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## Crow Indian Tribe v. United States

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***Crow Indian Tribe v. United States*, \_\_ F. Supp. 3d \_\_, 2018 U.S. Dist. LEXIS 163319, 2018 WL 4568418 (D. Mont. Sept. 24, 2018)**

**Hallee C. Kansman**

The protection status of the Greater Yellowstone grizzly bear continues to elicit debate and find its way into the courtroom. In *Crow Indian Tribe v. United States*, for the second time in the last decade, a court held the Service's attempt to delist the Yellowstone Grizzly arbitrary and capricious. Specifically, the court found the Service's evaluation of remnant populations, recalibration, and genetic health deficient. This case demonstrates the importance in and the resilient motivation behind preserving grizzly bear populations and genetics. As the practice of delisting a species under the Endangered Species Act continues, this case will provide important persuasive precedent in those inevitable future cases.

I. INTRODUCTION

In 2007, the U.S. Fish and Wildlife Service ("Service") published a final rule ("2007 Rule") distinguishing the Greater Yellowstone grizzly bear ("Yellowstone Grizzly" or "Grizzly") as a distinct population segment and delisting it.<sup>1</sup> As a result of a challenge to the 2007 Rule, the Ninth Circuit affirmed a United States District Court for the District of Montana's ("District Court" or "court") holding and vacated and remanded the 2007 Rule to the Service with instructions to properly determine the listing status of the Grizzly under the Endangered Species Act ("ESA").<sup>2</sup> After ten years the Service issued its new final rule ("2017 Rule"), delisting the Grizzly.<sup>3</sup> The promulgation of the 2017 Rule was then challenged, resulting in the D.C. Circuit decision in *Humane Society v. Zinke*.<sup>4</sup> In response to the D.C. Circuit's holding, the Service reopened public comment for the 2017 Rule and conducted a regulatory review, but ultimately chose to stick with its earlier determinations regarding delisting the Yellowstone Grizzly.<sup>5</sup> The Crow Tribe, along with other interested parties (collectively, "Plaintiffs"), filed suit following the delisting, and the District Court issued two 14-day temporary restraining orders before vacating the 2017 Rule and remanding back to the Service.<sup>6</sup>

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1. *Crow Indian Tribe v. United States*, \_\_ F. Supp. 3d \_\_, 2018 U.S. Dist. LEXIS 163319, 2018 WL 4568418, \*3 (D. Mont. Sept. 24, 2018).

2. *Id.*

3. *Id.*

4. 865 F.3d 585 (D.C. Cir. 2017) (holding the Service acted arbitrarily and capriciously when it failed to address the effect of delisting a distinct population segment of wolves on the remnant population).

5. *Crow Indian Tribe*, 2018 WL at \*3.

6. *Id.*

## II. FACTUAL AND PROCEDURAL BACKGROUND

During pre-colonial settlement, an estimated 50,000 grizzly bears roamed the continental states, occupying terrain outside mountain ecosystems.<sup>7</sup> Roughly a century later, grizzlies were found in only two percent of their historical range and by 1975, only six populations were identified in the United States.<sup>8</sup> That same year, the lower-48 grizzly bear was listed as threatened under the ESA.<sup>9</sup>

Starting in 1982, the Service concentrated on grizzly recovery in six ecosystems, including: “(1) the Greater Yellowstone Ecosystem, covering portions of Wyoming, Montana, and Idaho; (2) the Northern Continental Divide Ecosystem of north-central Montana; (3) Cabinet-Yaak area, extending from northwest Montana to northern Idaho; (4) the Selkirk Mountains in northern Idaho, northeast Washington, and southeast British Columbia; (5) north-central Washington’s North Cascades area; and (6) the Bitterroot Mountains of western Montana and central Idaho.”<sup>10</sup> Just two of those ecosystems, the Greater Yellowstone Ecosystem (“GYE”) and the Northern Continental Divide Ecosystem (“NCDE”), contain a substantial portion of the overall lower-48 grizzly numbers.<sup>11</sup> The six ecosystems, each geographically isolated from all others, show no evidence of interbreeding among their bear populations.<sup>12</sup> Additionally, no grizzlies originating from the GYE have been suspected or confirmed beyond the borders of the distinct population segment.<sup>13</sup>

Importantly, when the District Court vacated the 2007 Rule, it faulted the Service for: (1) inadequate regulatory mechanisms to ensure a healthy grizzly population; and (2) failure to consider the decline of whitebark pine seed, a substantial food source.<sup>14</sup> The Ninth Circuit reversed the first finding but affirmed the second, thus vacating the 2007 Rule.<sup>15</sup>

In 2016, as a direct result of the vacating of the 2007 Rule, the Service attempted to correct its earlier deficiencies and eventually published its 2017 Rule.<sup>16</sup> The 2017 Rule included portions of the Service’s Conservation Strategy, detailing the procedure for managing and monitoring the Grizzly population and assuring sufficient habitat to

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7. *Id.* at \*2.

8. *Id.*

9. *Id.* (“The lower-48 grizzly bear was listed as threatened in 1975, only two years after Congress passed the [Endangered Species Act]”).

10. *Id.*

11. *Id.*

12. *Id.* at \*3

13. *Id.* (citing Endangered and Threatened Wildlife and Plants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife, 82 Fed. Reg. 30,502, 30,517-18 (June 30, 2017)).

14. *Id.*

15. *Id.*

16. *Id.*

maintain recovery.<sup>17</sup> About one month after issuance of the 2017 Rule, the D.C. Circuit decided *Humane Society*, requiring the Service to conduct additional public comment.<sup>18</sup> The Service later issued a regulatory review, concluding its initial 2017 Rule did not require modification.<sup>19</sup> Plaintiffs then challenged the 2017 Rule under the Administrative Procedure Act (“APA”) and ESA.<sup>20</sup>

### III. ANALYSIS

The ESA does not hold a judicial review provision for actions taken under the Act’s authority. Thus, plaintiffs must use the APA as a cause of action to challenge ESA determinations, such as delisting decisions.<sup>21</sup> The ESA requires the Service to “identify and list species that are ‘endangered’ or ‘threatened.’”<sup>22</sup> The Service must list and delist a species pursuant to a five-factor analysis of potential threats,<sup>23</sup> and then make decisions “solely on the basis of the best scientific and commercial data available.”<sup>24</sup>

Under section 706(2)(A) of the APA, a court must “hold unlawful and set aside agency action, findings, and conclusions found . . . to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>25</sup> Under the APA, a district court may not vacate a rule unless the agency acted in one of four specifically prohibited ways.<sup>26</sup> Here, the

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17. *Id.* at \*13.

18. *Id.* (citing *Humane Society*, 865 F.3d 585, 586 (D.C. Cir. 2017)).

19. *Id.*

20. *Id.* at \*4 (“The plaintiffs raise two significant challenges to the [2017] Rule: (1) the Service violated the APA by failing to consider an important factor in delisting the Greater Yellowstone grizzly, which is the impact of delisting on the other remaining populations within the continental United States; and (2) the Service violated the APA by arbitrarily and capriciously applying the five-factor threats analysis demanded by the ESA.”).

21. *Id.* (citing *City of Sausalito v. O’Neil*, 386 F.3d 1186, 1205-06 (9th Cir. 2004)).

22. *Id.* (quoting *Center for Biological Diversity v. Zinke*, 868 F.3d 1054, 1057 (9th Cir. 2017)).

23. *Id.*; see 16 U.S.C. § 1533(a)(1) (The ESA, under § 4(a), “demands that the Secretary consider five potential threats when it reviews a listed entity’s classification: (1) ‘the present or threatened destruction, modification, or curtailment of [a species’] 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.’”).

24. *Crow Indian Tribe*, 2018 WL at \*4 (quoting 16 U.S.C. § 1533(b)(1)(A)).

25. *Id.* (quoting 5 U.S.C. § 706(2)(A)).

26. *Id.* at \*10 (“Under the arbitrary and capricious standard, the [c]ourt may not vacate an agency’s decision unless the agency ‘[1] relied on factors which Congress had not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’” (citation omitted)).

District Court reviewed whether the Service acted arbitrarily and capriciously in: (1) analyzing the threat of delisting on the remnant population; (2) requiring recalibration; and (3) providing for translocation or natural connectivity. The court focused on whether the Service failed to consider an important aspect of the problem in determining if the ESA allows the Service to delist a distinct population segment without proper examination.<sup>27</sup>

A. *Failing to Analyze the Threat of Delisting the Yellowstone Grizzly on the Remnant Population was Arbitrary and Capricious*

In 1978, Congress amended the ESA by expanding the definition of “species” to include distinct populations.<sup>28</sup> Plaintiffs argued the ESA required the Service to analyze the impact delisting the Yellowstone Grizzly could have on other grizzly populations.<sup>29</sup> The Service unsuccessfully asserted: (1) Plaintiffs’ arguments grounded in *Humane Society* were moot; (2) *Humane Society* was wrongly decided; and (3) *Humane Society* was distinguishable from the present facts.<sup>30</sup>

The court disagreed with the Service’s assertions because the only potential difference between the present case and *Humane Society* was “that the Service affirmatively stated the lower-48 grizzly would remain listed outside the newly designated population segment.”<sup>31</sup> This statement contradicted the Service’s position that the management of other grizzlies was not within the scope of the Rule.<sup>32</sup> The Service stated “it would be difficult to justify a distinct population segment in an area where bears have not been located for generations.”<sup>33</sup> The court held the Service could not abuse its power to “delist an already-protected species by balkanization,”<sup>34</sup> and that “*Humane Society* [was] only distinguishable on a formalistic basis.”<sup>35</sup>

Relying on the D.C. Circuit’s holding in *Humane Society*, the District Court held “[t]he Service’s power [was] to designate genuinely discrete population segments,” and not to fractionalize already-protected species in order to remove those species’ protections.<sup>36</sup> In published policy from 1996, the Service acknowledged the importance of distinct population segments’ recognition in balance with Congress’ goals “that designation of a distinct population segment should occur sparingly and

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27. *Id.* (The Service must “insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of a listed species.”) (quoting 16 U.S.C. § 1536(a)(2)).

28. *Id.* at \*5.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* (citing Final Rule, 82 Fed. Reg. at 30,502, 30,508 (June 30, 2017)).

33. *Id.*

34. *Id.* (quoting *Humane Society*, 865 F.3d at 603).

35. *Id.*

36. *Id.* (quoting *Humane Society*, 865 F.3d at 603).

only when the biological evidence indicates that such action is warranted.”<sup>37</sup> The ESA does not allow the Service to utilize the distinct population segment to forego analysis regarding the overall species’ success.<sup>38</sup> The Service acknowledged it did not properly analyze the impact of delisting the grizzlies outside the Greater Yellowstone area.<sup>39</sup> The District Court held the Service had arbitrarily and capriciously determined that analysis of the impact on the grizzlies residing outside the Greater Yellowstone area was unnecessary.<sup>40</sup>

*B. Failing to Require Recalibration of Population Estimates in the Conservation Strategy was Arbitrary and Capricious.*

Plaintiffs next argued the Conservation Strategy was arbitrary and capricious because the existing regulatory mechanisms, a factor required by the ESA when delisting, were inadequate.<sup>41</sup> Specifically, Plaintiffs argued reliance on non-binding commitments by the states—Montana, Idaho, and Wyoming—was insufficient, and failing to require a recalibration of the population was not “reasoned decisionmaking.”<sup>42</sup> The court first concluded that, because of Ninth Circuit precedent in *Greater Yellowstone Coalition v. Servheen*,<sup>43</sup> and the states’ “decades-long commitment” to Grizzly management, such specific action was an adequate regulatory mechanism.<sup>44</sup> However, the District Court held for Plaintiffs regarding the recalibration population estimator.<sup>45</sup>

The District Court stated, “[T]he Service could not reasonably conclude that adequate regulatory mechanisms exist to protect the [Grizzly], indicating the states were compelled to participate in the Conservation Strategy and neglected best available science.”<sup>46</sup> In the 2017 Rule, the Service indicated the estimation model used may not continue to be the best available science; however “it w[ould] continue to be the method for estimating the population until a new population estimator

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37. *Id.* (“[T]he designation of a distinct population segment . . . demand[s] an inquiry into three elements: (1) ‘discreteness . . . in relation to the remainder of the species to which it belongs’; (2) ‘significance . . . to the species to which it belongs’; and (3) ‘conservation status in relation to the [ESA]’s standards for listing.’” (citation omitted)).

38. *Id.*

39. *Id.* at \*8. (The D.C. Circuit in *Humane Society v. Zinke* “held that the Service has the authority to create and delist a segment in a single action . . . However, . . . the Service acted arbitrarily and capriciously when it failed to consider the effect of delisting on other members of the species.” (citation omitted)).

40. *Id.* (By not including “the legal and functional effects of the delisting,” the Service ignored the ESA’s policy of “institutionalized caution . . . which is necessary to promote the ESA’s purpose of conservation.” (citations omitted)).

41. *Id.* at \*12.

42. *Id.*

43. 672 F. Supp. 2d 1105 (D. Mont. 2009).

44. *Crow Indian Tribe*, 2018 WL at \*12 (quoting Final Rule, 82 Fed. Reg. at 30,603).

45. *Id.* at \*13.

46. *Id.*

[wa]s approved.”<sup>47</sup> The court cautioned against this determination by signaling the danger of establishing a rule based on estimates that the most scientifically progressive tools were unresponsive to.<sup>48</sup> The court acknowledged the actual risk present in the Service’s recalibration, characterizing it as “beyond mere speculation.”<sup>49</sup> The Service made its decision based upon the states’ hardline position on recalibration as a negotiating tactic, and not upon the basis of the best available science, as required by the ESA.<sup>50</sup>

*C. Failing to Provide for Translocation or Natural Connectivity was Arbitrary and Capricious.*

Plaintiffs’ final argument asserted the Service’s delisting decision was arbitrary and capricious due to a failure to analyze the genetic health of the Grizzly.<sup>51</sup> The District Court agreed because the Service failed to demonstrate “it considered the relevant factors and articulated a rational connection between the facts found and the choices made.”<sup>52</sup> The court held the Service “illogically cobbled together . . . two studies” to reach a conclusion of long-term population stability that neither study individually supported.<sup>53</sup> Thus, the Service failed to show that genetic diversity within the Greater Yellowstone area was a “non-issue,” and the court held the Service’s determination was arbitrary and capricious.<sup>54</sup>

#### IV. CONCLUSION

The holding from *Crow Indian Tribe v. United States* showcases the importance of abiding by proper statutory requirements under the ESA and APA, and how the application of such standards can influence the viability and survival of a threatened or endangered species. In making a choice regarding delisting, the Service must rely on best available science and impact on other populations.

The status of the Yellowstone Grizzly is a contentious matter in the American west, but the decision by the District Court was clear. Procedurally, the GYE Conservation Strategy will remain in place to ensure Grizzly population maintenance and the Service’s continuance in providing scientific data related to population estimates, habitat, and connectivity. Grizzlies are a dominant species in the ecosystem and offer both recreational and economic benefits.

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47. *Id.*

48. *Id.*

49. *Id.* at 14.

50. *Id.*

51. *Id.*

52. *Id.* at 15.

53. *Id.*

54. *Id.* at 17.