I previously discussed the wolf delisting rider to the budget compromise bill. I thought it would be useful to summarize here the recent court opinions concerning the wolf, and consider the effects of the rider on those opinions.

As you may recall, the rider (which never mentions "wolf" or "delisting") requires the Fish & Wildlife Service (FWS) to reissue its April 2009 final rule (74 Fed. Reg. 15,123). That rule effectively delisted the "Rocky Mountain Population" of gray wolves from the endangered species listing. This delisting includes parts of Washington, Oregon and Utah, and all of Montana and Idaho. The population in Wyoming, however, was not delisted because Wyoming lacked "adequate regulatory mechanisms" to protect the wolf. After a District of Montana court order, FWS reversed its April 2009 final rule on October 26, 2010.

FWS also delisted the "Western Great Lakes Populations" of gray wolves in a separate rule (74 Fed. Reg. 15,070), also issued in April 2009. This second rule encompasses all of Minnesota, Wisconsin and Michigan, as well as parts of North Dakota, South Dakota, Illinois, Indiana and Ohio. Prior to this rule, FWS issued a similar delisting rule for the Western Great Lakes Populations of gray wolves in 2007 (72 Fed. Reg. 6,052), but that rule was struck by the District Court of D.C. in 2008.

Human Soc'y of the U.S. v. Kempthorne, 579 F. Supp. 2d 7 (D.D.C. Sep. 29, 2008)

> In this litigation, environmental groups challenged the 2007 FWS rule that delisted the Western Great Lakes gray wolf populations. The court held that the statutory language is ambiguous. The court then refused to defer to the FWS interpretation: that FWS can designate and delist a distinct population segment within a broader listing. The court vacated and remanded the rule back to FWS. This opinion shares many parallels with the Defenders of Wildlife opinion, discussed below. Both opinions reject FWS's interpretation as impermissible given the statutory language and legislative history of the ESA. As I mention above, FWS issued a new delisting rule for the Western Great Lakes populations in April 2009, and it remains to be seen if that rule can overcome the hurdles posed by this opinion.

Defenders of Wildlife v. Salazar, 729 F. Supp. 2d 1207 (D. Mont. Aug. 5, 2010)

> This opinion found that FWS violated the ESA by partially removing Endangered Species Act (ESA) protections for distinct population segments of the gray wolf. The court vacated the FWS's Rocky Mountain delisting rule. The court determined that the legislative history of the ESA did not support the agency's attempt to partially delist the

wolf and therefore is not a permissible interpretation of the ESA. More importantly, the court held that the ESA unambiguously prohibits FWS from listing or delisting only part of a distinct population segment. (For you Chevron fans out there, that means the FWS rule failed both Chevron step 1 and 2.)

Because Congress did not amend the ESA with its wolf delisting rider, it is difficult to argue that the Defenders of Wildlife opinion is now invalid. And so Congress has, in effect, ordered FWS to reissue a final rule in violation of both the ESA and a direct court order. One could argue that Congress has implicitly delisted the wolf (and thus amended the ESA) with this rider (although I think that is a difficult argument to make). But the fact remains that it looks like Congress is ordering FWS to act in contempt of a direct court order.

Wyoming v. Dep't of Interior, 2010 WL 4814950 (D. Wyo. Nov. 18, 2010)

This opinion goes the opposite direction of the District of Montana. The District of Wyoming declared that FWS acted arbitrarily and capriciously by *not* delisting the wolf in Wyoming. Curiously, the opinion begins by quoting at length from A Sand County Almanac (*Thinking Like a Mountain*).

The crux of the problem for the court is that FWS wants Wyoming to designate the entire state as a managed trophy game area, even though most of the wolf habitat is in only part of the state (mainly northwestern Wyoming). FWS seeks to prevent excessive killing of the wolves, particularly under Wyoming's defense of property law, which allows property owners to kill any wolf doing damage to private property. The court finds the FSA's rejection of Wyoming's proposed, more limited management area to be arbitrary and capricious.

The court remanded the case back to the agency; it did not delist the wolf in Wyoming. This case is specifically protected by the wolf delisting rider, and in fact is the only case specifically mentioned in the rider language. But here the District of Wyoming remanded the final rule to the agency. FWS could choose not to delist the wolf and, in theory, still comply with this opinion.

Defenders of Wildlife v. Salazar, 2011 WL 1345670 (D. Mont. Apr. 9, 2011)

This case has gotten most of the recent press. This April 2011 opinion rejected a proposed settlement that would have delisted the wolves in Montana and Idaho. The court objected that it cannot approve a settlement that would, in effect, violate the ESA.

> The reasoning behind this case parallels the court's earlier August 5, 2010 decision, and the rider will likely affect both decisions equally, if at all.

In summary, the wolf delisting rider requires FWS to reissue a rule that was remanded by two courts: District of Wyoming and District of Montana. Republishing the rule without revision, as the rider seems to require, will be unresponsive to both court orders. And the rider protects at least one of those orders (the District of Wyoming). Perhaps FWS will determine that compliance with both the District of Wyoming and the Congressional rider requires it to revise the rule before re-publication. And I have yet to see a good argument for why Congress should be allowed to exclude this reissuance of the rule from all judicial review, or how reissuing this rule achieves the Congressional goal: delisting the wolf.