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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

DEFENDERS OF WILDLIFE, et al., Plaintiffs, vs. H. DALE HALL, et al., Defendants, and SAFARI CLUB INTERNATIONAL, et al., Defendant-Intervenors.	Case No. 08-14-M-DWM **PLAINTIFFS' RESPONSE TO SHOW CAUSE ORDER**

Plaintiffs Defenders of Wildlife, et al., hereby respond to this Court's January 28, 2011 Order to Show Cause [Dkt. 106]. As explained below, Plaintiffs' claims are not moot.

Section 10(j) was designed to encourage reintroductions of threatened and endangered species by providing greater flexibility in the management of populations designated as "experimental populations." See United States v. McKittrick, 142 F.3d 1170, 1174 (9th Cir. 1998). The provision allows the U.S. Fish and Wildlife Service ("FWS") to manage "experimental populations" as "threatened," rather than "endangered." 16 U.S.C. § 1539(j)(2)(C). In addition, if FWS determines that an experimental population is not "essential to the continued existence of" the species, the species is not subject to the consultation requirement of Endangered Species Act ("ESA") section 7 or the ESA's critical habitat requirement. Id. § 1539(j)(2)(B), (C).

In this case, Plaintiffs argue that FWS overstepped its authority under section 10(j) by adopting regulations that violate the agency's ESA mandate to conserve listed species. Id. §§ 1531(b), (c), 1536(a)(1). This Court has questioned its jurisdiction to hear Plaintiffs' challenge to FWS's unlawful 10(j) regulation in light of uncertainty regarding whether the reintroduced wolf populations in the northern Rockies presently satisfy section 10(j)'s criteria for experimental status.

Section 10(j) states that reintroduced populations of threatened or endangered species may be managed as "experimental" populations "only when, and at such times as," they are "wholly separate geographically from nonexperimental populations." Id. § 1539(j)(1). Section 10(j) is silent, however, on the question of what process, if any, is necessary to effectuate a change in the legal status of a population from experimental to nonexperimental—or vice versa.

This Court need not answer that question to exercise jurisdiction over this case. First, if the reintroduced wolf populations are "experimental," Plaintiffs' claims are not moot because the challenged 10(j) regulation continues to govern their management. Second, even if the reintroduced wolf populations are not currently "experimental," they may regain that status and the challenged regulation may be revived at any time. Under this scenario, the ESA violations alleged in Plaintiffs' complaint present a live controversy because they are "capable of repetition, yet evad[e] review." Natural Res. Def. Council v. Evans, 316 F.3d 904, 910 (9th Cir. 2003). Either way, Plaintiffs' claims present a live controversy and should be resolved on their merits.

I. REINTRODUCED POPULATIONS MAY LOSE THEIR EXPERIMENTAL STATUS ONCE THEY NO LONGER MEET THE STATUTORY CRITERIA

A. Reintroduced Populations Are "Experimental" When They Do Not Overlap With Wild Populations

ESA section 10(j) defines an experimental population as "any population

(including any offspring arising solely therefrom) authorized by the Secretary for release … , 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). Plaintiffs agree with this Court's conclusion that, "in order to retain its status as an experimental species, the species must meet the statutory definition." Show Cause Order at 3.

ESA section 10(j) precludes designation of an "experimental population" where it would overlap with one or more naturally occurring populations. See 16 U.S.C. § 1539(j); 50 C.F.R. § 17.80(a). It has been held that the natural presence of individuals of the same species within the experimental-population boundaries does not preclude an experimental population from being designated; rather, the inquiry is focused on the presence of naturally present populations within the experimental boundaries. See McKittrick, 142 F.3d at 1175; see also Forest Guardians v. U.S. Fish and Wildlife Serv., 611 F.3d 692, 707 (10th Cir. 2010); Wyo. Farm Bureau Fed'n v. Babbitt, 199 F.3d 1224, 1234-36 (10th Cir. 2000).

Section 10(j)(1)'s reference to "offspring" is derivative of the provision's reference to "population." 16 U.S.C. §1539(j)(1). This language clarifies that "experimental" status does not apply solely to the first generation of reintroduced individuals; the status may apply to successive generations provided they arise

solely from the experimental population, and not from a naturally present population. See id.[1]

FWS applied section 10(j) in its 1994 regulations establishing experimental wolf populations in central Idaho and the Greater Yellowstone Area. See 59 Fed. Reg. 60,266 (Nov. 22, 1994) (central Idaho); 59 Fed. Reg. 60,252 (Nov. 22, 1994) (Greater Yellowstone Area). FWS found that "[r]eproducing wolf populations are not known to occur in [the reintroduction areas]. Wolves have occasionally been sighted in these States, but do not constitute a population as defined by scientific experts."[2] 59 Fed. Reg. at 60,267 (central Idaho); 59 Fed. Reg. at 60,253 (Greater Yellowstone Area). FWS determined that the populations satisfied the requirement that they be "wholly separate geographically" from nonexperimental wolf populations, and the Ninth and Tenth Circuits upheld this determination. McKittrick, 142 F.3d at 1174-75; Wyo. Farm Bureau Fed'n , 199 F.3d at 1237.

[1] Consistent with the Ninth Circuit's interpretation of section 10(j), dispersing offspring of naturally present wolves are managed as experimental if they are within the experimental boundaries. See McKittrick, 142 F.3d at 1175. Pursuant to McKittrick, the presence of such dispersers does not preclude experimental status unless they are part of a naturally present "population," as defined by FWS, that overlaps with the experimental population.

[2] FWS defines a wolf population as "at least two breeding pairs of gray wolves that each successfully raise at least two young to December 31 of their birth year for 2 consecutive years." 59 Fed. Reg. at 60,271.

B. Reintroduced Populations May Not Be Managed as "Experimental" When They Do Not Satisfy Section 10(j)(1)'s Criteria

In the cases cited above, the Ninth and Tenth Circuit courts of appeals addressed the question of whether FWS's experimental designation was appropriate at the time the populations at issue were authorized for release. McKittrick, 142 F.3d at 1173-75; Forest Guardians, 611 F.3d at 695; Wyo. Farm Bureau Fed'n, 199 F.3d at 1228. There is no controlling case authority in this Circuit that answers the separate question posed by this Court: whether FWS may continue to manage reintroduced populations as "experimental" during periods when they do not satisfy the criteria set forth in ESA section 10(j)(1).

The plain language of section 10(j) directs that the agency may not. "[T]he starting point in every case involving construction of a statute is the [statutory] language itself." Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985) (quotation omitted). Section 10(j)(1) states that a reintroduced population is an "experimental population … 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)(1) (emphasis added). The inherently forward-looking language of the "experimental population" definition expresses Congress's intent that populations are to be treated as experimental when—and "only when"—the statutory criteria are met. Id.

The legislative history for the 1982 ESA amendments adding section 10(j) supports this reading. The conference-committee report makes clear that Congress anticipated situations in which populations could occasionally lose their experimental status: "If an introduced population overlaps with natural populations of the same species during a portion of the year, but is wholly separate at other times, the introduced population is to be treated as an experimental population at such times as it is wholly separate." H.R. Conf. Rep. 97-835, at 33 (1982), reprinted in 1982 U.S.C.C.A.N. 2860, 2874; see also H.R. Rep. 97-567, at 33 (1982); reprinted in 1982 U.S.C.C.A.N. 2807, 2833; McKittrick, 142 F.3d at 1175 ("When experimental and nonexperimental populations overlap—even if the overlap occurs seasonally—section 10(j) populations lose their experimental status.").

Furthermore, the term "experimental population" includes successive generations only to the extent that they "aris[e] solely" from the reintroduced population. 16 U.S.C. § 1539(j)(1). Because offspring arise from an experimental population only after its reintroduction, this language necessitates an ongoing inquiry into the appropriateness of "experimental" status after reintroduction occurs.

Contrary to this reading of the statute, the Tenth Circuit, in Wyoming Farm Bureau Federation, concluded that the experimental and nonexperimental

populations need not be "forever … distinct." 199 F.3d at 1235 n.5. This statement is contrary to the plain language of section 10(j), as discussed above. It is also dicta because the court was addressing arguments about individual dispersers, not populations, and was assessing the application of the ESA at the time of a population's reintroduction. See id. Furthermore, this out-of-circuit authority is not controlling here.

Nor is there any controlling administrative interpretation of section 10(j) that could override the statutory language. At the time of wolf reintroduction, FWS stated that "the [10(j) regulation] would remain in effect until wolf recovery occurs or a scientific review indicates that modifications in the experimental rule are necessary to achieve wolf recovery." 59 Fed. Reg. at 60,271 (central Idaho); 59 Fed. Reg. at 60,256 (Greater Yellowstone Area). This statement leaves out the situation the Court has identified here: the scenario where the species is not yet suitable for delisting, but has rebounded sufficiently that experimental populations may overlap with natural populations. FWS cannot now argue that this statement is binding, for it misinterprets the plain language of section 10(j) and is not entitled to deference. Chevron v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984) (When "Congress has directly spoken to the precise question at issue ... that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). FWS has a duty to ensure that

reintroduced populations are managed in a manner consistent with the ESA. If a population does not presently meet section 10(j)'s criteria for "experimental" status because it overlaps with a naturally present wolf population, it may not be managed under the relaxed standards available under that provision.

II. PLAINTIFFS' CLAIMS PRESENT A LIVE CONTROVERSY

Plaintiffs' claims are not moot. Although section 10(j) states that FWS may not continue to manage the reintroduced wolf populations as "experimental" at times when they do not satisfy the statutory definition of an "experimental population," the provision is silent as to how such a change in legal status is effectuated. 16 U.S.C. § 1539(j); see also Show Cause Order at 3 ("it is unclear whether removal of 10(j) experimental status requires action of a branch of the federal government"). However, regardless of whether "experimental" status comes and goes by operation of law—or whether it changes only upon a formal determination of a population's status by FWS—Plaintiffs' claims represent a live controversy.

First, if a change in legal status occurs only upon a formal determination by FWS, this case is not moot because no such determination has been made; the challenged 10(j) regulation continues to govern wolf management in central Idaho and the Greater Yellowstone Area. See Forest Guardians v. Johanns, 450 F.3d

455, 461 (9th Cir. 2006) ("a case is not moot where any effective relief may be granted") (emphasis omitted).

Second, Plaintiffs' claims are not moot even if the section 10(j)(1) definition of "experimental populations" is self-executing. If the reintroduced wolf populations in central Idaho and the Greater Yellowstone Area have lost their experimental status by operation of law because they are not "wholly separate" from nonexperimental populations, then the challenged 10(j) regulation does not currently govern wolf management.[3] However, the regulation would be revived at any time the reintroduced populations again satisfy the "experimental" criteria. As Congress recognized in adopting section 10(j), even after a population is designated as "experimental," its status may shift back and forth. See 16 U.S.C. § 1539(j)(1); H.R. Conf. Rep. 97-835, at 33 ("If an introduced population overlaps with natural populations of the same species during a portion of the year, but is wholly separate at other times, the introduced population is to be treated as an experimental population at such times as it is wholly separate."); see also 50 C.F.R. §17.80(a) ("Where part of an experimental population overlaps with natural populations of the same species on a particular occasion, but is wholly separate at

[3] Although FWS has made statements that call into question the present vitality of the central Idaho and Greater Yellowstone populations' "experimental" status, the record in this case does not contain the most current monitoring and genetic information that would be essential to resolving the question of whether the reintroduced wolf populations are presently "wholly separate" from nonexperimental wolf populations.

other times, specimens of the experimental population will not be recognized as such while in the area of overlap."). Accordingly, whatever the present legal status wolves in central Idaho and the Greater Yellowstone Area under section 10(j), this case is not moot because the challenged 10(j) regulation may again govern wolf management in the region, making FWS's legal violations the kind that are "capable of repetition, yet evad[e] review." Natural Res. Def. Council, 316 F.3d at 910 ("Government actions fall within the 'capable of repetition, yet evading review' exception when (1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again.") (quotation omitted). For the foregoing reasons, Plaintiffs respectfully request that this Court find that this case is not moot and address the merits of Plaintiffs' challenge to FWS's unlawful 10(j) regulation.

Respectfully submitted this 22nd day of February, 2011,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief contains 2,183 words, as determined by the word count function of Microsoft Word 2003 Professional Edition, in compliance with the 2,500 word limit established in this Court's January 28, 2011 Order to Show Cause.

Dated: February 22, 2011

/s/ Jenny K. Harbine
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