

Legal Review

October 29, 2015

**Cascadia Wildlands Legal Memo
Oregon Gray Wolf Delisting
Oregon Department of Fish and Wildlife Commission**

There are several particularly relevant statutory requirements concerning the listing and delisting of endangered and threatened species under Oregon law. The Commission must (1) determine whether or not the natural reproductive potential of the species is in danger of failure, ORS 496.172; (2) consider the species deterioration of range and habitat, overutilization for scientific, commercial, educational, or recreational purposes, and the extent of existing federal and state regulations, ORS 496.176(3); and finally (3) a delisting rule “shall be based on documented and verifiable scientific information about the species’ biological status,” ORS 496.176(3).

In determining whether or not to list a species, the Commission must determine whether or not the natural reproductive potential of the species is in danger of failure. ORS 496.172. The statute specifically provides:

(2) The commission, by rule, may add or remove any wildlife species from either list, or change the status of any species on the lists, upon a determination that the species is or is not a threatened species or an endangered species.

(3) A determination that a species is a threatened species or an endangered species shall be based on documented and verifiable scientific information about the species’ biological status. To list a species as a threatened species or an endangered species under ORS 496.004 and 496.171 to 496.182, the commission shall determine that the natural reproductive potential of the species is in danger of failure due to limited population numbers, disease, predation or other natural or human actions affecting its continued existence and, to the extent possible, assess the relative impact of human actions. In addition, the commission shall determine that one or more of the following factors exists:

- (a) That most populations are undergoing imminent or active deterioration of their range or primary habitat;
- (b) That overutilization for commercial, recreational, 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. Oregon law maintains that a species should be retained on the endangered species if there is still a danger of species conservation failure. ORS 496.176(2), (3); OAR 635-100-0112.

As an initial point, extensive, unsolicited review from interested members of the scientific community have argued that these requisite five factors listed above have not been met.

Based on current, verified wolf numbers in the state, ODFW admits there is a 5-6% risk of survival failure in the state. ODFW states that Oregon’s wolf population is “close to the conservation-failure threshold”

and admit that a “few years” of low population growth rates could “cause the population to decline below the threshold” (p. 69). A delisting rule at this time with this risk of survival failure is inconsistent with ORS 496.176(2), (3). It is not unreasonable to ask the state to wait to delist until this risk no longer exists; ODFW claims Oregon’s wolves are likely to surpass 100-150 in “1 to 3 years”, and that the threat of extinction or conservation failure will then be eliminated. (p. 69). This finding itself precludes outright removal of the gray wolf from the state list.

Further regarding the Department’s study, Oregon law requires that a delisting rule “shall be based on documented and verifiable scientific information about the species’ biological status.” ORS 496.176(3). “The commission by rule may remove a wildlife species from the state list upon a review of the best available scientific and other data which meets the criteria set forth below. The scientific information shall be documented and verifiable information related to the species’ biological status.” OAR 635-100-0112. “Documented and verifiable scientific information” is defined as scientific information reviewed by a scientific peer review panel of outside experts. OAR 635-100-0010(16). In other words the five listing/delisting factors described above must be met/or not met in order remove a species from the endangered species list, and determinations and analysis regarding those factors must be subjected to an external peer review.

ODFW or the Commission has yet to have the delisting proposal reviewed by an external peer review panel. It appears that the Department reached out to a singular scientist, Carlos Carroll for external review of the rule. This does not qualify as review by a scientific peer review panel, there are set processes to follow and societies that can be contracted to conduct an unbiased, legitimate, external peer review. Furthermore, there has been extensive unsolicited feedback from the scientific community that points out the flaws and inadequacies of the Department’s population viability analysis, and recommends conducting a formal external peer review.

Regardless, Carlos Carroll determined that the Department’s population viability analysis which placed the rate of conservation failure at five to six percent was overly optimistic in a number of ways, thus under representing risk of species failure in the state. Additionally, Carroll determined that the Department disregarded the genetic threat to wolves in Oregon and that this also ultimately led to an overly optimistic finding regarding potential population failure.

As such, preliminary scientific review indicates that the Department’s delisting determination is not based on the best available science and even assuming the Department’s overly optimistic modeling, there is still a substantial risk of conservation failure precluding delisting.

To proceed in a legally secure fashion, we recommend the Commission postpone any determination on the proposed delisting rule until after review by a peer review panel of scientists. Given early scientific indications that the current study by the Department is overly optimistic and flawed, we would further recommend that the Department postpone delisting efforts until confirmed wolf numbers and distribution have increased. It would also benefit the Department to postpone delisting efforts until after the five year review has been completed given that the Department would have a better understanding of the regulatory framework for the following five years.

Please contact Nick Cady, Legal Director of Cascadia Wildlands with any questions regarding this memo.

Nick Cady
Cascadia Wildlands
PO Box 10455

Eugene, Oregon 97440
(541) 434-1463
nick@cascwild.org