

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

DEFENDERS OF WILDLIFE, et al.,	)	No. CV-08-14-M-DWM
	)	
Plaintiffs,	)	
	)	
vs.	)	ORDER TO SHOW CAUSE
	)	
ROWAN GOULD, in his official	)	
capacity as Acting Director of the	)	
U.S. Fish and Wildlife Service, et al.,	)	
	)	
Defendants,	)	
and	)	
	)	
SAFARI CLUB INTERNATIONAL, et al.,	)	
	)	
Defendant-Intervenors.	)	
_____	)	

**I. Background**

In November of 1994, the Fish and Wildlife Service (“Service”) promulgated regulations that designated unoccupied portions of Idaho, Montana, and Wyoming as non-essential, experimental population areas for the gray wolf.

50 C.F.R. 17.84(i). In 1995 and 1996 the Service reintroduced wolves into those areas. Id.

The authority used to reintroduce the wolves is found in § 10(j) of the Endangered Species Act. 16 U.S.C. § 1539(j). Under § 10(j) the wolves of the northern Rocky Mountains were designated a nonessential experimental species. The present lawsuit presumes the 10(j) nonessential experimental status still exists.

## **II. History of the Case**

The issue of wolf management has been heavily litigated in this court. January 28, 2008, Plaintiffs challenged the 2008 revisions of the 10(j) regulations that govern management of the reintroduced wolf population of the northern Rocky Mountains. In April 2009 this court stayed the proceedings while multiple groups challenged the U.S. Fish & Wildlife Service's decision to designate and partially remove protections from the northern Rocky Mountain gray wolf distinct population segment (DPS) under the ESA, 16 U.S.C. § 1536.

August 5, 2010 this court resolved the challenges to the wolf listing. Consequently the stay in the present proceedings has been lifted, and before the court are cross motions for summary judgment.

### **III. Does a 10(j) nonessential experimental population exist?**

In the special rule published in March of 2010, the Service noted that it does not intend to reevaluate the “nonessential experimental” designation given to the reintroduced wolves of the northern Rocky Mountains. 50 C.F.R. § 17.84(i)(9) (2010). Instead, the Service indicated that it would not alter the 10(j) status until the gray wolf of the northern Rocky Mountain DPS is recovered and delisted. *Id.* But it is unclear whether removal of 10(j) experimental status requires action of a branch of the federal government. See 16 U.S.C. § 1539(j).

An experimental population is defined as “any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.” 16 U.S.C. § 1539(j). In order to retain its status as an experimental species, the species must meet the statutory definition.

According to the statutory definition, the experimental designation is not permanent. For example, “[w]hen experimental and nonexperimental populations overlap—even if the overlap occurs seasonally—section 10(j) populations lose their experimental status.” U.S. v. McKittrick, 142 F.3d 1170, 1175 (9th Cir. 1998) (citing 50 C.F.R. § 17.80(a)). Additionally, while the statute provides for

the possibility that the experimental status continues after the death of the original released wolves, the experimental designation is retained only if the remaining offspring arise solely from the released population. 16 U.S.C. § 1539(j)

In 1998 the Ninth Circuit Court of Appeals concluded an experimental population existed. McKittrick, 142 F.3d at 1175. The defendant in U.S. v. McKittrick pointed to sporadic sightings of isolated indigenous wolves in the release area to support his theory that the released wolves were not wholly separate geographically and that an experimental population did not exist. The Court rejected the argument holding that lone wolves or dispersers do not constitute a population that could render the experimental population not wholly separate geographically from a nonexperimental population. Id.

While at the time of their introduction the reintroduced wolves enjoyed 10(j) experimental status, based on evidence presented to this court and facts in the Federal Register, it is unclear whether the population meets the statutory definition of an experimental population.

Over a decade has passed since 1998, and legal questions have surfaced as circumstances have changed. McKittrick dealt with non breeding disperser wolves and the status of the experimental population at the time wolves were

reintroduced into the release areas. But to what extent is the experimental status threatened if multiple dispersing wolves breed with the experimental population?

Additionally, whether the offspring of the wolves of the northern Rocky Mountains have arisen solely from the original released wolves has not been addressed. The wolves released in 1994 have since died. See 74 Fed. Reg. 15, 123 (noting wolves can live 13 years but average less than 4 years in the DPS). Representations made to this court indicate that genetic exchange with nonexperimental populations has occurred in the DPS both naturally and through human-assisted migration management.

Representing the Department of Justice in Defenders of Wildlife v. Salazar, CV-09-77-M-DWM, Mark Eitel stated in a hearing held on August 31, 2009:

And second, Your Honor, we have data, it is proven, that wolves are dispersing between all three recovery areas and Canada. Further, we have documented genetic exchange from naturally dispersing wolves, from genetic data from 1994 to 2004.

So, Your Honor, we have that data. We know these populations are affected. We know wolves are dispersing. And that's from one limited sample of genetic data and two from radio-collared wolves which constitute about 30 percent of the population.

So the scientists know that if we're counting dispersals between all three recovery areas, if we're seeing genetic exchange from a limited set of data, we know there's more occurring than we are documenting. Because the whole biology of these wolves—I mean, they reproduce quickly. And the pups, the pups that survive, they disperse to go find new areas and go breed.

So that's the biology of these wolves. They go travel to find new packs and breed.

So we know for seeing some, there's a lot more that we don't know. So, Your Honor, Fish & Wildlife found these are areas, adequate exchange. Hrg. Transcr. 38:12 to 39:8 (Aug. 31, 2009) (CV-09-77-M-DWM).

In the same cause of action in a June 15, 2010 hearing, Mike Eitel reported:

Genetic diversity in this wolf population is extremely high. There's routine dispersal between all three recovery areas. I mean, the central Idaho and the Greater Yellowstone recovery areas are about 60 miles apart, and that is an average dispersal distance of a wolf. And proven effective genetic exchange has occurred between all three wolf subpopulations. And with the Canadian population, over 12,000 wolves. So you have a population connected, it's genetic and biologically robust and it's created a vast Canadian population. Hrg. Transcr. 60:17 to 61:-61:2 (June 15, 2010) (CV-09-77-M-DWM).

Further, the Federal Register cited in the Government's Statement of Undisputed Facts supports a conclusion that the experimental and nonexperimental wolf populations are connected and genetically intertwined. State. of Undisputed Facts in Support of F. Def.'s Cross-Mot. for S.J. & in Opposition to Pl.'s Mot. for S.J., Defenders of Wildlife v. Salazar at ¶¶ 139, 141, 159, 161,164 (D. Mont. 2009) (CV-09-77-M-DWM dkt # 115). The following excerpts are from an April 2, 2009 entry in the Federal Register. 74 Fed. Reg. 15123-01 (April 2, 2009).

[N]atural dispersal and human-assisted migration management has resulted in documented genetic exchange between dispersing and resident wolves among all three recovery areas, including the GYA. Id. at 15135.

\* \* \*

Routine dispersal of wolves has been documented among northwestern Montana, central Idaho and adjacent Canadian populations demonstrating that northwestern Montana's wolves are demographically and genetically linked to both the wolf population in Canada and in central Idaho (Pletscher et al. 1991, pp. 547-8; Boyd and Pletscher 1999, pp. 1105-1106; Sime 2007, p. 4; Jimenez et al. 2008d). Because of fairly contiguous, but fractured suitable habitat wolves dispersing into northwestern Montana from both directions will continue to join or form new packs and supplement this segment of the overall wolf population (Boyd et al. 2007; Forbes and Boyd 1996, p. 1082; Forbes and Boyd 1997, p. 1226; Boyd et al. 1995, p. 140; vonHoldt et al. 2007, p. 19; vonHoldt et al. 2008; Thiessen 2007, p. 50; Sime 2007, p. 4; Jimenez et al. 2008d). Id. at 15136

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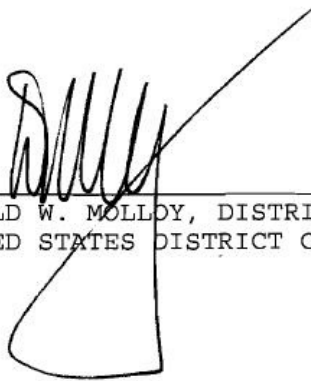
We have documented routine movement of radio-collared wolves across the nearly contiguous available suitable habitat between Canada, northwestern Montana, and central Idaho (Pletscher et al. 1991, p. 544; Boyd and Pletscher 1999, pp. 1095-1096; Sime 2007). In addition, there are several shared transborder packs, between Canada, Montana, and Idaho. While the GYA is the most isolated core recovery area within the NRM DPS (Oakleaf et al. 2005, p. 554; vonHoldt et al. 2007, p. 19), radio telemetry data demonstrate that the GYA is not isolated as at least one wolf naturally disperses into the GYA each year and at least 4 radio-collared non-GYA wolves have bred and produced offspring in the GYA in the past 12 years (1996-2008). Id. at 15161.

The plaintiffs' claims in this case presupposes the existence of a population meeting the requirements of section 10(j). If there is no such population due to the genetic and geographical connectivity cited by the United States of America in

Defenders of Wildlife v. Salazar, CV-09-77-M-DWM, the court's resolution of the issues raised in the plaintiffs' complaint would be nothing more than an advisory opinion.<sup>1</sup> If the population at issue does not meet the statutory requirements for 10(j) status, there would be serious questions about whether this case presents a live controversy. Therefore,

IT IS HEREBY ORDERED that each party shall file a brief showing cause why this case should not be dismissed as moot due to the absence of a population meeting the statutory requirements for 10(j) status. Simultaneous briefs shall be submitted by February 22, 2011 and shall not exceed 2,500 words.

DATED this 28<sup>th</sup> day of January, 2011.



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DONALD W. MOLLOY, DISTRICT JUDGE  
UNITED STATES DISTRICT COURT

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<sup>1</sup>The rules of professional responsibility require candor toward the tribunal. A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. Montana Rules of Professional Conduct 3.3 (ABA 2004).