

From: [Bean, Michael](#)
To: [Robert Aland](#)
Subject: Re: GRIZZLY BEARS - TELEPHONE CONVERSATION
Date: Saturday, January 31, 2015 1:59:17 PM

Thank you for sending me these.

On Sat, Jan 31, 2015 at 11:48 AM, Robert Aland <rhaland@comcast.net> wrote:

Dear Mr. Bean:

I thought you might like to read about two more recent FWS and NPS decisions apparently based on politics/economics and not on science.

Please see the attached.

Sincerely,

Bob Aland

On 1/20/15, 9:45 PM, "Michael Bean" <michael_bean@ios.doi.gov> wrote:

>Mr Aland, thank you for your detailed email.

>

>Sent from my iPad

>

>> On Jan 20, 2015, at 1:09 PM, Robert Aland <rhaland@comcast.net> wrote:

>>

>>

>> Dear Mr. Bean:

>>

>> Happy New Year. And hopefully a happy new year for grizzly bears.

>>

>> I have been thinking about your December 2 e-mail below, I would like to
>> offer a few comments.

>>

>> Decision To Be Based on Science

>>

>> First, let me address your assurance that "any decision to delist or
>>not

>> delist the grizzly bear will be based solely on science, as the law
>> requires."

>>

>> Prior to my retirement from the active practice of law, I engaged in a
>> substantial amount of litigation in my field. I learned, as I am sure
>>you

>> know, that "science" is a fluid term. There is no simple answer to the
>> question: "What is the best available science?" I can probably find

>> scientific opinion from one end of the spectrum to the other and at all
 >> points in between with regard to almost all subjects. This results in
 >> scientific (as well as economic and other) opinions in litigation at
 >>polar
 >> opposites depending upon which party offers the scientific evidence.
 >>The
 >> Supreme Court's landmark decisions in Daubert, 509 US 579 (1993), and
 >>Kumho
 >> Tire, 526 US 137 (1999), at their core, were all about determining which
 >> scientific opinions in litigation are acceptable and unacceptable. The
 >> trial court, according to the Supreme Court, is the "gatekeeper" in the
 >> battle of scientific experts.
 >>
 >> Will the Grizzly Bear Recovery Coordinator in the next attempt to
 >>delist the
 >> grizzly bears rely on the best available scientific evidence as you say
 >>in
 >> your e-mail? The answer, in my view, is "highly questionable." I reach
 >> this answer, in large part, by reference to the Coordinator's
 >>performance in
 >> the Greater Yellowstone litigation. I am quite familiar with the
 >> Administrative Record ("AR") in that litigation, and there is
 >>substantial
 >> evidence in that AR, which was prepared by the Coordinator, that was
 >> completely ignored. Perhaps most revealing was the Coordinator's
 >>personal
 >> selection and instruction of peer reviewers. Not even one of the 8 peer
 >> reviewers was a US person having special expertise with regard to
 >> Yellowstone Area grizzly bears. To no one's surprise, all peer
 >>reviewers
 >> supported FWS's delisting decision. These peer reviewers certainly
 >>would
 >> not have passed the Daubert and Kumho Tire tests.
 >>
 >> The next question is: Who within FWS in the current delisting exercise
 >> will monitor the Coordinator's determination of the best available
 >>science
 >> and selection of the appropriate peer reviewers to assure that he
 >>relies on
 >> the best available science and the most qualified peer reviewers? Who
 >>will
 >> be FWS's "gatekeeper" to use the Supreme Court's term?
 >>
 >> Based on my experience in the prior litigation, I conclude that there
 >>has
 >> been no FWS "gatekeeper." The Coordinator has been given almost a free
 >>rein
 >> for the last decade or more. That is not acceptable. See discussion
 >>below.
 >>

>> In my view FWS's determination of whether or not to try again to remove
>>ESA
>> protection for grizzly bears based on science is simple and
>>straightforward.
>> The most fundamental scientific test has not been satisfied: The
>>numbers
>> show that the grizzlies in Yellowstone and NCDE Areas were not
>>recovered in
>> 2007 and have not recovered as of today. Even under the new counting
>>method
>> promulgated by FWS in anticipation of delisting, which is highly suspect
>> because it appears to have been adopted to guarantee for the purpose of
>> delisting a higher number than under the method it superseded (I.e., the
>> flexible "science" discussed above), the number is no more than about
>>1,500.
>> (At one time, as you know, before massive human-caused mortalities,
>>there
>> were 50,000 100,000.) That number is far too small for the many
>>millions
>> of acres comprising the two ecosystems in question. Scientific
>>evidence in
>> the AR for the prior litigation indicates that there should be as many
>>as
>> 5,000 grizzly bears in the Yellowstone Area alone in order to have a
>> permanently self-sustaining, genetically sound population. See AR
>>55291-92,
>> 55354, 55369, 55478, 55553-54, 55755 (signed by 269 scientists).
>>
>> In this situation, having failed the most fundamental scientific test,
>>it
>> should not even be necessary to address the five statutory factors for
>> delisting, although those factors too would favor continued ESA
>>protection
>> of the bears.
>>
>> Decision Not Made or Imminent
>>
>> Turning to your point that a decision has not been made and is not
>>imminent,
>> I certainly want to accept your assurance but you can see why it is
>>easy to
>> conclude otherwise based upon the barrage of items that have been
>>written in
>> the last few years stating that a decision to delist would be issued in
>>late
>> 2014 or early 2015. Examples, among many others:
>> * Secretary Salazar stated in his July 2012 letter to Governor Mead
>>that he
>> wanted to "bring resolution to the grizzly bear issue quickly."
>> * Secretary Jewell's September 2013 letter to Governor Mead: "The Fish

>>and
>> Wildlife Service plans to make that decision [whether to delist] in
>>early
>> 2014."
>> * Governor Mead's May 2014 letter to Secretary Jewell (with copies to
>> Governors Bullock of Montana and Otter of Idaho and FWS Director Ashe):
>> "Based on your September 2013 letter, I had expected to see a delisting
>> decision in early 2014. There is no reason to wait. . . ."
>> * A blog in the Idaho Statesman-Review stated in December 2014:
>>"There are
>> an estimated 700 grizzly bears roaming the Greater Yellowstone
>>Ecosystem,
>> and next year the U.S. Fish and Wildlife Service will again propose
>>removing
>> federal protections for those bears and transferring management
>>authority to
>> the state. . . ."
>>
>> Objectively, it appears that a current decision to delist the bears
>>again
>> was foreshadowed by FWS's September 2013 biological opinion increasing
>>the
>> permissible "take" of grizzly bears on certain public lands. That
>>opinion
>> was based, perhaps in large part, on the new, and questionable, counting
>> method mentioned above. In fact, that biological opinion appears to
>>be a
>> mini-delisting in and of itself.
>>
>> Role of the Grizzly Bear Recovery Coordinator
>>
>> When I read an editorial in the Wall Street Journal on January 6, 2015,
>> relating to a different subject (i.e., the AIG episode), the following
>> paragraph caught my special attention in the context of your e-mail:
>>
>> "But New York Attorney General Schneiderman has continued to pursue a
>>state
>> civil law lawsuit against Mr. Greenberg. He is doing so even after
>>most of
>> his case has collapsed and his chances of winning any damages have been
>> quashed. His remaining motive seems to be the political one of saying
>> someday that he finally nailed a great white whale like Mr. Greenberg.
>>Like
>> Captain Ahab, he seems to have lost all judgment on the issue."
>>
>> The paragraph, in my view, can be slightly modified to apply to the
>>grizzly
>> bear decision by substituting (1) "Grizzly Bear Recovery Coordinator"
>>for
>> "New York Attorney General Schneiderman"; (2) "delisting decision" for

>> "state civil law lawsuit"; and (3) "grizzly bears" for "Mr. Greenberg."
>> The
>> Coordinator's case collapsed in Greater Yellowstone in the Federal
>> District
>> Court for Montana in 2009 and the US Court of Appeals for the Ninth
>> Circuit
>> in 2011.
>>
>> The Coordinator, in my view, is pursuing the grizzly bears in the same
>> manner that Captain pursued the whale and for reasons having little to
>> do
>> with science. It is hard for me to believe that the Coordinator will
>> give
>> up the pursuit under any circumstances.
>>
>> Perhaps the catalyst for the new delisting effort was Governor Matthew
>> Mead's May 2012 letter to Secretary Salazar, but my guess is that the
>> Coordinator would have triggered the new effort even if that letter had
>> not
>> been written. The Coordinator, based on documents that I received
>> under the
>> FOIA, was even involved in the preparation of Secretary Salazar's July
>> 2012
>> response to Governor Mead's letter.
>>
>> I do not easily attribute an official decision of this importance to a
>> single official in a large federal agency, but my conclusion, which I
>> know
>> is shared by many other grizzly bear supporters, is based on my
>> observations
>> and the Coordinator's actions and statements during the course of my
>> substantial involvement in the grizzly delisting matter since 2005,
>> when the
>> first delisting proposal was issued.
>>
>> One of the aspects of the Coordinator involvement that has shocked me,
>> as a
>> trial lawyer prior to my retirement, is the manner in which the
>> evidence for
>> litigation of this type is put together and used in the litigation. One
>> party, the agency, prepares the evidence in the form of the AR, submits
>> the
>> evidence to the court with a declaration of completeness and accuracy
>> and
>> controls the evidence thereafter under a number of favorable court
>> decisions. I know of no other area of the law in which the evidence is
>> so
>> controlled by one party without the other party having the right to
>> challenge and expand that evidence. We can discuss at a later time
>> whether

>> the AR in the prior grizzly litigation was complete and accurate.
>>
>> The Office of the Coordinator should be terminated and its
>>responsibilities
>> returned to the National Office where they belong.
>>
>> Governor Mead's Erroneous Management Cost Calculation
>>
>> I believe it is important for Secretary Jewell and you to be aware that
>> Governor Mead provided erroneous information in his May 2012 letter to
>> Secretary Salazar with regard to the critical issue of Wyoming's cost of
>> managing grizzly bears, since this information is at least indirectly,
>>and
>> maybe directly, relevant to your December 2 e-mail.
>>
>> Attached are copies of the following documents:
>> * My December 18, 2012, letter to Secretary Salazar describing Governor
>> Mead's substantial error;
>> * My December 26, 2012, fax transmitting a copy of the letter to
>>Secretary
>> Salazar to assure receipt;
>> * The Department of the Interior's internal record of receipt of my
>>letter;
>> and
>> * The May 1, 2012, internal memo (including attachment) that I received
>> (from WGFD in response to my request under the Wyoming Public Records
>>Act)
>> providing the numbers to Governor Mead upon which he based the number
>>in his
>> letter to Secretary Salazar.
>>
>> As you will see, Governor Mead overstated the annual cost by 60% and
>>maybe
>> more. Was Mead's error inadvertent or intentional? I don't know, but
>>it's
>> hard to see how he could have made an inadvertent error of this
>>magnitude
>> based upon the simple arithmetic required to be applied to the cost
>>numbers
>> presented to him.
>>
>> As you will see, I sent copies of my December 18 letter to Governor and
>>the
>> Grizzly Bear Recovery Coordinator. However, I did not receive a
>>response
>> from the Secretary, the Governor Mead or the Coordinator, and I have not
>> seen any public correction of the serious error.
>>
>> It will be interesting to see how the Coordinator deals with this
>>matter in

>> the AR that he presumably is now compiling for the next round of
>>litigation.
>>
>> Conclusion
>>
>> FWS's current grizzly bear delisting project should be terminated. FWS
>>has
>> already fought the battle and lost, and it should not renew the battle
>>to
>> satisfy (1) the political goals of politicians such as Governor Mead,
>>who
>> certainly has not been reluctant to publicize the pressure that he has
>> exerted on the Department, including FWS, and (2) the personal goals of
>>the
>> Grizzly Bear Recovery Coordinator, especially at a time when FWS is
>>issuing
>> "warranted but precluded" determinations due to lack of adequate
>>resources.
>> The allocation of substantial FWS resources again to grizzly bears is a
>> waste of those resources that should be allocated to other projects.
>>
>> The only reason to delist the grizzly bears, obviously not recognized
>>in the
>> ESA, is to allow them to be hunted as contemplated by the "management"
>>plans
>> of Idaho, Montana and Wyoming, all of which contemplate reduction of the
>> number of grizzlies in the Yellowstone Ecosystem to the minimum of 500.
>> As
>> FWS stated in its 2005 delisting proposal published in the Federal
>>Register:
>> "With European settlement of the American West, grizzly bears were shot,
>> poisoned, and trapped wherever they were found, and the resulting range
>>and
>> population declines were dramatic.² FWS should not open the door for
>> renewed slaughter.
>>
>> Local politicians who claim delisting brings dollars to the states from
>> out-of-state hunters and establishes their credentials as opponents of
>> "federal interference," outfitters who charge large fees for guiding
>>hunters
>> in their killing quests (as they do for cougars), hunters who boast of
>>their
>> bravery, ranchers who seek to protect their livestock from depredation
>> without mentioning that most of that grazing (and depredation) takes
>>place
>> at bargain prices on public lands (I.e., the only homes the grizzly
>>bears
>> have) and resource exploiters who seek access to the bears' habitats are
>> anxiously awaiting a delisting decision. The rule from the Watergate
>>era -

>> "follow the money" - is alive and well in the case of grizzly bears.
>>
>> If a decision has not been made and is not imminent, as you say, now is
>>the
>> time to terminate this unjustified (from any standpoint) pursuit of
>>these
>> great bears.
>>
>> American values must play a role with regard to the delisting decision.
>> Grizzly bears, having been nearly exterminated, are entitled to live,
>>not
>> die. Wildlife officials entrusted with their protection and
>>preservation
>> are not robots applying an esoteric law without discretion, especially
>>when
>> the boundaries of the best available science relating to the statutory
>> factors are not well-defined.
>>
>> All FWS and Interior officials and employees should be required to
>>re-read
>> the landmark decision in Tennessee Valley Authority v. Hill, 437 U.S.
>>153
>> (1978). The US Supreme Court, relying on the legislative history,
>>observed
>> that the Endangered Species Act ³as it was finally passed, . . .
>>represented
>> the most comprehensive legislation for the preservation of endangered
>> species ever enacted by any nation.² The Court stated that ³one would
>>be
>> hard pressed to find a statutory provision whose terms were any plainer
>>. .
>> . . Its very words affirmatively command all federal agencies ~~C~~to
>>insure
>> that actions authorized, funded, or carried out by them do not
>>jeopardize
>> the continued existence¹ of an endangered species or result in the
>> destruction or modification of habitat of such species² Thus,
>>the
>> Court stated, ³examination of the language, history, and structure of
>>the
>> [ESA] indicates beyond doubt that Congress intended endangered species
>>to be
>> afforded the highest of priorities.² (Emphasis added.)
>>
>> Please give these great bears the "highest of priorities." Having
>>nearly
>> exterminated these great bears, we owe them preservation and protection
>> indefinitely.
>>
>> Sincerely,

>>
>> Bob Aland
>>
>>
>> From: "Bean, Michael" <michael_bean@ios.doi.gov>
>> Date: Tuesday, December 2, 2014 at 8:06 AM
>> To: Robert H Aland <rhaland@comcast.net>
>> Subject: Re: GRIZZLY BEARS - TELEPHONE CONVERSATION
>>
>> Dear Mr. Aland:
>>
>> I enjoyed speaking with you yesterday. You may of course share with
>>others
>> the two key points that I tried to make: (1) any decision to delist or
>>not
>> delist the grizzly bear will be based solely on science, as the law
>> requires; and (2) No delisting proposal is imminent; the Fish and
>>Wildlife
>> Service is still evaluating the matter and has made no decision.
>>
>>
>>
>>> On Mon, Dec 1, 2014 at 11:31 PM, Robert Aland <rhaland@comcast.net>
>>>wrote:
>>> Mr. Bean:
>>>
>>> Thank you for taking the time to speak with me this morning.
>>>
>>> Rest assured that I heard all of your status and other comments loud
>>>and
>>> clear.
>>>
>>> Please let me know whether I can pass along your comments to friends
>>>who share
>>> my interest in preservation and protection of grizzly bears or should
>>>treat
>>> your comments as confidential.
>>>
>>> Bob Aland
>>>
>>> P.S. I would like to share with you the attached photo of my Illinois
>>>vehicle
>>> license plate.
>>>
>>>
>>> From: Robert H Aland <rhaland@comcast.net>
>>> Date: Saturday, November 29, 2014 at 9:35 AM
>>> To: "Bean, Michael" <michael_bean@ios.doi.gov>
>>> Subject: Re: GRIZZLY BEARS - TELEPHONE CONVERSATION
>>>

>>> Mr. Bean:
>>>
>>> 9:45 Eastern on Monday is perfect. I will place the call.
>>>
>>> I look forward to speaking with you.
>>>
>>> Bob Aland
>>>
>>>
>>> From: "Bean, Michael" <michael_bean@ios.doi.gov>
>>> Date: Saturday, November 29, 2014 at 9:16 AM
>>> To: Robert H Aland <rhaland@comcast.net>
>>> Subject: Re: GRIZZLY BEARS - TELEPHONE CONVERSATION
>>>
>>> Mr. Aland:
>>>
>>> I am available at 9:45am Eastern on Monday. If that time is not
>>>convenient
>>> for you, my next availability is at 2:15pm Eastern. Please let me know
>>>if
>>> either of these times works for you. The number is 202-208-4416.
>>>
>>>> On Fri, Nov 28, 2014 at 10:14 AM, Robert Aland <rhaland@comcast.net>
>>>>wrote:
>>>> Mr. Bean:
>>>>
>>>> Yes, with thanks.
>>>>
>>>> Preferably in the morning, but I will be available at any time at your
>>>> convenience.
>>>>
>>>> You choose the time and let me know and tell me the number to call.
>>>>
>>>> Bob Aland
>>>>
>>>> From: "Bean, Michael" <michael_bean@ios.doi.gov>
>>>> Date: Friday, November 28, 2014 at 8:29 AM
>>>> To: Robert H Aland <rhaland@comcast.net>
>>>> Subject: Re: GRIZZLY BEARS - TELEPHONE CONVERSATION
>>>>
>>>> Dear Mr. Aland: I apologize for not getting back to you sooner. Are
>>>>there
>>>> any times Monday that would be convenient for us to talk?
>>>>
>>>>> On Tue, Nov 25, 2014 at 4:45 PM, Robert Aland <rhaland@comcast.net>
>>>>>wrote:
>>>>>
>>>>> Dear Mr. Bean:
>>>>>
>>>>> Your secretary informed me yesterday that you would call me today to

>>>>> discuss
>>>>> grizzly bears.
>>>>>
>>>>> Unfortunately I have to leave my office now for about two hours.
>>>>>
>>>>> I would very much appreciate having the opportunity to speak with
>>>>> you. Can
>>>>> we speak tomorrow (Wednesday) afternoon at a time convenient for you?
>>>>>
>>>>> Sincerely,
>>>>>
>>>>> Bob Aland
>>>>>
>>>>>
>>>>> Robert H. Aland
>>>>> 140 Old Green Bay Road
>>>>> Winnetka, IL 60093-1512
>>>>> (847) 784-0994 (O)
>>>>> (847) 446-0993 (F)
>>>>> (847) 826-2537 (C)
>>>>>
>>>>>
>>>>>
>>>> --
>>>> Michael J. Bean
>>>>
>>>> Principal Deputy Assistant Secretary for Fish and Wildlife and Parks
>>>>
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>>>> michael_bean@ios.doi.gov
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>>
>> <Grizzlies - LT Salazar re WY Costs.pdf>

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