



United States Department of the Interior

OFFICE OF THE SOLICITOR

M-37024

MAY - 4 2011

Memorandum

To: Secretary
Assistant Secretary for Fish and Wildlife and Parks
Director, U.S. Fish and Wildlife Service

From: Solicitor

Subject: Withdrawal of M-37013 – The Meaning of “In Danger of Extinction Throughout All or a Significant Portion of its Range.”

On March 16, 2007, my predecessor issued a legal opinion, M-37013, that addressed several issues regarding the meaning of the phrase “in danger of extinction throughout all or a significant portion of its range” (SPR phrase). This phrase is found in the Endangered Species Act’s (ESA) definitions of “endangered species” and “threatened species.” See 16 U.S.C. § 1532(6), (20). In a 2010 decision involving the Northern Rocky Mountain distinct population segment of the gray wolf, a district court rejected Opinion M-37013’s conclusion regarding the interpretation of the SPR phrase that provided for applying the ESA’s protections to a listed species in only a portion of its range. See *Defenders of Wildlife v. Salazar*.¹ A subsequent decision from a court in the District of Arizona reached the same conclusion as the Montana court. See *WildEarth Guardians v. Salazar*.² Opinion M-37013 is also directly implicated in several pending cases.³ In light of these adverse decisions, the Fish and Wildlife Service (FWS) has notified me of its intention to reconsider how it applies the SPR phrase and to develop guidance on how to apply the SPR phrase in making decisions to add or remove species from the lists of threatened and endangered species. Therefore, I hereby withdraw Opinion M-37013⁴ to facilitate FWS’s review of the SPR phrase and issuance of new guidance.


Hilary C. Tompkins

¹ 729 F. Supp. 2d 1207 (D. Mont. Aug. 5, 2010), *appeal docketed*, Nos. 10-35885, 10-35886, 10-35894, 10-35897, 10-35898, and 10-35926 (9th Cir.) (The appeal is likely to be affected by the recent enactment of Sec. 1713 of P.L. 112-10 (April 15, 2011) which directs the Secretary to reissue the rule vacated by the court and precludes judicial review of its reissuance.)

² 2010 U.S. Dist. LEXIS 105253 (D. Ariz. Sept. 30, 2010), *appeal docketed*, No. 10-17638 (9th Cir.).

³ *Center for Native Ecosystems v. Salazar*, No. 09-cv-01463 (JLK) (D. Colo.); *Center for Biological Diversity v. Salazar*, No. 09-cv-2233 (PLF) (D.D.C.); and *National Association of Home Builders v. Salazar*, Civ. No. 10-832 (GK) (D.D.C.).

⁴ As noted above, Sec. 1713 of P.L. 112-10 directed the reissuance of the 2009 Northern Rocky Mountain wolf rule. Nothing in that section affects my authority to withdraw Opinion M-37013. The statute is applicable only to the issuance of this single rule; it makes no reference to Opinion M-37013 nor does it amend the Endangered Species Act generally.