

Greater Yellowstone Coalition, Inc. v. Servheen: The Ninth Circuit Rejects Agency Claim of Scientific Uncertainty in ESA Delisting

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I. OVERVIEW

The following case arose after the United States Fish and Wildlife Service (Service) decided to remove the Yellowstone grizzly bear population from the threatened species list. The Yellowstone region has become a place for people and grizzly bears to coexist close to each other.¹ It is home to both a grizzly population and the Yellowstone and Grand Teton national parks, and it is also a popular place for industries such as “natural resource extraction, ranching, agriculture, and tourism.”² During much of the twentieth century, Yellowstone National Park maintained open-pit garbage dumps that provided a consistent source of food for the grizzly population and a convenient place for tourists to view the bears.³ However, due to concerns about the bears’ attraction to human food, the dumps were closed in the 1970s, and grizzly mortality rates increased significantly thereafter.⁴ By 1975, the grizzly population in the lower forty-eight states was confined to a few areas and amounted to “less than 2% of its formerly contiguous historic range, and its numbers had dwindled from about 50,000 in 1800 to less than 1,000 today.”⁵ This significant bear population decline led the Service to list the grizzly as “threatened” under the Endangered Species Act (ESA)⁶ in 1975.⁷ Since then, the grizzly population has increased as scientists and conservationists led by the Service’s Grizzly Bear Recovery Coordinator Dr. Christopher Servheen have studied the bears and made efforts to

1. *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1019 (9th Cir. 2011).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 1020.
6. 16 U.S.C. §§ 1531-1544 (2006).
7. *Greater Yellowstone Coal.*, 665 F.3d at 1019.

change human behaviors that may threaten them.⁸ As required by the ESA,⁹ the Service issued the Grizzly Bear Recovery Plan (Plan) in 1982.¹⁰ Later, in 1993, a revised version of the Plan outlined a Recovery Zone for several regions, including the Greater Yellowstone Area (GYA).¹¹ The 1993 Plan also required the development of a conservation strategy for each grizzly population that would direct long-term management efforts after the population had been delisted.¹² The Plan has been considered a success; scientists estimate that the GYA grizzly population increased from 4.2% to 7.6% per year between 1983 and 2002. By 2006, the total grizzly population in the GYA was more than 500 bears, approaching Yellowstone National Park's carrying capacity.¹³ The success of the recovery efforts led to the mandated Final Conservation Strategy for the Grizzly Bear in the Greater Yellowstone Area (Strategy).¹⁴ The Strategy designated the Yellowstone Recovery Zone as the Primary Conservation Area (PCA), which consists of a 9210-square-mile area within the GYA and is designed to be a safe area for the bears to achieve recovery and expand their population beyond the PCA.¹⁵ The Strategy has two key mechanisms—population and habitat standards—to maintain the recovered bear population.¹⁶ In addition to these key mechanisms, the Strategy includes procedures to manage

8. *Id.*

9. 16 U.S.C. § 1533(f)(1).

10. *Greater Yellowstone Coal.*, 665 F.3d at 1020. The Recovery Plan “aimed to foster viable, self-sustaining grizzly populations in areas known to have been occupied by grizzlies within the preceding ten years,” such as areas of northern Montana, northern Washington, and northern Idaho. *Id.*

11. *Id.* The Recovery Zones were defined as “area[s] large enough and of sufficient habitat quality to support a recovered bear population within which habitat and population would be monitored.” *Id.* (internal quotation mark omitted).

12. *Id.*

13. *Id.*

14. *Id.* at 1019. The Strategy consists of an “inter-agency, multi-state cooperative blueprint for long-term protection and management of a sustainable grizzly population.” *Id.*

15. *Id.* at 1021; *see also* INTERAGENCY CONSERVATION STRATEGY TEAM, FINAL CONSERVATION STRATEGY FOR THE GRIZZLY BEAR IN THE GREATER YELLOWSTONE AREA 16-17 (2007), available at http://www.fws.gov/mountain-prairie/species/mammals/grizzly/Final_Conser_vation_Strategy.pdf.

16. *Greater Yellowstone Coal.*, 665 F.3d at 1021; *see also* INTERAGENCY CONSERVATION STRATEGY TEAM, *supra* note 15, at 25-56. The population standards mandate that there be a total population of more than 500 bears; that at least sixteen of the eighteen “Bear Management Units” within the PCA be occupied by at least one female with cubs over a six-year period; and that the annual mortality limits be nine percent of adult females, fifteen percent of adult males, and nine percent of cubs under two years old. *Greater Yellowstone Coal.*, 665 F.3d at 1021. Habitat standards are based on habitat conditions that existed in 1998, which were found to have sufficiently supported a rising bear population. *Id.* The number and capacity of developed sites such as campgrounds and visitor services facilities must be kept at or below the 1998 levels. *Id.* at 1022. Vegetation, food availability, and human activities will also be monitored. *Id.*

bear/human conflicts as well as a “coordinated information and education campaign” to help people learn how to coexist with bears in order to reduce the number of conflicts.¹⁷ Soon after the Strategy was finalized as a long-term conservation plan, the Service decided to remove the grizzly bear from the ESA’s threatened species list.¹⁸ After the Service published its Final Rule Removing the Yellowstone Distinct Population Segment of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife (Rule), a nonprofit organization called the Greater Yellowstone Coalition (GYC) filed suit in the United States District Court for the District of Montana, arguing that the Rule was “arbitrary, capricious, and unlawful under the ESA.”¹⁹ GYC claimed, among other things, that the existing regulatory mechanisms were inadequate to protect the grizzly population and that the Service “failed to adequately consider the impacts of global warming and mountain pine beetle infestation on the vitality of the region’s whitebark pine trees.”²⁰ The district court granted summary judgment to GYC on these two claims, finding that the Service had “failed to rationally support its conclusions that adequate regulatory mechanisms were in place to protect the grizzly and that declines in whitebark pine did not threaten the grizzly.”²¹ The court vacated the Rule and remanded the matter to the Service for further consideration.²² The Service appealed the decision to the United States Court of Appeals for the Ninth Circuit. Regarding the first issue, the Ninth Circuit reversed the district court’s ruling and *held* that the Service’s regulatory mechanisms were reasonable; however, the

17. *Greater Yellowstone Coal.*, 665 F.3d at 1022; *see also* INTERAGENCY CONSERVATION STRATEGY TEAM, *supra* note 15, at 57-62. “[B]ear/human conflicts” are defined as “incidents in which bears injure people, damage property, kill or injure livestock, damage beehives, obtain anthropogenic foods, or damage or obtain garden and orchard fruits and vegetables.” *Greater Yellowstone Coal.*, 665 F.3d at 1022 (quoting INTERAGENCY CONSERVATION STRATEGY TEAM, *supra* note 15, at 57 (internal quotation marks omitted)).

18. *Greater Yellowstone Coal.*, 665 F.3d at 1019, 1021-23. The delisting applied only to the Yellowstone grizzly population. *Id.* at 1023. Eight federal and state entities signed a memorandum of understanding in which they agreed to implement the Strategy: the Service; the U.S. Forest Service; the National Park Service; the U.S. Geological Survey; the Bureau of Land Management; the Montana Department of Fish, Wildlife, and Parks; the Wyoming Game and Fish Department; and the Idaho Department of Fish and Game. *Id.* at 1021.

19. *Id.* at 1023.

20. *Id.* GYC also raised the following claims: that the Service “failed to consider the grizzly’s historic range, rather than its current range, when it assessed whether the grizzly was threatened by habitat loss” and that “the Yellowstone grizzly population is too small to be delisted because it lacks sufficient genetic diversity to be self-sustaining.” *Id.* Though GYC was granted summary judgment on these claims, they were not at issue in the appeal. *Id.* at 1023 n.1.

21. *Id.* at 1023.

22. *Greater Yellowstone Coal., Inc. v. Servheen*, 672 F. Supp. 2d 1105, 1109 (D. Mont. 2009), *aff’d in part, rev’d in part and remanded*, 665 F.3d 1015.

Ninth Circuit affirmed the district court's ruling on the second issue and *held* that the Service "failed to articulate a rational connection between the data in the record and its determination that whitebark pine declines were not a threat to the Yellowstone grizzly." *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015, 1020 (9th Cir. 2011).

II. BACKGROUND

The ESA directs the Secretary of the Interior to publish a list of all "endangered" and "threatened" species.²³ The ESA defines an "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range."²⁴ A "threatened species," on the other hand, is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."²⁵ The Secretary may base his decision to list a species on any of the following factors:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.²⁶

Once a species is listed as endangered or threatened, the Secretary is directed to develop and carry out a plan for its "conservation and survival" (a recovery plan).²⁷ For a species to be delisted, the Secretary must determine that none of the factors listed above continue to threaten or endanger the species.²⁸

The Secretary delegated the responsibility of administering the ESA to the Service and the National Marine Fisheries Service (NMFS).²⁹

23. 16 U.S.C. § 1533(c)(1) (2006).

24. *Id.* § 1532(6).

25. *Id.* § 1532(20).

26. *Id.* § 1533(a)(1). Although the Ninth Circuit has not answered the question whether "regulatory mechanisms" includes voluntary actions as well as regulatory actions, the United States District Court for the District of Oregon held that voluntary, unenforceable efforts should not be considered regulatory mechanisms. *Or. Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1154-55 (D. Or. 1998) ("Absent some method of enforcing compliance, protection of a species can never be assured").

27. 16 U.S.C. § 1533(f)(1).

28. 50 C.F.R. § 424.11(d) (2011). Additionally, for a species to be delisted, the removal "must be supported by the best scientific and commercial data available to the Secretary after conducting a review of the status of the species." *Id.*

29. *Id.* § 402.01(b).

Final decisions made by these agencies under the ESA are reviewable under the Administrative Procedure Act,³⁰ which requires an agency's decision to be overturned if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."³¹ The United States Supreme Court in *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.* explained that an agency rule would be considered arbitrary and capricious

if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.³²

The Ninth Circuit in *Lands Council v. McNair* recognized that courts are required to defer to an agency's decision when it is in an area that involves a significant degree of special expertise.³³ The Ninth Circuit has also acknowledged that it is to be "most deferential" when the agency is "making predictions, within its [area of] special expertise, at the frontiers of science."³⁴ However, the United States Supreme Court in *State Farm* has elucidated the point that an agency may not simply claim "substantial uncertainty" to justify its decisions and actions.³⁵ Instead, the agency must offer and explain the "rational connection" between the facts in the record and the agency's conclusion.³⁶

The Ninth Circuit has adhered to the reasoning in *State Farm* and has "insisted that agencies support and explain their conclusions with evidence and reasoned analysis."³⁷ For example, in *Tucson Herpetological Society v. Salazar*, the Ninth Circuit held that the Secretary of the Interior's factual findings did not support his decision to

30. *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1090 (9th Cir. 2005) (holding that a biological opinion (BiOp) issued by NMFS is reviewable under the APA).

31. 5 U.S.C. § 706(2)(A) (2006).

32. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

33. *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc) (quoting *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 954 (9th Cir. 2003)).

34. *Id.* (alteration in original) (quoting *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1099 (9th Cir. 2003)).

35. 463 U.S. at 52.

36. *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (internal quotation mark omitted)).

37. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 648 (9th Cir. 2010) (citing *Lands Council*, 537 F.3d at 994, 998).

remove the flat-tailed horned lizard from the threatened species list.³⁸ There, although the Secretary reported that there were limited and inconclusive studies regarding the lizard's population, he concluded that the lizard population was persisting.³⁹ The court reasoned, "If the science on population size and trends is underdeveloped and unclear, the Secretary cannot reasonably infer that the absence of evidence of population decline equates to evidence of persistence."⁴⁰ The Ninth Circuit, in *Brower v. Evans*, similarly held that the Secretary acted arbitrarily and capriciously in concluding that dolphin-safe labeling standards could be relaxed to a less protective standard.⁴¹ There, the Secretary reached this conclusion without obtaining and considering data from congressionally mandated dolphin stress studies.⁴² Although the Secretary argued that the lower standard should be upheld because there was inconclusive data that the dolphins were facing significant adverse impacts, the court reasoned that the Secretary "must affirmatively find whether or not there is a significant adverse impact before the dolphin safe labeling standards can be relaxed."⁴³ The court further noted that "[t]he deference accorded an agency's scientific or technical expertise is not unlimited" and that "[t]he presumption of agency expertise can be rebutted when its decisions, while relying on scientific expertise, are not reasoned."⁴⁴

III. THE COURT'S DECISION

In the noted case, the Ninth Circuit relied on the framework set out in *State Farm* and its own reasoning in *Lands Council* and *Tucson* in its analysis of whether there was a rational connection between the agency's data and its conclusion and to determine whether the Service's regulatory measures were adequate.⁴⁵ The court first held that the Service's decision to delist the grizzly bear in the GYA was arbitrary and capricious because there was no rational connection between the evidence the Service cited and its conclusion that whitebark pine decline was not a threat to the

38. 566 F.3d 870, 878-79 (9th Cir. 2009).

39. *Id.* at 878.

40. *Id.* at 879.

41. 257 F.3d 1058, 1066, 1070 (9th Cir. 2001).

42. *Id.* at 1070.

43. *Id.* at 1066-67 (construing 16 U.S.C. § 1385(g)(1)).

44. *Id.* at 1067 (citing *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679 (D.D.C. 1997)).

45. *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1022-23, 1028 (9th Cir. 2011).

grizzly population.⁴⁶ The court then held that the Service was reasonable in determining that the existing regulatory mechanisms were adequate to maintain a recovered grizzly population.⁴⁷

The Ninth Circuit first discussed whether there was a reasoned basis to support the Service's conclusion that a decline in whitebark pine did not pose a threat to the grizzly population in the Yellowstone area.⁴⁸ By analyzing the scientific evidence that the Service presented in the Rule regarding the relationship between whitebark pine and the grizzly bear, the court determined that the trees are one of four food sources that are significant to the survival and reproductive success of the grizzly bear. Thanks to their "high fat content and abundance," the pine seeds are important "pre-hibernation food" for the bears.⁴⁹ The court also noted that according to the Rule, the whitebark pine population will be adversely affected in the future due to an increase in mountain pine beetles and white pine blister rust.⁵⁰ Furthermore, the Service found that climate changes such as an increase in temperature in the northern Rocky Mountains may lead to an increase in blister rust as well as mountain pine beetles, whose population is otherwise controlled by very cold winters.⁵¹ Most importantly, the court cited evidence in the Rule of a distinct relationship between "reduced whitebark pine seed abundance and increased grizzly mortality"; one such piece of evidence showed that when the pine seeds are not abundantly available, grizzly bears search for food in a wider range, which leads to an increase in contact with humans.⁵² Reviewing the scientific evidence presented in the Rule regarding the relationship between whitebark pine and grizzly bears, the

46. *Id.* at 1019-20.

47. *Id.* at 1020.

48. *Id.* at 1024-30.

49. *Id.* at 1024-25 (quoting Final Rule Removing the Yellowstone Distinct Population Segment of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife (Final Rule), 72 Fed. Reg. 14,866, 14,867 (Mar. 29, 2007) (to be codified at 50 C.F.R. pt. 17) (internal quotation mark omitted)).

50. *Id.* at 1025 (citing Final Rule, 72 Fed. Reg. at 14,929). Data showed that an epidemic of beetles had harmed sixteen percent of whitebark pine in some way. The evidence also indicated that about twenty-five percent of the trees in the GYA were currently infected with blister rust. *Id.* (citing Final Rule, 72 Fed. Reg. at 14,928-29).

51. *Id.* (citing Final Rule, 72 Fed. Reg. at 14,929).

52. *Id.* at 1025-26 (citing Final Rule, 72 Fed. Reg. at 14,868, 14,899, 14,929, 14,932-33). The court cited evidence presented in the Rule that indicated that greater conflicts between humans and grizzly bears occur in years of low whitebark pine seed levels, resulting in a greater number of grizzly deaths by humans who are defending their life and property. *Id.* at 1025 (citing Final Rule, 72 Fed. Reg. at 14,868).

court concluded that a decline in whitebark pine trees would negatively affect the grizzly population.⁵³

The court then considered several of the Service's arguments and ultimately found all of them unconvincing.⁵⁴ The Service first contended that the bears are "resourceful omnivores" and will adapt to the whitebark pine decline.⁵⁵ The court agreed with this assertion but found that the Service failed to address the danger that the bears will face when they try to adapt to new food sources, such as by widening their range closer to humans, which could lead to an increase in human and grizzly conflicts.⁵⁶ The Service also argued that even if there is a decline in whitebark pine trees, there will still be enough habitat in the GYA to maintain a recovered grizzly population.⁵⁷ However, because the Service delineated the entire PCA as "*necessary* to support the recovered grizzly population," the court reasoned that it would be irrational for the Service to consider anything less than the total PCA as a place that could sustain the grizzly population.⁵⁸

The final argument raised by the Service was that it "simply does not yet know what impact whitebark pine declines may have on the Yellowstone grizzly."⁵⁹ Looking to *Lands Council*, the court acknowledged that when there is "scientific uncertainty," courts usually defer to agency expertise in the field.⁶⁰ However, following the Supreme Court's reasoning in *State Farm*—that it is not "sufficient for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions"—the Ninth Circuit found that the Service must rationally explain why scientific uncertainty about the effect of whitebark pine decline on grizzly bears supports delisting now.⁶¹ In coming to its holding, the court also looked to its reasoning in *Tucson* to find that a lack of established data showing bear population declines due to whitebark pine declines does not mean the grizzly bears will not face threats from whitebark pine decline.⁶² Therefore, because the Service did

53. *Id.* at 1026.

54. *Id.* at 1026-30.

55. *Id.* at 1026 (quoting Final Rule, 72 Fed. Reg. at 14,932).

56. *Id.*

57. *Id.* at 1027-28.

58. *Id.* at 1028 (quoting Final Rule, 72 Fed. Reg. at 14,914 (internal quotation marks omitted)).

59. *Id.*

60. *Id.* (citing *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc)).

61. *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (internal quotation mark omitted)).

62. *Id.* at 1030 (citing *Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870, 879 (9th Cir. 2009)). In *Tucson*, the Ninth Circuit reasoned that if there is inconclusive science about a species'

not have sufficient data to support its conclusion, the court found the Service did not have a rational basis for its decision.⁶³

The court then analyzed whether the Service rationally supported its conclusion that the existing regulatory mechanisms it employed to maintain a recovered grizzly population were adequate.⁶⁴ The issue the court grappled with was whether the Strategy, which included many non-legally binding and legally binding measures, could be considered a regulatory mechanism.⁶⁵ The Ninth Circuit commented that it had never specifically considered whether a conservation strategy like the Service's constitutes an appropriate regulatory mechanism, but it took note of the district court's decision in *Oregon Natural Resources Council v. Daley*, in which the court held that "voluntary, unenforceable measures in conservation plans are not 'regulatory mechanisms.'"⁶⁶ However, the Ninth Circuit in this case determined it was unnecessary to decide if the Strategy overall was a "regulatory mechanism" because it found that the Strategy's legally binding measures were adequate regulatory mechanisms in and of themselves.⁶⁷ The court held the legally binding measures were "adequate" regulatory mechanisms because they "offer[ed] a recovered species something less than the stalwart protections of the ESA, but considerably more than no special protection at all."⁶⁸

The majority opinion yielded a concurrence and dissent by Judge Thomas, who began by agreeing with the majority's finding that the Service did not provide a rational connection between the evidence and the conclusion that a decline in whitebark pine would not harm the grizzly population.⁶⁹ However, he contested the majority's holding that

population size and trends, it cannot be "reasonably infer[red] that the absence of evidence of population decline equates to evidence of persistence." 566 F.3d at 878-79.

63. *Greater Yellowstone Coal*, 665 F.3d at 1030. Another argument raised by the Service was that while a decline in whitebark pine trees may affect individual bears, the grizzly population as a whole will not be affected. *Id.* at 1026. However, the court found that the scientific study the Service used to come to this conclusion only included data gathered "before the 'epidemic of mountain pine beetles' began to kill the region's whitebark pines" and was therefore outdated. *Id.* at 1026-27 (quoting Final Rule, 72 Fed. Reg. 14,866, 14,871, 14,928 (Mar. 29, 2007)).

64. *Id.* at 1030.

65. *Id.* at 1030-31.

66. *Id.* at 1030 (citing 6 F. Supp. 2d 1139, 1153-56 (D. Or. 1998)).

67. *Id.* at 1030-31. The court found that several of the Strategy's standards had been incorporated into the National Forest Plans and National Park Superintendent's Compendia, which "make legally binding the Strategy's standards on ninety-eight percent of the critical PCA and are buffered by the legal protections afforded by the Wilderness Act on a significant portion of grizzly habitat outside the PCA." *Id.* at 1031-32.

68. *Id.* at 1032.

69. *Id.* at 1032-33 (Thomas, J., dissenting).

the Service rationally concluded that adequate regulatory mechanisms were in place because, as he argued, the Strategy on its own is not enforceable under a “single federal or state law or regulation” and its implementation is therefore entirely voluntary.⁷⁰ Looking to *Daley*, Judge Thomas asserted that because the Strategy is voluntary and unenforceable, it should not be deemed an adequate regulatory mechanism under the ESA.⁷¹

IV. ANALYSIS

In view of the Supreme Court decision in *State Farm* as well as rulings from its own circuit, the Ninth Circuit’s decision in the noted case appropriately held that the Service’s data did not support its decision to delist the Greater Yellowstone grizzly population. By using the “rational connection” test set out in *State Farm*, which requires agencies to have a rational basis for their decisions, the Ninth Circuit adhered to the court’s reasoning in *State Farm* and gave less deference to the Service because it attempted to justify its decision by claiming “substantial uncertainty.”⁷²

Furthermore, considering the Ninth Circuit’s decision in *Tucson*, in which the court found that inconclusive or undeveloped data does not support the conclusion that a species is not adversely impacted,⁷³ it was reasonable for the court in the noted case to find that the inconclusive data about whitebark pine trees did not rationally support the Service’s conclusion that the grizzly population would not be threatened by a decline in whitebark pine.⁷⁴ The Ninth Circuit also supported its decision by adhering to the precedent established in its decision in *Brower*, in which the court found that deference given to an agency’s expertise is not without limits, especially when the agency’s decision is not reasoned.⁷⁵ The noted case sets a high standard for future courts in their examination of an agency’s data when there is scientific uncertainty. It suggests that courts should carefully examine the data in such cases in order to determine whether there was a reasoned basis for the agency’s ultimate decision.

70. *Id.* at 1034 (citing Final Rule, 72 Fed. Reg. 14,866, 14,904, 14,922-26 (Mar. 29, 2007)).

71. *Id.*

72. *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

73. *Tucson Herpetological Soc’y v. Salazar*, 566 F.3d 870, 879 (9th Cir. 2009).

74. *Greater Yellowstone Coal.*, 665 F.3d at 1030.

75. *Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001) (citing *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679 (D.D.C. 1997)).

Another noteworthy aspect of the Ninth Circuit's reasoning is its discussion of the impact that climate change may have on the Greater Yellowstone grizzly population.⁷⁶ The court gave considerable weight to the Service's findings that climate change may cause an increase in mountain pine beetles and white pine blister rust, which would result in a decrease in whitebark pine and threaten the grizzly population.⁷⁷ It will be interesting to see how future courts weigh the factor of climate change when analyzing questions about ESA delisting.

By affirming the district court's ruling that the Service failed to articulate a rational connection between the evidence in the record and its decision that a loss in whitebark pine would not threaten the grizzly population, the Ninth Circuit upheld the district court's order vacating the Service's Rule.⁷⁸ This is a victory for environmental groups because the grizzly population in the GYA will continue to be protected as a threatened species under the ESA, and the issue will be sent back to the Service for further review.

V. CONCLUSION

The Ninth Circuit was correct to hold that the Service's decision to delist the grizzly population in the GYA was not rationally supported by the evidence it provided. The inconclusive evidence regarding the whitebark pine trees was not a proper basis for determining that a loss in whitebark pine trees would not impact the Greater Yellowstone grizzly population. The court appropriately reasoned that the Service cannot claim "scientific uncertainty" as a justification for its delisting decision.

Sona Mohnot*

76. *Greater Yellowstone Coal.*, 665 F.3d at 1025.

77. *Id.* at 1025-26.

78. *See id.* at 1032 (explaining that the court's decision on the whitebark pine issue was sufficient to affirm the order vacating the Rule).

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