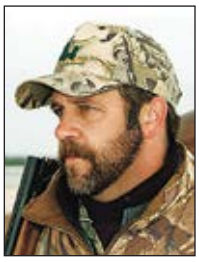
A CLASH BETWEEN PROFESSIONAL JUDGMENT AND THE LAW



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While serving as the director of the U.S. Fish and Wildlife Service (FWS) in the early 2000s, I was involved in the attempt to delist gray wolves in the Greater Yellowstone Ecosystem (GYE). Much of that effort involved working with state agencies and legislatures to develop state management plans that would conform to federal and state laws and provide adequate regulatory mechanisms to permit states to manage wolf populations within their borders. The goal was to develop management plans that would preclude the need for Endangered Species Act (ESA) protection. We were unable to achieve wolf delisting due to a number of issues, mostly surrounding the legal requirements that accompanied a delisting final rule.

With my education and training as a biologist, legal decisions often seemed at odds with sound science and resource management decisions. From a purely biological perspective, wolf numbers assured sustainable populations throughout the range of the GYE. State agencies clearly had the expertise to monitor and manage wolf numbers within their borders. However, legal issues associated with the ESA, ESA rules and regulations, and court decisions stymied our best attempts at delisting. Professional judgment and the court decisions seemed to clash again and again.

It is through this lens that I tried to understand the recent September 24, 2018, decision negating the FWS's attempt to delist grizzly bears in the GYE. Grizzly bears in the Lower 48 states were listed as a threatened species in 1975. At that time, there were six separate populations, all of which lived in portions of Montana, Wyoming, Idaho, Washington, and British Columbia. Today, the majority of grizzly bears reside in the GYE and Northern Continental Divide areas.

In 2007, in recognition of the grizzly bear's population numbers in the GYE, the FWS attempted to delist that population. This decision was made using the best scientific information available. From a policy perspective, it also addressed the concerns of legislators, private landowners, ranchers, and hunters within the GYE area. That decision was remanded back to the agency because of concerns about the grizzly bear's whitepine bark seed diet and another issue that continues to perplex the FWS. In 2017, the FWS made a second attempt to delist the GYE population. In their final rule, the FWS addressed the whitepine bark seed issue but was confounded again because of the geographic specificity of the delisting attempt.

Grizzly bears and gray wolves were originally listed (1975 and 1974 respectfully) as species throughout the entirety of their ranges in the Lower 48 states. Those listing decisions were made prior to an ESA amendment in 1978 that permitted the FWS to "sparingly use" distinct population segments (DPS). The use of DPS would provide a tool for the FWS to carve out specific geographic populations within a species' range which required protection under the ESA. It recognized that viable populations could occur within the species' range that did not need protection, while other populations might need special protection—a useful, common-sense approach to wildlife management. However, prior to 1978, if a species was originally listed throughout its entire range, it could only be delisted throughout the species' entire range, not as a DPS.

The FWS argued that DPS status was appropriate for delisting both grizzly bears and gray wolves, but the courts disagreed in each delisting attempt. At issue was the ability for individual movement and genetic exchange among populations within the entire range. Grizzly bears in the GYE have not interbred with those in the Northern Continental Divide area presumably since the 1800s or early 1900s, prior to their decimation by early wilderness settlers. The courts declared that the FWS must consider the impact of delisting a specific population (GYE) on the viability of other existing populations within the grizzly range. Another complication involved the means of population estimation—past, present, and future—and its repercussions on required species status reviews going forward.

Although the courts and the FWS recognized the states' ability to provide adequate regulatory mechanisms to sustain the survival of these species, the courts did not provide that authority. Instead they based their decisions on existing laws and case law that continue ESA protections for grizzly bears and gray wolves. State fish and wildlife managers have been continually frustrated in the process.

This layman's description of the issues surrounding delisting decisions was intended to make two points. One, the FWS operates under legal constraints that are not well understood by most people, including some responsible for species' management. Two, Congress has the ability to address the DPS provision in order to provide a scientifically justified and common-sense approach to managing species at a much finer scale than is currently available. The FWS and state agencies have demonstrated their assurance of the long-term survival of species through established expertise, long-term commitment, financial contributions, and existing regulatory mechanisms. The public demands species' protections and flexibility in application of the law. We need to learn from our past experience when considering amendments to the ESA. ■