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## Bringing Back the Great Bear: Challenges and Opportunities of Grizzly Restoration in the Northern Rockies

Thomas France Esq.

Dan Brister Esq., MS.

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**Bringing Back the Great Bear:  
Challenges and Opportunities of Grizzly Restoration in the  
Northern Rockies**

**Thomas France, Esq.\* & Daniel Brister, MS.\*\***

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I. INTRODUCTION

*Grizzly Bears and their Hold on the American Imagination*

Saving, protecting, and conserving wildlife have been American passions since the beginning of the last century. Some species have had an outsized importance in these efforts, none more so than the grizzly bear. Grizzlies grab our imagination and transform our perceptions of wild lands, reminding us that there are places we cannot visit without an abundance of care and caution.

Grizzlies are inexorably tied to place in the public mind, wild places at the edge of civilization. In some ways, the backcountry of Glacier and Yellowstone National Parks are almost synonymous with grizzly bears. When grizzlies are gone, the essential character of the land changes.

Aldo Leopold, writing of one of the last grizzlies to be trapped in Arizona, described its effect on Escudilla, the mountain that had been the bear's stronghold: "Escudilla still hangs on the horizon, but when you see it you no longer think of bear. It's only a mountain now."<sup>1</sup>

As the West was settled, grizzlies disappeared from many mountains. 50,000 Grizzly Bears (*Ursus arctos horribilis*) once inhabited the lower 48 United States, ranging from Canada to Mexico and from the vast expanses of the Great Plains to coastal California.<sup>2</sup> As European settlers spread across the West, grizzly numbers plummeted. Few people questioned the wisdom of killing an animal known to prey on both livestock and people. Bears were shot, trapped, and poisoned, their numbers reduced to just a few hundred, mostly isolated in two last strongholds in and around Glacier and Yellowstone National Parks.<sup>3</sup>

Because of their hold on America's imagination, the plight of the grizzly helped Congress see the wisdom of protecting not only bears but all threatened and endangered wildlife. Congress specifically referenced grizzlies in its rationale for passing the Endangered Species Act in 1973,<sup>4</sup> and in 1975 grizzlies were one of the first species protected under the new law when the Fish and Wildlife Service listed the grizzly bear as a "threatened" species throughout the lower 48 states.<sup>5</sup>

Thanks to their ESA protections and the 45 years of conservation programs mandated and carried out under the Act, grizzlies are once again found on many mountains where they have been absent for decades. Grizzly populations in both the Greater Yellowstone Ecosystem ("GYE") and the Northern Continental Divide Ecosystem ("NCDE"), which includes Glacier National Park, have met government-established recovery objectives. In some ways, grizzlies can be seen as one of the great success stories of both the ESA and the American wildlife conservation movement.

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\* Thomas France is an attorney and also the Regional Executive Director for the National Wildlife Federation's Northern Rockies, Prairies and Pacific Regional Center based in Missoula, MT.

\*\* Daniel Brister is a third-year law student at the University of Montana, where he is earning his J.D. with certificates in Federal Indian law and natural resources & environmental law. He serves as Editor-in-Chief of the Public Land & Resources Law Review.

1. ALDO LEOPOLD, SAND COUNTY ALMANAC: WITH OTHER ESSAYS ON CONSERVATION FROM ROUND RIVER 145 (1970).

2. U.S. FISH AND WILDLIFE SERVICE, REVISED GRIZZLY BEAR RECOVERY PLAN 9 (1993).

3. *Id.*

4. *Id.* at 31,734-36.

5. Amendment Listing the Grizzly Bear of the 48 Conterminous States as a Threatened Species, 40 Fed. Reg. 31,734 (July 28, 1975).

But this success has raised new challenges about both how the ESA works and how grizzlies should be managed.

Even as recovery criteria agreed upon first in 1981 and again in 1992 have been met, important issues have arisen that call into question the recovery effort. Foremost among these challenges is a recent federal district court ruling that rejected a U.S. Fish and Wildlife Service (“FWS”) proposal to delist the Yellowstone grizzly, separate and distinct from other grizzly bear populations.<sup>6</sup> The disjunctive strategy for achieving recovery in separate, isolated geographies was central to the court’s decision.

By delisting the Greater Yellowstone grizzly without analyzing how delisting would affect the remaining members of the lower-48 grizzly designation, the Service failed to consider how reduced protections in the Greater Yellowstone Ecosystem would impact the other grizzly populations. Thus, the Service “entirely failed to consider an important aspect of the problem.”<sup>7</sup> This district court decision, coupled with and informed by a similar court decision on wolf delisting,<sup>8</sup> raises challenging questions about how grizzly bear conservation should move forward.

Federal-state partnerships have been forged around the presumption of timely delisting in individual grizzly bear ecosystems and the robust bear populations found in the GYE and NCDE have convinced biologists in both federal and state agencies that these populations no longer need the heightened protections of the ESA.<sup>9</sup> Meanwhile, recovery in the remaining four grizzly ecosystems is far from assured and will require decades of work.<sup>10</sup> Finding a path forward to integrate the successes achieved with the unrealized goals remaining will test not only the Fish and Wildlife Service and its agency partners, but also the network of non-governmental organizations and public citizens who are deeply engaged and invested in grizzly conservation work. Part of the answer may lie in reimagining the recovery planning process as more than a merely biological process and incorporating a more broadly-based social contract to garner a wide range of citizen support.

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6. Crow Indian Tribe v. United States, 343 F. Supp. 3d 999, (D. Mont. 2018).

7. *Id.* at 1004 (Citing Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, (1983).

8. See Humane Society v. Zinke, 865 F.3d 585 (D.C. Cir. 2017).

9. Draft Conservation Strategy for the Northern Continental Divide Ecosystem Grizzly Bear, 78 Fed. Reg. 26,065 (May 3, 2013).

10. In addition to the GYE and the NCDE, smaller grizzly populations currently exist in the Yaak and Cabinet mountains of Northwestern Montana and the Selkirk and North Cascade mountains of Northern Washington.

## II. PASSAGE OF THE ENDANGERED SPECIES ACT AND PROTECTION OF THE GRIZZLY BEAR

Closely identified with efforts to prevent the extinction of the bald eagle, the grey wolf, and the grizzly bear, the Endangered Species Act (“ESA”) was passed into law in 1973 “to halt and reverse the trend toward species extinction.”<sup>11</sup> Acknowledging that such efforts were to be undertaken at “whatever the cost,”<sup>12</sup> the United States Supreme Court recognized the ESA as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”<sup>13</sup>

If FWS determines a species qualifies for endangered or threatened status, that species must be added to a list of protected species published in the Federal Register.<sup>14</sup> Listed species receive strong federal protections, including proscriptions on possessing, killing, selling, importing, or exporting individuals of that species.<sup>15</sup> Criminal sanctions for knowingly violating these prohibitions include fines of up to \$50,000 or a year in prison.<sup>16</sup>

An “endangered” species is defined under the ESA as one that “is in danger of extinction throughout all or a significant portion of its range . . . .”<sup>17</sup> A “threatened” species is one that “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”<sup>18</sup> Species listed under the ESA enjoy many protections. Federal agencies are required to “insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of” that species.<sup>19</sup> Additionally, the “take” of any member of a listed species is prohibited, with very limited exceptions.<sup>20</sup> “Take” is defined as harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting—or attempting to undertake any of the above.<sup>21</sup>

In determining whether a species qualifies for endangered or threatened status, the Secretary of the Interior is directed to apply five fac-

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11. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).

12. *Id.*

13. *Id.* at 180.

14. 16 U.S.C. § 1533(c)(1).

15. *Id.* § 1538(a).

16. *Id.* § 1540(b)(1).

17. 16 U.S.C. § 1532(6).

18. *Id.* § 1532(20).

19. *Id.* § 1536(a)(2).

20. *Id.* at §1538(a).

21. *Id.* at §1532(19).

tors. This five factor analysis looks at: (1) “the present or threatened destruction, modification, or curtailment of 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 [the species’] continued existence.”<sup>22</sup> The Secretary is required to rely upon the best available scientific and commercial data in making such a determination.<sup>23</sup> The Secretary has delegated to the U.S. Fish and Wildlife Service the authority to determine whether a terrestrial species meets the requirements to be considered “threatened” or “endangered.”<sup>24</sup>

The ESA defines “species” as “any subspecies of fish or wildlife or plants,” and, “any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.”<sup>25</sup> Neither the ESA nor agency regulations defines the term “distinct population segment.” FWS has issued policy guidance stating that the existence of a “distinct population segment” turns upon the discreteness and significance of a sub-population as compared to the population as a whole.<sup>26</sup> This policy guidance stresses that the FWS’ authority to recognize distinct population segments should be “exercised sparingly.”<sup>27</sup>

The ESA requires the FWS to revise its lists of endangered and threatened species “from time to time” in response to “recent determinations, designations, and revisions.”<sup>28</sup> FWS is also required, every five years, to “review and determine whether any such species should be (1) removed from the list (delisted); (2) changed in status from “endangered” to “threatened” (down listed); or (3) changed in status from “threatened” to “endangered” (up listed).<sup>29</sup>

In 1975, three years after passage of the ESA, the FWS listed the entire population of grizzly bears in the lower forty-eight United States as a threatened species.<sup>30</sup> At the time, this population was thought to number

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22. 16 U.S.C. § 1533(a)(1).

23. *Id.* § 1533(b)(1)(A).

24. 50 C.F.R. § 402.01(b).

25. 16 U.S.C. § 1532(16).

26. Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4,722, 4,725 (Feb. 7, 1996).

27. *Id.* at 4,724.

28. 16 U.S.C. § 1533(c)(1).

29. *Id.* § 1533(c)(2)(A), (B).

30. Amendment Listing the Grizzly Bear of the 48 Conterminous States as a Threatened Species, 40 Fed. Reg. 31,734 (July 28, 1975); *Greater Yellowstone Coal, Inc. v. Servheen*, 665 F.3d 1015, 1019 (9th Cir. 2011).

between 800 and 1,000 individual bears and the species had been extirpated from 98-percent of its habitat. In the GYE, the total number of grizzly bears was estimated at just 136 individuals.<sup>31</sup>

In 1981, six years after the grizzlies were listed under the ESA, a group of wildlife biologists who had dedicated their professional lives to grizzly conservation—was assembled to draft the initial Grizzly Bear Recovery Plan.<sup>32</sup> Under the ESA, the purpose of this recovery plan was to “delineate reasonable actions that are believed to be required to recover and/or protect” the grizzly bear.<sup>33</sup> While the plan was revised in 1993, the underlying strategy developed by this small group in 1981 has been the guiding force for grizzly bear management for the last 38 years. Even the Service has recognized that the plan is outdated. In its most recent five-year status review for the grizzly bear, conducted in 2011, the Service found that the recovery plan “no longer reflects the best available and most up-to-date information on the biology of the species and its habitat.”<sup>34</sup> Given the holding in *Crow Indian Tribe v. United States*, the plan also no longer reflects the current legal framework within which its recovery and delisting goals must occur.

In the Recovery Plan, the Service identified six distinct geographic areas where grizzly populations would be restored to adequate numbers and established a template of recovery actions—primarily protecting habitat and minimizing mortality—which agencies would need to undertake to effect substantive recovery.<sup>35</sup> The Plan identified four recovery zones—the Greater Yellowstone, the Northern Continental Divide, the Cabinet-Yaak, and the Selkirks—along with three additional areas for evaluation—the Selway-Bitterroots, the North Cascades, and the San Juan Mountains of Colorado—for potential recovery.<sup>36</sup> Ultimately, the San

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31. National Park Service web site: <https://www.nps.gov/yell/learn/nature/grizzlybear.htm>.

32. The original plan was drafted by Don L. Brown, Montana Department of Fish Wildlife and Parks, through an interagency assignment to the U.S. Fish and Wildlife Service. Other individuals involved included Stephen P. Mealey, U.S. Forest Service, John Weaver, U.S. Forest Service, Wayne Brewster, U.S. Fish and Wildlife Service, John Craighead, Frank Craighead, Richard Knight and Chuck Jonkel of the Interagency Grizzly Bear Study Team. The Grizzly Bear Recovery Plan was signed on January 29, 1982, by FWS Director Robert A. Jantzen; U.S. Fish and Wildlife Service, Grizzly Bear Recovery Plan viii (1993).

33. U.S. FISH AND WILDLIFE SERVICE, REVISED GRIZZLY BEAR RECOVERY PLAN i (1993).

34. U.S. FISH AND WILDLIFE SERVICE, GRIZZLY BEAR 5-YEAR REVIEW: SUMMARY AND EVALUATION 14–15 (2011).

35. *Id.* at 33–34.

36. *Id.* at 39–121.

Juans were dropped while recovery targets have been established for the North Cascades and the Selway-Bitterroots.

The Recovery Team also made two critical decision that have shaped grizzly conservation efforts ever since. First, the Team agreed that delisting would occur as “each of the remaining populations by population . . . achieve the recovery targets.”<sup>37</sup> Although there are reasons why a disjunctive approach was chosen, the Recovery Plan provides no explicit justification for this choice. Second, while the Plan recognized the importance of linking the “island” bear populations identified in the plan, it did not make linkage a criteria for recovery. Instead, the Plan called for a Linkage Zone Assessment and acknowledged that a “consideration in future grizzly bear management is the possibly of linkage between the existing island populations.”<sup>38</sup>

Guided by the plan, the Service began to implement recovery efforts. Vigorous work was undertaken in the GYE centered on Yellowstone National Park and the NCDE centered on Glacier National Park and the Bob Marshall wilderness complex, and it is in these areas where the recovery targets identified in the Recovery Plan have been met.<sup>39</sup> The reasons for this focus were straightforward. Although grizzly bear populations were greatly reduced in both Glacier and Yellowstone National Parks and surrounding habitats on USFS lands at the time of listing, both areas still had significant numbers of bears and these populations were of intense interest to people everywhere. Much was known about the Yellowstone Ecosystem population due to the work of the Craighead brothers who had worked in Yellowstone from 1959 to 1967. There was much less information about the NCDE population. Both ecosystems had a core of biologists from a host of agencies available to work on grizzly recovery. There was a commitment to have grizzly bears in Yellowstone and Glacier Parks and, to some extent, this aided the USFWS in developing and facilitating land use priorities to favor grizzly bear recovery on adjacent lands, particularly National Forests.

Many changes resulted from the grizzly bear’s protected status as a threatened species under the ESA. While limited hunting was allowed to continue in the Northern Continental Divide Ecosystem, grizzly bear

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37. U.S. FISH AND WILDLIFE SERVICE, REVISED GRIZZLY BEAR RECOVERY PLAN ii (1993).

38. U.S. FISH AND WILDLIFE SERVICE, REVISED GRIZZLY BEAR RECOVERY PLAN 25 (1993).

39. Grizzly Bears; Yellowstone Distinct Population; Notice of Petition Finding; Final Rule, 72 Fed. Reg. 14,866, 14,935 (March 29, 2007); INTERAGENCY GRIZZLY BEAR COMMITTEE, CONSERVATION STRATEGY FOR THE GRIZZLY BEAR IN THE NORTHERN CONTINENTAL DIVIDE ECOSYSTEM 49 (2018).



hunts throughout the Greater Yellowstone Ecosystem and elsewhere were prohibited. A Yellowstone Grizzly Bear Recovery Area was established within and around Yellowstone and Grand Teton National Parks including the John D. Rockefeller, Jr. Memorial Parkway; U.S. Forest Service and Bureau of Land Management lands; and state and private lands in Idaho, Montana, and Wyoming. State and federal agencies sought a way to coordinate research and monitoring efforts and to monitor grizzly bear population trends, food habits, and behaviors. In 1983, the Interagency Grizzly Bear Committee (“IGBC”) was established, facilitating communication and cooperation among management agencies in all recovery areas. The following section details some of the circumstances which led to these developments.

### III. IMPLEMENTING THE INTERAGENCY GRIZZLY BEAR STUDY TEAM AND A RECOVERY STRATEGY

Aside from a limited study conducted by Olaus Murie in the 1940s, there had never been a comprehensive effort to study or collect data on grizzly bear ecology or population trends in Yellowstone or anywhere else.<sup>40</sup> This changed in 1959 when the Craighead brothers began a long-term and cutting-edge research project which would last until 1971.<sup>41</sup> The primary focus of their study was the grizzly bears frequenting the Trout Creek open pit garbage dump and other dump areas, located in the interior of Yellowstone National Park.

Throughout most of the twentieth century, grizzly bears were allowed, even encouraged, to feed on human refuse in garbage dumps within Yellowstone National Park<sup>42</sup> and also in Glacier National Park. As many as six such open pit dumps once existed in Yellowstone, collecting trash from the Park’s hotels, restaurants, campgrounds, and other facilities.<sup>43</sup> In the 1920s and 1930s, the Park Service even constructed bleachers in Yellowstone, so tourists could witness the spectacle of bears gathering to feed upon the trash.<sup>44</sup>

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40. Mary Meagher, *Bears in Transition, 1959–1970s*, 16 *YELLOWSTONE SCIENCE* 5, 7 (2008).

41. *Id.*

42. United States Geological Service, *History of the IGBST*, [https://www.usgs.gov/centers/norock/science/history-igbst?qt-science\\_center\\_objects=0#qt-science\\_center\\_objects](https://www.usgs.gov/centers/norock/science/history-igbst?qt-science_center_objects=0#qt-science_center_objects).

43. Meagher, *supra* note 40, at 6.

44. Mark A. Haroldson, Charles C. Schwartz, & Kerry A. Gunther, *Grizzly Bears in the Greater Yellowstone Ecosystem: From Garbage, Controversy, and Decline to Recovery*, 16 *YELLOWSTONE SCIENCE* 13, 14 (2008).

The Craigheads studied grizzly bears in the large congregations of grizzly bears gathering at the Yellowstone dumps using radio-tracking, collecting data that allowed them to determine the age of the bears' first reproduction, average litter size, reproductive rate, and the ways in which age structure influenced population dynamics.<sup>45</sup> Their methods and data are still used by grizzly bear researchers and allow comparisons between grizzly bears before and after they were granted status as a threatened species under the ESA.<sup>46</sup>

In the 1960s, following the recommendations of the Leopold report of the Advisory Committee to the National Park Service,<sup>47</sup> wildlife management in the national parks shifted to a natural population regulation policy, an approach which stood in stark contrast to the human acclimated conditions created and encouraged by the dumps. As a result, Yellowstone officials began planning for closure of the Yellowstone dumps. While some of the dumps began closing in the mid-1960s, as late as the summers of 1968 and 1969 an estimated 14,000 pounds of human refuse remained available to bears in two dump sites, one located at Trout Creek in the Hayden Valley and the other at Rabbit Creek near Old Faithful.<sup>48</sup>

The Craigheads, who believed a sudden closure of the dumps would deprive the bears of adequate time to develop more natural feeding habits and lead to increased conflicts with humans, advocated for a gradual phasing out of the dumps.<sup>49</sup> The Park Service, on the other hand, urged the dumps' immediate closure, seeking to prevent another generation of bears from being acclimated to human food waste.<sup>50</sup> This difference of opinion, coupled with restrictions the Park Service placed on the Craigheads' research and publications, resulted in the expiration of the Craigheads' research permits in Yellowstone National Park.

Ultimately the Park Service's view prevailed. In February of 1970 President Nixon issued Executive Order #11507 banning open pit garbage dumps on federal lands.<sup>51</sup> As a result of the elimination of this unnatural food source, conflicts between grizzly bears and humans increased, resulting in the management removal and killing of hundreds of bears. Between

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45. *Id.* at 15.

46. *Id.* at 14.

47. ALDO LEOPOLD ET AL., *WILDLIFE MANAGEMENT IN THE NATIONAL PARKS* (1963).

48. Meagher, *supra* note 40, at 9.

49. Haroldson, *supra* note 44, at 16.

50. *Id.*

51. Prevention, Control, and Abatement of Air and Water Pollution at Federal Facilities, Exec. Order No. 11,507, 35 Fed. Reg. 2573 (Feb. 4, 1970).

1967 and 1972, at least 220 Yellowstone grizzlies were killed in management removals.<sup>52</sup>

In an effort to fill the void left by the cessation of the Craighead studies, and in response to concerns over the increase in grizzly bear mortality, the U.S. Department of Interior established the Interagency Grizzly Bear Study Team (“IGBST”).<sup>53</sup> An interdisciplinary group of scientists responsible for long-term monitoring and research efforts on grizzly bears in the Greater Yellowstone Ecosystem, the IGBST is comprised of representatives from the U.S. Fish and Wildlife Service, the U.S. Forest Service, the U.S. Geological Survey, the National Park Service, the Eastern Shoshone and Northern Arapaho Tribal Fish and Game Departments, and the States of Idaho, Montana, and Wyoming.<sup>54</sup> This collaborative approach allows for inclusion of a range of perspectives and the sharing of resources and information.

Over the years, the IGBST has collected what is arguably the largest and longest-running collection of data on any grizzly bear population, anywhere.<sup>55</sup> Owing largely to the breadth and depth of the studies conducted by the Craighead brothers and the IGBST, and to Yellowstone’s unique place in the American consciousness, we know more about Yellowstone grizzlies than any other population. Stated simply, Yellowstone is the single most studied grizzly bear population in the world and we have a correspondingly high level of understanding of the population. Knowledge of the increase in human caused grizzly bear deaths following the dump closures, coupled with other concerns for the future of bears in Yellowstone and elsewhere, led to FWS’ decision to add the grizzly bear to the list of threatened species in 1975.<sup>56</sup> Ongoing IGBC population stud-

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52. J.J. CRAIGHEAD, J.S. SUMMNER, & J.A. MITCHELL, *THE GRIZZLY BEARS OF YELLOWSTONE: THEIR ECOLOGY IN THE YELLOWSTONE ECOSYSTEM, 1959–1992* (1995).

53. United States Geological Service, *History of the IGBST*, [https://www.usgs.gov/centers/norock/science/history-igbst?qt-science\\_center\\_objects=0#qt-science\\_center\\_objects](https://www.usgs.gov/centers/norock/science/history-igbst?qt-science_center_objects=0#qt-science_center_objects).

54. United States Geological Service, *Interagency Grizzly Bear Study Team*, [https://www.usgs.gov/science/interagency-grizzly-bear-study-team?qt-science\\_center\\_objects=0#qt-science\\_center\\_objects](https://www.usgs.gov/science/interagency-grizzly-bear-study-team?qt-science_center_objects=0#qt-science_center_objects).

55. Haroldson, *supra* note 44, at 20–21.

56. United States Geological Service, *History of the IGBST*, [https://www.usgs.gov/centers/norock/science/history-igbst?qt-science\\_center\\_objects=0#qt-science\\_center\\_objects](https://www.usgs.gov/centers/norock/science/history-igbst?qt-science_center_objects=0#qt-science_center_objects).

ies revealed that, even with ESA protections, Yellowstone grizzly numbers continued to decline into the 1980s.<sup>57</sup> As a result, the Fish and Wildlife Service established the IGBC in 1983.<sup>58</sup>

The member agencies of the IGBC established policies and regulations aimed at reducing human-grizzly bear conflicts, including food storage orders to minimize the availability of human foods to bears, restrictions on sheep grazing within grizzly bear recovery areas, and efforts by the Park Service to encourage natural predation and scavenging through the elimination of bison and elk culling programs.<sup>59</sup> While recovery efforts were initiated on all grizzly populations in the lower-48 United States, Yellowstone received the bulk of attention—and resources, owing largely to the park’s iconic status as the world’s first national park and the sheer volume of available data on its grizzly bear population.<sup>60</sup> Its recovery was prioritized from the highest levels of government. These collective efforts contributed to a halt in the grizzly’s decline. Comparatively, the other grizzly bear ecosystems identified in the Recovery Plan have not received the same level of attention from the IGBC.

#### IV. THE DELISTING CONVERSATION BEGINS

When grizzlies were first listed under the Endangered Species Act in 1975, the National Park Service estimated that the Yellowstone population at 136 bears.<sup>61</sup> Throughout much of the 1980s there were significant concerns about the viability of the Yellowstone grizzly population.<sup>62</sup> By the early 1990’s however, population data suggested that the population was growing by 3–4 percent a year and that the recovery objectives articulated in the 1993 Recovery Plan Revision were being met.<sup>63</sup> In response, and following the guidelines of the Recovery Plan, FWS began working on a Conservation Strategy to guide management by multiple agencies in

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57. *Id.*

58. *Id.*

59. History of the IGBC, [https://www.usgs.gov/centers/norock/science/history-igbst?qt-science\\_center\\_objects=0#qt-science\\_center\\_objects\\_](https://www.usgs.gov/centers/norock/science/history-igbst?qt-science_center_objects=0#qt-science_center_objects_)

60. Kerry A. Gunther, Rebecca R. Shoemaker, Kevin L. Frey, Mark A. Haroldson, Steven L. Cain, Frank T. van Manen, & Jennifer K. Fortin, *Grizzly Bears: Ultimate Omnivores of the Greater Yellowstone Ecosystem* 23 (YELLOWSTONE SCIENCE 7 (2015)).

61. National Park Service, Grizzly Bears & the Endangered Species Act, <https://www.nps.gov/yell/learn/nature/bearesa.htm>.

62. L.L. Eberhart & R.R. Knight, *How Many Grizzlies in Yellowstone?* 60 JOURNAL OF WILDLIFE MANAGEMENT 416, 419–20 (1996).

63. U.S. Fish & Wildlife Serv., FINAL CONSERVATION STRATEGY FOR THE GRIZZLY BEAR IN THE GREATER YELLOWSTONE AREA 22 (2007).

the event grizzlies were delisted and management authority shifted from FWS to other federal and state agencies.<sup>64</sup>

In early 2000, the National Wildlife Federation and other conservation organizations approached then Montana Governor Marc Racicot and suggested Montana and neighboring states assert a larger role in the conservation strategy process.<sup>65</sup> With Racicot's leadership, the governors of Montana, Idaho and Wyoming appointed a three-state, 12-member citizen's panel representing diverse interests to make recommendations to them on the conservation strategy and whether the states should support it.<sup>66</sup> As a result of this state-led, citizen-based process, all three states endorsed the federal recommendations as far as they went but also initiated state grizzly bear management plans for managing bears beyond primary conservation areas identified in the federal strategy.<sup>67</sup>

Between 2000 and 2007, Montana, Idaho, and Wyoming all adopted grizzly bear management plans that were incorporated into the Final Conservation Strategy.<sup>68</sup> Fundamentally, these plans recognized that bears were expanding beyond the primary conservation area identified in the Conservation Strategy and that state strategies were needed to guide management in this larger landscape. In addition, FWS required each of the six national forests surrounding Yellowstone National Park to amend the forest plans that had been developed through the National Forest Management Act to incorporate binding standards and additional guidelines for managing grizzlies on national forest lands.<sup>69</sup> Yellowstone and Grand Teton National Parks also had to modify their management plans to include specific management standards. The end result of these multiple planning efforts was a comprehensive strategy that encompassed three state management plans, binding standards for all national forests and NPS lands in the Greater Yellowstone, and a Conservation Strategy that was signed by both the states and the affected federal agencies including FWS, the National Park Service, the BLM, and the U.S. Forest Service.<sup>70</sup>

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64. *Id.* at 16.

65. Montana Department of Fish, Wildlife, and Parks (2019). WESTERN GOVERNORS APPOINT ROUNDTABLE TO COMMENT ON DRAFT YELLOWSTONE GRIZZLY BEAR CONSERVATION STRATEGY. [online] Available at: [http://fwp.mt.gov/news/newsReleases/headlines/nr\\_0449.html](http://fwp.mt.gov/news/newsReleases/headlines/nr_0449.html) [Accessed Aug. 16, 2019].

66. *Id.*

67. U.S. Fish & Wildlife Serv., FINAL CONSERVATION STRATEGY FOR THE GRIZZLY BEAR IN THE GREATER YELLOWSTONE AREA (2007).

68. *Id.* See appendices K, L, and M.

69. *Id.* at 77–78.

70. *Id.*

## V. THE FIRST DELISTING PROPOSAL: THE COURTS SAY NO

With the Conservation Strategy in place, the U.S. FWS published a final rule (“2007 Rule”) classifying the Greater Yellowstone grizzly bear as a Distinct Population Segment (DSP)<sup>71</sup> and simultaneously delisting that segment.<sup>72</sup>

While the biological data indicated that the Yellowstone grizzly population had met and exceeded the objectives established by the Recovery Plan, and while FWS had engaged in a multi-faceted, multi-year process for developing the Conservation Strategy and the final rule, many conservation and environmental groups were unmoved by the data and unreconciled to the loss of ESA protections for grizzly bears. Yet even while there were shared concerns within the environmental community, there were fissures as well. As a result, the Greater Yellowstone Coalition filed a lawsuit in Montana federal district court and a large coalition of environmental groups filed similar litigation in the federal court for Idaho. Ultimately, the case came to the Ninth Circuit through the Montana federal district court which had ruled that the FWS rule violated the ESA,<sup>73</sup> that FWS had not demonstrated the existence of adequate regulatory mechanisms to protect grizzlies,<sup>74</sup> and that FWS had failed to provide adequate scientific support for its conclusion that a decline in whitebark pine, an important food source, would not negatively impact the population.<sup>75</sup>

On appeal in 2011, the Ninth Circuit affirmed the district court’s holding on a single one of these claims, remanding the 2007 Rule to the Service with instructions to properly determine the listing status of the

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71. Under the ESA, a “species” is defined as “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16) (2019).

72. Endangered and Threatened Wildlife and Plants; Final Rule 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, 72 Fed. Reg. 14,866 (Mar. 29, 2007).

73. *Greater Yellowstone Coal, Inc. v. Servheen*, 672 F. Supp. 2d 1105, 1113–18 (D. Mont. 2009), *aff’d in part, rev’d in part, and remanded*, 665 F.3d 1015 (9th Cir. 2011).

74. *Id.*

75. *Id.* at 1118–20.

grizzly under the ESA.<sup>76</sup> Noting the potential impacts of the loss of white-bark pine on grizzly bears in the GYE, the Ninth Circuit criticized the FWS for its insistence on delisting the population.

Perhaps the Service's delisting process, based on two decades of grizzly population growth, was well underway before the whitebark pine loss problem appeared on the radar and could be studied. But now that this threat has emerged, the Service cannot take a full-speed ahead, damn-the-torpedoes approach to delisting—especially given the ESA's "policy of institutionalized caution."<sup>77</sup>

Importantly, while the plaintiff organizations vigorously attacked the Conservation Strategy because, they alleged, it failed to provide the "regulatory certainty" that they argued ESA required, the Ninth Circuit held that the Conservation Strategy was an "adequate regulatory mechanism" for managing grizzlies once they were delisted.

#### VI. ROUND TWO: THE FEDERAL COURTS SAY NO AGAIN

Instead of immediately addressing the single issue of whether the decline in white bark pine truly posed a threat to the Yellowstone grizzly population and republishing a rule that was otherwise sound, FWS decided that it should review the entire rule, a process that took six years. Even as this lengthy rule-making process was underway, new fissures and developments were destabilizing the case for delisting the Yellowstone grizzly.

First, in crafting the new rule, FWS entered into discussions with the wildlife agencies in Montana, Idaho, and Wyoming over whether the states would hunt grizzly bears after delisting and, if so, how grizzly bear hunts would be managed through a revised Conservation Strategy.<sup>78</sup> The hunting issue was not only polarizing for the agencies but also for the many NGO's involved in the delisting process.<sup>79</sup> All three states were aggressive in defending their authorities to manage game species—as griz-

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76. *Id.*

77. *Id.* at 1030 (citation omitted).

78. *Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999, 1015 (D. Mont. 2018). The hunting debate presented itself to the District Court in form of the population estimator known as the Chao2 model. As the Court noted, FWS removed its commitment to recalibrating Chao2 not on the basis of the best available science "but rather as a concession to the states in order to reach a deal." The purpose of the "deal" was to provide more flexibility in mortality limits and potentially more hunting related mortality.

79. See generally Ben Goldfarb, *Why Hunting a Single Grizzly Bear is Such a Big Deal*, Outside Online, Sept. 17, 2018, <https://www.outside-online.com/2340046/idahos-role-conflict-over-hunting-grizzlies>

zlies would be classified under state law after delisting—even as FWS demanded strict and binding mortality quotas.<sup>80</sup> As the agencies engaged in a fierce battle over how mortality would be measured, the public debate ensued that encompassed the traditional hunting/anti-hunting divide amplified by emotions surrounding wild grizzly bears and their place on the western landscape.

A second, more profound development was the continued growth of the grizzly population, not just in Yellowstone but in the Northern Continental Divide Ecosystem as well. As bears were found on more and more mountains, and the distance between the two populations continued to shrink, the possibility that a single, connected bear population might one day inhabit the northern Rockies seemed increasingly achievable even as the rationale for designating Yellowstone grizzlies as a “distinct population segment” became weaker.<sup>81</sup>

Finally, and contemporaneously with FWS efforts to finalize the Yellowstone grizzly delisting rule in 2017, the U.S. Court of Appeals for the District of Columbia decided *Humane Society of the United States v. Zinke* and substantially altered the legal terrain on which the Yellowstone rule was constructed.<sup>82</sup> While the Ninth Circuit confined its review of the 2007 grizzly bear rule by focusing exclusively the GYE grizzly bear population, the D.C. Circuit rejected FWS’s proposal to delist wolves in the Western Great Lakes because FWS made no effort to evaluate the impacts delisting would have on other wolf populations or to consider recovery within the context of both the current and the historic range of the wolf.<sup>83</sup>

In response to the D.C. Circuit’s holding in *Humane Society*, the Service conducted a regulatory review and reopened public comment for the 2017 Rule, ultimately choosing to stand behind its earlier determinations regarding delisting the Yellowstone Grizzly.<sup>84</sup> Just as they had been in 2007, Yellowstone grizzlies were designated as a Distinct Population

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80. *Id.*

81. C.P. Peck et al., Potential Paths for Male-Mediated Gene Flow to and from an Isolated Grizzly Bear Population, *ECOSPHERE*, Oct. 23, 2017, <https://doi.org/10.1002/ecs2.1969>.

82. *Humane Society v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017).

83. In *Humane Society*, the D.C. Circuit upheld the Service’s authority to simultaneously designate part of a broader population as a Distinct Population Segment and delist a species, while also holding that such a delisting requires the Service to conduct a “comprehensive review” of the legal and functional effects of the delisting on the remaining members of the species. See 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).

84. *Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999, 1006 (D. Mont. 2018).



Segment (“DPS”) along with a simultaneous finding that the Yellowstone population had met recovery targets and could be removed from the list of the threatened species under the ESA. A number of environmental groups, joined by Native American Tribes who objected to sport hunting of grizzlies, filed suit.<sup>85</sup>

In September 2018, the U.S. District Court for the District of Montana issued summary judgment and vacated the Fish and Wildlife Service’s 2017 Final Rule, restoring Endangered Species Act protections to the Greater Yellowstone grizzly.<sup>86</sup> The Court based its decision on issues that were not addressed by the Ninth Circuit in 2011 but which did reflect the new facts and the new law that had emerged in the interim:

- (1) Citing to the holding in *Humane Society v. Zinke*, the Court held that FWS failed to consider the effect of delisting the GYE DPS on the still-listed remainder of lower-48 grizzly bears;
- (2) Again citing to *Humane Society*, the Court held that FWS failed to conduct a “comprehensive review” of the entire listed species;
- (3) The Court held that the Conservation Strategy was not an “adequate regulatory mechanism” because FWS acted arbitrarily and capriciously “in order to reach a deal” with states in calibrating mortality impacts on the grizzly population. This holding reflected the battle between the states and FWS over grizzly hunting and the states’ desire for more flexibility in how mortality impacts were measured. While the states won the inter-agency debate, the victory proved hollow when reviewed by a federal court.

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85. Plaintiff conservation organizations included the Alliance for the Wild Rockies, the Center for Biological Diversity, the Fund for Animals, the Humane Society of the United States, the National Parks Conservation Association, Native Ecosystems Council, the Sierra Club, Western Watersheds Project, and WildEarth Guardians. Tribal plaintiffs included the Crow Indian Tribe, the Crazy Dog Society, the Hopi Nation Bear Clan, the Northern Arapaho Elders Society, the Northern Cheyenne Tribe, the Piikani Nation, and the Standing Rock Sioux Tribe in addition to nine individually-named plaintiffs. The Crow Tribe, along with other tribes and tribal members, also filed claims under the Religious Freedom Restoration Act (“RFRA”). The District Court issued two 14-day temporary restraining orders preventing the states from initiating hunts, before vacating the 2017 Rule and remanding back to the Service. As a result, the court did not consider claims brought by the Crow and other tribes under RFRA. Depending on the outcome of the appeal to the Ninth Circuit, the stay on these claims could be lifted and those claims heard on their merits.

86. *Crow Indian Tribe*, 1003.

- (4) The Court held that FWS was arbitrary in finding that grizzly bears of the GYE were not threatened by insufficient genetic diversity.

While the Court's finding that FWS had acted arbitrarily and capriciously in approving the faulty mortality model is discouraging in that it reflects a breakdown in the level of cooperation between agencies necessary to manage grizzlies, the more challenging findings are those that require a detailed inquiry into how delisting Yellowstone grizzly bears will impact other still-protected grizzly bear populations. These challenges run in two different directions.

First, while the courts have thus far upheld the USFWS' designation of the Greater Yellowstone grizzly population as a distinct population segment, it is clear that as the grizzly bear populations in the NCDE and GYE continue to grow and as bears continue to expand their habitat, defining them as separate and isolated populations has become increasingly problematic. Another rule-making that seeks to simultaneously create and delist a Yellowstone DPS is a legally wobbly proposition at best. Yet combining the two populations into one would represent a dramatic and fundamental shift in the structure of grizzly bear management.

Second, since the initial Recovery Plan was adopted in 1982, FWS and cooperating state and federal agencies have pursued a disjunctive recovery strategy built on viewing each population as a discreet entity to the exclusion of all others and delisting each population in isolation as it recovers. As the courts have now made clear in both *Crow Indian Tribe* and *HSUS*, the Yellowstone population cannot be viewed in isolation from other grizzlies in the northern Rockies and an accounting must be done of how Yellowstone delisting fits within the larger recovery strategy. Specifically, the agencies will need to explain how grizzly populations in the Selkirks, the Cabinet-Yaak, and the Selway-Bitterroot Grizzly Bear Ecosystems will achieve recovery without more deliberate and wholistic strategies for fostering connectivity and genetic exchange between the NCDE, the Greater Yellowstone, and the other areas inhabited by grizzlies.

## VII. THE PATH FORWARD UNDER *HSUS* AND *CROW INDIAN TRIBE*

FWS has appealed the decision in *Crow Indian Tribe v. U.S.* and the legal status of the Yellowstone grizzly under the ESA will be determined most immediately by the Ninth Circuit Court of Appeals. If the Court overturns Judge Christensen's decision and reinstates the Final Rule delisting the bears, the district court could lift the stay on the bifurcated

claims of the tribes and resume proceedings on those undecided claims. If the 9th Circuit instead upholds the district court's decision in *Crow* and the bears retain their threatened status under the ESA, the Service will need to take a hard look at the deficiencies cited by the District Court and reconsider its approach to delisting.

What conditions, under *HSUS* and *Crow*, are legally required for the delisting of grizzly bears? According to the court in *Crow*, FWS must (1) consider the effect of delisting the GYE DPS on the remaining grizzlies in the lower 48 states, (2) conduct a "comprehensive review" of the entire listed species (all lower 48 grizzly bears), and (3) make a finding, informed by the best available science, that Yellowstone grizzlies are not threatened by inadequate regulator mechanisms or insufficient genetic diversity. Under *Humane Society*, which was cited as authority in *Crow*, "[t]he statute requires a comprehensive review of the entire listed species and its continuing status. Having started the process, the Service cannot call it quits upon finding a single distinct population segment."<sup>87</sup>

In *Humane Society*, the court held that the Endangered Species Act permits the US Fish and Wildlife Service to designate a subset of a listed species as a "distinct population segment" in order to delist and remove its protections under the ESA. According to the court, the ESA "allows the identification of a distinct population segment within an already-listed species, and further allows the assignment of a different conservation status to that segment if the statutory criteria for uplisting, downlisting, or delisting are met."<sup>88</sup> In order to do so, however, the Service must first "make the proper findings."<sup>89</sup>

"[W]hen a species is already listed, the Service cannot review a single segment with blinders on, ignoring the continuing status of the species' remnant. The statute requires a comprehensive review of the entire listed species and its continuing status."<sup>90</sup> In addition to addressing and answering the questions surrounding a "comprehensive review," the uncertainty of what the courts would call a "comprehensive review," and the effects of delisting Yellowstone bears on the remaining still-protected bears in the lower-48 United States, scientific questions of genetic viability and issues of connectivity will be of crucial importance.

One of the primary reasons for initially listing the grizzly bear under the ESA was that direct persecution and habitat fragmentation had reduced its numbers and range by ninety-eight percent in the lower forty-

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87. *Crow Indian Tribe*, 1008–1009, citing *Humane Society*, 601.

88. *Id.* at 600.

89. *Humane Society*, 595.

90. *Crow Indian Tribe*, 1008–1009.

eight states,<sup>91</sup> dividing the species into isolated populations incapable of interbreeding. Despite this recognition, the Recovery Plan and its strategy focused on rebuilding existing bear populations with connectivity to be pursued separately and apart from recovering the six identified recovery areas. This approach made sense when bear numbers were small and the challenge of connecting widely separate populations seemed more theoretical than practical. Presumably, a “comprehensive review” would have to address a number of critical questions bound up in this strategy.

Today, populations remain small and recovery distant for the grizzlies found in the Selkirk and the Cabinet-Yaak Grizzly Bear Ecosystems. What is holding back a more robust recovery of populations in these areas after decades of work and how will they remain connected to other grizzly bear recovery areas? The Selway-Bitterroot Ecosystem is the largest unoccupied grizzly habitat in the lower 48 states with four and a half million acres protected by wilderness designations.<sup>92</sup> Beyond the hope that grizzlies may one day naturally recolonize the area, there is no active strategy for recovery of this critical area. In addition to being a place where a significant grizzly population must be established,<sup>93</sup> the Selway-Bitterroot is also the landscape that links all the recovery areas in the northern Rockies together, from the Greater Yellowstone in the south to the Cabinet-Yaak, Selkirk, and Northern Continental Divide Recovery areas in North. Challenging as it might be to change the disjunctive recovery objectives established by the Recovery Plan decades ago, the comprehensive review now required under *Crow* and *Humane Society* seems to call the question: should the recovery goal be changed to encompass a single meta-population of bears in the lower-48 states, restored through federal leadership under the Endangered Species Act rather than through the separate, disjointed, and less coordinated work of state fish and wildlife agencies in Idaho, Montana and Wyoming.

#### VIII. SHOULD FWS COMBINE THE NCDE AND YELLOWSTONE GRIZZLY POPULATIONS? MUST THEY?

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91. U.S. FISH AND WILDLIFE SERVICE, DRAFT GRIZZLY BEAR RECOVERY PLAN 23 (1990).

92. Congressionally protected Wilderness areas within this ecosystem include the Selway-Bitterroot, the Frank Church-River of no Return, and the Gospel Hump.

93. In the spring and summer of 2019, there was a single known grizzly bear in the Bitterroot Mountains of Idaho, having migrated there after being relocated and released in the Cabinet Mountains.

An immediate question confronting federal and state bear managers is whether the strategy of designating Yellowstone area grizzly bears as a distinct population segment remains viable. While the court in *Crow Indian Tribe* concurred with the designation—in part based on a finding that 200 miles separated the NCDE and the Yellowstone—and while the court in *Humane Society* agreed that FWS could simultaneously designate a distinct population segment *and* delist it, FWS faces an emerging hurdle if it proceeds with another rule-making to delist the Yellowstone grizzly population. Quite simply, the Yellowstone population may no longer meet the criteria of the FWS delisting policy.

Both bear biologists and the public have long perceived Yellowstone grizzlies as an “island population,” cut off from the bears of Glacier Park and the Bob Marshall Wilderness by hundreds of miles and landscapes filled with human activities inimical to grizzly bear occupancy. In large measure, these factors led the Recovery Team to identify separate populations and establish a strategy for delisting them separately. But in the 38 years since the Recovery Plan was released, bear populations in both areas have expanded and the gap between the two populations has steadily grown smaller. Today the distance between the southernmost sighting of an NCDE grizzly and the northernmost Yellowstone grizzly is less than fifty miles.<sup>94</sup> While these growing populations are a remarkable success biologically, their close proximity now may make it legally impossible to separate the Northern Continental Divide and the Greater Yellowstone into distinct recovery areas.

Under FWS policy, three elements are considered in establishing a distinct population segment: the discreteness of the population, the significance of the population, and the conservation status of the population.<sup>95</sup> While the Yellowstone population will likely always be able to meet the policy’s tests for significance and conservation importance, a population can only be considered discrete if it is “markedly separated from other populations” or “delimited by international government boundaries.”<sup>96</sup>

The fact that Yellowstone and NCDE grizzlies are now only a good day’s walk from one another hardly seems a marked separation, especially when the data suggests that distance will continue to shrink and potentially disappear at any moment. As the two populations merge, it

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94. C.P. Peck et al., *Potential Paths for Male-Mediated Gene Flow to and from an Isolated Grizzly Bear Population*, ECOSPHERE, 2017, <https://doi.org/10.1002/ecs2.1969>.

95. Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4,722, 4,725 (Feb. 7, 1996).

96. *Id.*

becomes increasingly difficult to justify not only delisting the Yellowstone population, but the fundamental structure and strategy of the Recovery Plan. Combining the Yellowstone and NCDE Ecosystems would not only require developing new population goals for a single, unified Northern Rockies Recovery Areas, but strategies for ensuring occupancy across much larger landscape and for sustaining the linkage zones that have allowed the two populations to come together as one. Such revisions will place greater focus on wildlife corridors, not merely as temporary passages between protected areas like the NCDE and GYE, but as bear occupancy is demonstrating, important grizzly habitat in its own right. Wildlife managers should view such expanded thinking not as an obstacle but as an opportunity. The Grizzly Bear Recovery Plan, adopted 38 years ago, has provided important guidance but it needs to be revised to address both the legal constraints of the DPS policy and the biological potential for grizzlies on a larger, connected landscape.

#### IX. HOW IS THE REQUIRED COMPREHENSIVE REVIEW BEST UNDERTAKEN?

Under *Humane Society* and *Crow Indian Tribe*, FWS cannot develop a proposal to delist the Yellowstone Grizzly without reviewing both the status of other grizzly populations and how removing ESA protections for the Yellowstone population will impact other recovery efforts.<sup>97</sup> Such a review could undertake several forms. One course would be for FWS to simply prepare a narrative report and conclude all was sufficiently well to justify its delisting course. Alternatively, FWS could recognize that the changes that have occurred in grizzly country—both the biological and human habitats in which bears live—warrant a comprehensive review of the entire recovery strategy. If thoughtfully undertaken, the review would both meet the legal tests imposed by the courts while also building a broader public consensus around both recovery goals and the strategies to achieve them.

Both the original 1982 Recovery Plan and the revised 1993 Plan were developed by small groups of agency biologists and managers. An important consideration in building both public trust in the review and public support for new strategies that might result from it would be to assemble a more diverse recovery team, one that includes user group representatives, experts from the non-governmental community and political

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97. *Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999, 1008–09 (D. Mont. 2018).

leaders who speak for important constituencies within the northern Rockies. While there are certainly challenges involved in such an approach, Idaho, Wyoming and Montana have all successfully used collaborative processes in many situations and for many years to address challenging natural resources conflicts.

In part such a course would recognize that that new conservation model that has emerged as grizzly recovery has progressed. Over the last 100 years, wildlife populations of many species were rebuilt through the efforts of state fish and wildlife agencies and underwritten by excise taxes paid by hunters and anglers. This "North American Model" has restored relatively abundant populations of many big game and bird species and it has also given hunters and anglers an important voice in setting the priorities for state fish and wildlife agencies. Yet hunters and the North American Model have played only a small role in the grizzly bear story. Instead, the ESA has provided the legal template, agency leadership has come primarily from the Fish and Wildlife Service even as the states have been important partners, and an entire community of environmentally-based conservation organizations, as contrasted with hunter-based conservation groups, has stepped up to move grizzly conservation forward.<sup>98</sup> In addition, a constellation of local landowner organizations has emerged in many areas of the northern Rockies and partnered with the conservation community in place-based grizzly conservation initiatives. At present, there is little room for this diversity on state fish and wildlife commissions which makes recovery planning an important avenue for building broader support for grizzly conservation.

One of the first collaborative processes in the region was the three-state group that was appointed by Governors Racicot, Batt, and Geringer in 2000. Although each governor appointed only five members, the final make-up reflected a broad spectrum of views even while together individual committed to problem solving and collaboration.<sup>99</sup> Importantly, the governors gave the group a clear assignment that included both critiquing the draft Conservation Strategy and identifying additional steps that were needed for the states to support the Strategy. If a multi-state, multi-interest roundtable was assembled to revise the current Grizzly Recovery Plan it

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98. The importance these new actors was demonstrated in the appointments made by Montana Governor Steve Bullock when he recently established a new grizzly bear advisory council. Out of 18 members, only two represented hunters while five members represented conservation and wildlife perspectives and many of the seven agricultural representatives appointed have worked with conservationists on grizzly bear projects. Tribal, timber, and outdoor industry voices were also selected.

99. See [http://fwp.mt.gov/news/newsReleases/headlines/nr\\_0449.html](http://fwp.mt.gov/news/newsReleases/headlines/nr_0449.html).

would need a similarly clear mandate. In addition to reviewing and revising the existing recovery plan objectives, the assignment might include:

- Reviewing the current recovery strategy of disjunctive delisting;
- Recommending whether recovery should include establishing effective linkage corridors between grizzly recovery areas;
- Evaluating explicit linkage and corridor strategies for the Cabinet-Yaak and Selkirk grizzly populations;
- Setting a timeline for natural recolonization of the Salmon-Selway Ecosystem with a reintroduction protocol if natural recolonization does not occur;<sup>100</sup>
- Recommendations on whether a grizzly bear recovery strategy should be developed for the northern plains of Montana where grizzlies are now regularly found.

Any interest-based, multi-stakeholder recovery team would require strong support from bear biologists and managers and would need to operate within sideboard that include a sound scientific basis for any and all recommendations. An important goal of such a collaborative approach is building a broader base of support for a recovery strategy, not just for the public and political leaders—two important constituencies to be sure—but with the groups that are most engaged in grizzly bear conservation.

When the grizzly recovery strategy was developed in the early 1980's, biologists were hemmed in by their perception of the possible. The reach of the ESA was only beginning to be understood. Grizzly bear populations were small, and notions of connectivity were conceptual at best. State wildlife agencies were resentful of their lost management authorities and the political environments was challenging. Crafting a pragmatic, measured plan with clearly achievable goals was a prudent approach.

It has taken years, but the federal courts have now measured the goals of the Recovery Plan and held that the ESA demands more. Even while acknowledging the growth in grizzly populations, the Montana federal district court has held that recovery means more than checking off the

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100. In 2000, the Fish and Wildlife Service adopted a final rule for reintroducing grizzly bears into the Selway-Bitterroot Wilderness Area in Idaho and Montana by designating the reintroduced population as “experimental, non-essential” pursuant to section 10(j) of the ESA. While political resistance has kept FWS from actually reintroducing bears, the regulations to do so remain in place at 50 CFR 17.



boxes of individual populations. While based in law, the court's opinion merges with conservation biology in recognizing the importance of connectivity and the challenges of recovering small, isolated populations.

While the many biologists, managers, and advocates who have defended the Recovery Plan (including one of authors) could rightly feel defeated by these Court decisions, by far the better response is to recognize the opportunity being presented to rethink the grizzly recovery strategy and re-energize recovery efforts, even while building on the work of the last 38 years.