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TOPICAL TOP STORY

Feds' appeal says federal judge in Missoula overstepped in grizzly delisting case

ROB CHANEY rchaney@missoulian.com 1 hr ago

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Yellowstone grizzly bear

Federal attorneys pushed their case that Greater Yellowstone Ecosystem grizzly bears should be removed from Endangered Species Act protection, arguing in an appeal filed late Friday the U.S. Fish and Wildlife Service wasn't required to do a comprehensive review of all grizzlies in the Lower 48 states.

The U.S. Department of Justice's opening salvo to the U.S. 9th Circuit Court of Appeals also accused the lower court judge in Missoula of improperly substituting his opinion of the scientific evidence of grizzly genetic diversity for that of FWS biologists.

However, the government said it would not challenge U.S. District Judge Dana Christensen's ruling that state wildlife agencies aren't ready to manage the Greater Yellowstone Ecosystem (GYE) bears and haven't sufficiently studied how delisting one big grizzly population might affect smaller separate populations.

Last September, Christensen rejected the service's 2017 delisting rule covering about 750 grizzlies in the 9,800-square-mile Greater Yellowstone Ecosystem.

Christensen found the plan "arbitrary and capricious" on four points:

- inadequate explanations of how handing bears over to state management and hunting would ensure the bears' continued survival,
- how delisting grizzlies in one recovery area might affect five other recovery populations,
- whether the Yellowstone grizzlies were too isolated to provide for genetic diversity,
- and whether the service had done a required comprehensive analysis of its delisting plan on the bears.

That left the federal government with two options. It could appeal Christensen's ruling to the U.S. 9th Circuit Court of Appeals, or go to work writing a new delisting rule that resolved the judge's criticisms. Both efforts could take two years to complete. Friday's

government brief states the Fish and Wildlife Service (FWS) has already started work fixing some of the problems, but also argues the delisting rule should be reinstated because the judge went too far in his opinion.

“The district court erred, however, in ruling that FWS must conduct a ‘comprehensive review’ of the entire listed species, because the Act imposes no such requirement and because courts may not impose procedures not required by statute,” the brief stated. “The court further erred in substituting its scientific judgment for FWS’s on the matter of the bears’ genetic fitness, in violation of the foundational principles of judicial review of agency decision-making.”

Attorneys for the states of Montana, Idaho and Wyoming must have their briefs in by June 7. The nongovernmental co-defendants Safari Club International, National Rifle Association, Sportsmen’s Alliance Foundation, Rocky Mountain Elk Foundation, Wyoming Farm Bureau Federation, Wyoming Stock Growers Association, and two private ranch owners have their briefs due June 21.

The plaintiffs who won last September’s Crow Tribe v. Zinke case overturning the grizzly delisting rule get until July 22 to respond. The appeals process allows three more back-and-forth responses before a final hearing.

“Due to the complexity of the briefing schedule, no streamlined extensions of time ... will be approved,” Circuit Court Mediator Margaret Corrigan wrote in the order. “Any request for an extension of time to file any brief shall be made by written motion and shall include a proposed schedule for all briefs that have not yet been filed.”

Christensen's September decision canceled planned grizzly trophy hunting seasons in Wyoming and Idaho, and put a curious kink in the FWS work plan. After it published a delisting rule for the Greater Yellowstone Ecosystem grizzlies in 2017, the service turned its attention to the roughly 1,000 bears in the larger Northern Continental Divide Ecosystem. The NCDE extends through Montana's Rocky Mountains from Interstate 90 to Glacier National Park and the Canadian border.

By summer 2018, the Interagency Grizzly Bear Committee members had signed off on a habitat criteria study for the NCDE, the Flathead National Forest had completed its grizzly bear recovery plan (which applied to five national forests encompassing the NCDE), and Montana Fish, Wildlife and Parks had adopted a formal rule stating how the state would count and care for grizzlies once they were delisted. Those preparations were supposed to clear the way for FWS to publish a federal delisting rule for that recovery area by the end of 2018.

Large parts of the proposed NCDE delisting rule were connected to the successful recovery of grizzlies in the Greater Yellowstone Ecosystem. The judge's derailment of the Greater Yellowstone delisting forced the service to suspend the NCDE rule, even though all the preliminary work was done.

"We're still working on recovering bears according to the recovery plans," FWS spokeswoman Jennifer Strickland said on Friday. "There are bears outside of the GYE that we're still working to conserve. That type of work doesn't just stop."

Strickland added the Fish and Wildlife Service has built a network of university researchers, state wildlife agencies, tribal governments and others who all have a stake in grizzly recovery.

"When things like this force us to pause, we're still talking with those partners and brainstorming how this affects all of us," Strickland said. "The grizzly isn't recovered without them."

The Fish and Wildlife Service's 2018 annual grizzly report, released on Friday, included a list of activities still underway. It included population modeling, huckleberry habitat mapping, bear diet assessments in three recovery areas, army cutworm moth food studies in the Greater Yellowstone recovery area, and building a database of grizzly attacks in the Lower 48 states.

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No. 18-3038

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CROW INDIAN TRIBE, et al.,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, et al.,
Defendant-Appellee,

and

STATE OF WYOMING, et al.,
Intervenor-Defendant-Appellee.

Appeal from the United States District Court for the District of Montana
Nos. 9:17-cv-00080, 9:17-cv-00111, 9:17-cv-00118, 9:17-cv-00119,
9:17-cv-00121, 9:18-cv-00019 (Hon. Dana C. Christensen)

OPENING BRIEF FOR THE FEDERAL APPELLANTS

JEFFREY ROBERT CLARK
Assistant Attorney General

ERIC GRANT
Deputy Assistant Attorney General

ANDREW C. BERGLIN
ELLEN J. DAVIES
SANDRA PETER

Attorneys

OF COUNSEL:
TISON INSWELL
Office of the Attorney
U.S. Department of the Interior
U.S. Department of Justice
Washington, D.C. 20540
(202) 501-4626
www.govprinters.gov



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Rob Chaney

Natural Resources & Environment Reporter

Natural Resources Reporter for The Missoulian.