

## Grizzly Bear Delisting Vacated: FWS legal authority, not hunting, at issue

On September 24, 2018, the federal district court in Missoula, Montana ruled that a Final Rule issued by U.S. Fish and Wildlife Service ("FWS") in June 2017 violated the Endangered Species Act ("ESA"). *Crow Indian Tribe v. United States*, CV 17-89-M-DLC, 2018 WL 4568418 (D. Mont. Sep. 24, 2018). The Final Rule would have delisted one distinct population segment ("DPS"); the court was only tasked with answering the following: "Did [FWS] exceed its legal authority when it delisted the Greater Yellowstone grizzly bear?" *Id.* at 1. The court made clear in the second paragraph of the decision that, "Although this Order may have impacts throughout grizzly country and beyond, this case is not about the ethics of hunting, and it is not about solving human-or livestock-grizzly conflicts as a practical or philosophical matter. These issues are not before the court." *Id.* This case had nothing to do with the merits of hunting, but the court's decision effectively cancelled hunts planned in Idaho and Wyoming. This is because the ruling places grizzly bears back under the protections of the ESA; under these protections, there is not permitted hunting at this time.

### ***Court Determined Three Violations of Endangered Species Act***

The vacated Final Rule was issued by FWS on June 25, 2017, and had two effects: FWS created



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the Greater Yellowstone DPS and simultaneously delisted the Greater Yellowstone DPS. The D.C. Circuit Court of Appeals has ruled that contemporaneous creation and delisting of a DPS is permitted. *Humane Society v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017). The plaintiffs did not challenge the grizzly bear delisting on this ground, so the court assumed that FWS could create and delist a DPS at one time. However, the Montana district court vacated the rule because FWS failed to consider the effect of delisting the Greater Yellowstone DPS on other populations of grizzly bear, failed to ensure that adequate regulatory mechanisms were in place to help the Greater Yellowstone DPS recover by not including a recalibration (population estimation) provision in the Conservation Plan, and drew conclusions about the Greater Yellowstone DPS's genetic viability that were inconsistent with the conclusions drawn by two studies relied on by the agency. The district court reasoned that FWS even violated the ESA under the stringent "arbitrary and capricious" standard required to overturn agency action under the Administrative Procedure Act ("APA").

### ***FWS Did Not Consider the Effect of Delisting on Other DPS's***

In *Humane Society v. Zinke*, the D.C. Circuit Court of Appeals

ruled that FWS must consider the effect of delisting a DPS on the DPS's that remain covered by the ESA. In that case, FWS failed to include analyses of gray wolf DPS's that were not being listed, leaving the status of remaining populations unclear. In *Crow Indian Tribe v. United States*, FWS argued that considering the effect of delisting on other DPS's was unnecessary because those populations would remain protected by the ESA. FWS also argued that this case was different than *Humane Society v. Zinke* because in the grizzly bear delisting rule, FWS included an affirmation that "other DPS's remain covered under the act." The court ruled that it was not legally distinguishable, and applied the rule from *Humane Society v. Zinke*, ordering that FWS must consider the effect of delisting one DPS on the entire listed population, including populations that will remain under ESA protections. The court rejected FWS's argument that keeping populations under the ESA was sufficient. A review of the threat to the entire listed population is required, including the five factor threat analysis under ESA § (4)(a); if after that FWS determines that delisting a DPS will not harm the remaining population, it may be permitted.

### ***FWS Did Not Include a Recalibration Provision in Its Conservation Plan***

Through the delisting process, FWS collaborated with Idaho, Montana, and Wyoming in developing management plans to be implemented after delisting. In the final Conservation Strategy, FWS allowed the states to decide whether to change the current population estimator in use (Chao2). Because the delisting is

based on population estimates of grizzly bears based on Chao2, any measurements estimated using a different population estimator must be recalibrated to the numbers based on Chao2 in order to see whether the population is shrinking, growing, or stable.

The court reasoned that failure to include a specific recalibration method or a specific way states would recalibrate was a failure to consider whether there are adequate regulatory mechanisms to ensure recovery post-delisting. FWS's rule would have let the states choose their own recalibration method, or none at all, because the Final Rule did not include a recalibration provision; the court ruled that this was a negotiation tactic not permitted under the ESA delisting process and FWS therefore acted arbitrarily and capriciously in its implementation of the ESA. The court emphasized that the decision to not include a recalibration provision was not based on best available science as mandated by the ESA.

***FWS Drew Conclusions about Genetic Viability of the Greater Yellowstone DPS That Was Not Based on the Best Available Science***

In its Final Rule, FWS concluded that the Greater Yellowstone DPS was genetically independent and self-sufficient, and did not need measures like translocation or cross-breeding with grizzly bears from other populations in order to ensure long-term genetic health. FWS drew its conclusion based on two studies. One study, Miller and Waits (2003) found a 4:1

ratio between actual population estimates and "effective" population – the number of bears that contribute to the gene pool via breeding. The study estimated that there were about 100 grizzly bears in the effective population based on its own estimate of 400 bears in the actual population. FWS used this information to conclude that 100 grizzly bears would be sufficient to combat short and long term effects of inbreeding.

The second study Kabath, et al. (2015) found that the effective population size may be 42 to 66% of the total population. FWS applied 66% to the total population in its Final Rule, concluding that the Greater Yellowstone DPS's effective population size is 469. The Final Rule did not include any provisions for translocation, natural connectivity, or cross-breeding that might ensure more genetic diversity in the future. The court ruled that the studies did not support the conclusion that the DPS was genetically independent and self-sufficient.

**IMPACT OF RULING**

The Court did not consider the merits of regulated hunting within any management system and pointed out that the "ethics of hunting" were not at issue in this case. However, the court's ruling prevents hunting authorized by Idaho and Montana in anticipation of delisting of the Greater Yellowstone DPS, which would have transferred management wholly to the states. Now, the Greater Yellowstone DPS is back under FWS protections, which do not permit hunting.

**Governor of California Vetoes Anti-hunting Bill/SB 1487**

We reported on California's SB 1487, The Iconic African Species Protection Act, in last month's Bulletin. Its purpose was to discourage Americans from safari hunting in Africa

and to continue the "animal rights leadership" of the state. The underlying problem was it's illegality. The final version that passed the Assembly had so many exemptions, conditions



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and exceptions that it was just a shell of the original bill. It would not have fulfilled its purpose. The Governor vetoed the bill on the last possible date of September stating the purpose of the bill was not legal. In our view, the bill had been and had to be gutted to get passage but it was still illegal thus a magnet for litigation. It was not a "protection" bill, rather the aim was to remove protection.

Conservation Force became seriously involved in this California bill when the sponsoring senator ignored our warnings about our successful New Jersey federal court case that rested upon federal law preemption and the express ESA provision prohibiting state restrictions on ESA and CITES regulated trade. The bill passed through the Senate in total disregard of that case law and our warning. The New Jersey case had stopped the "Cecil Campaign" in its tracks (an anti-hunting campaign to stop imports at every U.S. port of entry). Second, the bill concerned much more than just California interests and no doubt would be cited as a model in other states. Third, if we were to litigate it as we did in New Jersey, then it was best to wade in to know all the facts intimately. (In New Jersey the state's Attorney General preposterously denied the purpose of the law was to stop the import of ESA trophies so we had to scramble to prove the

intent of the legislation.) Fourth, our relatively new peer reviewed Benefits Fact Sheets provided an opportunity to educate all 80 State Assembly Members in hope, win or lose, it may start to open their eyes for future fights. We followed those new tools with direct letters from four hunting countries and Namibia's renown community association, NACSO. Most of Conservation Force's campaign was unprecedented.

All the steps and events in the campaign were too long to repeat here but by the time the bill reached the Governor it was just a shell so full of exemptions and conditions that it could only serve to broadcast the anti-hunting sentiment but little more. We sent the Governor a tactful notice that we would sue if he signed the bill, and we had the African wildlife authorities redirect their original opposition letters to the committees to the Governor personally (with Zimbabwe's hand delivered the last day). Nevertheless, the governor said he shared the feelings of the anti-hunters, but he understood it was illegal. There could be no doubt in his mind why the successful litigant in the New Jersey court case was ever-present and that we meant business.

The governor has saved the state taxpayers a senseless legal battle defending a bill too full of exemptions to be more than a symbolic sentiment and, admit it or not, he has to recognize

some of the merits of all he has seen in the education campaign. We have the most convincing and authoritative educational material ever assembled that is continually being peer reviewed, revised and updated. We monitor all the states to keep the Cecil Campaign against trophy imports in check and in this case FWS had expressed their concern to me about its potential to spread to other states. I am sure the weight of the California Coalition, and the SCI chapters, the taxidermists, all hunting organizations that weighted in like the RMEF, WSF, DU and experts had an impression on the Governor, but he cited the illegality because, of course, the whole purpose was illegal even if only a shell remained of the bill when it reached and it passed in the California Assembly.

Conservation Force sent faxes with photographs to all of the 80 Assembly Members every working day of the session (more than 800 faxes). Some of the educational photographs with their caption messages follow here to demonstrate the attention and tool of education they can provide. We need more messaging photographs that tell a story, capture and convey a useful educational message, and aid in adding emotion to our messages in the future. Please contribute useful photographs. Email to [CF@conservationforce.org](mailto:CF@conservationforce.org).



*9 year old boy killed by elephant at the same time as his brother.*



*Education: rural community children in school built by hunting operator. Many hundreds (really thousands) of schools, teacher houses, water wells, medical facilities, etc are provided by hunting operators and their clients.*





*Water, Health and Safety: Hunting operators provide men, women, children and elders healthier water at a safer location away from crocodiles, lions, leopards, etc that commonly feed upon them and their family members.*



*What will come first, the school bus, the elephants, or the hyena?*



*Snares seized by hunting operator.*



*Will it be this?  
Ranger Removing snare.*



*Or this? Young Leopard killed by snare  
in Zambia.*



*Snared lion with game ranger.*



*Wire snared Giraffe in Tanzania.*



*Legal hunting makes local people more  
tolerant of cattle killers.*

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