Howling Insanity

Is this the beginning of the end for wolves or the end of the beginning?
By Dave Skinner

On April 16, 2010, Sen. Max Baucus (D-MT) proudly declared, "This week we put an end to the hard-fought battle to delist wolves in Montana and return them to state management."

The "end" was a rider (Section 1713) stuffed into the 2011 Appropriations omnibus (Public Law 112-10), cosponsored by Baucus and Congressman Mike Simpson (R-ID), which went into effect May 5. It reinstated the U.S. Fish & Wildlife Service's (FWS) so-called 2009 Rule, which delisted Rocky Mountain gray wolves outside Wyoming.

Is this really the end? No, but it might be the end of the beginning of the end.

What the Heck Really Happened?

First, it is a well-known fact that Congress never: (a) acts without a political crisis; or (b) does the right thing before exhausting every other option. Congress found itself without options after a series of lawsuits filed (and rulings made) in the Missoula, Mont., court of U.S. District Judge Donald W. Molloy.

In a nutshell (go ahead and Google the cases in the sidebar on page 60, if you want to argue), the combined legal impact of Molloy's court decisions and others turned Northern Rockies wolf management (and that of all other listed species, just you watch, baby!) as follows:

1. All or nothing: All animals in a population are either listed or they aren't.
2. No DPS: The feds have been sued out of their authority to separate populations into "distinct population segments" such as was done when evil, nasty Wyoming was split off from nice, cooperative Montana and Idaho.
3. Everywhere, all the time: The feds have also lost control of the definition of what constitutes a "significant portion of its range." Now open is the question of whether or not a species must fill its historic range before delisting, or how much qualifies as "significant."

When wolves were parked in Yellowstone and central Idaho in 1994-95, the promise was that once wolves met a minimum goal of 30 breeding pairs and 300 total wolves in the three states of Idaho, Montana and Wyoming, the states would be delegated management responsibilities, including predator controls and appropriate hunting seasons.

Wolves reached the population goal (which had been modified to 15 breeding pairs/150 per state) in 2001 at the latest, and are currently at a known minimum of 1,600, over five times the original goal (and at modern-history highs of over 4,000 in Wisconsin, Minnesota and Michigan).

But in its latest filing, claiming that Congress violated the Separation of Powers Doctrine when it passed the rider implementing the 2009 Rule, the Center for Biological Diversity is claiming numbers from 4,300 to 7,500 as a minimum in the Northern Rockies, plus 350,000 wolves across the West, plus

historic populations of two million nationwide.

Howling in Congress

The outgoing 111th Congress tried and failed to pass two competing wolf bills in December 2010.

The first, initiated by Montana Rep. Denny Rehberg (R), would amend the Endangered Species Act to exempt gray wolves (but not Mexican or reds) from ESA protections nationwide, period. The second would bypass Judge Molloy and implement the 2009 Rule as a matter of law not subject to court review, without actually amending the Endangered Species Act. Neither bill passed before Congress adjourned.

In the next Congress, moderate Republican Mike Simpson of Idaho introduced a House version of the bypass approach, matching the Senate version supported by Sen. Jon Tester (D-MT). In such an atmosphere of bipartisan comity (and crisis), an exemption bill never had a chance.

In early March, Deputy Interior Secretary David Hayes announced that FWS would withdraw its appeals-court challenge to U.S. Judge Alan Johnson's November 2010 ruling that keeping Wyoming's wolves listed while delisting Montana and Idaho wolves was "arbitrary and capricious"—a ruling functionally opposite Judge Molloy's prior rulings. The withdrawal removed a potential "conflict" between the 9th and 10th Circuit Courts if each appeals court upheld "its" district judges—a circuit conflict that would bring the Supreme Court into play.

On March 18, Hayes then announced that a settlement had been reached with 10 of the 14 (that's *fourteen*) plaintiffs in the 2008 10(j) lawsuit reactivated by Molloy after he'd shot down the 2009 Rule.

Keiran Suckling, of the Center for Biological Diversity (CBD), a group not known for legal restraint, conceded to the Associated Press that his group was in a "political firestorm," therefore settling was "the best step in a political strategy to head off disastrous congressional action." While the settlement "allowed" Montana and Idaho hunts under FWS oversight, it kept wolves outside Montana and Idaho fully protected. In return, Greens would get an "independent scientists" panel that could very well independently conclude higher population floors, and withdrew for rewrite the "significant portion of the range" authority—a huge win for Greens.

But Judge Molloy rejected the settlement April 9. Congress then passed the rider April 14. Greens got what they feared most, a direct congressional vote on ESA issues. And, as everyone knows, doing it the first time is always the hardest.…

On May 5, the same day FWS released the Federal Register notice that the 2009 Rule would be implemented, FWS also announced the start of the process for delisting gray wolves in the Midwest (Wisconsin, Upper Michigan and Minnesota).

The Deal Maker

If you think there's a method to this madness, you're right. For one thing, Deputy Secretary David Hayes played a role in shaping Treasured Landscapes as one of the "DOI_ Politicals" in the "Our Vision" national monument scheme. [See *RANGE*, Winter 2011 at www.rangemagazine.com]

More relevant is Hayes' track record as then Interior Secretary Bruce Babbitt's "fixer" in the Clinton era. Hayes was tasked with rescuing the Endangered Species Act from Congress by aggressively promoting Habitat Conservation Plans and their so-called "safe harbor, no surprises" protections.

HCPs were, and are, brilliant political strategy. Landowners invested in an expensive, painful HCP agreement that protected the landowner from future bankruptcy were far less likely to support ESA reform or repeal than a landowner facing being pushed off the cliff. Furthermore, an HCP success gave holdouts an incentive to buy in. In short, the

HCP solution politically co-opted parties that would otherwise aggressively support repeal or reform—but were now invested in keeping the ESA intact.

The HCP strategy worked. Hayes defused the ESA habitat bomb and put Congress back to sleep. Today, pressure for general ESA reform, or species exemptions, is ramping up. For example, federal Judge James Redden has sent the government back to the drawing board three times since 2001 over its salmon management plan for the Columbia River. In early May, the 82-year-old Redden held his last hearing on the matter. Might he finally rule that dams must be blown to save fish?

Furthermore, the same week of Redden's hearing (May 10), the Obama administration (through David Hayes) announced a settlement with WildEarth Guardians. Since 2007, WildEarth Guardians and CBD have combined to blitz (and paralyze) the feds with 1,230 new species-listing petitions.

FWS agreed to yay or nay 251 candidate species no later than Sept. 30, 2016, with several sexy species such as Pacific fisher and sage grouse having earlier decision deadlines. In return, WildEarth Guardians agreed not to sue again before March 31, 2017, and not to submit new listing petitions for any more than 10 species per fiscal year. Most charmingly, "Defendants [FWS] agree that the Plaintiff is the prevailing party…entitled to an award of reasonable attorney's fees and costs." Jackpot!

For its part, CBD walked away from the WildEarth Guardians settlement because the deal would limit its litigation options and left out, among others, the wolverine. The settlement was stayed by District Judge Emmett Sullivan May 17 for further mediation until June 20.

So, is it any coincidence that the man who saved the ESA once is again involved? Now as Interior Secretary Ken Salazar's fixer, David Hayes is doing everything possible to demonstrate to Congress that the ESA as written is fine, just fine, and no further action is necessary.

A Deal Breaker

Hayes may fail, however. Although Congress has finally voted directly on an ESA species, game managers (and everyone else) in the affected Rockies/Northwest states are fully aware that Congress can still vote to relist the populations released by the 2009 Rule if "acceptable" numbers of wolves in acceptable habitat aren't maintained.

Apart from wolves, pressure for general ESA reform, or species exemption, may ramp up.

On the other hand, Congress can always vote to delist wolves as a species worldwide, and Congress may soon have all the reasons it needs. The truth is that the ESA itself was not amended in any way. It appears that Hayes succeeded in preventing Congress from mangling the ESA after all.

Or did he? The very day FWS reinstated the 2009 Rule (May 5), two lawsuits were filed in Judge Molloy's court: Alliance for the Wild Rockies (an EarthFirst! spinoff), WildEarth Guardians and another holdout from the blown March 18 settlement filed one case; the Center for Biological Diversity filed the other.

Both lawsuits allege the Simpson/Tester rider violates the Constitution because "a legislative enactment" aimed at "the outcome of a particular pending case" that does not amend the "underlying statute" is a violation of the Separation of Powers Doctrine. Remember, the lawsuit in which Molloy spiked the 2009 Rule is still live, under appeal to the 9th Circuit Court.

Conspicuously absent from this latest round of court excitement is, for some strange reason, former Green "pack leader," Defenders of Wildlife. A whole passel of groups (Montana and Idaho farm bureaus, Rocky Mountain Elk Foundation, National Rifle Association, Safari Club, Friends of Animals, state of Idaho) filed motions to intervene in the separation of powers case. Plaintiffs had no objection, nor did the FWS, but all were rejected by Judge Molloy on June 1. Among other things, Molloy stated that "differing litigation strategies do not normally justify intervention."

What might Judge Molloy do? A few months before he is to take senior status (but not full retirement), he's being asked to rule whether or not Congress big-footed him, "constitutionally."

Consider that before becoming a judge in 1996, Molloy was working a case for Trial Lawyers for Public Justice. TLPJ's website brags it was "founded in 1982 at Ralph Nader's urging [no kidding]" to pursue litigation that would, as Nader biographer David Boller wrote, "forge new public policy in the process." To translate, TLPJ lawyers don't practice law, they rewrite it in court.

Regardless of how Judge Molloy rules, appeals (and delays) are nearly certain either way. But if Molloy declares, in essence, that not changing the law was unconstitutional, guess what? The "all or nothing" approach to species listings is back in force, with population minimums and range all open questions.

How will Congress respond? The possible outcomes have many environmental groups very concerned. One spokesman for a moderate environmental group declared to the *Missoulian,* "I fear more perhaps for the Endangered Species Act being damaged by furthering this discussion in this way."

Damaged? Or fixed? Howling insanity, indeed.

Dave Skinner is a writer, photographer and hunter. He lives in Whitefish, Mont. He says he'll, "do whatever it takes to hold on to the ranch in North Dakota that was his grandfather's legacy."

In Case You're Interested

Insert the case following case numbers in a Google search and you'll find the rulings as well as pleadings: CV-08-14-M-DWM (the 10j case); CV-08-56-M-DWM (first-round delisting lawsuit, mostly against Wyoming's trophy and predator zones, also genetics and minimum populations); CV-09-77-M-DWM; CV-09-82-M-DWM (second-round consolidated cases, genetics and population, against 2009 Rule); CV-11-70-M- DWM (current separation of powers suit against Congress); United States v. McKittrick; 142 F.3d 1170 (9th Cir. 1998), established complete separation of experimental from "real" endangered populations applied in the 10j case.