternatives 2 nor 3 would strike a balance that satisfies DFCs 10 or 12 belies the Federal Appellees’ claim that the FS engaged in meaningful balancing.

¹⁹ The Federal Appellees appear to misstate one of WWP’s challenges as referring to the FS’s “selection of Idaho fescue as the key species to track.”

D. *Remedy*

Our recent decision in *Diné Citizens Against Ruining Our Environment v. Haaland*, 59 F.4th 1016 (10th Cir. 2023), “adopt[ed] the test set out by the D.C. Circuit in *Allied-Signal* for determining whether vacatur is necessary.” *Id.* at 1049 (citing *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).²⁰ The *Allied-Signal* test for vacatur consists of two factors: (1) “the seriousness of the agency action’s deficiencies (and thus the extent of doubt whether the agency chose correctly),” and (2) “the disruptive consequences of an interim change that may itself be changed.” *Id.* (quotations and alterations omitted).

“A strong showing of one factor may obviate the need to find a similar showing of the other.” *Am. Bankers Ass’n v. Nat’l Credit Union Admin.*, 934 F.3d 649, 674 (D.C. Cir. 2019); *see also Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 270 (D.D.C. 2015) (“There is no rule requiring either the proponent or

Fed. Aplee. Br. at 50. But WWP is challenging the utilization level of Idaho fescue, not its selection. WWP argues that the FS “never considered the effect that 50% utilization of Idaho fescue would have on wildlife habitat needs.” WWP Aplt. Br. at 29.

²⁰ The Federal Appellees filed a letter under Federal Rule of Appellate Procedure 28(j) on February 7, 2023, acknowledging our adoption of the *Allied-Signal* test in *Diné*. CBD and WWP both filed responses to this letter. CBD asks us to “temporarily enjoin the Upper Green Project and remand to the district court to apply the *Allied-Signal* test to determine if vacatur is appropriate.” Doc. 10978118 at 2. We decline to do so based on our determination of remedy. In its response, WWP requests “an opportunity to more fully brief this issue” if we chose to apply the *Allied-Signal* test. Doc. 10978712 at 2. Given the briefing before us, the Appellants’ responses to the Federal Appellees’ 28(j) letter, and our analysis of the issues in this opinion, we see no need for additional briefing.

opponent of vacatur to prevail on both factors.” (citing *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008)).

First, as the Federal Appellees explain, even if there are deficiencies in the BiOp and the ROD, we need not necessarily order vacatur—“FWS or the Forest Service would be able to cure such deficiencies on remand.” Fed. Aplee. Br. at 53. We agree.

Second, the Appellees have highlighted the disruptive consequences vacatur would impose. The Ranchers explain that “[v]acatur would threaten disruption” of the “seasonal pattern” of grazing, which rotates from cattle grazing on “lower ground,” outside the allotments in “late spring,” to the “[s]ummer grazing” that occurs on the UGRA Project allotments. Ranchers Aplee. Br. at 41-42. According to the Ranchers, these seasonal rotations are critical due to the “time they give private land to grow the next hay crop, which will feed the cattle herds during the next winter.” *Id.* at 42. Both the Federal Appellees and Wyoming note that “[r]educing livestock numbers and placing further restrictions on livestock grazing can adversely affect permittees and local communities.” Fed. Aplee. Br. at 53 (quoting App., Vol. 4 at 167); *see also* Wyo. Aplee. Br. at 45 (same).

Neither CBD nor WWP have addressed these disruptions. Both argue that vacatur would “adhere to the [plain] language of the APA” that “courts ‘shall hold unlawful and set aside agency action’ found to be arbitrary or capricious.” WWP Reply Br. at 27-28 (quoting 5 § U.S.C. 706(2)); *see* CBD Reply Br. at 20 (same). But “vacatur is not always the appropriate remedy.” *Diné*, 59 F.4th at 1049. It is not appropriate

here because the deficiencies in the BiOp and the ROD are curable upon remand to the agencies, and vacatur would cause disruption. We therefore remand to the FWS and the FS without vacatur.

III. CONCLUSION

First, on the ESA challenges, we reverse in part and hold that the BiOp was arbitrary and capricious and therefore violated the ESA for failing to consider (1) including a limit on lethal take of female grizzly bears, and (2) the UGRA Project's contribution to the mortality sink for female grizzly bears. But we affirm in part and hold that the BiOp was not arbitrary and capricious for (1) its reliance on Conservation Measures or (2) its alleged failure to consider anticipated take elsewhere in the GYE.

Second, we hold that the FS's reliance on the FWS's flawed BiOp was arbitrary and capricious.

Third, on the NFMA challenges, we affirm in part and hold that the ROD was not arbitrary and capricious in its discussion of adequate forage and cover for sensitive amphibians in the Project area. We reverse in part and hold that the ROD was arbitrary and capricious for its failure to address the issue of adequate forage and cover for migratory birds in the Project area, and therefore violated the NFMA.

We remand to the agencies without vacatur, *see Diné*, 59 F.4th at 1049, to address the deficiencies in the BiOp and the ROD consistent with this opinion.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

May 25, 2023

To Counsel of Record

RE: 22-8031, 22-8043, Western Watersheds Project, et al v. Haaland, et al
Dist/Ag docket: 2:20-CV-00231-NDF, 2:20-CV-00234-NDF

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Wolpert', with a long horizontal flourish extending to the right.

Christopher M. Wolpert
Clerk of Court

CMW/klp