WOLF DELISTING

In this part one, of a two-part series, Dr. Charles Kay reveals the hidden and premeditated ways that Earthjustice and federal judge Donald W. Molloy have went about legally keeping the big bad wolf on the Endangered Species List!

By Dr. Charles Kay

Before wolves in the northern Rockies can be removed from the endangered species list, certain requirements must be met. The first is that there has to be a minimum of ten breeding pairs, or approximately 100 wolves, for three consecutive years in each of three recovery zones—central Idaho, northwest Montana, and Yellowstone. That condition has now been met for 11 years. Second, before the U.S. Fish and Wildlife Service (USFWS) can return wolf management to Montana, Idaho, and Wyoming, the three states must have federally-approved state wolf management plans. Montana's state plan is meaningless because there is no set limit on the number of wolves or where those wolves can be found in the state. Idaho's plan, which was approved by the

director of the state fish and game agency, is illegal because it called for many more wolves than set by that state's legislature. Wyoming's plan calls for a minimum of 15 breeding wolf packs in and around Yellowstone Park. Wolves in the rest of the state, though, are classified as predators and can be shot without season, limit, or license.

Basically, Wyoming's plan reflects what the federal government stated in the Final Environmental Impact Statement (FEIS). As we will see, however, the federal government had no intention of following the FEIS it had written. It is also important to remember that wolves in western Montana north of Interstate 90 were given full Endangered Species Act (ESA) protection because those animals had naturally moved down from Canada. Wolves in Idaho and Yellowstone, on the other hand, were released under what is called the 10j rule, as experimental non-essential populations. Under 10j, there is greater flexibility in dealing with wolves that prey on livestock compared to wolves with full ESA protection. Moreover, under 10j, states can petition the USFWS to allow a state to institute predator control, if it can be shown that wolves have caused significant declines in ungulate numbers. Finally, the wolves the federal government captured in Canada were released in the northern Rockies over the strenuous objections of the Montana, Idaho, and Wyoming state legislatures.

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Wolves in western Montana, north of Interstate 90, were given full Endangered Species Act (ESA) protection because those animals had naturally moved down from Canada. However, the wolves that the federal government captured in Canada were released in the northern Rockies over the strenuous objections of the Montana, Idaho, and Wyoming state legislatures.

Because all the approved recovery goals had been met, the U.S. Fish and Wildlife Service (USFWS) delisted wolves in the northern Rockies early in 2008. A consortium of environmental groups immediately filed suit in federal district court to block delisting. The plaintiffs included the Defenders of Wildlife, the Sierra Club, the Humane Society of the United States, the Center for Biological Diversity, the Western Watershed Project, and the Wildlands Project, among others. They were represented by Earthjustice, a group that litigates on behalf of liberal causes. The defendants, of course, were the U.S. Department of Interior and the U.S. Fish and Wildlife Service. Montana, Idaho, Wyoming, sportsmens' organizations, and livestock groups intervened on behalf of the federal government.

In cases such as this, it is important to understand how our federal judicial system works, since it is nothing like what you may have seen on TV, or in the movies. There are three levels to the federal court systems—district courts, circuit or appellate courts, and the U.S. Supreme Court. District courts determine the facts in any one case and are where trials are held, if necessary. District judges can also rule on points of law. Appellate or circuit courts, of which there are ten in the U.S., and the Supreme Court only rule on points of law, not matters of fact. District court rulings can be appealed to a circuit court, while appellate court decisions can be appealed to the U.S. Supreme Court. However, there is no automatic right of appeal to a higher court and higher courts need not hear a case, if they believe the matter has been settled by a lower court. The U.S. Supreme Court, for example, only agrees to hear a very small percentage of the cases presented for possible review.

Earthjustice filed suit to return wolves to ESA protection in the Missoula Division of the U.S. District Court of Montana. This was done for an all important reason, namely that there is only a single federal judge in Missoula. This insured that Earthjustice's case would be assigned to Judge Donald W. Molloy. Molloy was

While Judge Donald Molloy allows Earthjustice to file injunction after injunction to stop the managing of wolves, the sportsmen of the West are rapidly losing more and more of their treasured wildlife to the ever-growing populations of the voracious predators.

appointed by President Clinton and is an exceedingly liberal judge, just what Earthjustice and its clients wanted. In an earlier lawsuit, Molloy returned grizzly bears to full ESA protection after the USFWS attempted to delist that species. Delisting lawsuits, in general, are based almost entirely on what is termed the administrative record, which in the case of wolves, runs to tens of thousands of pages. The administrative record includes everything the government has ever produced relating to wolf recovery, as well as all the public comments that have ever been submitted, including those of Earthjustice and various environmental groups. I have no idea what all is in the wolf administration record, nor does anyone else, except perhaps for a handful of attorneys.

After a case like this is set in motion, both sides are allowed to file legal briefs, supporting documents, and witness declarations. In addition, both sides generally file for what is called summary judgment. That is, both sides claim that their position is so factually strong and legally clear that the judge can rule from the bench without recourse to a trial. There may be a hearing in court on legal issues, but usually no witnesses are called and there is no cross examination of supposed facts or anything else. Lawyers talking to and at other lawyers.

Once the USFWS delisted wolves, management authority automatically returned to the states, which meant that under Wyoming's pre-approved plan, wolves outside the Yellowstone recovery zone could be legally killed by any and all means. And die a few did. To hear Earthjustice tell it, it was the end of the world. Earthjustice immediately went before Judge Molloy and asked for a temporary injunction to stop the killing of wolves in Wyoming, which Molloy granted. A temporary injunction can only legally be issued if not doing so will cause irreparable harm and if the side requesting the temporary injunction is likely to prevail when the court hands down its final ruling. Therefore people in the know took this as a sign that Molloy would side with Earthjustice and return wolves to ESA protection, which is what Molloy did. Round one to Earthjustice and its pro-wolf clients.

Molloy's ruling was based on what the judge claimed was a lack of "genetic exchange" between wolves in the three recovery zones. What is most interesting, as well as disturbing, is that in Molloy's 40-page decision, he used the term "genetic exchange" 49 times and actually invented his own term "genetic connectivity," which he used twice. In the FEIS, however, which is supposed to govern wolf recovery and delisting, "genetic exchange" was mentioned only once in an appendix. In other words, there is no requirement for "genetic exchange" in the FEIS or Endangered Species Act. Nor was "genetic exchange" ever discussed by the USFWS or opened for public comment before wolves were released.

Molloy, in part, based his ruling on a poorly designed study, which contended that there was no "genetic exchange" between wolves in Idaho-Montana and those in Yellowstone. That study also included a worst case COMPUTER MODEL, which predicted dire consequences for wolves in the northern Rockies due to inbreeding. Moreover to reach his decision, Molloy had to completely ignore the declarations submitted by Dr. David Mech and other USFWS wolf biologists, who said that there was "genetic exchange" among all wolves in the northern Rockies, and that the COMPUTER MODEL relied upon by the judge was just that, a worse case model based on erroneous assumptions.

What Molloy did is called legislating from the bench, which means that Molloy MADE law instead of enforcing existing statutes. Again, there is absolutely no requirement for "genetic exchange" either in the draft EIS, the FEIS, or the ESA. Molloy simply codified his personal whim, instead of relying on scientific experts, as mandated by law. In other words, Molloy would have the public believe that he knows more about wolves than Dr. Mech and other scientists, who have studied wolves most of the biologists' adult lives. Why did Molloy do this? Because he can. The chance of getting Molloy's decision overturned is virtually zero and Molloy knows it. Western Montana is in the 9th Circuit and that appellate court sits in San Francisco. The 9th Circuit is the most liberal appellate court in the nation, so the probability of getting the 9th Circuit to overturn a Molloy ruling is next to nil.

Above the 9th Circuit is the U.S. Supreme Court, but as explained earlier, that court is highly selective in the cases it hears. Hence any legal decision made by Molloy is unlikely to ever be overturned. Besides, appeals take years and cost several hundred thousand dollars.

In his ruling, Molloy also blasted the USFWS's approval of Wyoming's state wolf management plan, again based on his personal opinion, not science or any facts of law. In short, Molloy was saying that he wanted wolves fully protected throughout the entire state of Wyoming, no matter what the FEIS said. As we will see, Molloy not only invented the law but he and Earthjustice fabricated the science.

Furthermore, it is clear that the federal government set this lawsuit up to LOSE. First, the USFWS inserted "genetic exchange" one time in an appendix no one, except Earthjustice, ever read and then a Park Service employee co-authored that poorly designed genetic study relied upon by the plaintiffs and Judge Molloy. As I have explained in earlier articles dating back to 1993, by setting delisting lawsuits up to LOSE, the USFWS maintains jurisdiction, while appearing to do what the agency promised in the FEIS, that is delist. Setting lawsuits up to LOSE also deflects political pressure away from the USFWS, while keeping money flowing to the agency. Unless one can be impeached, it is impossible to rein-in a federal judge, like Molloy, but Congress can discipline any federal agency by cutting or eliminating its budget.

Based on Judge Molloy's ruling, in November 2008, the USFWS rescinded its earlier delisting order and issued new delisting regulations for wolves in the northern Rockies. The federal government addressed Molloy's earlier "genetic exchange" argument by agreeing to release additional, unrelated wolves, if any wolf population actually became inbred. To further appease Molloy, this time the USFWS delisted wolves only in Montana and Idaho, NOT Wyoming. Under the ESA, the federal government

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can list species, subspecies, and what are called distinct population segments (DPS). Wolves in Montana, Idaho, Wyoming, and small slivers of Utah, Oregon, and Washington state were listed as a single, northern Rockies DPS. Thus in the USFWS's new move to delist, the agency split a DPS, by not including Wyoming.

To no one's surprise, Earthjustice sued the federal government a second time to stop delisting. As in the first delisting lawsuit, Earthjustice asked Molloy for a temporary injunction to stop delisting until the new case could be heard. This time, however, Molloy did not honor Earthjustice's request. Hence in the Fall of 2009, both Idaho and Montana held wolf hunts under their pre-approved state plans. Montana set a quota of 75 and when 72 wolves were killed, Montana closed its season. Hunter success in Montana was 0.46%. Idaho set a quota of 220 wolves with a season that ran from September 1st to March 31st, 2011, yet only 188 wolves were killed for a success rate of 0.70%. Again to hear wolf-advocates tell it, the hunts were a "slaughter." After all, such claims are great theatre, good press, and above all, bring in millions of dollars in donations from a gullible public.

Based on his refusal to grant a temporary injunction in the second delisting lawsuit, some thought Molloy might leave wolves under state management. In that they were sorely mistaken. I am not an attorney, but even I know, based on case law, that you cannot split a DPS after it has been listed. It was an easy call for Molloy, wolves were back under ESA protection. So again, the USFWS appeared to be doing what the agency had promised, that is delist wolves, while in reality, the agency had set the second delisting lawsuit up to LOSE, just like the first. I have also been told that the federal government made sure it LOST both delisting actions by assigning the cases to inexperienced and inadequately prepared attorneys. Round two to Earthjustice and the groups it represents. Round three, however, was to be fought in a different court…

Editor's Notes:
In the next issue of MuleyCrazy, Dr. Kay continues to reveal more hidden agendas of the United States' liberal and animal rights activist groups. Will the sportsmen and true conservationists of this great nation prevail in this ongoing battle, or are the West's treasured wildlife herds merely awaiting their death sentence?