

The "Deal", Part I: Judge Molloy Cannot Destroy Law

by Tom Remington

50 CFR Part 17 - Final rule: Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana. This is "The Deal."

It is an understatement to say that during discussions of whether or not to reintroduce gray wolves to Yellowstone National Park (YNP) and Central Idaho, there was lots of controversy and deep concerns. Let's examine very briefly events that led up to gray wolf reintroduction.

In 1982 Congress made amendments to the Endangered Species Act (ESA) which included Section 10(j). 10(j) made provisions to allow the Secretary of Interior to establish areas of "experimental" populations of species.

In 1987 the Northern Rocky Mountain Wolf Recovery Plan was adopted. After many meetings, planning and public comment periods, the Final Environmental Impact Statement on the reintroduction of gray wolves into Yellowstone National Park (YNP) and Central Idaho was established in May of 1994.

Most everything was in place except that there remained still opposition and concerns over the impact that reintroduced and established gray wolves would have on private land owners, ranchers and the citizenry in general. This is where "The Deal" comes into play.

"The Deal" was a Final Rule written by Ed Bangs that laid out the rules specifically as to how reintroduction of wolves would take place, where and what recourse citizens and landowners would have in dealing with problem wolves. "The Deal" is long and complicated and I'll cover that later.

What is most important about this Final Rule, 50 CFR Part 17, is that without it, there would be no gray wolf reintroduction. You may want to read that again. It was established as a means of assuring the people of Idaho, Wyoming and Montana that with Section 10(j) of the ESA and the designation of wolves within prescribed areas as "nonessential experimental" flexibilities outside the strict protection guidelines of the ESA, to control and limit depredations by wolves and other issues, would be implemented.

It is vitally important to read and understand the language of "The Deal" and its intent. Therefore, it is of the utmost importance to recognize that as the rules of "The Deal" were established, any designation of nonessential experimental does not apply strictly to the species so designated. Where gray wolves were being reintroduced, the nonessential experimental classification was not given strictly to wolves but to wolves WITHIN a prescribed area.

"The release site for reintroducing wolves will be in Yellowstone National Park. The designated experimental population area will include the State of Wyoming; that portion of Idaho east of Interstate Highway 15; and the State of Montana east of Interstate Highway 15 and south of the Missouri River east of Great Falls, Montana, to the Montana/North Dakota border."

And the reason these prescribed areas are given nonessential experimental flexibility is spelled out often in "The Deal."

"It is anticipated that released wolves will come into contact with humans and domestic animals inside and outside of the Park. Public opinion surveys, public comments on wolf management planning, and the positions taken by elected local, State, and Federal government officials indicate that wolves should not be reintroduced without assurances that current uses of public and private lands will not be disrupted by wolf recovery activities."

As you have seen, "The Deal" creates boundaries that within those limits gray wolves are classified as "nonessential experimental." As stated, this status allows managers greater leniency to deal with troublesome wolves where managing under the restrictions of the ESA in general would not provide. It is intended to limit as much as feasible, negative involvement between people and wolves.

Another extremely important explanation provided in "The Deal" is the one that involves how to designate wolves that wander in and out of the experimental areas.

"It is possible that prior to 2002, other wolves may appear in the wild and be attracted to the experimental area occupied by the reintroduced wolves. Any "new" arrivals would be classified as part of the experimental population. These wolves could assist in the recovery and expansion of the experimental population to where wolves could be dispersing into central Idaho and Montana. Wolves dispersing into areas in Idaho and Montana, outside of the experimental area, would continue to receive endangered species protection under the Act, as did the wolves that recolonized an area near Glacier National Park in 1982."

This recognition of the possibility of non reintroduced wolves moving into experimental zones and reintroduced wolves moving out of them, further reinforces the notion that the purpose of the ESA Section 10(j) is not demanding a "nonessential experimental" label on wolves as a whole but on those within the prescribed zone, regardless of how they got there. Is it not insane to consider that anyone could designate a species experimental and nonessential without providing physical boundaries or limitations of such? It was supposed that once wolves were moving freely between experimental zones the species would be recovered.

Recently, Judge Donald Molloy, a district judge from Missoula, Montana, attempted to weasel his way into ruling that the "nonessential experimental" designation of wolves in the Northern Rocky Mountain area be eliminated. In short, it is my opinion that he carries no authority in which to do that without violating the ESA and the Final Rule known as "The Deal".

In *Defenders of Wildlife v. Rowan Gould, USFWS*, Judge Molloy completely misunderstands the intent of Section 10(j) by only focusing on the wolves themselves. As I've demonstrated above, the purpose of "nonessential experimental" is to provide more flexible management within a prescribed area, not necessarily limited on how to deal with wolves in general.

Judge Molloy in his ruling states that he is of the mind that gray wolves in the Northern Rockies should lose their experimental status because of genetic diversity and the fact that the original reintroduced wolves are all now dead.

"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."

When you have determined yourself to see that "nonessential experimental" applies only to the status of wolves and not the entire management process and intent of the guaranteed assurances from "The Deal", Molloy's argument might be somewhat convincing but still lame at best. To assume that because the original reintroduced gray wolves are now dead, abolishes the entire "nonessential experimental" purpose is no different than someone claiming I'm not American because all the Founding Fathers are now dead.

I realize that Judge Molloy is hiding behind some cherry-picked scientific mumbo-jumbo in order

to somehow employ the notion of having fulfilled the statutory definition of “nonessential experimental” but in doing so he misses the most important part of this entire mess he has helped to create. The needs of the people and the intent of the rules.

Molloy thus instructed both sides in the lawsuit to come back to his court on February 22 and convince him that wolves should or should not retain their “nonessential experimental” status in the Northern Rockies. For what purpose? Is he setting himself up to succeed in keeping wolves delisted regardless of how he is influenced by the two sides? If he is convinced that eliminating experimental status is the right choice, then if he remains consistent to his previous rulings that you cannot delist wolves with the utilization of boundaries then I would suppose there is no end to the madness. If he runs with keeping the “nonessential experimental” designation, will he then claim that wolves are not recovered yet for that very lame reason? In his court, most anything could happen.

As I pointed out previously, it is questioned as to whether or not Judge Molloy even has jurisdiction to rule on this case because part of his previous ruling on wolves that returned them to the Endangered Species List is under appeal in the 9th Circuit [edited to 9th from 10th].

Regardless of what Judge Molloy thinks about whether those wolves should retain experimental status, it is, once again, my opinion that he does not have legal authority to do that as it is spelled out in “The Deal.”

*“Federal responsibility for protecting gray wolves under the experimental population provisions of the Act would continue until **formal delisting rulemaking procedures are completed.** (my emphasis)”*

I think that is very clear as to when this designation will change and it is not up to Judge Molloy to alter it. It is quite apparent that the exact purpose of “nonessential experimental” designation as it pertains to the reintroduction of gray wolves in Yellowstone and Central Idaho, under the Final Rule of wolf reintroduction written by Ed Bangs, is to provide the promised management flexibility to deal with problem wolves that the people of Idaho, Wyoming and Montana worried about from the very beginning. It was part of their contractual assurances.

Therefore, it is my humble opinion that Judge Molloy is left with only one recourse; allow for the delisting of gray wolves in the Northern Rockies. Anything short of that can only be construed as standing in the way of justice.

Judge Donald Molloy, a federal district judge operating out of Missoula, Montana, has indicated he wants to consider dissolving the classification of "nonessential experimental" the populations of gray wolves in the Northern Rockies, as per the Endangered Species Act (ESA), claiming that under the ESA the status of the gray wolf has met the "statutory requirements of 10(j)."

There are several forces at work here further complicating an already confusing mess. One issue is whether Judge Molloy even has jurisdiction to continue hearing cases that are being appealed to a higher court. In *Defenders of Wildlife v. Ken Salazar*, Judge Molloy essentially returned gray wolves to protection under the ESA based on his claim that the U.S. Fish and Wildlife Service (USFWS) could not exclude Wyoming in its 2009 Final Rule declaring wolves in Idaho and Montana a Distinct Population Segment. That ruling is under appeal through the 9th Circuit Court of Appeals.

While *Defenders of Wildlife v. Ken Salazar* is under appeal, Judge Molloy heard the case of *Defenders of Wildlife v. Rowan Gould* (Dept. of Interior). On appeal Judge Molloy ordered the Plaintiffs and the Defendants "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."

As I pointed out in above, Judge Molloy is completely misinterpreting the function of "nonessential experimental" usage as it pertains to Section 10(j) of the ESA. Molloy appears to be viewing such a classification placed on wolves and not a designation of a prescribed geographical location where wolves are being "experimental" and are "nonessential" to the survival of the species. The wolf population, or as is spelled out in the Final Rule, in Canada, where the wolves for reintroduction would come, are "nonessential" - meaning that taking wolves out of Canada would not put the survival of the species in danger. The two designated areas are "experimental", thus any wolves entering either of those two areas would be classified "nonessential experimental" once they enter and would lose it once they left. It is non factual for Judge Molloy to state in his ruling that, "Under 10(j) the wolves of the northern Rocky Mountains were designated a nonessential experimental species."

Also, "The Deal" or the Final Rule, 50 CFR Part 17, was crafted as the rules to regulate how, when, and where gray wolves would be reintroduced and the terms of managing them once reintroduction was complete. I raise the question as to whether this Final Rule, a.k.a. "The Deal", has been forgotten, overlooked, ignored or illegally manipulated or changed.

I've scoured "The Deal" several times now and have yet to discover anywhere in that Rule that allows any judge, environmental group, fish and game department or even the USFWS to change

or eliminate the rules regarding the Nonessential Experimental Populations of gray wolves in the Northern Rocky Mountain region, short of delisting.

An amendment to the ESA in 1982 provided the Secretary of Interior to designate "experimental" populations of species; a tool to learn more about species recovery. This amendment was known as the Section 10(j).

"The Deal" is very explicit as to the creation of two very important and different "nonessential experimental" areas prior to wolf reintroduction. The purpose of two population control areas was that each was to be managed in a completely different way.

If you will look at the map just below, you will notice two areas shaded in dark gray. One area is the Yellowstone Park area and the second is commonly referred to in this debate as Central Idaho. (Both maps inserted can be found at "http://www.fws.gov/mountain-prairie/species/mammals/wolf/EIS_1994.pdf" Final Environmental Impact Statement of 1994 on wolf recovery.)

Each of these shaded zones are areas where it was decided to designate as wolf reintroduction areas.

In the next map, it clearly outlines the two larger "Nonessential Experimental Populations" (NEP) for wolves. The lighter shaded gray depicts the Central Idaho NEP and the darker gray, the Greater Yellowstone NEP.

As was defined in "The Deal", each NEP was to be managed differently, precisely that wolves within the Yellowstone National Park were to be treated as an endangered species protected under the ESA. Outside the Park, the "experimental" designation gave managers more flexibility to limit conflicts between citizens and their property. This was vital as an assurance in order to convince citizens to go along with wolf reintroduction. ("http://www.fws.gov/mountain-prairie/species/mammals/wolf/EA_01182008/FR%20pub%20-%2010j%20Revision%2002082008.pdf" Please find Final Rule establishing the two NEPs.)

"The Deal" or Final Rule for wolf reintroduction provided some flexibility in how implementing recovery of wolves was to take place but nowhere, as I have already pointed out, is there any provision for eliminating the use of nonessential and experimental population regions for wolf recovery for growing populations of wolves.

Throughout the Final Rule, it provides managers ways to deal with conflicts, problem wolves and even those that enter an NEP from a nonexperimental population of wolves. Page 7 of "The Deal" allows for changes to reintroduction methods if prior releases indicated a change would be better. The Final Rule actually allowed for what would be done if after the Final Rule was published and before reintroduction, wolves did establish a population by definition in either of the NEPs.

Within the confines of "The Deal" the only plans to allow for change deals only with problems encountered that are hindering wolf recovery or after 2 years there is no growth. Even then the two NEPs would not necessarily lose their designation. The Secretary of Interior could pull the plug or make necessary adjustments for recovery.

In 2005 and again in 2008, via Federal Rulings, the USFWS "expanded" provisions of Section 10(j) of the ESA but did not change the "nonessential experimental" provisions or status of gray wolves in the Northern Rockies. The two changes only further enhanced the authority of managers to reduce conflicts while waiting for wolf delisting.

Aside from a complete amendment to "The Deal" or I suppose the ESA, the only way the two "nonessential experimental" populations of wolves are going to lose their title is when the USFWS implements all the legal channels to delist the wolves as a recovered species.

This is first pointed out on page 11 of "The Deal":

*"Once this rule is effective and wolves have been released into the recovery area, the rule 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.**" (emphasis added)*

This indicates that modification could be granted "to achieve wolf recovery". I have yet to hear any legitimate argument that wolves are not recovered in these NEPs. It appears what's holding up delisting are legal technicalities but I think that claim is a cop out. At the writing of this Final Rule, Ed Bangs was not anticipating wolves to have been recovered in numbers exceeding five times the prescribed recovery goals and tied up in court. His foreseeable problem was how to get wolves recovered.

The mechanisms put in place in "The Deal" to get wolves out of any "nonessential experimental" classification are quite clear.

"Federal responsibility for protecting gray wolves under the experimental population provisions of

the Act would continue until formal delisting rulemaking procedures are completed."

This tells us there are no provisions in "The Deal" that would allow Judge Molloy to magically, by the stroke of his courtroom pen, remove the designation of "nonessential experimental."

I would like to further point out one more dilemma that Judge Molloy has now gotten himself into. "The Deal" states:

"All reintroduced wolves designated as nonessential experimental will be removed from the wild and the experimental status and regulations revoked when (1) legal actions or lawsuits change the wolves status to endangered under the Act."

This presents a very tricky situation. Again, Ed Bangs is not considering such legal action taking place some 15 or 16 years after reintroduction. Should Judge Molloy decide to, as he has repeatedly done, base his rulings on ridiculously crafted "technicalities", somehow declare wolves have "fulfilled the statutory requirements of Section 10(j)" and attempt to strip Idaho, Montana and Wyoming of any designation of "nonessential experimental", then according to "The Deal", Molloy will have forced the hand of the USFWS to remove wolves; those that are a result of reintroduction. You might want to read that one more time.

The only alternatives Judge Molloy has are to drop the whole "nonessential experimental" fulfilling statutory regulations nonsense, force the USFWS to have to remove wolves from Idaho, Montana, Wyoming and everywhere else wolves resulting from reintroduction have gone, or delist wolves.

His courtroom drivel, absurdities and rubbish rulings have gone just about far enough and appear to be coming around to bite him on the end he probably spends far too much time sitting on.