

ROOM FOR THE GRIZZLY:

Recent Court Intervention into ESA
Delisting Decisions

Brown Grizzly

Photo by Joshua Hoehne



My Focus

- Role of federal courts in Fish and Wildlife Service (FWS) review decisions delisting species as recovered; grizzly as a case study, but also many years of litigation over 4 Final Rules delisting the gray wolf
- Some Important issues recently addressed in federal courts in delisting cases; generally in favor of continued species protection
- Will these decisions endure? (Trump administration changes; US Supreme Court review)
- Thoughts on future co-existence with grizzly and other large carnivores (my work on Black Bear)

Protected Status of Grizzly

- Fish & Wildlife Service (FWS) listed grizzlies as “threatened” species under ESA in 1975 after years of relentless shooting, trapping, poisoning during frontier movement West
- *Threatened: “likely to become endangered in foreseeable future in all or significant portion of range”*

Grizzly Population and Distinct Population Segment (DPS)

- 6 populations of grizzly, 2 most significant: Greater Yellowstone Ecosystem (GYE) 700 bears and Northern Continental Divide Ecosystem (NCDE) 900 bears
- DPS: 1978 Amendment to ESA; allowed designation of smaller population if “discrete” (*markedly separated*) and “significant” to species (including genetic diversity, unique habitat; segment important to persistence of species)

Grizzly as Example of Recent Delisting Issue

- FWS first Final Rule 2007: designation of GYE as Distinct Population Segment and *simultaneous* delisting of grizzly: Permissible under ESA?
- Precedent: FWS had also issued 4 Final Rules delisting gray wolf species; 4 courts overturned; Humane Society v. Zinke (2017), D.C. Circuit court:
- FWS can simultaneously create a DPS and evaluate segment status under ESA Factors, but cannot create DPS for *purpose* of delisting: delist by “balkanization; Administrative Procedure Act (APA) review, ‘arbitrary and capricious’ to remove or lower listing status of one segment without considering the *effect on the whole* listed species; failure to consider an important aspect; gray wolf protection reinstated

Decisions to List, Delist, or Change Status

- 5 Mandatory Factors under ESA, 4(a)(1):
 - A- Present or threatened destruction, modification, or curtailment of its habitat or range
 - B- overutilization for commercial, recreational, scientific, or educational purposes
 - C- disease or predation
 - D- inadequacy of existing regulatory mechanisms

OR;

 - E- other natural or manmade factors affecting its continued existence

Reversion of Management to States upon Delisting

- Wyoming, Idaho, and Montana have territory in the GYE (about twice size of Yellowstone Park)
- Upon FWS publication of 2017 Final Rule delisting GYE grizzly, Wyoming (22 animals) and Idaho (1 animal) began plans for regulated hunting seasons to begin September 1, 2018
- Crow Indian Tribe, other tribes, and various environmental groups sued in the District Court Missoula, Montana for a Temporary Restraining Order to stop the hunts (5 cases consolidated)

700 Greater Yellowstone Grizzlies Would Lose ESA Protection 2017 Final Rule Delisting GYE



Some Photographers Against Hunting Applied for Hunting Licenses

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— NOT A GUN —**



Photo Courtesy
Teresa S. Thompson
www.teresa-thompson.com

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Crow Indian Tribe et al v. U.S. et al,
2018 Westlaw 4568418,

- Judge Dana L. Christensen, Chief District Judge:
- Precedent: as in HSUS v. Zinke 2017 (wolf case), FWS had failed to consider “issue of extreme importance”: effect of delisting GYE population on species *as a whole*; includes impact from vast loss of historical range; piecemeal review is delisting by “balkanization”; Also, flawed ESA Factor analysis of long term threat of geographic isolation to genetic diversity; FWS comments about soon delisting NCDE; <100 wolves left protected if both populations delisted
- Final Rule vacated and Remanded
- Grizzly population reinstated as “threatened” under ESA; hunt stopped for 2018

Will ESA Protection of Grizzly (other large carnivores) Hold?

- “**threatened**” status: if *continuous*, Trump administration proposal for new case by case treatment of threatened species (different from endangered); would not apply (prospective only)
- If **economic** factors are considered in future listing and delisting under ESA, changing the standard of “*solely* on basis of best scientific and commercial data”, not clear how grizzly would fare: grizzly tourism economically valuable to region, but hunting revenues most of state wildlife budgets; ranchers and farmers object to grizzly protection (livestock)

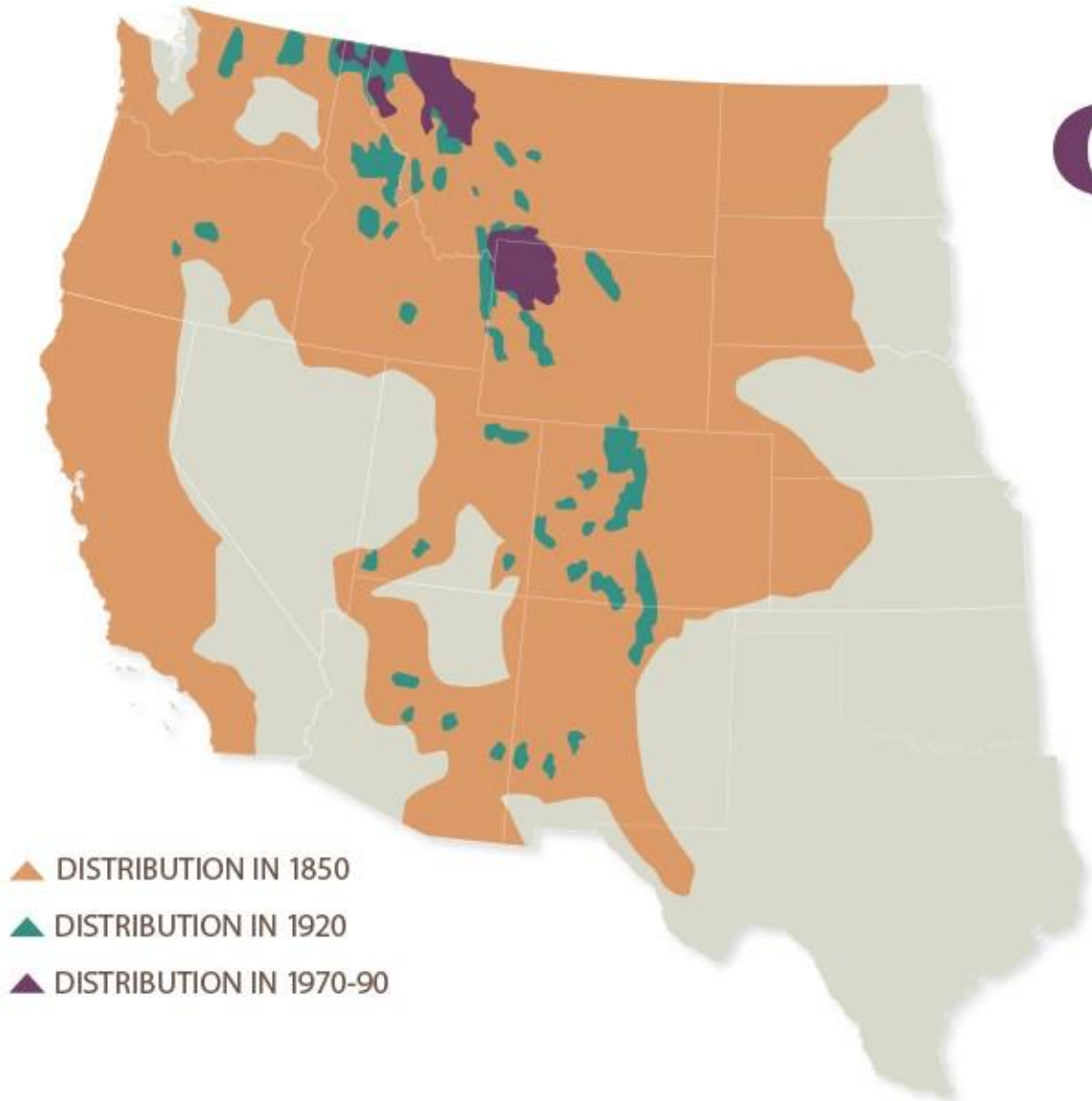
Will Courts uphold DPS decisions on DPS? Legislation?

- Will FWS be required to look at species *as a whole* in delisting segment? (D.C. Circuit and District Court said yes)
DPS population status may be considered separately under ESA (earlier acceptance of split listings within a species); But in DPS delisting must consider effects on *whole* listed population; better view DPS is *inherently comparative* so must consider *whole*
- Proposed Legislation: Will judicial review of listing decisions be limited (proposal of no review for 5 years after delisting decision)? Delay significant given FWS recent pattern of Final Rules delisting DPSs of species (gray wolves, grizzlies)

Other Issue Subject to Change in Future:

- FWS interpretation of “range” of species (not defined in ESA; FWS Range Policy: ***current range*** at time of listing or review (only occupied areas, *not historical range*)
- D.C. Circuit and District Court MT accept FWS interpretation as permissible (under Chevron), but still must consider *effect of vast loss of historical range*)

GRIZZLY RANGE: THEN AND NOW



General Conclusion on Future of Grizzly

- **Animals culturally freighted in ethically questionable ways:** icon of wilderness; “our greatest wild animal” (Naturalist Enos A. Mills, 1919) vs. ferocious killer; **misunderstanding** and stereotyping as old as Lewis & Clark 1805, misread grizzly curiosity as aggressive and “ferocious”; retiring and peaceful animal despite enormous physical power (avoids humans; attacks defensively when surprised, cornered or cubs threatened); Importance of **early and ongoing education** about the animal’s nature and habits, and on how to avoid conflicts; rancher and farmer responsibilities; individual responsibilities
- Human bear interactions increasing; change human attitudes about animals as resources for us; learn to **co-exist with and respect irreplaceable wild creatures**; shared home

Myth of Ferocious Killer Grizzly



Grizzly Bear Walking on Mountain

Photo Adam Willoughby-Knox



Photo by Daniele Levis Pelusi



Grizzly Walking in Forest, Geert Pieters

Wild Grizzly, Chris Gierman

