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Crow Indian Tribe v. Wyoming—Ninth Circuit affirms remand of FWS's 2017 rule delisting the Greater Yellowstone Ecosystem Grizzly Bear distinct population segment

The Fish and Wildlife Service listed the grizzly bear in 1975 as a threatened species under the Endangered Species Act. The agency adopted a Grizzly Bear Recovery Plan in 1982 that identified six ecosystems in the in northwest, including the Greater Yellowstone Ecosystem located in Idaho, Montana and Wyoming. When the 1982 Plan proved successful in that ecosystem, FWS established its bears as a distinct population segment in a 2007 rule and simultaneously delisted them. Litigation ensued, with the Ninth Circuit remanding for further consideration. *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015 (9th Cir. 2011). Ten years later, the agency issued the Final Rule Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife, 82 Fed. Reg. 30,502 (June 30, 2017). FWS had published a year earlier the Conservation Strategy for the Grizzly Bear in the Greater Yellowstone Ecosystem that described how the ecosystem's population should be managed once delisted, and the 2016 Strategy was relied upon by the 2017 Rule "as sufficient to ensure the long-term recovery of the Yellowstone grizzly." The D.C. Circuit, however, subsequently decided *Humane Society v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017), which held that when delisting a Western Great Lakes gray wolf DPS, FWS must consider the delisting's effect on the remaining listed wolves. Because the agency had not done so when developing the 2017 Rule, it undertook sua sponte a regulatory review and concluded that the D.C. Circuit's reasoning did not require the Rule's modification because the remnant grizzly population retained its listed species status, in contrast to *Humane Society* where the non-DPS wolves no longer constituted a distinct species given their dispersed nature. FWS thus did not consider the grizzly delisting on the viability and protectability of remaining listed bear population.

Various groups, including several Indian tribes, and individuals had challenged the 2017 Rule under the ESA when issued, and applying *Humane Society* the district court held that FWS failed to consider adequately the delisting's impact on the remnant grizzly population. *Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999 (D. Mont. 2018). It arguably directed the agency's to conduct a "comprehensive review" considering "(1) 'the present or threatened destruction, modification, or curtailment of its habitat or range'; (2) 'overutilization for commercial, recreational, scientific, or educational purposes'; (3) 'disease or predation'; (4) 'the inadequacy of existing regulatory mechanisms'; and (5) 'other natural or manmade factors affecting its continued existence.'" *Id.* at 1014 (quoting 16 U.S.C. § 1533(a)(1)). The district court next held that FWS had failed to apply the best available scientific evidence in failing to recognize that "that the long-term viability of the Greater Yellowstone grizzly is far less certain absent new genetic material" (*id.* at 1018) and in concluding that "'[t]ranslocation of bears ... will be a last resort and will be implemented only if

there are ... genetic measures that indicate a decrease in genetic diversity'" (*id.* at 1020). Last, the district court found error in FWS's "concession to the states to secure their participation in the Conservation Strategy" over the model for calibrating a particular year's grizzly population. *Id.* at 1018. The 2017 Rule was therefore vacated, and the matter remanded for further agency consideration.

FWS and the three States appealed. The Ninth Circuit affirmed in all respects except as to the scope of the "comprehensive review" apparently ordered by the district court. *Crow Indian Tribe v. Wyoming*, ___ F.3d ___, 2020 WL 3831636 (9th Cir. July 8, 2020). Prior to reaching the merits, the panel rejected the plaintiffs' challenge to appellate jurisdiction on the ground that the remand order was not a final judgment and that the appellants lacked Article III standing. As to the federal defendants, it relied on *Alsea Valley Alliance v. Department of Commerce*, 358 F.3d 1181 (9th Cir. 2004), to conclude that an appealable order existed "[b]ecause the manner in which the FWS would reevaluate the 2017 Rule on remand would be altered by a favorable decision by this court, the FWS does not merely seek an advisory opinion." It further found standing on this rationale. As to the States, the remand constituted an appealable final judgment "because the district court has issued a definitive ruling, contrary to the Intervenors' position, concluding that the FWS's failure to include a commitment to recalibration in the 2017 Rule was arbitrary and capricious" and, therefore, "[a]n appeal is the only way the Intervenors' objections [to the recalibration requirement] can be considered." The States had standing since they "had relied on the validity of the 2017 Rule in enacting legislation and state management plans" and a favorable ruling on appeal would redress the harm resulting from an inability to implement those plans.

On the merits, the panel recognized that, unlike the situation in *Humane Society*, "we do not know whether the remnant grizzly population would be protectable as a species after the delisting of the Yellowstone grizzly, because the FWS has not examined the remnant. The FWS has merely kept the remnant listed as 'threatened' as a matter of law without any empirical examination of the effect delisting the Yellowstone grizzly would have on the remnant." It "agree[d] with the FWS that the district court appears to have required a Section 4(a) analysis of the remnant population" and held that "such an extensive analysis is not required by the ESA or *Humane Society*." Instead, "although a full Section 4(a) analysis of all the factors affecting the continued existence of the remnant was not required, the FWS must determine on remand whether there is a sufficiently distinct and protectable remnant population, so that the delisting of the DPS will not further threaten the existence of the remnant."

The panel turned to FWS's contention that "it reasonably interpreted the best available science to conclude that current levels of genetic diversity indicate that mandatory translocation is not necessary, and that there is 'no immediate need for new genetic material.'" It rejected the agency's reliance on two studies for this proposition, finding that both "express concerns about the long-term genetic health of the Yellowstone grizzly." Indeed, "[t]he 2017 Rule even acknowledged that long-term viability requires regulatory measures" but looked to state "regulatory mechanisms for ensuring gene flow occurs." The panel responded that "[s]tate management plans may be considered adequate regulatory mechanisms, but only if they work." Here, "[t]he states have committed to monitor bear movement and set restrictions on hunting, but they have made no commitment to take action if natural connectivity of grizzly bear populations does not occur." FWS's own promise of "possible future action" in the form of, inter alia, halting over-hunting of grizzly was no less inadequate because "it does not demonstrate a commitment to increase population size, as the studies the FWS relies upon indicate would be required to ensure long-term viability."

The States appealed that portion of the remand order requiring a commitment in the new rule to account "for methodological changes between population estimators in order to ensure that the FWS is able to accurately estimate the Yellowstone grizzly's population size"—i.e., a commitment to recalibration. The States opposed any such requirement "because [they] have committed to using the current population estimator for the foreseeable future[,]" and thus "any commitment to recalibration would be unnecessary and speculative." The panel, like the district court, was unpersuaded, deeming "[a] commitment to recalibration is necessary in the event that the states adopt a new estimator, or else the effect of any future change will never be known. The states' promise to retain the current estimator for now does nothing to address this threat."

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/07/08/18-36030.pdf