Photo credit: Tracy Brooks, FWS. From the National Digital Library.

A few months ago, Rhead summarized litigation over the US Fish and Wildlife Service's multiple attempts to remove the gray wolf from the list of endangered and threatened species, and noted environmental groups' filing of a challenge to the appropriations rider which called for FWS to re-delist (is that a word?) the wolf in Montana and Idaho.

This week brought two new developments: 1) Judge Molloy upheld the delisting rider; and 2) FWS agreed to approve Wyoming's wolf management plan, a step expected to lead to delisting in Wyoming. My take is that Judge Molloy got the law right but FWS has once again got it wrong.

First, Judge Molloy's latest opinion. You'll recall that back in 2009, FWS issued a rule recognizing a Distinct Population Segment of the gray wolf in the northern Rockies, and delisting the Montana and Idaho portions of that DPS. Overall, the wolf population in the northern Rockies substantially exceeded recovery plan goals. FWS found that Montana and Idaho had drafted plans for managing wolves after delisting that would adequately conserve wolves within their boundaries into the foreseeable future. Those states had committed to managing wolves as a trophy game species everywhere, meaning that although hunting would be allowed, take would be regulated and monitored. FWS declined to delist in Wyoming because Wyoming's plan was quite different. Wyoming planned to manage wolves as a trophy game species only in the northwest corner of the state, in and immediately around Yellowstone National Park. In the remaining 7/8 of the state, Wyoming's plan would have categorized the wolf as a predatory animal, allowing unregulated killing with no reporting requirement.

Judge Molloy vacated that rule in 2010, ruling that FWS could not delist a portion of the DPS while leaving another portion listed. Congress then stepped in, passing a continuing appropriations bill with a rider directing FWS to reissue the 2009 delisting rule "without regard to any other provision of statute or regulation" and declaring that the reissued rule would not be subject to judicial review. Pub. L. 112-10, § 1713. FWS reissued the delisting rule in May.

Several environmental groups challenged the constitutionality of the rider. Judge Molloy has now rejected that challenge. He clearly was not happy with the rider:

> Inserting environmental policy changes into appropriations bills may be politically expedient, but it transgresses the process envisioned by the Constitution by avoiding the very debate on issues of political importance said to provide legitimacy. Policy changes of questionable political viability, such as occurred here, can be forced using insider tactics without debate by attaching riders to legislation that must be passed.

Nonetheless, he concluded that Ninth Circuit precedent compelled him to find the rider constitutional:

> Section 1713 sacrifices the spirit of the ESA to appease a vocal political faction, but the wisdom of that choice is not now before this Court. . . .However, our Circuit has interpreted Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992), to hold that so long as Congress uses the words "without regard to any other provision of statute or regulation that applies," or something similar, then the doctrine of constitutional avoidance requires the court to impose a saving interpretation provided the statute can be fairly interpreted to render it constitutional.

Judge Molloy decided that he must interpret the rider as exempting the Northern Rocky Mountains DPS from what he had previously held was the ESA's requirement that a DPS be listed or delisted in whole rather than in part. As so interpreted, he would still have held the statute unconstitutional if it were a matter of first impression. But he found himself bound by Ninth Circuit precedent upholding similar provisions. See Consejo de Desarrollo Economico de Mexicali v. U.S., 482 F.3d 1157, 1170 (9th Cir. 2007); The Ecology Center v. Castaneda, 426 F.3d 1144, 1148-50 (9th Cir. 2005); Stop H-3 Association v. Dole, 870 F.2d 1419, 1437-38 (9th Cir. 1989).

I agree with Judge Molloy on both counts. The rider is offensive, accomplishing by a political back door what probably could not have been done directly. But it passes constitutional muster under current doctrine. Plaintiffs have said they will appeal to the Ninth Circuit. I expect that appeal to fail. Of course, the Ninth Circuit can be unpredictable; a lot depends on the specific panel selected. Even if plaintiffs get their dream panel and win on appeal, I think there's a real chance that the Supreme Court would take the case and reverse.

That’s not to say the situation is hopeless for the wolf in Montana and Idaho, where it is now delisted. FWS has long believed that the wolf would remain viable under the management plans adopted by those states, which commit to maintaining a population well above what FWS considers a minimum viable population. No court has ever found that FWS is factually or legally wrong on that point. Taking the optimistic view (not my style, but let’s try it on), maybe wolves don’t need more help in those states. If they do, the law requires FWS to notice and take action. Delisted species must be monitored for at least 5 years, and if that monitoring reveals serious problems FWS must do a new status review and a new listing if required. Nothing in the rider changes that. It simply required re-issuance of the 2009 rule, which provided for post-delisting monitoring and committed to initiating a status review if populations fall below minimum recovery levels or the states significantly change their management plans. Assuming FWS is right about recovery requirements (and I acknowledge that’s a big assumption), wolves will be okay in Montana and Idaho.

Which brings us to Wyoming and the second new development.

As already explained, the 2009 delisting rule did not delist the wolf in Wyoming. FWS has vacillated about how to deal with Wyoming, which has refused to adopt the kind of management plan FWS wants to see. FWS initially called on the states in 2002 to create management plans that would support delisting. Two years later, FWS disapproved the plan Wyoming submitted because it would have treated the wolf as a predatory animal outside the boundaries of Yellowstone and Grand Teton National Parks and did not clearly commit to maintaining the number of packs in the state that FWS thinks necessary. A few years later, though, FWS did an about-face, approving a management plan almost identical to the one it had earlier found inadequate, and delisting the wolf throughout the northern Rockies. Judge Molloy enjoined that delisting, concluding that FWS had failed to adequately explain its change of heart.

This week, Interior announced that it has reached agreement with Wyoming on a new plan. It’s tough to evaluate the agreement, because only a skeleton has been publicly released. Wyoming will have to change its statutes and regulations, and the details of those changes will be crucial. FWS will then have to issue a new delisting rule, which will have to survive judicial review.

Based on the limited information currently available, I think a delisting would have a tough time making it through the courts. There are certainly positive steps in the

agreement. Wyoming will commit to maintaining 10 packs outside the national parks, compared to the 7 it was willing to support previously. The state will provide more protection for wolves within the trophy game management area, including imposing stricter limits on killing wolves in defense of property. And the trophy game management area will expand an unspecified amount during the winter months to provide some protection for dispersing wolves.

But serious problems remain. It remains unclear that Wyoming is committed to maintaining 15 packs within the state; that responsibility still rests on national park managers. And the plan still treats the wolf as a predatory animal, subject to unregulated and unmonitored killing, in most of the state. It seems to me that FWS had it right originally — designating the wolf as a predator anywhere in the state will make it hard to enforce restrictions on killing in the trophy game management area. That's especially true in a state which has made it abundantly clear over the past decade that it does not believe the wolf should enjoy protected status anywhere, and with regard to a species that reached the endangered list because of unrestricted killing.

If a Wyoming delisting is to survive judicial review, FWS will have to make a credible case that Wyoming will have both the will and the ability to enforce restrictions on taking wolves, and that those restrictions will be sufficient to provide for a viable population for the foreseeable future. Given the history in Wyoming, I think that's a tough battle.

Of course, there's another route. I hear that Wyoming's congressional delegation is talking about getting another rider that would require delisting in Wyoming or insulate any delisting rule from judicial review. At this point, I wouldn't bet against that strategy succeeding.