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## NEWSLETTER

Featuring updates on grizzly bear conservation activities,  
and the latest *Grizzly Times* Blog  
from [Louisa Willcox and David Mattson, PhD.](#)  
Co-Founders of *Grizzly Times*.

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May 23, 2020

***Dear Friends of the Grizzly,***

As Yellowstone Park begins to reopen, grizzlies greet a world with few people (so far) inside park borders, but threats elsewhere. Federal protections for bears are more important than ever as Louisa notes in her new essay...

**NEW BLOG:**

***“What Are We Fighting About?”***

***9th Circuit Hears Yellowstone Grizzly Bear Delisting Case***

By Louisa Willcox

Reflecting on the May 5th 9th Circuit Court of Appeals hearing on Yellowstone grizzly bear delisting, Louisa considers the court’s deliberations in the context of three decades of litigation that she has witnessed from a front row seat. She notes: *“litigation is always a roll of the dice. For decades, we have been relying on lawyers to save the Yellowstone grizzly from doom. They have been remarkably successful, but leaning too hard on lawyers is a dangerous game – and why I have a knot in my stomach and my well-washed fingers crossed.*

*“We have long needed to take this fight to the court of public opinion. To address the current killing crisis, we need to strengthen law enforcement and improve coexistence practices. ...Reducing conflicts between bears and people is not something we should be fighting over, but rather a commonsense win-win solution.”*

She concludes: *"Ultimately, how we manage grizzlies in their last refuges in Yellowstone and the Northern Rockies is a measure of who we are. Are our hearts big enough to keep our iconic grizzlies in our midst?"*

The blog follows below (after the Newsletter) or click the icon to read it on the *Grizzly Times* website.



#### **NEW PODCAST:**

**Brad Orsted Shares How Grizzlies Saved his Life**



In this powerful interview, award-winning wildlife photographer and filmmaker Brad Orsted shares his personal battles after the death of his infant daughter Marley, and how grizzlies and wild country brought him back from the brink. A few excerpts:

*At rock bottom one morning, I walked out into Yellowstone, terribly hungover, and had a close encounter with a grizzly bear. It was a brief and non-threatening encounter, but it snapped me out of my kind of woe-is-me doldrums and my suicidal fantasies that I was having at the time. ...Days before that, I had written in my journal that it would be OK if I walked out into the backcountry of Yellowstone and died, and let the grizzly bears and the birds eat me and shit me out somewhere beautiful. And standing there on Swan Lake flats in Yellowstone, with a grizzly close enough I could see the whites of his eyes, I realized two things: that I didn't want to die anymore, and I definitely did not want to be shit out somewhere beautiful anymore.*

*There may not be another animal in North America that's shrouded in more mystery and lore than the grizzly bear. They've been immortalized as the epitome of a bad camping experience and portrayed as man's best friend on TV. But I think they're just really misunderstood a lot of times. ...And I don't mean to anthropomorphize grizzlies, but I don't think we should be anthropocentric either and think that we're the only beings capable of love and compassion and emotion. As a wildlife photographer specializing in grizzlies, I've seen that love and compassion and intelligence in the grizzly bear.*

Click on the icon below to hear or read the transcript of Brad's Podcast.



### **IN THE NEWS:**

**Sarah of the Grizzly World: Grizzly Matron 399 Has Emerged with Four Cubs!**



Last week the celebrity grizzly bear matron 399 emerged with four cubs in Grand Teton National Park. It is extremely rare for a mother grizzly to have quadruplets – and even more extraordinary given that 399 is 24, ancient in bear years. This is only a little less miraculous than the biblical Sarah, who gave birth at 90.

The bear paparazzi was out in full force in the recently re-opened park. But 399 has raised six previous litters in the company of awed photographers and families. We have written extensively about the clan of 399 here: <https://www.grizzlytimes.org/399-s-story>

We observed: *"We should never forget how inherently vulnerable grizzly bears are and the difference that one good mom can make. The entire Yellowstone grizzly bear population could be built on as few as 50 fertile females alive during the early 1980's. Every mom matters. A female such as 399 is an Olympian."*

*"399 has made the risky choice to invite us into her life and trust us with her fate and those of her cubs. Will we betray this trust?"*

Keep your eyes peeled for a delightful new children's book, *Grizzly 399*, by Sylvia Medina, with photographs by Tom Mangelsen, whose images also grace *Grizzlies of Pilgrim Creek*.

[https://www.jhnewsandguide.com/this\\_just\\_in/grizzly-399-four-cubs-in-tow-spotted-at-pilgrim-creek/article\\_94797af5-1918-5dc1-a29a-021c03f050df.html](https://www.jhnewsandguide.com/this_just_in/grizzly-399-four-cubs-in-tow-spotted-at-pilgrim-creek/article_94797af5-1918-5dc1-a29a-021c03f050df.html)

### **Grizzly Tale: Mali Shot and Killed Following Rescue by Indigenous Nations**



*Photo by Suzie Hall.*

The recent killing of a young grizzly bear named Mali serves as a reminder not only of the role that First Nations can play in redefining bear conservation – but also of the long journey yet ahead. After the Kwikwasut'inuxw Nation prompted the trapping and transportation of the bear last month from Hansen Island in British Columbia, it was later shot by a person in self-defense.

The male bear had swum from the B.C. mainland to Hansen Island, where it began rummaging for human food. This journey is noteworthy, first, because it was an epic swim and, second, because grizzly bears did not historically occur on offshore islands such as Hansen. A climate-driven decline in salmon spawning runs on the mainland during the past several years has likely been forcing some young bears to undertake ocean journeys in search of food.

Mike Willie, hereditary chief of the local Kwikwasut'inuxw Nation, and a resident of Hansen Island, was among those who had been trying to save the bear by relocating it back to the mainland, saying: *"We are really wanting to put a stop to grizzlies being shot, and for conservation officers to get out of kill mode right away into relocation."*

Willie said news of the bear's death marks "a very sad day for all of us," but that the work would continue. "We are continuing down the path of reconciliation with the province and will work together in putting a program together to protect grizzlies." he said.

Following Mali's burial on First Nations territory burial grounds, the region's three First Nations are planning a series of travelling town halls focusing on the use of bear spray and rubber bullets, and on bear-proofing trash, gardens, fruit trees and barbecues.

- <https://www.theglobeandmail.com/canada/british-columbia/article-mali-the-bear-and-an-indigenous-approach-are-changing-the-outlook-for/>
- <https://www.vicnews.com/news/mali-the-grizzly-shot-after-an-epic-relocation-to-be-buried-today-on-first-nations-land/>
- <https://vancouverisland.ctvnews.ca/saving-a-b-c-grizzly-indigenous-reconciliation-is-changing-how-conservation-officers-deal-with-problem-bears-1.4897769>

### **International Union for Conservation of Nature Has Been Infiltrated by Trophy Hunting and Fashion Industries**



Buzzfeed recently published a stunning investigative piece on how the trophy hunting and fashion industries have infiltrated the International Union for Conservation of Nature (IUCN), one of the world's largest and most influential conservation organizations. Safari Club International is featured among a cast of many other dark players.

The IUCN is widely recognized as the global leader on species conservation. Its huge network of 15,000 experts advise national governments on what endangered species deserve protection, and its headline-grabbing Red List, published every five to 10 years, is the world's most comprehensive account of which species are at greatest risk of extinction.

But this investigation shows that trophy hunters and luxury fashion brands have been working for years to influence the IUCN to reduce protections and promote expansion of the billion-dollar trade in endangered animal species.

Trophy hunting is big business. During the past decade, 1.7 million hunting trophies were traded worldwide, and according to the International Fund for Animal Welfare, 200,000 of those are believed to have come from endangered species.

Perhaps needless-to-say, Safari Club, Rocky Mountain Elk Foundation, and the NRA have long advocated hunting Yellowstone grizzlies for sport.

<https://www.buzzfeednews.com/article/robertojurkschat/red-list-iucn-trophy-hunting>

### **GOOD NEWS!**

**Thanks to WildEarth Guardians, Wildlife Services Cuts Back on Killing for Now**





A court settlement arising from litigation brought by WildEarth Guardians requires that Wildlife Services be more transparent and reevaluate the methods it uses in Montana. The misnamed “Wildlife Services” is a division of the U.S. Department of Agriculture that kills thousands of predators each year, including grizzlies, to appease ranchers and farmers.

In the meantime, Wildlife Services agreed to suspend practices including deployment of M-44 bombs that spray sodium cyanide into the faces of animals that trigger the traps. Like all traps, M-44s are indiscriminate, killing whatever animal triggers them. The agency will also not use neck snares or Conibear traps (pictured above), both of which kill animals by suffocating them. They’ll also be required to check traps daily except during winter when they can check every other day. And, finally, they won’t be allowed to kill cougars or black bears on federal land, or undertake any predator control in Wilderness areas, wildlife management areas, or along Wild and Scenic Rivers. WildEarth Guardians argues that the federal government should employ more non-lethal methods to resolve predator-livestock conflicts, especially for iconic and protected species such as grizzly bears.

- <https://montanafreepress.org/2020/05/14/wildlife-services-to-cut-back-killings-pending-environmental-review/>
- <https://missoulacurrent.com/outdoors/2020/05/wildlife-predator-control/>

### Wyoming Poachers Finally Nailed



In March of this year, a Fremont County Circuit Court Judge found two Dubois, Wyoming, men guilty of poaching elk and deer during 2018. These two men had multiple prior poaching offences, including the killing of a grizzly bear during 2015. The judge sent a message to other would-be poachers by ordering one of the offenders named Kelly J.

Grove to pay \$6,365 in fines, spend one year in jail, and the three years following his release under supervised probation.

His accomplice Spencer Carrico was ordered to pay \$6,110 in fines, and had his hunting and fishing privileges suspended in Wyoming and 44 other states for four years.

The Deputy Prosecuting Attorney for Fremont County emphasized that *"Grove has a shocking history of violations. ...He's been convicted of wanton waste of animals, including a bighorn sheep, he's attempted to shoot the antlers off of live deer, he was on federal probation for game violations when he committed this crime and more."*

At least some justice has been served here, but the details of this case underscore the brutality of what goes on in parts of Wyoming.

<https://www.sweetwaternow.com/two-dubois-men-sentenced-for-poaching-dating-back-to-2018/>

### **Madison Valley Ranchers Make Progress Living with Grizzlies**



*Photo courtesy of Bozeman Daily Chronicle*

Recently, Montana's Madison Valley Ranchlands Group established a program for removing and composting livestock carcasses. The program is important because carcasses of livestock that have died for any number of reasons can attract grizzlies and other scavengers to areas where people are active.

This program emulates work that was pioneered in the Blackfoot River drainage of Montana by the Blackfoot Challenge. The Challenge's carcass composting program, along with other measures, led to a 74% reduction in conflicts between humans and grizzly bears.

A number of people employed by county, state and federal agencies, as well as nonprofit organizations, have been working for years to foster grizzly bear coexistence in the Madison Valley. Thanks to all!

<https://www.bozemandailychronicle.com/news/madison-valley-group-works-to-prevent-conflict-with-predators>

### **Cool Video of a Rare White Grizzly in Banff**



A resident of Canmore, Alberta recently spotted this extremely rare white grizzly along a road in Banff -- check out the video below!

This is not an albino, but a rare gene anomaly that makes the grizzly bear white instead of its usual brownish color. Nicholas Scapillati of the Grizzly Bear Foundation observed: *"The science can explain why it happens and can give you percentages how rare this is – but that's not why people are interested in this story. It speaks to our eternal relationship with nature. It's rare and unique; people really look for meaning in these things."*

That interest has caused concern among some experts. Grizzly bear scientist Mike Gibeau said: *"These unusual looking animals get hunted ruthlessly by photographers, and so the less we talk about them, the better."*

- <https://www.narcity.com/news/ca/ab/white-bear-in-banff-super-rare-bear-sighting-caught-on-video-in-alberta>
- <https://www.theguardian.com/world/2020/may/22/canada-rockies-white-grizzly-bear>

### **Please Consider a Gift to *Grizzly Times***

We need your help! David and I have retired and are doing this full-time work pretty much gratis – despite the gradual dissolution of our physical bodies!

If you were following the delisting court case, you know that David's role was vital to the litigation success that restored protections to Yellowstone's grizzly bears. The skilled attorneys could not have won the case without David's scientific expertise. David also recently helped with the appeal of this case to the 9th Circuit Court, with implications for delisting of Northern Continental Divide or even all Lower 48 grizzlies.

As we do not have our own nonprofit, Conservation Congress, a not-for-profit tax-deductible organization, has agreed to be our fiscal sponsor. (Thank you, Denise!)

You can make a one-time contribution or sign up for a monthly donation through the Conservation Congress link:

[Donate](#)



Or, you can mail a donation to:  
Conservation Congress  
2234 Sierra Vista Circle  
Billings, MT 59105

\* Be sure to note that your contribution is for *Grizzly Times* (GT).

Thank you for your continued support - in any way - it is greatly appreciated!

***For the Bears,  
Louisa and David***

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## **Grizzly Times Blog**

### ***“What Are We Fighting About?” 9th Circuit Hears Yellowstone Grizzly Bear Delisting Case***

May 20, 2020

Louisa Willcox



Court hearings over the fate of grizzlies have always made me nervous, and the one on May 5th was no exception. For the second time in ten years, a three-judge panel of the 9th Circuit Court of Appeals heard oral arguments on whether or not Yellowstone grizzlies should be protected under the Endangered Species Act (ESA). The future of Yellowstone's bruins rests upon whether or not this panel upholds a 2018 order issued by Montana District Judge Dana Christensen to restore endangered species protections for the Yellowstone population.

My throat tightened when Judge Andrew Hurwitz asked: "What are we fighting about here?" The answer has more to do with morality and compassion than it does with legal technicalities. And the question deserves to be examined in light of three decades of court battles over Yellowstone grizzlies – battles that I've watched from a front-row seat.

First, some context. The panel's hearing capped a legal dispute that has raged for the past three years over whether endangered species protections for the Yellowstone bear should be stripped. A final ruling is expected in the next several months. At issue is whether management authority should be turned over to the states of Idaho, Wyoming and Montana – states that plan to kill more bears, including by trophy hunting.

The hearing was surreal because the federal government had already conceded defeat, agreeing with the plaintiffs that the US Fish & Wildlife Service (the Service) needed to step back and analyze how delisting Yellowstone's bears would affect recovery of grizzlies in other nearby populations. In another example of legal arcana, grizzlies in the more robust population around Glacier Park, as well as in the Selkirks and Cabinet-Yaak, are considered part of the "remnant."

Judge Hurwitz was justifiably confused by the fact that federal lawyers were demanding the Court's precious time to contest what seemed an uncontested issue, asking: "Is there anybody in this case who doesn't think the remnant shouldn't remain listed? Tell me what we're fighting about if everybody agrees the remnant should remain listed."

Department of Justice attorney Joan Pepin, who represented the Service, agreed but then dodged, asking the court to narrow the scope of Christensen's ruling to give the agency maximum "flexibility." Pepin doth protest too much, I thought.

So what was this hearing about anyway? In a word: Wyoming.

### **What are We Fighting About? Wyoming and State Management**

I have no doubt that Wyoming led the charge into the 9th Circuit. Indeed, for the last three decades, Wyoming Game and Fish (WGF) Department has spearheaded the fight to wrest control over managing grizzlies from the federal government.

So it was hardly surprising to see Wyoming's attorney, Jay Jerde, presenting arguments on behalf of intervenors that included Idaho and -- tellingly -- the NRA, Safari Club, and livestock organizations.

Like me, Jerde has gotten grizzled during the many years he's contested management of Yellowstone bruins. But his age-worn tune hasn't changed: "the bear is recovered, we are the professionals, and federal management of endangered species violates state sovereignty over wildlife. Give us the keys to grizzly bear management."

I first heard this mantra in 1992, when WGF Director Pete Petera tried to bully the Service into delisting Yellowstone grizzlies. But Wyoming (in concert with Idaho and Montana) had begun agitating to remove ESA protections as early as 1985 when Yellowstone grizzlies were at their nadir of only a few hundred bears. The states' zeal may seem baffling unless you consider their longstanding financial dependencies on hunters, their belief that large carnivores are part of a zero-sum competition for elk, their blind devotion to hunting, and their obsessive quest for power.

Delisting would allow the states to unleash a lethal regime on Yellowstone's grizzly bears, exacerbating recent population declines triggered by the climate-driven loss of whitebark pine— a source of food that had been (and in some places still is) a staple of Yellowstone bears. There is little doubt that state management would push bears in this

ecosystem back to the precipice they narrowly escaped only because of federal intervention under the ESA.

Nonetheless, Jerde requested that the Court reject Judge Christensen's order in its entirety and reinstate the Service's 2017 rule that had delisted grizzlies and triggered the current round of litigation.

Importantly, Wyoming would not have had its day in court if the Service, the Defendant in the case, had declined to appeal Christensen's ruling. Having seen plenty of tantrums by Wyoming Game and Fish officials over the years – including threats to walk away from grizzly bear management entirely if the Service did not rush to delist – I could just imagine the drama behind the scenes that led to the federal government's half-hearted appeal. (It should be said that the Service shares the states' delisting agenda, but with a more civil demeanor and, sometimes, a tad more sense).

At a fundamental level, this hearing was about little more than the federal government giving Wyoming a stage to throw another fit -- in front of a different audience.

But, for the grizzly, the stakes could not be higher.

#### **Washing Dishes: Binding or Voluntary?**

On behalf of WildEarth Guardians, Matt Bishop of Western Environmental Law Center addressed the threats posed by long-term genetic isolation of Yellowstone's grizzly population. In his relisting order, Christensen had found that the government had not adequately addressed this issue, noting that the Service had "illogically cobble[d]" together studies to demonstrate that the population's isolation was no longer a threat to the species' continued survival."

Bishop reinforced his conclusion, saying: "Not a single (scientific) paper has said that grizzlies are OK in the long term."

Scientists are increasingly concerned about the century-plus isolation of Yellowstone grizzlies, which is especially worrisome given the population's relatively small size. Out of a population of 740 or so animals, only a couple hundred can potentially breed. In the long term, geneticists believe that this is a recipe for disaster, and argue that the best solution is to reconnect Yellowstone to other grizzly bear populations. Experts also maintain that relocating grizzlies to Yellowstone from other populations is a move of last resort.

In recent years, grizzlies have been expanding westward from Yellowstone and southeast from the Northern Continental Divide, raising hopes for natural connectivity. But Bishop warned that hunting grizzlies on the ecosystem's periphery would reverse this progress.

In response to questioning, Pepin said that the Service would consider translocating grizzlies to Yellowstone to augment genetic diversity if Northern Rockies populations did not reconnect naturally. But she did not commit the government to any course of action to address the problem.

Bishop made the case for binding rather than discretionary commitments. He got the only smile of the day from all three judges when he used the analogy of negotiating with his teenage daughter over washing the dishes: would she do what he asked or just consider the request?

Clearly, a win on this issue could boost prospects for reconnecting grizzly bear populations in the Northern Rockies, including recolonization of the vast Selway-Bitterroot ecosystem that grizzlies are just now rediscovering.

### **Paper vs. Real Bears and the Counting Problem**

Jerde was especially worked up over the lower court's decision regarding management of bear mortality if new methods are adopted to count bears — an issue called “recalibration.” Judge Christensen had found that future changes in methods for estimating population size could result in creating “paper bears” and allow state managers to kill hundreds more bears by using different but convenient statistical gimcrackery. The Service can change methods, he ruled, but it must ensure that management of mortality is prudent and precautionary.

During deliberations in 2016 over the Service's draft delisting rule, both the former Director of the Service, Dan Ashe, and former Yellowstone Park Superintendent, Dan Wenk, had raised concerns about the consequences of creating paper bears. Both were called to heel by higher-ups catering to state interests.

Jerde claimed that methods for counting bears would not change for the “foreseeable future.” But federal scientists have repeatedly stated that they will soon unveil a new method — a fact that 9th Circuit Judge Paul J. Watford echoed, saying: “There are strong indications in the very near future a new population estimator will be adopted.”

The most likely method on the horizon would almost certainly boost bear numbers by a substantial amount. If benchmarks for managing mortality are not correspondingly “recalibrated,” the states would have free rein to kill literally hundreds of bears. Due to weak post-delisting monitoring, a major drop in the population would probably not be detected in time to reverse course. Even if problems were detected, would be no binding mechanisms to correct them. More on this later.

### **What We Need to Keep Fighting About: Climate Change and Dead Bears**

Because the hearing focused narrowly on procedural and jurisdictional issues, the most critical and immediate threats to Yellowstone's bears -- climate change and unsustainable bear deaths -- did not come up, although the Court could consider these issues given that they are amply covered in written briefing materials.

This Court is no stranger to the threats posed to Yellowstone's grizzlies by climate change. In fact, climate change had been front and center in litigation over a previous attempt to delist Yellowstone grizzlies in 2007. The 9th Circuit Court upheld a 2009 order by District Judge Donald Molloy to reinstate ESA protections on the grounds that the Service had failed to consider the impacts of the climate-driven collapse of whitebark pine — and had even lied about the severity of the problem.

As I listened to the hearing last week, I could not help but reflect on the previous 9th Circuit hearing during 2009. For me, a highlight from that earlier give and take was a

question posed by Judge Susan Graber: "Isn't it true that female grizzlies produce fewer cubs after years of poor whitebark pine seeds?"

True indeed – and the kind of question that you would expect a mother to ask, not to mention someone invested in understanding the science relevant to grizzly bears. It was also true that, by 2009, a mountain pine beetle outbreak unleashed by a warming climate had killed over 70% of Yellowstone's whitebark pine, making every year a poor year for seed crops.

These forests have continued to succumb to beetles and an introduced pathogen called white pine blister rust, while the terrible consequences have become increasingly clear. Pepin's dismissal of any negative effects arising from loss of whitebark pine was hardly surprising given that the government has spent millions of taxpayer dollars during the past ten years attempting to paper over the threat posed to grizzlies by climate change.

Since losing in court, government researchers funded by the Service have produced more than a dozen narrowly focused publications with an overt partisan spin designed to bolster the case for delisting. Virtually all of this research relied on impenetrable models, flawed assumptions, faulty logic, and data that the government tenaciously hides. Their conclusions? Bears are omnivores (no kidding), and dandelions and ants are great substitutes for calorie-rich pine seeds. (Really?)

Government models notwithstanding, grizzlies have not been faring well. Resourceful bears have been compensating for the losses of pine seeds by seeking out other high-calorie foods, largely in the form of meat. In a trend I would not have predicted a decade ago, bears are increasingly predating on cows and scavenging elk meat left by big game hunters. Learning that the sound of a gunshot can be a dinner bell, bears are mixing it up with hunters in contests that grizzlies typically lose. Today, conflicts with hunters and livestock producers have replaced conflicts over garbage and human attractants as the leading causes of grizzly bear deaths.

### **Shattering Records of Grizzly Deaths**

The death toll reflects these changes. Between 2015 and 2018 grizzly bear deaths shattered previous records -- in a population that has been flatlined for nearly 20 years. What is particularly disturbing is that in 2018 eleven deaths were listed as "Under Investigation" for possible poaching. This unprecedented spike occurred just one year after Yellowstone grizzlies were delisted. As has been documented elsewhere, removal of protections was perhaps construed by some people as tacit permission to unleash a personal vendetta against bears.

Not surprisingly, the deaths exceeded the government's thresholds of allowable mortality during 2015-2018. Mortality limits are one of the very few standards that were included in the Service's 2017 delisting rule -- and it matters given that excessive human-caused deaths helped land the bear on the endangered species list in the first place.

According to the delisting rule, if allowable limits are breached two years in a row, bear managers are supposed to do something. But they have not even admitted to a problem.

Interestingly, starting in 2015, the Interagency Grizzly Bear Study Team, charged with keeping mortality records, stopped reporting on whether thresholds were breached. You



can figure this out for yourself by scrutinizing the Study Team's annual reports, but it's complicated. The point is that managers may have no clue they have a problem.

In fact, that seems to be the case. At a recent meeting of Yellowstone grizzly bear managers, a Committee charged with investigating how human-grizzly bear conflicts might be reduced erroneously claimed that "grizzly mortalities are below threshold."

As numbers of grizzly bear deaths mount, the population is at a tipping point. And our climate will almost certainly continue to warm, with worsening consequences for bears. Models show that we are likely to lose army cutworm moths, another staple food for Yellowstone grizzlies that has, for now, picked up some of the slack left by dead whitebark pine. Moths rely on alpine flower nectar, but as tundra migrates off the top of the mountains during the next century, moth habitat will disappear. Berries are expected to decline too. These losses will likely prompt grizzlies to continue foraging closer to people, with predictable results.

Although the 9th Circuit may not rule on these issues, the fight over climate change and its impacts on bears will not end any time soon.

#### **What Could Have Been: Adequate Regulatory Mechanisms**

During the hearing I found myself staring at Chief Judge Sidney Thomas' mug shot on the Court's home page and thinking about his role ten years ago in the decision to keep grizzlies protected. With Judge Graber he had served on the panel that upheld Judge Donald Molloy's finding regarding whitebark pine. However, two out of the three judges on the panel (Graber and Tallman) over-turned Molloy's finding that post-delisting regulatory mechanisms were not adequate to maintain the population because they were not binding.

In dissenting with his colleagues, Judge Thomas wrote: "*There is not a single federal or state law or regulation that provides a means for enforcing the [Conservation] Strategy's mortality standards. Rather, if the grizzly population becomes threatened, the agency is to review the situation and call a committee meeting. And that only occurs if the mortality limits are exceeded for at least two years.*"

*The Service's reliance on voluntary action is contrary to law. ... Good intentions are not rules of law. Unenforceable aspirational goals are not regulatory mechanisms. Promises to monitor, review, and convene committees do not satisfy the statutory requirement."*

He agreed with Molloy who wrote: "*The majority of the regulatory mechanisms relied upon by the Service — the Conservation Strategy, Forest Plan amendments, and state plans — depend on guidelines, monitoring, and promises, or good intentions for future action. Such provisions are not adequate regulatory mechanisms when there is no way to enforce them or to ensure that they will occur.*"

Molloy also took aim at the government's "damn the torpedoes" approach to delisting — an approach that has not changed in the intervening decade.

As Matt Bishop described, post-delisting plans are still built on a quicksand of promises. I am not alone in thinking that the fight over grizzlies today would be less ferocious if the

government had adopted binding regulations along with mechanisms to trigger corrections should problems arise.

Parenthetically, Molloy and Thomas are both Montanans -- born, raised and educated in the state. Christensen, who was appointed to the seat on the United States District Court for the District of Montana that was vacated by Molloy, went to law school at the University of Montana and has lived in Montana since 1976. Could it be that living in a state where you are likely to rub shoulders with wildlife managers offers special insights into how grizzlies might be managed?

I am reminded of a day, years ago, when I overheard another federal judge, also from Montana, say to an attorney: "you know, I don't know why you would ever trust the states with the grizzly."

Touché.

### **Of Commonsense and The Court of Public Opinion**

No matter what the 9th Circuit decides, this will not be the Court's last word about the bear. After Pepin conceded that there would likely be opportunity for further judicial review, Judge Mary Schroeder dryly noted: "I am sure of that."

Still, litigation is always a roll of the dice. For decades, we have been relying on lawyers to save the Yellowstone grizzly from doom. They have been remarkably successful, but leaning too hard on lawyers is a dangerous game – and why I have a knot in my stomach and my well-washed fingers crossed.

We have long needed to take this fight to the court of public opinion. To address the current crisis, we need to strengthen law enforcement and improve coexistence practices. There is no lack of ideas or expertise on this front. Since 1991 bear managers have produced numerous reports containing detailed recommendations, many related to reducing numbers of hunter- and livestock-related conflicts. Few have been comprehensively implemented, largely because of insufficient funding, courage, and political support.

Reducing conflicts between bears and people is not something we should be fighting over, but rather a commonsense win-win solution.

We can also do more politically. We can ask our representatives to support the Tribal Heritage and Grizzly Bear Protection Act sponsored by Congressman Raul Grijalva (D-AZ). The bill would ban trophy hunting and protect grizzlies for their ecological and cultural values. It would also guarantee Native American Tribes a role in conserving and managing the grizzlies that many Tribes consider to be sacred. Moreover, many Tribes have legal claim to lands where grizzlies could be recovered, including substantial areas that could reconnect existing populations.

Reform of state wildlife management is also increasingly important. The numbers of people who value wildlife for intrinsic reasons are climbing at the same time that hunter numbers are dropping. More and more, the public is demanding that state managers protect wildlife for its own sake, rather than for hunting. (I have written about this complicated issue here and here.) More practically, we need to provide financial and

other incentives for state agencies to serve the broader public interest, not a well-heeled minority of hunters and ranchers who have been driving the states' "damn the torpedoes" approach to grizzly bear management.

After thanking the bear's devoted lawyers one more time, there is a lot we can do right now for grizzlies, including giving them more space and more compassion. We also need to make our governments accountable and worthy of our trust. Ultimately, how we manage grizzlies in their last refuges in Yellowstone and the Northern Rockies is a measure of who we are. Are our hearts big enough to keep grizzlies in our midst?

*You can listen to the May 5th 9th Circuit court hearing [here](#).*

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