Fall 2018: A Good Time to be a Greater Yellowstone Grizzly Bear

In late September Judge Dana Christensen gave the Greater Yellowstone grizzly bear population some very welcome news. The United States District Court judge ruled the United States Fish and Wildlife Service (USFWS) exceeded its legal authority in 2017 when it delisted the Greater Yellowstone grizzly bear from the U.S. *Endangered Species Act* (ESA). Judge Christensen restored this grizzly bear population's ESA status. The decision quashed the plans of the states of Wyoming and Idaho to re-introduce limited hunts this fall for this iconic species, hunts those states haven't allowed since 1974 and 1946 respectively.

The judge concluded that delisting these bears could not stand for two reasons. First, the USFWS failed to consider what impact delisting Greater Yellowstone grizzlies would have on grizzly populations in five other ecosystems in the Lower 48 states. Second, the USFWS "arbitrarily and capriciously" applied the ESA's threat analysis in this case.

Judge Christensen's comments on how federal Fish and Wildlife officials applied the threat analysis struck me as scathing. When it came to how the grizzly bear population would be estimated in the future the judge concluded that, in dropping a key USFWS commitment to recalibrating population estimate models, "the Service illegally negotiated away its obligation to apply the best available science in order to reach an accommodation with the states of Wyoming, Idaho, and Montana." He also criticized how the USFWS used two studies to support its claim that delisting wouldn't threaten the genetic health of the Greater Yellowstone bears. The Service's use was "illogical, as both studies conclude that the long-term health of the Greater Yellowstone grizzly depends on the introduction of new genetic material."

Reading this decision is enlightening for a variety of reasons. Most obviously, it underlines how our cousins south of the 49th parallel often face very similar conservation challenges to the ones we do. For those who are unfamiliar with the extent of the grizzly's decline in North America, it details well the history of the grizzly's precipitous decline in the Lower 48 states. In considering those who challenged the USFWS decision, the case also illustrates the common ground that should be looked for between First Nations and ENGOs. The decision is also striking for what it insinuates about politics and science. Western states had put considerable political pressure on the Fish and Wildlife Service to delist the Greater Yellowstone grizzlies. That political pressure, in Judge Christensen's view, improperly influenced how the USFWS considered and weighed the scientific information bearing on the delisting issue.

I also wondered if one aspect of this case wasn't quite analogous to a damaging change Alberta has proposed in its 2016 draft of a new Grizzly Bear Recovery Plan. This is the proposed change to "open road" density thresholds from the "open route" density thresholds that were established in the 2008 Grizzly Bear Recovery Plan. We described this change in a letter to Minister Shannon Phillips as "incredibly concerning." AWA believes the scientific evidence clearly shows this shift will not assist recovery efforts. The shift defines out of existence the linear disturbances associated with open routes (such as seismic lines), disturbances the scientific literature clearly links to the risk of mortality.

The analogy in Judge Christensen's decision is the choice the USFWS made, under the political pressure from the states, about how to estimate grizzly bear populations for the purposes of the ESA. The issue was "recalibration" – a mechanism where officials would bring population estimates from a new model into line with those of the model used to set the Final Rule. Recalibration was intended to be based on the "best available science" in order to maintain a strong level of protection for grizzly bears. In order to strike a deal with the states, the USFWS abandoned recalibration and the commitment to the best available science. "Rather than maintain heightened protections in the face of a recognized threat to the health of the Greater Yellowstone grizzly," the judge wrote, "the Service accepted a 'compromise' that was in effect a capitulation."

In the cases of both the USFWS recalibration/population estimator model choice and the Alberta "open routes to open roads" choice government officials preferred options that posed greater threats to the health of grizzly bears. The vital difference between the cases is that legal action in the U.S. under the ESA was available to American tribes and ENGOs. They took advantage and Judge Christensen agreed with them that the USFWS failure to include a recalibration provision in a conservation strategy was "arbitrary and capricious." No such legal recourse is available to defend those Alberta grizzlies that will face continued or increased mortality risks if the open roads threshold is adopted by the provincial government.

- Ian Urquhart