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Ninth Circuit Finds Fish & Wildlife Failed to Adequately Account for Climate Impacts, Keeps Yellowstone Grizzlies on ESA List^[]**

By Jessica Ferrell [\[a0\]](#)

The Ninth Circuit Court of Appeals recently affirmed a Montana district court ruling that blocked the U.S. Fish & Wildlife Service (the "Service") from removing Yellowstone grizzly bears from the ESA's threatened species list. [Greater Yellowstone Coalition, Inc. v. Servheen, 665 F.3d 1015 \(9th Cir. 2011\)](#). The opinion is noteworthy because it is based in large part on climate change impacts, and because the Court did not defer to the agency despite considerable scientific uncertainty. The Court vacated the Service's rule delisting the grizzly—resulting in the species' continued protection under the ESA—and sent the matter back to the Service for more review.

Background

The Service listed grizzly bears as threatened in 1975. At that time, approximately 1,000 grizzlies occupied only 2% of their historical range in the lower 48 states, and between 136 and 250 grizzly bears were left in the Greater Yellowstone Area.^[1] In 1982, the Service completed its first grizzly bear recovery plan.^[2] Grizzly mortality began to decline in the Greater Yellowstone Area around 1983, and in 1993, the Service revised the Grizzly Bear Recovery Plan.^[3] This revision ultimately led to the creation of a "Conservation Strategy," under which a mixture of state and federal agencies were to guide management of the Yellowstone grizzlies.^[4] In 2007, federal wildlife officials estimated that over 580 grizzlies lived in the Greater Yellowstone Area alone.^[5] The population continued to grow afterwards, but has dropped slightly over the past few years due to high grizzly mortality levels since 2008.^[6]

In response to population gains during the beginning of the last decade, in November 2005, the Service proposed designating the Yellowstone grizzlies as a Distinct Population Segment ("DPS") and removing the DPS from the ESA list of threatened species.^[7] The Service issued its Final Rule on March 29, 2007.^[8] The Service concluded that the Yellowstone Grizzly DPS warranted DPS status because they were "markedly separated" from the other grizzly bear subpopulations.^[9] It also delisted the Yellowstone Grizzly DPS, concluding that, "[b]ased on the best scientific and commercial information available," the Yellowstone Grizzly DPS "is recovered and no longer meets the [ESA's] definition of threatened or endangered."^[10]

In 2007, an environmental group, the Greater Yellowstone Coalition, challenged the Service's decision to remove the Grizzly DPS from the ESA list.^[11] In 2009, in *Greater Yellowstone Coalition v. Servheen* ("GYC v. Servheen"),^[12] U.S. District Court Judge Donald W. Molloy agreed with two of the Coalition's claims, concluding that: 1) the Service failed to adequately consider the potential impacts of global warming and other factors on the whitebark pine, an important food source for grizzly bears; and 2) the Service failed to show that adequate regulatory mechanisms existed to protect the DPS after delisting.^[13] The district court enjoined the Service's delisting rule. Its opinion was one of the first in which a court prevented the delisting of a species based on the potential impacts of climate change, despite the species' apparent recovery. See J. Ferrell & R. Prugh, *Despite Apparent Recovery, Climate Change Keeps Grizzly Bears on ESA List*, *Marten Law News* (Oct. 2009).^[14]

Effects of Whitebark Pine Declines on Grizzlies

In the final rule, the Service identified a number of different causes of the decline of whitebark pine, and the ef-

fects of that decline on grizzlies. It concluded, however, that even if whitebark pine continued to decline, the DPS would not be adversely affected because the bears would adapt by finding other food sources.^[15] In support of this conclusion, the Service pointed to the fact that the availability of whitebark pine nuts varied from season to season due to a variety of factors and, therefore, the bears are already accustomed to finding alternative food sources in years when whitebark pine nuts are unavailable.^[16]

The district court rejected the Service's contentions, finding that the "best science indicates that whitebark pines are expected to decline due to a variety of causes[.]"^[17] The court ultimately concluded that the Service failed to articulate "a rational connection" between the best available science and the Service's conclusion that grizzly bears would be able to adapt to the decline of whitebark pines.^[18] It found that there was "scant evidence" in the administrative record for the proposition, and that much of the science cited in the Final Rule "directly contradict[ed] the [Service's] conclusions."^[19] Consequently, the court granted plaintiff's request for summary judgment on that issue.

On appeal, the Ninth Circuit agreed with the district court and the Coalition on the pine issue. It determined that "it cannot reasonably be denied that whitebark pine loss presents at least a potential threat to the Yellowstone grizzly population." The court noted that the Service itself found that: 1) whitebark pine seeds are "one of four food sources 'important to grizzly bear survival and reproductive success'"; 2) mountain pine beetles and white pine blister rust, exacerbated by climate change, may lessen whitebark pine abundance; 3) climate change is and will continue to severely affect the northern Rocky Mountains; and 4) a "well-documented association" exists between reduced whitebark pine seed abundance and increased grizzly mortality.^[20] The appellate court acknowledged the scientific uncertainty inherent in the calculation of potential declines in food sources and effects on species, and that such "uncertainty generally calls for deference to agency expertise."^[21] Still, it explained that it:

nonetheless ha[s] a responsibility to ensure that an agency's decision is not arbitrary. It is not enough for the Service to simply invoke 'scientific uncertainty' to justify its action. As the Supreme Court has explained, '[r]ecognizing that policymaking in a complex society must account for uncertainty ... does not imply that it is sufficient for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions.' The Service must rationally explain why the uncertainty regarding the impact of whitebark pine loss on the grizzly counsels in favor of delisting now, rather than, for example, more study.... Otherwise, we might as well be deferring to a coin flip.^[22]

The court faulted the Service for its heavy reliance on "'adaptive management' to justify its decision to delist the grizzly despite the scientific uncertainty." It rejected "out of hand any suggestion that the future possibility of relisting a species can operate as a reasonable justification for delisting. Whatever comfort may be taken in relisting as a safety net, it is no answer to conclude that a species is not threatened simply because it can be relisted if it is threatened. But there is no explanation of what the other 'management responses' referred to might be, or why they would be reasonably likely to mitigate population declines caused by whitebark loss." The court emphasized that adaptive management responses must be tied to specific triggering criteria in order to qualify as a basis for a delisting. The court concluded: "Just as it is not enough simply to invoke 'scientific uncertainty' to justify an agency action, it is not enough to invoke 'adaptive management' as an answer to scientific uncertainty."^[23]

Due to the Service's failure to set forth a "rational connection between the data before it and its conclusion that whitebark pine declines were not likely to threaten the Yellowstone grizzly bear," the appellate court affirmed Judge Molloy's decision on this ground.

Other Regulatory Mechanisms for Grizzly Protection

A second factor that led to the district court's decision was its finding that the Service erred in concluding that adequate regulatory mechanisms exist to protect the Yellowstone Grizzly DPS following delisting.^[24]

In the final rule, the Service concluded that the existing regulatory mechanisms were adequate to protect the DPS from again becoming threatened.^[25] In reaching this conclusion, the Service relied on the existence of various federal and state statutes and regulations, the Conservation Strategy, Forest Plan amendments incorporating the Conservation

Strategy, and state management plans.^[26]

The district court concluded that the sources upon which the Service relied are not "adequate regulatory mechanisms" under the ESA.^[27] The court noted that the regulatory mechanisms the Service cited "depend on guidelines, monitoring, and promises, or good intentions for future action" and that the provisions were not adequate regulatory mechanisms because there was "no way to enforce them or to ensure that they [would] occur."^[28] It also concluded that, although the Service had cited a variety of state and federal laws and regulations in its final rule, it had not explained how the laws and regulations would serve to protect the delisted population.^[29] Accordingly, the court concluded that the Service had not complied with the ESA in its consideration of the adequacy of existing regulatory mechanisms for the purposes of delisting, and granted the plaintiff's request for summary judgment on the issue.^[30]

Although it did not necessarily need to reach the question, the appellate court disagreed with Judge Molloy on this issue. Reversing his opinion on the regulatory mechanism question, the appellate court anchored its holding on its determination that, because the Strategy's standards were incorporated into National Park Superintendents' Compendia and National Forest Plans (NFPs), they will be legally enforceable.^[31] The district court did not reach this conclusion; nor did Circuit Judge Thomas, who dissented on appeal. Describing compliance with the Strategy as voluntary, Judge Thomas wrote: "Good intentions are not rules of law. Unenforceable aspirational goals are not regulatory mechanisms. Promises to monitor, review, and convene committees do not satisfy the statutory requirement."^[32] In response to the Service's and majority's conclusion that incorporation of Strategy standards into NFPs and Compendia give those standards the force of law, Judge Thomas noted that NFPs only incorporate habitat standards, and lack a mechanism to enforce mortality limits.^[33]

Judge Thomas also criticized the Service's analysis of existing laws and regulations, noting that some of the "existing regulatory mechanisms" to which it refers as protecting grizzlies are actually generic resource management laws (i.e., the Sikes Act, providing for resource management on military reservations), while others authorize hunting of the bears (i.e., state laws identifying bears as trophy game animals).^[34]

Conclusion

Climate change effects will continue to play a large role in ESA listing and delisting decisions and consultations. Both the district and appellate court opinions in *Greater Yellowstone Coalition* demonstrate how potential adverse effects from future climate disruptions may preclude the federal government from delisting species that it might otherwise determine have recovered.

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^[FNa0] Jessica K. **Ferrell** practices environmental and natural resource litigation at Marten Law Group. She can be contacted by telephone at 206-292-2636, or by e-mail at jferrell@martenlaw.com.

^[FN1] *GYC v. Servheen*, No. CV 07-134, slip op. at 5 (D. Mont. Sept. 21, 2009).

^[FN2] [Final Rule Designating the Greater Yellowstone Area Population of Grizzly Bears as a Distinct Population Segment; Removing the Yellowstone Distinct Population Segment of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife: 90-Day Finding on a Petition To List as Endangered the Yellowstone Distinct Population Segment of Grizzly Bears \("Grizzly Bear Final Rule"\)](#), 72 Fed. Reg. 14866, 14869 (Mar. 29, 2007) (to be codified at 50 CFR Pt. 17).

^[FN3] 72 Fed. Reg. at 14868-74.

^[FN4] 72 Fed. Reg. at 14922-23; see also U.S. Fish and Wildlife Service, Final Conservation Strategy for the

Grizzly Bear in the Greater Yellowstone Area (Mar. 2007), http://www.fws.gov/mountain-prairie/species/mammals/grizzly/Final_Conservation_Strategy.pdf.

[FN5] [Grizzly Bear Final Rule, 72 Fed. Reg. at 14935.](#)

[FN6] See USGS, 2011 Known and Probable Grizzly Bear Mortalities in the Greater Yellowstone Ecosystem (2011).

[FN7] [Designating the Greater Yellowstone Ecosystem Population of Grizzly Bears as a Distinct Population Segment; Removing the Yellowstone Distinct Population Segment of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife, 70 Fed. Reg. 69,854, 69,854, 69,881 \(proposed Nov. 17, 2005\)](#) (to be codified at 50 CFR Pt. 17); see also J. Ferrell, *U.S. Fish and Wildlife Service Proposes To Remove ESA Protections for Yellowstone Grizzlies*, Marten Law Group Environmental News (Nov. 30, 2005).

[FN8] [Grizzly Bear Final Rule, 72 Fed. Reg. at 14869.](#)

[FN9] [72 Fed. Reg. at 14877.](#)

[FN10] 72 Fed. Reg. at 14935-36. A species is considered "threatened" under the ESA if the species "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." [16 U.S.C.A. § 1532](#)(20). A species is endangered if it "is in danger of extinction throughout all or a significant portion of its range." [16 U.S.C.A. § 1532](#)(6).

[FN11] GYC did not challenge FWS's DPS designation. *GYC vs. Servheen*, No. CV 07-134, slip op. at 13 (D. Mont. Sept. 21, 2009).

[FN12] *Greater Yellowstone Coalition vs. Servheen*, No. CV 07-134 (D. Mont. Sept. 21, 2009).

[FN13] *GYC vs. Servheen*, No. CV 07-134, slip op. at 29-30, 45-46.

[FN14] "A species may be delisted only if [the best available] data substantiate that it is neither endangered nor threatened," because it is extinct, recovered, or the original data for classification were in error. [50 C.F.R. § 424.11](#). A species reaches "recovery" when there is "improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in [[16 U.S.C.A. § 1533](#)(a)(1)]." [50 C.F.R. § 402.02](#).

[FN15] 72 Fed. Reg. at 14929-30.

[FN16] [72 Fed. Reg. at 14930.](#)

[FN17] *GYC vs. Servheen*, No. CV 07-134, slip op. at 26 (D. Mont. Sept. 21, 2009).

[FN18] *GYC vs. Servheen*, No. CV 07-134, slip op. at 27-28.

[FN19] *GYC vs. Servheen*, No. CV 07-134, slip op. at 28, 30.

[FN20] [Greater Yellowstone Coalition, Inc. v. Servheen, 665 F.3d 1015 at 1026 \(9th Cir. 2011\).](#)

[\[FN21\] *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015 at 1028 \(9th Cir. 2011\).](#)

[\[FN22\] *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015 at 1028 \(9th Cir. 2011\).](#)

[\[FN23\] *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015 at 1029 \(9th Cir. 2011\)](#)

[\[FN24\]](#) As noted above, an agency must consider five factors when making a decision to delist (or list) a species as endangered or threatened under the ESA. One of these factors is whether the "existing regulatory mechanisms" are adequate to protect and maintain the population of a species such that ESA measures are no longer necessary. See [16 U.S.C.A. §§ 1533\(a\)\(1\)\(D\)](#), [1532\(3\)](#); [50 C.F.R. § 424.11\(d\)\(2\)](#).

[\[FN25\] *Grizzly Bear Final Rule*, 72 Fed. Reg. 14866, 14922-26.](#)

[\[FN26\] *Grizzly Bear Final Rule*, 72 Fed. Reg. 14866, 14922-26.](#)

[\[FN27\] *GYC v. Servheen*, No. CV 07-134, slip op. at 13-24 \(D. Mont. Sept. 21, 2009\).](#)

[\[FN28\] *GYC v. Servheen*, No. CV 07-134, slip op. at 24.](#)

[\[FN29\] *GYC v. Servheen*, No. CV 07-134, slip op. at 24.](#)

[\[FN30\] *GYC v. Servheen*, No. CV 07-134, slip op. at 25, 45-46.](#)

[\[FN31\] *GYC v. Servheen*, No. CV 07-134, slip op. at *12.](#)

[\[FN32\] *GYC v. Servheen*, No. CV 07-134, slip op. at *14 \(Thomas, J., dissenting\).](#)

[\[FN33\] *GYC v. Servheen*, No. CV 07-134, slip op. at *17, n.5 \(Thomas, J., dissenting\).](#)

[\[FN34\] *GYC v. Servheen*, No. CV 07-134, slip op. at *15 \(Thomas, J., dissenting\).](#)

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