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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

DEFENDERS OF WILDLIFE, et al., v. ROWAN GOULD, in his official capacity as Acting Director of the U.S. Fish and Wildlife Service, et al., and SAFARI CLUB INTERNATIONAL, et al., Defendant-Intervenors.	No. CV-08-14-M-DWM **FEDERAL DEFENDANTS' BRIEF TO SHOW CAUSE PURSUANT TO THE COURT'S ORDER OF JANUARY 28, 2011**

In response to this Court's order to show cause ("Order"), Dkt. No. 106, the Federal Defendants submit the following, which demonstrates that the Northern Rocky Mountain Gray wolf 10(j) population retains its experimental status, and that the status may be revised only through rulemaking or other affirmative action by the federal government. In short, because the Fish and Wildlife Service ("Service") has not conducted a rulemaking to alter the status of the experimental population, the experimental designation remains in place and the controversy underlying the instant litigation is not moot. Moreover, because no party has raised a claim, established jurisdiction (including Article III standing), or otherwise alleged that the Service failed to take an affirmative, regulatory action to alter the underlying experimental population designation, whether the Service can properly maintain such a designation is beyond the scope of the claims pending before this Court.

I. This Case Should Not Be Dismissed as Moot Because the 10(j) Population Retains Its Experimental Status.

Section 10(j) of the Endangered Species Act ("ESA") provides for the reintroduction of experimental populations of listed species outside their current range when the experimental population is "wholly separate geographically from non-experimental populations of the same species." 16 U.S.C. § 1539(j). In its Order, the Court stated that "it is unclear whether removal of 10(j) experimental status requires

action of a branch of the federal government." Dkt. No. 106 at 3. As discussed below, a 10(j) population cannot lose its experimental status without affirmative federal action, because such a result would be inconsistent with the Administrative Procedure Act ("APA"), the ESA, and the Service's regulations.

A. The 10(j) Population At Issue Cannot Lose its Experimental Status Until Recovery is Achieved.

In order to determine how and when a 10(j) population loses it experimental status, the first step is to look at the plain language of the statute to determine "whether Congress has 'directly addressed the precise question at issue.'" Mayo Found. for Medical Educ. v. U.S., 131 S. Ct. 704, 711 (2011) (quoting Chevron USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984)). Here, Congress has not done so. See 16 U.S.C. § 1539(j). Therefore, under step two Chevron analysis, a court "may not disturb an agency rule unless it is 'arbitrary or capricious in substance, or manifestly contrary to the statute.'" Mayo Found., 131 S. Ct. at 711.

When the Service established the Northern Rocky Mountain Gray wolf 10(j) population in 1994, it interpreted the "wholly separate geographically" requirement to allow for the establishment of an "experimental area" or "zone." See, e.g., 59 Fed. Reg. 60252, 60259 (Nov. 22, 1994) ("1994 Rule"). At that time, there was no natural gray wolf population in the "zone." Id. at 60257. Accordingly, the Service determined that

any gray wolf inside the "zone" would be considered experimental until the Northern Rocky Mountain Gray wolf had recovered. Id. at 60256. Any gray wolf outside the zone, even if that wolf was introduced as experimental, would be considered endangered. Id. This "zone" approach, which ignores the origin of each wolf and looks to the wolf's current location to determine listing status, is logical, because the origin of an individual wolf is difficult to establish with any certainty. United States v. McKittrick, 142 F.3d 1170, 1173 (9th Cir. 1998) ("wolves are protected by the ESA based on where they are found, not where they originate"). This interpretation of the ESA was upheld by the Tenth Circuit in Wyoming Farm Bureau v. Babbitt ("WFB"), 199 F.3d 1224, 1236-1237 (10th Cir. 2000).[1] With this understanding of the rule in mind, there is and has been no overlap between non-experimental gray wolf populations and the Northern Rocky Mountain Gray wolf 10(j) population, because the experimental and natural populations are clearly delineated until recovery is achieved. See WFB, 199 F.3d at 1237.

The Congressional purpose behind Section 10(j) was to give the Service flexibility and managerial discretion to address the concerns of stakeholders. McKittrick, 142 F.3d at 1174. The "zone" approach is consistent with that purpose.

[1] The statute of limitations on challenges to the 1994 Rule has run. 28 U.S.C. § 2401(a).

Indeed, the Service designed the "zone" approach and the reintroduction program to encourage interbreeding between the experimental and natural populations to further recovery. WFB, 199 F.3d at 1235 n.5. The "zone" approach is also fully consistent with the unavoidable fact that listed species, particularly wolves, can "lose" or "gain" protections simply by crossing geographical boundaries. WFB, 199 F.3d at 1235 n.4. Under this interpretation of Section 10(j), to which deference is due, there will be no change in the status of the experimental population, absent affirmative action by the federal government, until recovery. 59 Fed. Reg. at 60256.[2]

B. A 10(j) Population Cannot Lose Its Experimental Status Without Affirmative Federal Action.

Administrative law principles dictate that a properly promulgated rule that was subject to notice and comment, like the 1994 Rule, cannot be revoked without affirmative action by either the executive or the judicial[3] branch. See, e.g., Consumer

[2] Section 10(j) can also be read to say that the "wholly separate geographically" requirement only applies at the time of the "release." See WFB, 199 F.3d at 1235 n.5, 1236-1237 (holding that experimental populations and natural populations need not "be forever kept distinct"). Because there is ample evidence that the Northern Rocky Mountain Gray wolf has not lost its experimental status, it is unnecessary to resolve this question of statutory interpretation here.

[3] A court can remand and vacate a rule that was subject to notice and comment, but only after ruling on the merits, 5 U.S.C. § 706(2)(A), or through a consent decree, see, e.g., Ford Motor Co. v. NLRB, 305 U.S. 364, 373 (1939). While the listing status of the 10(j) population is relevant to determining whether this case is moot,

Energy Council of Am. v. Fed. Energy Regulatory Comm'n, 673 F.2d 425, 446 (D.C. Cir. 1982) (APA requires notice and an opportunity to comment prior to repeal); Montgomery Ward & Co., Inc. v. F.T.C., 691 F.2d 1322, 1329 (9th Cir. 1982) (amendment of rule requires notice to affected parties via rulemaking).

If, as the Order suggests, the 10(j) population could lose its experimental status simply by virtue of wolves mating in the wild, the public, the States, the Service, and the Court would have no way of knowing, at any given time, what set of rules applied to that population – the more flexible management standards of the 10(j) rule or the more rigid standards of endangered status.[4] Likewise, if mating activity or genetic exchange alone dictated the applicable legal regime, a population could lose its experimental status long before the Service could determine if the designation had accomplished its intended purpose (i.e., recovery) and long before any party wishing to challenge the loss of experimental status would ever be on notice that the event had occurred. This result runs contrary to the letter and spirit of the APA, which values record-supported agency decision-making, public notice, and the ability to comment on

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Dkt. No. 106, the experimental status of the 10(j) population is not before this Court on the legal merits of that designation. Thus, the Court lacks jurisdiction to issue a decision that alters the experimental status of the 10(j) population.

the crafting of regulations *before* any contemplated regulatory change takes effect. See Ruangswang v. INS, 591 F.2d 39, 45 (9th Cir. 1978) (amendment of regulation held to be an abuse of discretion because of lack of notice); Paulsen v. Daniels, 413 F.3d 999, 1004-05 (9th Cir. 2005) ("'notions of fairness and informed administrative decision-making require that agency decisions be made only after affording interested persons notice and an opportunity to comment.'") (citation omitted). In short, absent a judicial ruling on the merits of a regulatory action or a settlement via consent decree, rulemaking is necessary to change the status of a 10(j) population.

Indeed, the Tenth Circuit addressed this issue, as well as the flexibility accorded to the Secretary of Interior in defining an experimental population, when it considered the decision to create the experimental population at issue here:

> The purpose of requiring the Secretary to proceed by regulation, apart from ensuring that he will receive the benefit of public comment on such determinations, is to provide a vehicle for the development of special regulations for each experimental population that will address the particular needs of that population. Among the regulations that must be promulgated are regulations to provide for the identification of experimental populations. Such regulations may identify a population on the basis of location, migration pattern, or any other criteria that would provide notice as to which populations of endangered or threatened species are experimental.

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[4] The Order cites McKittrick extensively. McKittrick addressed a different issue than the one presented here, but it is instructive for its deference to the Service's interpretation of "wholly separate geographically."

WFB, 199 F.3d at 1232-1233. Thus, in order to determine whether an experimental population can be re-characterized as threatened or endangered or delisted, the Service must first conduct a rulemaking based on an administrative record. The Service may undertake rulemaking at its own initiative, or in response to a petition.

Moreover, when Congress enacted Section 10(j) of the ESA, it specifically provided that designation of an experimental population would occur only by regulation, 16 U.S.C. § 1539(j), consistent with the process in Section 4 for altering the listing status of a species, id. at 1533(b); see also 50 C.F.R. § 17.81 (providing that all designations of experimental populations "proceed by regulation" under 5 U.S.C. § 553). The plain language and legislative history of Section 10(j) do not address the process for removing a population's experimental designation, thereby leaving to the Service the task of supplying a reasoned interpretation. Chevron, 467 U.S. at 843. The Service has reasonably interpreted the statute as requiring regulatory action to remove a population's experimental status. This interpretation comports with the ESA's processes for designating an experimental population under Section 10(j) and for altering a species' listing status under Section 4, and it is owed deference. Chase Bank v. McCoy, 131 S. Ct. 871. 880 (Jan. 24, 2011) ("Under Auer v. Robbins, 519 U.S. 452 (1997), we defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is 'plainly erroneous or inconsistent with the

regulation.'"). The Service's interpretation also comports with Congress's evident intent to encourage public involvement via notice and comment with regard to actions affecting endangered and threatened species. See H.R. Rep. No. 93-740, at 25 (1973) (Conf. Rep.); see also 16 U.S.C. § 1540(g) (further allowing public participation via the citizen suit provision). Finally, the interpretation squares with the Service's regulations at 50 C.F.R. § 17.81 and the agency's decision in the 1994 Rule to retain the experimental designation until recovery is achieved. See supra. Because the Service's interpretation is a permissible reading of the ESA and its 10(j) regulations, it is owed deference even if other readings are possible or even, in the Court's view, preferable. See, e.g., WFB, 199 F.3d at 1231.

In contrast with the Service's reasonable interpretation of Section 10(j), the Court's proposed reading is at odds with the APA, the ESA, and the 1994 Rule. Indeed, such a reading could violate basic constitutional principles of due process. For example, under the current 10(j) rule, it is permissible to take an experimental wolf in specific scenarios. See, e.g., 73 Fed. Reg. 4720, 4723 (Jan. 28, 2008). This is not the case for an endangered wolf. 16 U.S.C. § 1538 (generally prohibiting take of endangered species). If an experimental population could lose its status without regulatory action by a federal agency, a citizen might take an endangered wolf, while believing that he or she was taking an experimental wolf consistent with the law. This

lack of "fair notice" runs contrary to basic constitutional tenets. City of Chicago v. Morales, 527 U.S. 41, 58 (1999) ("the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law"); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").

Similarly, the Court's proposed interpretation presents significant law enforcement concerns. If an experimental population can lose its status without rulemaking, it would be extremely difficult for the Service to effectively police illegal take. Indeed, it is likely that the government would need to address the issue of overlap in every enforcement action it brings with regard to wolves in the Northern Rocky Mountains. This is not what Congress intended when it enacted Section 10(j) of the ESA. See, e.g., H.R. Rep. No. 97-597, at 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2833 (Congress enacted 10(j) to "avoid potentially complicated problems of law enforcement").

Lastly, several practical considerations make the Court's suggested interpretation untenable for the effective management of the Service's nationwide 10(j) program. Declaration of Gary Frazer (discussing how States and localities would

refuse to agree to 10(j) rules because of the uncertainty involved). The Court's interpretation is also inconsistent with the agreement that the States, local governments and landowners relied upon when the 1994 Rule was promulgated. Id. Service regulations and applicable case law disfavor such unexpected changes in course. 50 CFR § 17.81(d) (Section 10(j) regulations shall, to the maximum extent possible, be considered an agreement between the Service, the state, other federal agencies and private landowners); Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983) (An agency cannot change an established course of conduct without articulating "a reasoned analysis" that makes a "rational connection between the facts found and the choice made") (citations omitted).

In sum, a 10(j) population cannot lose its experimental status without affirmative action by the Service or, in the proper circumstances, the judiciary. Regulatory action has not been taken, and the experimental status of the 10(j) population is not before the Court on the merits. As a result, the Northern Rocky Mountain 10(j) population retains its experimental status.[5]

[5] For the same reasons as discussed above, it is incorrect that a 10(j) population only retains its experimental status if the wolves that make up that population arose solely from the animals originally introduced as experimental. Contra Dkt. No. 106 at 3-4. This flawed interpretation was examined and discarded by the Court of Appeals for the Tenth Circuit. WFB, 199 F.3d at 1237. It is also inconsistent with Ninth Circuit case law. McKittrick, 142 F.3d at 1173 ("wolves are protected by the ESA based on where

Respectfully submitted on this 22nd day of February, 2011.

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they are found, not where they originate"). Lastly, this interpretation conflicts with the Service's interpretation of the ESA, which is due deference. See supra.

CERTIFICATE OF SERVICE

I certify that on February 22, 2011, I electronically filed the foregoing with the Clerk of the U.S. District Court of Montana using the CM/ECF system, which will send a Notice of Electronic filing to the counsel of record.

/s/ Erik E. Petersen
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CERTIFICATE OF COMPLIANCE

Consistent with this Court's order, Dkt. No. 106, I hereby certify that the foregoing brief contains 2,480 words, excluding the caption and certificates, in compliance with the Court's 2,500 word limit. In order to determine the number of words, I relied upon the word court of the word-processing system used to prepare this brief.

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/s/ Erik E. Petersen
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February 22, 2011