

LEGAL STATUS MINORITY OPINION
Submitted by Sharon Beck, Member
Wolf Advisory Committee

In the cover letter that was sent from the staff of the Oregon Department of Fish and Wildlife (ODFW) to the Commission with the draft *Oregon Wolf Conservation and Management Plan* (Plan), is the statement that the Plan is intended to be a “conservation solution based on what is known and what is legal”.

This minority opinion on the legal status of the wolf in Oregon outlines how the proposed Plan is outside the scope of the Commission’s authority, how the Commission has failed to act in the way required by the Oregon Endangered Species Act (ESA), and why the Plan is unnecessary and violates the Oregon ESA.

The process that the Wolf Advisory Committee has nearly completed has been based on the opinion of the Oregon Department of Justice as to what the Oregon ESA says about conservation of the wolf. However, these opinions are largely unsupported by or inconsistent with Oregon law and legislative history. To the extent that the Plan is based on these opinions, it is also inconsistent with Oregon law and should not be adopted by the Commission.

Background

The Oregon ESA was enacted to protect wildlife species that were native to Oregon.¹ ORS 496.172(1). An endangered species was defined to be “any native wildlife species determined by the [Oregon Fish and Wildlife C]ommission to be in danger of extinction throughout any significant portion of its range within this state”. ORS 496.009(6). A threatened species was defined as “any native wildlife species the commission determines is likely to become an endangered species within the foreseeable future throughout any significant portion of its range within this state”. ORS 496.009(16).

Oregon Revised Statute 496.172 sets forth the powers of the Commission under the Oregon ESA with regards to native endangered/threatened species. According to the statute, the Commission shall:

- (1) Conduct investigations to determine if a native wildlife species is threatened or endangered;
- (2) Establish, publish, and revise the state’s threatened and endangered species list, and protect species as required by ORS 496.182 (survival guidelines and consultation on state agencies’ endangered species management plans);

¹ “Native means indigenous to Oregon, not introduced”. ORS 496.171(2). According to the legislative history, the drafter intended that the ESA would not apply to species that had been extirpated from the state. The Oregon Fish and Wildlife Commission (Commission) ignored this legislative history in adopting its administrative rules. OAR 635-100-0110(5)(a). As such, there is question regarding the legality of the Commission’s administrative rules on this point.

- (3) Work cooperatively w/state agencies that have land management authority or regulatory authority to determine their roles, within their statutory obligations, in the conservation of endangered species as described in ORS 496.182(8);
- (4) Establish a take permit system for threatened and endangered species NOT federally listed as endangered or threatened species;
- (5) Cooperate with the Oregon Department of Agriculture to protect native plants (carry out provisions of ORS 564.105); and
- (6) Adopt administrative rules to carry out the provisions of ORS 496.171-.182 (Oregon ESA) and ORS 496.026 (take prohibitions).

These powers are to be exercised in such a way so that private landowners are not required to protect threatened/endangered species on their land, and so that uses of private land are not further restricted within the state. ORS 496.192(1).

In 1995, when wolf introduction began in the Western states, the Oregon legislature had the foresight to amend Oregon's ESA to protect the state against the significant cost of recovering wildlife already being addressed by the federal ESA. ORS 496.182(1). The legislature was willing to be involved in cooperative state or federal programs for listed species, but only if they did not significantly impact the primary uses of state land. *Id.*

The Proposed Wolf Management Plan is Outside the Commission's Authority

State commissions can only act as authorized by the legislature. Actions inconsistent with or outside the scope of the statutory authority provided to the Commission are inappropriate and reversible by a court of law.

In a January 31, 2003, Memorandum to the Commission, Assistant Attorney General William Cook (Mr. Cook) addressed conservation of gray wolves in Oregon. He stated that the Commission had the authority to develop a plan for wolves in Oregon within the context of the "conservation mandate" of the Oregon ESA. *See* January 31, 2003, Memorandum, from William J. Cook, page 2. Mr. Cook also stated that "[t]he law provides an array of management options from which the Commission may choose when determining how to conserve the species". This memorandum failed, however, to address the limited role the legislature has created for the Commission in conservation actions. It also failed to address important limitations of the management options available to the Commission.

1. Limited Conservation Role

The Oregon ESA authorized the Commission to consult with land-owning agencies who are working to determine what role, if any, they can play in the conservation of species. ORS 496.172(3), 496.182(8). However, the determination as to what conservation actions are taken is left to the state agency, not the Commission. ORS 496.182(8)(B) ("the state land owning or managing agency, in consultation with the State Department of Fish and Wildlife, shall determine the role its state land shall serve in the conservation of

the endangered species”). The only conservation activities the Commission controls are those on the Oregon Department of Fish and Wildlife’s (ODFW) land.

As set forth above, the Oregon ESA also prohibits the Commission from any requiring private landowners to protect species and from restricting the use of private land as a result of Commission actions under the statute. ORS 496.192(1). If the Commission were to adopt the Plan as written, it would be contrary to this statute.

The Oregon legislature has not authorized the Commission to set out a state-wide conservation or recovery plan for species as it is attempting to do through the “Wolf Management Plan”. Nonetheless, the Plan provides for an extralegal process with the pretext of implementing “conservation”. The law requires the ODFW to fulfill a consulting function with land owning agencies to determine how they can help in conservation efforts and to determine how its own land can help with conservation efforts, *but no more*. The role of the ODFW concerning consultation are defined in law; It does not include doing the planning for other agencies or excluding them from the process.

The Oregon ESA also does not support a state-wide plan that requires actions on private lands. The scope of the Commission’s authority to manage the gray wolf as is set forth in ORS 496.172, 496.182, 496.192. Missing from this statute is the authority to write a plan for any land except that owned by the agency itself, and missing is the authority to conserve the species on any land but it’s own. Furthermore, missing is the authority, let alone the obligation, to “conserve” the wolf.

Mr. Cook’s January 31, 2003, Memorandum and later Commission directives state how the law defines conservation and what it says about methods and procedures that might be used, but then make a huge leap by giving broad authority, and even the responsibility, to the Commission to implement conservation actions throughout the state, despite applicable statutes that say otherwise. The Commission’s adoption of any plan that is based on this legal advice is outside the scope of the Commission’s statutory authority and is subject to legal challenge.

2. Limited Management Tools

The Oregon ESA authorizes regulation of “take” of endangered species. ORS 498.026(2); ORS 496.172(4); ORS 498.012(1), (3). However, it is very important to note that the Commission CAN NOT establish a system of state permits for the incidental take of endangered or threatened species that are on the federal list. ORS 496.172(4). As such, so long as the gray wolf is listed by the federal government as threatened in Oregon, the Commission is prohibited from providing incidental take permits to anyone for the take of a wolf. It is not clear why the Commission has not been advised by the Attorney General’s office of this fact. Nonetheless, **the Commission would be wise to avoid placing itself in a position of requiring a permit that it cannot issue.**²

² Note that incidental take permits are distinct from take for purposes of protecting private property from wolf damage. ORS 498.012. Damage take actions are direct take, not incidental.

The Commission Has Failed to Act As Required by the Oregon ESA

While the Commission has taken time to consider adopting a Plan that exceeds its statutory authority, it has failed to act as required by the Oregon ESA.

The legislature directed the Commission to review and revise the list of threatened/endangered species every five years and remove those that do not meet the definition of endangered or threatened as set forth in Oregon law. ORS 496.176(8). This is something the Commission has very blatantly failed to do. If it would have acted as required by law, the Commission would have removed the wolf from the endangered species/threatened species list long ago because the gray wolf does not qualify as an endangered or threatened species under the Oregon ESA.

The definitions for endangered species and threatened species³ require that any listed species be native. The subspecies of *canus lupus* that previously existed in Oregon was declared extinct many decades ago. As a result, any wolf species introduced elsewhere that may migrate to Oregon is a subspecies or distinct population segment of a species that is not native to this state. These non-native species cannot be treated as species that deserve listing under the Oregon ESA.

The statutory definitions for endangered and threatened species also require that a listed species be in danger of extinction. Because gray wolves are extinct in Oregon, they cannot be *in danger of extinction*. By definition, they are not listable species. Therefore, they must be removed from the Oregon endangered/threatened species list.⁴

The Oregon ESA lists the following three factors, at least one of which must be present for a species to be listed as endangered or threatened:

- (a) That most populations are undergoing imminent or active deterioration of their range or primary habitat;
- (b) That overutilization for commercial, recreational, or scientific or educational purposes is occurring or is likely to occur; or
- (c) That existing state or federal programs or regulations are inadequate to protect the species or its habitat. ORS 496.176(3).

None of these factors are present for the gray wolf. A gray wolf population's survival is determined independently of its habitat. It has been said that the gray wolf is a habitat

³ "Endangered species" is defined to be "(a) [a]ny native wildlife species determined by the commission to be in danger of extinction throughout any significant portion of its range within this state"; and "(b) [a]ny native wildlife species listed as an endangered species pursuant to the federal Endangered Species Act". ORS 496.004(6). Threatened species is defined as "[a]ny native wildlife species the commission determines is likely to become an endangered species within the foreseeable future throughout any significant portion of its range within this state"; and "(b) [a]ny native wildlife species listed as a threatened species pursuant to the federal Endangered Species Act". ORS 496.009(16).

⁴ The federal rules adopted pursuant to the federal ESA deal with this situation explicitly by listing extinction as a basis for delisting a species. 50 C.F.R. . § 424.11(d).

generalist and its habitat is anywhere it exists. Thus, the USFWS has concluded that habitat loss, deterioration, or modification is not considered to be a threat or deterrent to gray wolf recovery. *Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States*, 68 Fed. Reg. 15804, 15845 (“Final Rule”). The federal government has found that sufficient habitat exists for wolf populations because the gray wolf has very stable populations throughout its current range (currently occupied habitat) in the Western and Eastern United States. Final Rule 15822, 15828. The gray wolf is currently protected by the federal ESA as a threatened species throughout these areas. Final Rule 15804 et seq. It is further protected as an endangered species by the federal government in the Southern United States.⁵ *Id.* In light of these factors, even if a wolf were found in Oregon and even if it were determined to be native to Oregon (note that neither I or those I represent would agree with such a determination), it does not meet any of the three prerequisites for listing, and should not, therefore, remain on the Oregon endangered/threatened species list

The Commission should do as the legislature has required and review and revise the list of threatened/endangered species. In light of the information set forth above, this should lead the Commission to remove the gray wolf from Oregon’s list for the reason that it does not meet the definition of endangered or threatened as set forth in Oregon law and for the reason that none of the listing factors set forth in ORS 496.176(3) are present for the gray wolf.

The Plan Is Unnecessary and Violates the Oregon ESA’S Policy Against Duplication

Mr. Cook advises that the most important tool the Commission has to conserve wolves is the “take” prohibition, which authorizes the Commission to regulate take of Oregon wildlife. He states that the Commission has long-standing authority to prohibit or regulate the taking of wolves. However, this advice does not account for the limitation on developing incidental take permits only for species not listed by the federal government. ORS 496.172(4). It also is inconsistent with Oregon law, which provides that federal take permits and statements will preempt state protective measures. *Id.* (“An incidental take permit or statement issued by a federal agency for a species listed under the federal Endangered Species Act. . .shall be recognized by the state as a waiver of any state

⁵ When the USFWS evaluated the Western States for wolf habitat, it passed Oregon up as inadequate because of the lack of large blocks of public land. Plus, ODFW had established that Oregon did not have an adequate prey base for another large predator. See ODFW “Wolf Issues” Memorandum, prepared by Mark Henjum, dated February 6, 2002. Notably, the USFWS did not require critical habitat or a wolf management plan in Oregon prior to downlisting the gray wolf in the West. Final Rule 15822 (designation of critical habitat is unnecessary); Final Rule 15840 (USFWS is not interested in and has no plans for management of wolf recovery in states adjacent to ID, MT, and WY). The USFWS also did not and will not require that wolves occupy Oregon prior to downlisting or delisting the gray wolf in the Western DPS. Final Rule 15810-11.

protection measures or requirements otherwise applicable to the actions allowed under the federal permit.”)

Furthermore, it should be noted that until the Commission goes through a public process of developing administrative rule, it may not restrict damage take activities.⁶ ORS 498.012(1) (“Nothing in the wildlife laws is intended to prevent. . .taking any wildlife that is damaging. . .land. . .livestock. . .”); *see also* OCA Letter to Commission dated May 14, 2004 (attached). Plus, any action concerning damage take permits of this sort must be consistent with the 2003 Oregon legislature’s strong emphasis on an approach to wildlife management that ensures appropriate measures are taken to assist farmers, ranchers and others in resolving wildlife damage problems. ORS 610.055(1) (2003).

If the Commission is successful in adopting the Plan by administrative rule, then the Commission may indeed have additional authority to control human behavior through a prohibition on damage takes (note that the general restriction on taking endangered/threatened species is already in place under ORS 498.026(1)). However, the question is whether this action is necessary in light of the fact that the federal government has determined that the gray wolf need not occupy Oregon in order for the gray wolf to be delisted in the United States.

Furthermore, is this action necessary in light of the fact that private landowners are already able, under Oregon law, to protect their private property from damage by a gray wolf? The Commission is proceeding under the false presumption that damage take can only occur if it acts. This is contrary to a plain reading of Oregon law.

The only action that is truly needed by the Commission at this time is to establish a hazing permit system for problem wolves (pursuant to ORS 498.006) and to pledge assistance to the public when they are unable to deal with a problem wolf without government assistance. (Notably, it is the federal government (APHIS) that will be working to remove wolves, not the state itself. This again raises the question of the purpose of the Plan. Problem wolves would be dealt with even without a Plan in place.) In addition, the Commission should act as required by law to remove the gray wolf from the Oregon endangered/threatened species list.

When the legislature was writing the endangered species laws it did not intend to regulate private lands or including them in the “conservation” processes since it specifically limited the ESA provisions to state owned land, prohibited the Commission from imposing requirements on private landowners to take affirmative action to protect species, and restricted the Commission from imposing restrictions on the use of private land through authority delegated to it by the Oregon ESA.

⁶ At this time, the wolf is classified as an endangered species in Oregon. Thus, the only requirement for a take of a wolf attacking livestock under both Oregon and federal law is to report such take to the state and the USFWS (with the exception of public lands grazers, who are required to obtain a permit prior to any take actions). ORS 498.012(3); Final Rule 15865.

In addition, the legislature clearly was opposed to actions that were duplicative of the federal government's. In the audio tapes of the 1995 ESA Amendment hearings, the author of the amendment, Representative Veral Tarno, clearly stated the intent of HB 2120 (the ESA Amendments): "What it [HB 2120] tries to do is just get our State out of the business if the feds are involved in listing these species. The biggest concern is why do we have to have a duplication of effort? If the federal government is going to list a species, then why do we have to come back and do the same duplicate work that the feds have done?" The Oregon ESA also states that:

Notwithstanding the provisions of this section, the Commission may decide not to list a species that otherwise qualifies as a threatened or endangered species within this state if the Commission determines that the species is secure outside this state or the species is not of cultural, scientific or commercial significance to the people of this state.

ORS 496.176 (9) (emphasis added) (note that this originally had the word "and" in the place of the underlined word "or" above, but the 1995 amendments changed the "and" to "or" to allow the Commission much more flexibility and reasons NOT to list species).

Clearly, the legislature did not intend for the Commission to become involved in protecting and recovering a species that the federal government was already protecting, and this policy was intended to be applied even if the species was not present in Oregon or only minimally present in the state. The Commission's adoption of this Plan would directly contravene this directive.

Implementation of the proposed Plan requires changing "what is legal". It is largely contrary to Oregon law and the clear direction of the Oregon legislature. Without significant changes, any adoption of the Plan would be tantamount to the Commission attempting to amend state law through the adoption of administrative rule.

Conclusion

In light of the above, I request that the Commission choose not to adopt the draft plan. Instead, let the Commission adopt rules for hazing problem wolves, allow damage take without the burden of permits, and pledge to obtain funds to provide compensation for wolf damage and to support government control of problem wolves. Also, let the Commission leave the recovery and protection of gray wolves to the federal government, and act as required by law to review and remove the gray wolf from the Oregon endangered/threatened species list. Any other action will simply result in the adoption of a Plan that is clearly not based on what is "legal" or what is "known".