

... of Plaintiff's

... as moot in all other respects.

Finally, IT IS ORDERED that the April 2, 2009 Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population

...gment (74 Fed. Reg. 15,123) is VACATED and set aside. The Clerk of Court is directed to enter judgment in accordance with this

Opinion. Dated this 5th day of August, 2010.

Donald W. Morley
Donald W. Morley, District Judge
United States District Court
14:43 P.M.



Wolf Management

Back in the Hands of the States

Congress restored

...a decision by the U.S. Fish and Wildlife Service (FWS) that some states are now the official managers of the gray wolf. This overturned a U.S. District Court decision and Congress blocked the courts from reviewing the matter further. This stroke of constitutional power is welcomed by some, frightening to others, and familiar to those who recall that Congress intervened several times from 1988 to 1991 when it directed the administration to begin the process for wolf reintroduction in the Rockies.

By **Greg Schildwacher**
B&C Professional Member

But the meaning of this case is deeper than the drama of congressional action and the amusement of who welcomed it then and fears it now. We need to see that when Theodore Roosevelt (TR) made conservation a national issue, he opened it to national debate. His triumph was not that the nation would do conservation his way—or, as we may dream, our way for his sake—but that it would be done according to a competition with other views. Now the contest of decision-making in America is a professional enterprise open to all but controlled and dominated by those with specialized knowledge about how the country makes up its mind. Unless we engage in that profession, we cannot expect decisions to turn conservation where field biologists and agency administrators would take it.

The wolf case illustrates one way this has played out so that sportsmen prevailed, in part. It is a guide to what we must do to influence the future of conservation.

Some issues draw attention to themselves.

Wolf conservation has often done so, but there was no clear reason to expect that Congress would bestir itself after U.S. District Judge Donald Molloy's decision on August 5, 2010. His decision rejected the fifth attempt by the Fish and Wildlife Service to remove some or all wolves from the lists of threatened and endangered species. Reversing the "delisting" was in most respects a typical development in the FWS's routine for any Endangered Species Act (ESA) issue—the courts have made many *de facto* listing decisions.

Environmental lawsuits have been common for about 40 years, and multiple lawsuits on an issue are not strange, especially regarding ESA. Most of their lawsuits push species onto the lists—such as a string of complaints on the Canada lynx and several other species. And they file many suits to impose what they see as protections, as they have done on Columbia River salmon species for nearly 20 years straight. Some have sued to block what others consider as good conservation, as when some environmentalists sued to stop the wolf reintroduction because they did not like how it would be done.

Congress rarely reacts, partly because Congress specifically enabled such lawsuits. Before the era of routine lawsuits, technical agencies had wide discretion given them at birth by TR and his peers. The year after founding the Forest Service in 1905, when TR created the Grand Canyon National Game Preserve on the Kaibab plateau, the Forest Service needed no further process to

begin killing wolves and other predators there. Precursors of the Fish and Wildlife Service needed only a congressional appropriation to exterminate wolves nationwide. Technocracy ruled this way until the 1960s when Rachel Carson condemned the reign in a book about pesticide use, *Silent Spring*. She suggested that citizens should have access to agency data, advance public consideration of options, and recourse to file suit. Within 10 years Congress granted all three wishes, respectively, in passing the Freedom of Information Act, National Environmental Policy Act, and provisions for citizen lawsuits in ESA and other laws.

Like many environmental lawsuits, complaints about wolf delisting avoid the basic issue of whether wolves had recovered and alleged flaws in the decision-making process. The process runs through reams of policies beyond ESA alone, including the general ESA regulations, the wolf recovery plans, the environmental impact statement on reintroduction, separate special regulations for the reintroduced wolves and wolves returning on their own, a FWS policy on defining the legal meaning of "population," and the Administrative Procedures Act.

Against this history, there were several plausible reasons that Congress might thwart the legal stratagems this time. Unlike most wildlife, wolves present a more straightforward biology: they reproduce quickly, flourish in various habitats, and are relatively easy to count. Clear data show wolves are more than five times over recovery goals. Also, by 2010, more hunters were advocating delisting for conservation reasons as wolves were affecting big game management. Finally, as recovery is rare (13 species in the U.S. out of more than 1,300 species listed), the legalisms of delisting were unforeseen and demoralizing obstacles to success.

Americans care about wildlife conservation, but

...not as much as many other things. This is clear and poignant on Capitol Hill, where front-page issues occupy the chambers through which all issues must pass. Even routine conservation questions must be worked out informally to clear them for rubber stamping through channels. The quality of decisions made informally depends heavily on the aptitude and effort of the members of Congress and staffs controlling the issue. Many are new to the subjects, details of policy, and unintended consequences. They need help from people that former Senator John F. Kennedy described as "expert technicians...capable of explaining complex and difficult subjects in a clear,

understandable fashion." JFK was explaining the proper role of lobbyists.

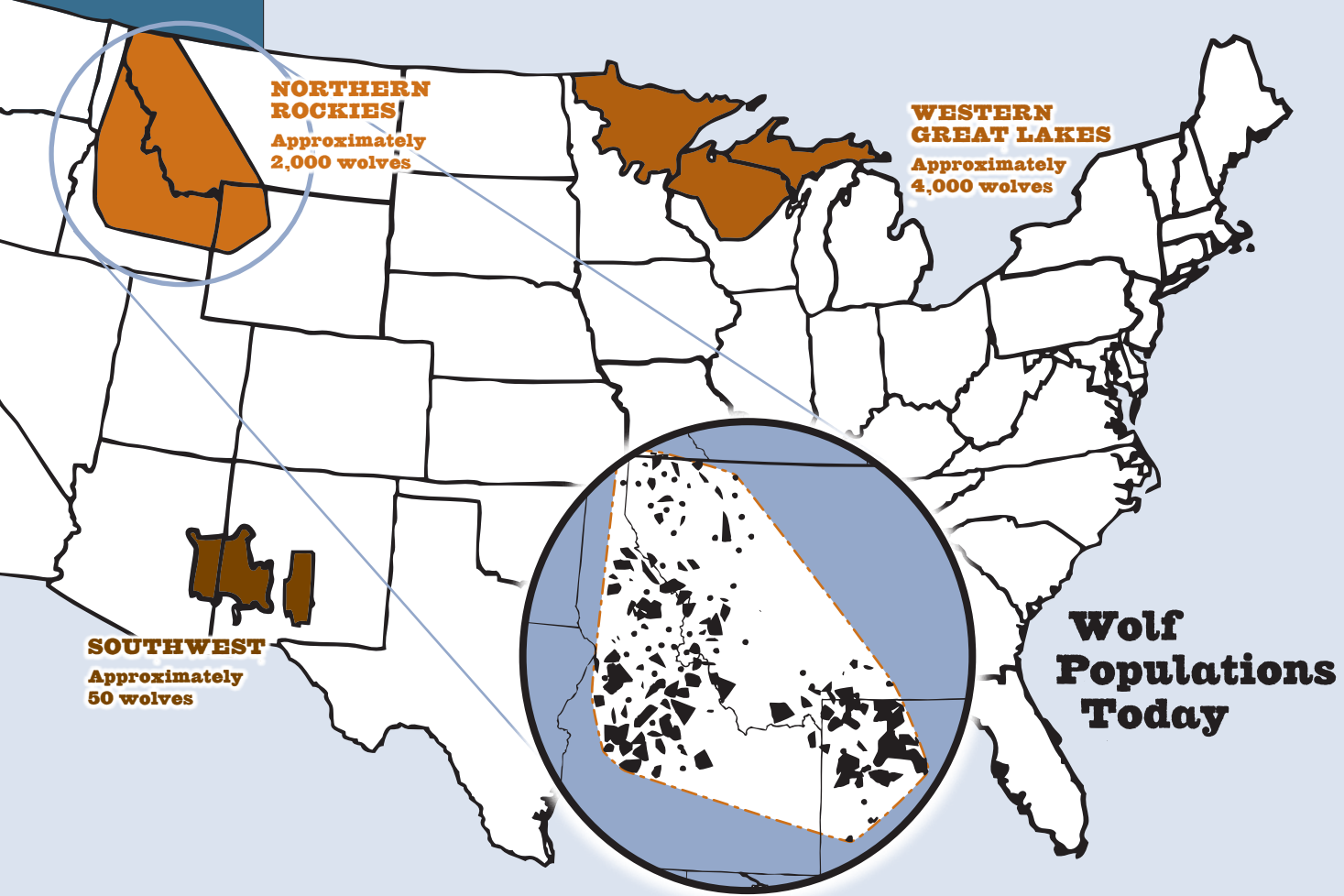
As wolf delisting is not front-page news in many places, it faced mixed prospects after Judge Molloy. On one hand, the Senate—usually the final bottleneck—took bipartisan initiative with Rocky Mountain senators on both sides of the aisle introducing three different bills by end of September 2010 to delist wolves. On the other hand, the bills proposed widely different means of delisting. One would amend ESA to disqualify all wolves from federal protection. Another would amend ESA to delist part of the Rocky Mountain population. A third would delist the same area without amending ESA. These were opening positions designed to sound like solutions to angry people. They were not positions based on analysis of existing policy and pressing problems concerning livestock, big game, lawsuits, and sustaining the recovered wolf population under state laws.

To help simplify the puzzle of fitting good policy with straight answers and votes, the Rocky Mountain Elk Foundation (RMEF) collected data on how people perceived the issue and options. RMEF conducted a nationwide telephone survey of 1,000 committed voters with extra calls in Idaho, Montana, Wyoming, Wisconsin, Minnesota, and Michigan. They collected detailed qualitative data from focus groups in Minneapolis and Detroit. Results showed that most people trust ESA and believe state wildlife managers should have most authority over wildlife. Especially in metro-Detroit, it appeared that urban America has a decent grasp on general conservation principles.

RMEF and a few other groups began advocating the simplest, most persuasive facts as the points to guide policy and politics: federal goals were met, states were supposed to take over, states had detailed management plans, and the hold-up in court is on technicalities. The RMEF group began discarding facts about radicals at the fringes and red tape in the bureaucracy because—though factual—they drove away support. A good exchange got going between Senators Jim Risch of Idaho and Jon Tester of Montana, two leaders of the Congressional Sportsmen's Caucus. Great Lakes states members of Congress were not active.

Back rooms

...with or without smoke, are not as secret as the image suggests. What they really are is exhausting. Most people invited to these meetings have jobs that require them to attend several each day. Many attendees are perfectly willing and justified in reporting what happens in the room, talking through



the issues and taking advice, but they are often too busy with follow-up to return every call.

This was the labor of love in October and November. As the issues and options took shape, legislators from the Rocky Mountain states began negotiating, as did the governors and the Obama Administration, which continued exploring a settlement with the plaintiffs in the lawsuit.

Each venue reported occasional progress but none had a clear way to carry out anything they might decide. If wolf state delegates to Congress agreed on a bill, they would need to persuade California and East Coast members who held jurisdiction over it. If Wyoming's negotiators agreed to adjust or replace their state's management plan, the change would need to pass the entire legislature. If the administration found a way forward, it would need to issue a new delisting rule.

By mid-October, the difficulties compounded as hunters sent mixed messages. Simple points advocating state management competed with threats of poaching wolves and punishing politicians who settled for anything but a symbolic position. This made the issue seem doomed to the decision-makers trying to help us and some stopped working on it. We hunters realized we were not organized on wolves as we have been on game laws, Pittman-Robertson, and the agenda of

our Federal Advisory Committee and American Wildlife Conservation Partners network. The wolf issue was outside our basic political competence just as the wolf was outside scientific regulated management for most of our history. Just five years earlier we had gained a place in the wolf debate when FWS authorized culling wolves to help state big game managers. Now, angry that this token achievement was held up in court along with most other wolf policy, we were losing a chance for a better solution.

Boone and Crockett Club President Lowell E. Baier attempted a revival by uniting sportsmen behind ethical sportsmanship. With six groups joining, the Club issued an editorial calling hunters to "continue toward [the] goal in an orderly fashion" so that "wolves will be managed the same way as other wildlife, based on the best available science with protections against illegal killing." The Club's press consultant placed the piece in regional papers, weeklies, and Web sites starting October 20, 2010. With signatures by the Mule Deer Foundation, Pope and Young Club, Elk Foundation, Safari Club, Wild Sheep Foundation, and the Wildlife Management Institute, the statement inspired more coalition work to follow.

At the same time, a new idea for a solution began to circulate: environmental plaintiffs might accept delisting if state managers had higher minimum population sizes

to maintain. From governors' staffs, it sounded like the governors might agree to higher numbers. Or, Congress could impose higher numbers on the states. Or, the administration could attempt to enact the idea through a new rule or a settlement. Many sportsmen objected to infringing on state authority as well as rewarding plaintiffs with arbitrary numbers not considered in public process. Twenty-four groups from American Wildlife Conservation Partners (AWCP) co-signed a letter to Attorney General Eric Holder and Secretary of the Interior Ken Salazar urging them to keep the idea out of settlement talks. Some of the AWCP groups—now starting to work as a coalition—expressed the same objection to members of Congress and staff.

Pressure to force an agreement rose around the mid-term elections and the end of the 111th session of Congress. The numbers-approach seemed to be handy, if not perfect. If governors agreed to it, members of Congress could enact it as part of an overdue spending bill for the new fiscal year. But it is risky for Congress to tread on state sovereignty in the West, so Congress needed governors to bend. On December 2, 2010, Senators Baucus and Tester wrote to Secretary Salazar declaring that a state-based agreement was a necessary precondition for congressional action.

The numbers-approach soon collapsed on its main flaw of being arbitrary.

The administration abruptly proposed new numbers to the governors over the first week-end in December (as the Club met in Albuquerque). The proposal insisted that Idaho's minimum population rise from 150 wolves to around 500 wolves, claiming to be consistent with Idaho's own plan. But 500 wolves was Idaho's chosen population objective, not its minimum. Idaho planned to keep the population around that number, not always above it. The distinction was lost or ignored, and although Governor Butch Otter might have agreed to a minimum higher than 150, he rejected 500 and the governors' talks broke up. Still, somehow the same proposal reached the Senate for a parting shot at agreement in that chamber, but it was rebuffed.

Wolf delisting had a brief formal consideration in the Senate before adjournment. On December 21, with informal efforts dead, Senator Mike Crapo, R-Idaho, rose in session for a symbolic attempt to pass one of the original bills from September. Senator Ben Cardin, D-Md., objected and a short debate followed with Senators Jim Risch, R-Idaho, and Max Baucus, D-Mont. Senator Crapo mentioned that the failed numbers-proposal would have changed Idaho's management plan, which Senator Baucus had not known and, once informed, agreed was unacceptable. It was a small achievement for the efforts thus far: a short Senate debate that clarified the members' minds and helped the next effort.

"Where would this get us?"

It was an email from congressional staff containing a draft bill to reinstate the delisting decision overturned by Judge Molloy. It was now the first week of February, and several AWCP groups were already asking for a solution based in previous decisions by the FWS to delist recovered wolves. Compared to that, the discussion draft was a partial solution: Rockies only, except Wyoming, and no Great Lakes states. Meanwhile, some members had resubmitted bills from the previous Congress and some staff still hoped to revive the numbers-based proposal.

By that Friday, February 11, the new discussion draft appeared officially in both the new wolf bill proposed by Montana's Democratic senators and also in a provision by Representative Mike Simpson of Idaho in the Republican budget bill numbered H.R. 1. It looked like they had a deal. The sportsmen now working as a coalition liked some of it: keeping federal and state authority separate and upholding valid, science-based decisions. Plus, it was a blunt political message to litigators. Our coalition issued a statement thanking members of Congress "for taking

several steps in the right direction for wolf conservation." Congressional Sportsmen's Foundation led the statement, joined by the National Rifle Association, Safari Club International, Elk Foundation, Wild Sheep Foundation, and Boone and Crockett Club.

Our group suggested improving the deal by overturning all the lawsuits, not just the latest one, and reinstating the larger recovery areas published by the FWS in 2003. That seemed too strong a rebuke of environmentalists for the Senate to accept. We thought it wiser to include Wyoming and—biologically—with only parts of Oregon, Washington, and Utah delisted, we thought it certain that the remaining areas of those states, some of which already had wolves, would never carry enough wolves to justify delisting as a standalone area.

As Congress and the administration resolved the main issues of the spending bill, our coalition was along for the ride. H.R. 1 passed the House, and, on March 4, the Democratic Senate proposed the exact same wolf delisting provision in its alternative budget. In mid-March the Obama administration and the plaintiffs proposed a court settlement, hoping to forestall Congress. But on April 9, Judge Molloy rejected the settlement, and we soon learned the final budget bill included delisting. The only change in the end was a gesture for Wyoming in a new sentence confirming a different court's ruling that the FWS had been arbitrary in rejecting Wyoming's plan.

In dealing with this one species,

... Congress changed nothing in the ESA, and therefore, left the root problem for other species. Some wordings of ESA are open to misinterpretations allowing attacks on valid decisions. Most of these shrewd efforts go to adding favorite species to the list regardless of biological priority. But one of the remaining wolf cases yet to be decided by Judge Molloy may also disrupt active recovery for other species. That case concerns FWS's authority to adapt standard ESA protections, which FWS uses in order to reintroduce a species without needless restrictions on local people. It helps win support for reintroductions. Rightly applied, this provision enabled wolf reintroduction and earlier projects for the California condor, black-footed ferret, whooping crane, and several fish

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and other mammals and birds. Challengers have twisted its meaning such that, if Judge Molloy accepts the twisted reading, the provision will become meaningless in winning local support for reintroductions. Ironically, this provision was the last effective amendment of ESA—in 1982—and we may lose what we accomplished then by failing to clarify ESA now.

To safeguard the ESA or any law, or to improve one, requires forays deep into the public forum such as described here for wolf delisting. Many make the effort because they care. For the Boone and Crockett Club, it is a duty of mission. Fittingly, when TR spoke of "the man in the arena," he was talking about citizenship. That is what it takes to keep his conservation legacy. ■

