

Adequacy of Regulatory Mechanisms

Background: Most species that achieve recovery targets will continue to face some risk factors after delisting. Some of these remnant threats may be significant if not adequately managed into the future. While these remnant threats were adequately managed while the Act's protections were in place (thus, helping the species reach recovery), this Federal protective mechanisms will be removed upon delisting. This frequently raises questions by Service and partners involved in recovery, as well as plaintiffs and courts, as to whether management will continue and whether management will be adequate in the absence of the Act's protections.

In some circumstances, new threats materialize or are anticipated to materialize once Federal protections are removed. For example, the Act typically prohibits direct intentional take. However, some species may be hunted once management is returned to the States (e.g., grizzly bears and gray wolves). In these cases, the framework intended to manage this risk factor is typically untested because the action was previously prohibited. This absence of a demonstrated track record of success creates an additional challenge for partners and the Service to demonstrate that management will be adequate to maintain recovery.

Why "Regulatory" Mechanisms: As an agency, we have tended to give partners the benefit of the doubt and provide flexibility in how remnant threats will be managed after delisting. We often look to Section 4(b)(1)(A) of the Act which directs us to "tak(e) into account those efforts (by)... any State... or any political subdivision of a State... to protect such species." However, the courts have consistently put greater weight the ESA's requirement that listing and delisting decisions be based upon the five factors including potential for "overutilization" (Factor B) to occur and whether we have regulatory mechanisms to ameliorate this concern (Factor D).

In the recent Wyoming wolf delisting case, the court found that although Wyoming committed to a specific numeric population target in both state law and regulation, the mechanism was inadequate because their law and regulation failed to explain how this target would be met. Instead, the State used a management plan as the tool to explain management specifics. The court was unwilling to rely on their management plan as it was not regulatory. The court concluded that "the Service cannot rely solely on an unenforceable promise as a basis to delist a species."

Similarly, in the Yellowstone grizzly bear case, both the District Court and the Court of Appeals gave little to no deference to the detailed commitments made in the 500-page Conservation Strategy and accompanying Memorandum of Understanding. These documents were largely ignored because they were not regulatory, not binding and not enforceable. We won this portion of the appeal not because the circuit court disagreed with the District court on this fact. Instead, we won this portion of the appeal because the commitments made in the Conservation Strategy were incorporated into binding and enforceable regulatory mechanisms via Forest Service Land Management Plans.

What Level of Detail is Needed: Courts have similarly indicated we need specific management details in these regulatory documents. In the 2009 Court of Appeals ruling on grizzly bear, the court rejected vague commitments to adaptive management (intended to address whitebark pine concerns). The court's majority opinion stated "For adaptive management of a potential threat to suffice as a basis for a delisting determination, we believe that more specific management responses, tied to more specific triggering criteria, are required."

The Wyoming wolf case also ran into similar issues. In her ruling from the bench on our motion to reconsider, the judge in the Wyoming wolf case expressed significant concern beyond the non-regulatory nature of the State management plan. Specifically, she indicated the State plan also failed as an adequate regulatory mechanism because it lacked specifics. While the plan indicated the State would manage for a buffer above minimum population targets, it did not indicate what that buffer would be (e.g., manage for 13 breeding pairs to ensure the floor of ten is not compromised) nor did it indicate what triggers would generate a management response (e.g., if the population fell to 12 breeding pairs, hunting would be curtailed or if the population fell to 10 breeding pairs, no hunting would occur, etc.).

Summary and Lessons Learned: Because the Service does not have a policy that has gone through notice and comment, we do not get Chevron deference on our view of this issue. Courts have given very little weight Section 4(b)(1)(A) of the Act which directs us to "tak(e) into account those efforts (by)... any State... or any political subdivision of a State... to protect such species." In the absence of a policy providing clear sideboards on this issue, the courts have clearly and repeatedly indicated:

- Remnant threats that persist in the absence of ESA protections must be managed.
- Only legally binding and enforceable regulatory mechanisms will be viewed as an adequate mechanism to manage these remnant threats should a decision be litigated.
- Non-regulatory documents such as conservation strategies, memorandums of understanding or agreement, and State management plans will not be viewed as adequate as stand-alone documents as they are not regulatory, not binding and not enforceable. The primary value of an overarching document such as a Conservation Strategy is to guide what should be put into regulation.
- Regulations must be specific and detailed including specific, measurable triggers and specific detailed management responses. In short, we must clearly explain in regulation how a species and threat will be managed after delisting. General commitments to a target are not adequate.