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February 10, 1986

The Honorable Larry Echohawk
House of Representatives
Resources and Conservation Committee

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Mr. Echohawk:

Your question on the wolf depredation statute recently introduced by the House Resources and Conservation Committee has been referred to me for response.

QUESTION PRESENTED:

Does a proposed statute, which allows individuals to destroy without criminal or civil liability wolves that are depredating livestock, conflict with any provisions of federal law?

BRIEF ANSWER:

The proposed statute could be in conflict with the Endangered Species Act and if so would not insulate a person from prosecution by the federal government.

ANALYSIS:

The Supremacy Clause of the United States Constitution, art. 6, cl. 2, requires that state law must yield where state and federal law conflict. Conflicts between state and federal law were recently discussed by the United States Supreme Court in Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984):

[S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with

both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purpose and objectives of Congress.

(Citations omitted.)

The Endangered Species Act, 16 U.S.C. §§ 1531 to 1543, was enacted by Congress in an attempt to conserve plant and animal species that are in danger of extinction. 16 U.S.C. § 1531. Under this act, it is unlawful for any person to take an endangered species within the United States. 16 U.S.C. § 1538(a)(1)(B). To "take" an endangered species "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Illegal taking of an endangered species carries civil and criminal penalties. Under 16 U.S.C. § 1540(a), a person who knowingly violates the act can be assessed a penalty of up to \$10,000 by the Secretary of Interior; under 16 U.S.C. § 1540(b), a person convicted of a knowing violation of the act can be fined up to \$20,000 and imprisoned for up to a year. Finally, 16 U.S.C. § 1535(f) discusses conflicts between state and federal laws and states that "[a]ny state law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this Act or in any regulation which implements this Act but not less restrictive than the prohibitions so defined."

The species of wolf present in Idaho is Canis lupus; this species is commonly referred to as the gray, timber, or Northern Rocky Mountain wolf. Historically, gray wolves roamed over much of Idaho but today survive only in small numbers in the central Idaho area. See generally T. Kaminski and J. Hansen, Wolves of Central Idaho 29 (1984). The gray wolf has been listed as an endangered species in Idaho since 1967. 32 Fed. Reg. 4001 (1967); 50 CFR §17.11 at 72.

The bill in question, proposed I.C. § 25-2809, states that "[a]ny wolf which is threatening, tracking, pursuing, harassing, attacking or killing domestic livestock or poultry may be destroyed by anyone without criminal or civil liability." Since the gray wolf is listed as an endangered species in Idaho, the proposed bill would probably be in direct conflict with the Endangered Species Act. According to the interpretation of the Endangered Species Act by federal fish and wildlife officials, the listing of the gray wolf as an endangered species prohibits the type of activity sanctioned by this bill. Therefore, the proposed statute could not shield a person from prosecution under the Endangered Species Act unless the taking were authorized under an exception to the Act.

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The only exception that might permit the taking of a gray wolf is found in 16 U.S.C. §1539(a)(1):

The Secretary [of Interior] may permit, under such terms and conditions as he shall prescribe--

- (A) any act otherwise prohibited by section 9 [16 U.S.C. §1538] for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j);
- (B) any taking otherwise prohibited by section 9(a)(1)(B) [16 U.S.C. §1538(a)(1)(B)] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

An "experimental population" is defined as "any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species." 16 U.S.C. § 1539(j). Reintroduction of wolves into an area such as Yellowstone National Park would be considered an experimental population but taking them would be subject to strict regulation by the Secretary of Interior. See U.S. Fish and Wildlife Service, Agency Review Draft Revised Northern Rocky Mountain Wolf Recovery Plan 26 (1985). Even assuming this exemption may, under very strict restrictions, permit the taking of a wolf in an experimental population, it would not permit the taking of a wolf from a natural population.

Please do not hesitate to contact me if you have any further questions on this matter.

Very truly yours,



Steven J. Schuster
Deputy Attorney General
Natural Resources Division

SJS/cjm