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# WILL CLIMATE CHANGE HELP OR HARM SPECIES LISTING?

by Jessica B. Goldstein\*

While many know the effects climate change has on the polar bear, few know that climate change also affects the grizzly bear. On March 26, 2010, environmental groups were victorious when the United States Fish and Wildlife Service (“FWS”) reinstated the Endangered Species Act (“ESA”) regulatory protections<sup>1</sup> for the grizzly bear (*Ursus arcots horribilis*) to comply with the decision in *Greater Yellowstone Coalition, Inc. v. Servheen*.<sup>2</sup> However, now that the ESA can potentially be used to keep species listed due to ensuing climate change threats, will FWS be more wary when initially listing species?

The 1973 Congress enacted the ESA with the view that an endangered species’ value is immeasurable.<sup>3</sup> Therefore, supposedly a species with high costs of recovery and low economic benefits receives the same treatment as a species with possibly large benefits and low costs.<sup>4</sup> However, budget constraints allow only about 100 species to be listed each year and official preferences get top priority.<sup>5</sup> An ESA official may hesitate to list a species that, due to the threat of climate change, may never be removed in light of the impact that species might have on the budget.<sup>6</sup>

In the ESA and later amendments, Congress stressed the importance of preserving the ecosystem.<sup>7</sup> Scientists identified that saving the habitat of a species increases the chances of species survival.<sup>8</sup> While a recent lawsuit mandated the continued listing of the grizzly bear due to climate change threats on an important food source, it is unclear if FWS will modify initial species listings in the future.

In 1975, the grizzly bear was listed as a threatened species under the ESA.<sup>9</sup> On March 29, 2007, FWS promulgated its rule, declaring the Greater Yellowstone Area (“GYA”) grizzly bear population a distinct population segment (“DPS”), thereby removing it from protection under the ESA.<sup>10</sup> The resulting lawsuit was led by numerous environmental groups, jointly known as the Greater Yellowstone Coalition (“GYC”).<sup>11</sup> The GYC sued members of the FWS along with the Secretary of the Interior, Dirk Kempthorne,<sup>12</sup> alleging four claims, two of which succeeded.<sup>13</sup>

First, the GYC argued that the Service did not provide adequate regulatory mechanisms to maintain the recovering grizzly bear population.<sup>14</sup> The regulatory mechanisms in the 2007 Rule lacked teeth, depending only on guidelines, monitoring, and good intentions for future action.<sup>15</sup> This is problematic, as a species removed from ESA protection needs an immediately enforceable plan to keep the population stable, as it will be susceptible to new dangers.<sup>16</sup>

The GYC also argued that the FWS did not adequately consider climate change’s impact on the whitebark pine, an important food source for grizzly bears.<sup>17</sup> The whitebark pine is threatened by climate change which has increased the population of its predators, the pine nut beetle and the white pine blister rust.<sup>18</sup> However, the FWS concluded that the grizzly bears should be able to adapt to the loss of the whitebark pine.<sup>19</sup>

U.S. District Judge Donald W. Molloy held that the FWS failed to consider the potential impacts of global warming and whether adequate regulatory mechanisms existed.<sup>20</sup> While the FWS is considering an appeal, in the meantime, the case has forced the FWS to keep the Greater Yellowstone Area grizzly bear listed as a threatened species under the ESA.<sup>21</sup>

If the FWS has to consider the impacts of climate change in its determinations under the ESA, this potentially opens the door for the listing of a multitude of species. This case could be the beginning of litigation by environmental groups to keep species protected under the ESA due to the impacts of climate change on a species’ habitat and food sources.<sup>22</sup> While it might appear that a population has recovered, a change in that species’ environment or food source will leave it vulnerable.<sup>23</sup> One concern is that after *GYC v. Servheen*, the FWS may be more cautious in its initial decision to list a particular species out of fear that it will never be removed due to climate change arguments.<sup>24</sup>

While this may become an issue in the future as climate change impacts increase, at least for now, the National Oceanic and Atmospheric Administration (“NOAA”)<sup>25</sup> does not seem deterred by the ruling in *GYC v. Servheen*. On March 16th, 2010, NOAA announced it is listing the eulachon (also known as the Columbia River smelt) DPS as threatened due to global warming and other factors pushing it towards extinction.<sup>26</sup> It is important to note, however, that Native American tribes asked to have this fish listed in 2007 and it took two years before NOAA proposed a rule.<sup>27</sup> If climate change speeds up, other species might be left behind.



**Endnotes:** Will Climate Change Help or Harm Species Listing? *continued on page 57*

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<sup>1</sup> Endangered and Threatened Wildlife and Plants; Reinstatement of Protections for the Grizzly Bear in the Greater Yellowstone Ecosystem in Compliance With Court Order (“Grizzly Bear Final Rule”), 75 Fed. Reg. 1,496 (Mar. 26, 2010) (to be codified at 50 C.F.R. pt. 17).

<sup>2</sup> Greater Yellowstone Coalition, Inc. v. Servheen, 672 F.Supp.2d 1105 (D. Mont. 2009).

<sup>3</sup> Endangered Species Act, 16 U.S.C. § 1531 (1973) (declaring the inherent “esthetic, ecological, educational, historical, recreational, and scientific value” of endangered species to the Nation and all people).

<sup>4</sup> G.M. Brown Jr. & J.F. Shogren, *Economics of the Endangered Species Act*, 12 J. ECON. PERSPECTIVES 3, 8-9 (1998).

<sup>5</sup> See *id.* at 8.

<sup>6</sup> *Id.* at 11-13.

<sup>7</sup> 16 U.S.C. § 1531(b) (“The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . .”).

<sup>8</sup> See Brown & Shogren, *supra* note 5, at 8.

<sup>9</sup> Greater Yellowstone Coal., Inc., 672 F.Supp.2d at 1110. A threatened species is “any species which is in danger of extinction throughout all of a significant portion of its range.” 16 U.S.C. § 1532(6).

<sup>10</sup> 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 2007 Rule”), 72 Fed. Reg. 14,866, 14,869 (Mar. 29, 2007) (to be codified at 50 C.F.R. pt. 17).

<sup>11</sup> Great Yellowstone Coal., Inc., 672 F.Supp.2d at 1105.

<sup>12</sup> *Id.*

<sup>13</sup> GYC claimed that “(1) there are inadequate regulatory mechanisms to protect the grizzly once it is delisted; (2) the Service did not adequately consider the impacts of global warming and other factors on whitebark pine nuts, a grizzly

food source; (3) the population is unacceptably small and dependent on translocation of outside animals for genetic diversity; and (4) the Service did not properly consider whether the grizzlies were recovered across a significant portion of their range.” *Id.* at 1109. The first two claims succeed in court. *Id.* at 1126.

<sup>14</sup> *Id.* at 45.

<sup>15</sup> *Id.* at 24.

<sup>16</sup> Louisa Willcox, *The Good, the Bad, and the Grizzly—The Delisted Yellowstone Grizzly Update from Natural Resources Defense Council*, PBS Nature, <http://www.pbs.org/wnet/nature/episodes/the-good-the-bad-and-the-grizzly/the-delisted-yellowstone-grizzly-update-from-natural-resources-defense-council/1036/> (last visited Apr. 12, 2010).

<sup>17</sup> Greater Yellowstone Coal., Inc., 672 F.Supp.2d at 118.

<sup>18</sup> See Willcox, *supra* note 16. The FWS admitted if whitebark pines suffer a slow decline, it will be difficult to notice any changes in the grizzly survival rate. Presented studies portrayed a relationship between the availability of whitebark pine nuts and grizzly bear survival and fecundity rates. Greater Yellowstone Coal., Inc., 672 F.Supp.2d at 1120.

<sup>19</sup> See Greater Yellowstone Coal., Inc., 672 F.Supp.2d at 1119 (discussing the disconnect between the studies the agency relies on and its conclusion in its 2007 Rule).

<sup>20</sup> *Id.* at 1126.

<sup>21</sup> “Grizzly Bear Final Rule,” 75 Fed. Reg. at 1496.

<sup>22</sup> See Russell Prugh & Jessica Farrell, *Despite Apparent Recovery, Climate Change Keeps Grizzly Bears on ESA List*, Marten Law, <http://www.martenlaw.com/newsletter/20091019-grizzly-bears-kept-on-esa-list> (last visited Apr. 12, 2010).

<sup>23</sup> See Greater Yellowstone Coal., Inc., 672 F.Supp.2d at 1119-20.

<sup>24</sup> See *id.* at 1126-27.

<sup>25</sup> The NOAA is also responsible under the ESA to list species and promulgate rules for their protection. 16 U.S.C. § 1536.

<sup>26</sup> NOAA, *Eulachon*, <http://www.nwr.noaa.gov/Other-Marine-Species/Eulachon.cfm> (last visited Apr. 16, 2010).

<sup>27</sup> *Id.*