Rebecca K. Smith
Public Interest Defense Center, P.C.
P.O. Box 7584
Missoula, Montana 59807
(406) 531-8133
(406) 830-3085 FAX
publicdefense@gmail.com

James Jay Tutchton
Tutchton Law Office LLC
6439 E. Maplewood Ave.
Centennial, CO 80111
(720) 301-3843
jtutchtontlo@gmail.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR DISTRICT OF MONTANA
MISSOULA DIVISION

ALLIANCE FOR THE WILD ROCKIES, *et al.*, Plaintiffs, vs. KENNETH SALAZAR, *et al.*, Defendants.	Case No. CV-11-70-M-DWM Case No. CV-11-71-M-DWM [Consolidated] **PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Though fundamental to the system of checks and balances established by the Framers of the Constitution, the separation of powers doctrine has, of late, exhibited relatively little strength as a check on the expansion of legislative power at the expense of the judiciary. The Supreme Court has held that Congress has the constitutional authority to change the law affecting ongoing litigation, and that even if it does so in a manner intended to impact the outcome of specific pending litigation its exercise of its law-making authority in such a manner is not unconstitutional. See e.g. Robertson v. Seattle Audubon Soc., 503 U.S. 429 (1992).

Nonetheless, the Supreme Court has also held that when Congress passes a law directing the judiciary to reach a particular outcome in a pending case under existing law and does not amend the existing law, Congress exceeds its constitutional authority and treads on the judiciary's authority to construe the law. See e.g. U.S. v. Klein, 80 U.S. 128 (1871).

Accordingly, despite the lack of success in recent separation of powers-based challenges to congressional enactments that tip the scales of justice in favor of particular active litigants, there remains some space between the twin outposts of Robertson and Klein. The question of whether a law which influences the outcome of a pending case is unconstitutional in

violation of the separation of powers doctrine depends on whether Congress amends existing law, and thus behaves constitutionally under Robertson, or whether Congress directs the judiciary as to its construction of existing law and fact-finding in a pending case, and thus behaves unconstitutionally under Klein.

The present case is like Klein, not Robertson. Here, Congress made no amendments to the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq*. Indeed, the authors of the particular legislative enactment at issue have explicitly stated their Act does not amend the ESA. Rather, their Act simply instructs the Federal Defendants to reissue a rule previously determined by this Court to be contrary to the plain language of the ESA, and attempts to immunize the new rule from judicial review. Once again, this Court is faced with what "may be a pragmatic solution to a difficult biological issue, but it is not a legal one." Defenders of Wildlife, *et al.* v. Salazar, *et al.*, 729 F.Supp.2d 1207, 1211 (D.Mont. 2010). Accordingly, as argued below, this Court should find Congress' current attempt to institute by fiat what it views as "pragmatic solution" is unconstitutional, just as this Court found the prior effort of the Federal Defendants to institute the same pragmatic solution by rule, contrary to the plain language of the ESA – plain language that remains unaltered by the congressional act at issue here.

STANDARD OF REVIEW

The Court is well versed in the appropriate standard of review governing Plaintiffs' Motion for Summary Judgment. As the Court has previously indicated, summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Defenders of Wildlife, 729 F.Supp.2d at1215, *quoting* Fed. R. Civ. P. 56(c). As this Court has noted summary judgment "is a particularly appropriate tool for resolving claims challenging agency action." Id., *citing* Occidental Eng'g Co. v. INS, 753 F.2d 766, 770 (9th Cir. 1985). In the present case Defendants have not yet answered the Complaint and no discovery or other proceedings have taken place; however, as the Court has stated, this case should turn on the interpretation of constitutional law and thus summary judgment is both appropriate and efficient early in the course of this litigation. Order, Dkt. 8 at 1 & n.1, *citing* Fed. R. Civ. P. 56(b) (summary judgment motions can be filed at any time).

THE SEPARATION OF POWERS DOCTRINE

The separation of powers doctrine, setting apart the executive, legislative, and judicial functions of government is one of the basic "checks

and balances" contained in the Constitution. As Chief Justice Marshall wrote nearly two hundred years ago, "[t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judicial construes the law." Wayman v. Southard, 23 U.S. 1 (1825). See also Marbury v. Madison, 5 U.S. 137 (1803) (establishing authority of judicial branch, including authority to order executive to comply with law and to overrule acts of Congress). "Time and again" the Supreme Court has affirmed "the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches." Morrison v. Olson, 487 U.S. 654, 693 (1988).[1]

In incorporating the separation of powers doctrine into the basic checks and balances of Constitution the framers paid heed to the political philosopher Montesquieu's warning that "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. …[T]here is no liberty, if the judiciary power is not separated from the legislative and executive." Baron de Montesquieu, The Spirit of the Laws, bk. XI, ch. 6.

---

[1] See also Mistretta v. U.S., 488 U.S. 361 (1989) (The Supreme Court "consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.").

Defending the Constitution in The Federalist Papers, James Madison agreed with Montesquieu describing the separation of powers doctrine as "essential to a free government." The Federalist No. 48 at 308, James Madison, New American Library ed., 1861. See also The Federalist No. 47 at 324 (J. Cooke ed. 1961) (J. Madison) ("The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointive, or elective, may justly be pronounced the very definition of tyranny.").

In particular, the Framers were concerned with the expansion of legislative power at the expense of the other branches. This fear arose from direct experience during the Confederation of States that preceded the constitutional convention:

> The supremacy of the legislatures came to be recognized as the supremacy of factions and the tyranny of shifting majorities. The legislatures confiscated property, erected paper money schemes, [and] suspended the ordinary means of collecting debts.

Levi, Some Aspects of Separation of Powers, 76 Colum. L. Rev. 369, 374-75 (1976). "One abuse that was prevalent during the Confederation was the exercise of judicial power by the state legislatures." INS v. Chadha, 462 U.S. 919, 961-63 (1983) (Powell, J., concurring) (noting contemporaneous records of legislatures exercising the judicial power). Accordingly, in light of this experience, the Supreme Court views the "system of separated

powers and checks and balances [adopted by the Framers as] 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another.'" Morrison, 487 U.S. at 693, *quoting* Buckley v. Valeo, 424 U.S. 1, 122 (1976).

> The Supreme Court has stated:
>
> > The doctrine of separation of powers is fundamental in our system. It arises, however, not from Art. III nor any other single provision of the Constitution, but because "[b]ehind the words of the constitutional provisions are postulates which limit and control."

National Mut. Ins. Co. of the Dist. of Col. v. Tidewater Transfer Co., 337 U.S. 582, 590-91 (1949) *quoting* Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934). However, where, as in the present case, the separation of powers between the judicial and legislative branches of the government is at issue, the starting point for analysis in the explicit allocation of governmental powers in the Constitution. Article III, §§ 1 and 2 vest the judicial power in the Supreme Court and the lower federal courts and provide that this power shall extend "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties …." Article I of the Constitution vests "[a]ll legislative powers herein granted … in the Congress of the United States …."

Two early decisions of the Supreme Court, State of Pennsylvania v. The Wheeling and Belmont Bridge Company, 59 U.S. 421 (1855) and

United States v. Klein, 80 U.S. 128 (1871) establish the limits Article III imposes on Congress' ability to direct the court's interpretation and application of the law to the facts in particular pending cases.

In Wheeling Bridge, the Supreme Court had previously ruled two bridges over the Ohio River were an obstruction to navigation under the existing laws that regulated navigation. 59 U.S. at 429. Subsequently, Congress enacted a new law designating the bridges "post-roads for the passage of the mails of the United States" and authorized the Wheeling and Belmont Bridge Company "to have and maintain their said bridges at their present site and elevation." Id. Congress also declared that the bridges were "lawful structures, in their present positions and elevations, and shall be so held and taken to be, any thing in any law or laws of the United States to the contrary notwithstanding." Id.

The Supreme Court held that the new law making the bridges post roads changed the substantive law governing interstate commerce and the bridges. Id. at 30. Under the new law, the Court's prior ruling regarding the bridges no longer applied:

> So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of congress, they are to be regarded as modified by this subsequent legislation; and although [the bridge] still may be an obstruction in fact, [it] is not so in the contemplation of the law.

Id.

Justice McLean, in dissent, urged that the new law could not be given effect because in it Congress had exercised the judicial power of deciding a particular case in violation of the separation of powers:

> The judicial power is exercised in the decision of cases; the legislative, in making general regulations by the enactment of laws. The latter acts from considerations of public policy; the former by the pleadings and evidence in a case …. The act declared the bridge to be a legal structure, and, consequently, that it was not a nuisance. Now, is this a legislative or a judicial act?

Id. at 440 (McLean, J., dissenting). The majority rejected this view, not because it found Congress had permissibly exercised an adjudicative function in the case, but because Congress had legislated to change the governing substantive law: "[S]ince the decree [of the Court], this right [of navigation] has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction." Id. at 432.

The Supreme Court's subsequent decision in Klein added explication to this separation of powers analysis. In Klein, the plaintiff made a claim for money due from the government based on receipt of a pardon (which included the restoration of all property seized during the Civil War). See United States v. Padelford, 76 U.S. 531, 542-43 (1869) (holding that receipt of a Presidential pardon established conclusive proof of loyalty and entitled the recipient to return of his property). Congress, however, then added an

amendment to an appropriations act, "with perhaps little consideration in either House of Congress," Klein, 80 U.S. at 143, to address the result in Padelford and the pending Klein case.

> The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it, both in the Court of Claims and in this court on appeal.

Id. at 144.

The Supreme Court found this new law unconstitutional because in it "Congress … inadvertently passed the limit which separates the legislative from the judicial power." Id. at 147. In reaching this conclusion, the Supreme Court carefully distinguished Wheeling Bridge:

> No arbitrary rule of decision was prescribed in [Wheeling Bridge], but the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.

Klein, 80 U.S. at 146-47.

Klein and Wheeling Bridge thus stand for the straightforward proposition that Congress cannot direct the outcome of a particular pending case by instructing the courts how to interpret and apply the existing law to the specific pending claims. Such an effort involves Congress in the adjudication of cases under Article III, a role forbidden to it by the

separation of powers doctrine.

More than a century later, the Supreme Court returned to its analysis of the relevant aspects of the separation of powers doctrine in Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992). Robertson arose, when in response to successful litigation brought by conservation groups halting proposed timber harvesting in certain national forests, Congress enacted the "Northwest Timber Compromise" as § 318 of the Department of the Interior and Related Agencies appropriations Act of 1990, 103 Stat. 745. 503 U.S. at 433. Subsection 318(b)(6)(A) of this Act provided:

> [T]he Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned [identifying the conservations groups' litigation by case name and docket number].

See Robertson, 503 U.S. at 434-35.

In response to motions to dismiss based on this new statute, the conservation-group plaintiffs in the specifically identified cases argued that the above-quoted provision violated Article III of the Constitution. Robertson, 503 U.S. at 436. The district courts upheld the statute and dismissed the respective lawsuits, but the Ninth Circuit (on consolidated appeals) reversed, holding the Appropriations Act violated the separation of

powers doctrine under Klein because "the first sentence of § 318(b)(6)(A) 'does not, by its plain language, repeal or amend the environmental laws underlying this litigation,' but rather 'directs the court to reach a specific result and make certain factual findings under existing law in connection with the two [pending] cases.'" Id.

The Supreme Court reversed, holding that "subsection (b)(6)(A) compelled changes in law, not findings or results under old law" because "under subsection (b)(6)(A), the agencies could satisfy their MBTA [Migratory Bird Treaty Act] obligations in either of two ways: by managing their lands so as neither to 'kill' nor 'take' any northern spotted owl within the meaning of § 2 [of the MBTA, 16 U.S.C. § 703], or by managing their lands so as not to violate the prohibitions of subsections (b)(3) and (b)(5) [of Section 318 of the Appropriations Act]." Id. at 438. The Supreme Court thus reversed the Ninth Circuit, not based on any contrary interpretation of Klein, but on the ground that the challenged Appropriations Act amended the applicable underlying statute and thus passed constitutional scrutiny.

The Supreme Court further illuminated the space between Klein and Robertson in Plaut v. Spendthrift Farms, Inc., 514 U.S. 211 (1995). "Whatever the precise scope of Klein … later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable

law.'" Plaut, 514 U.S. at 218, *citing* Robertson, 503 U.S. at 441. Plaut thus firmly sets forth the principle that a statute that amends applicable law, even if it is meant to determine the outcome of pending litigation, does not violate the separation of powers doctrine. As Plaut recognizes, Robertson does not moot Klein's holding, but provides that Congress amends applicable law when it creates a new method to satisfy the existing statutory requirements, i.e. when "compliance with certain new law constituted compliance with certain old law." Robertson, 503 U.S. at 440. Accordingly, Robertson does nothing more that re-state and re-affirm the holding of Wheeling Bridge, a case decided a decade and a half before Klein. Klein remains good law.

This Court has itself previously examined the space between Robertson and Klein on facts similar to those at issue in Robertson. See Ecology Center v. Castaneda, 426 F.3d 1144, 1147-48 (9th Cir. 2005). In Ecology Center this Court originally enjoined certain timber sales because the Forest Service had failed to document the existence of a minimum of 10% old growth habitat at elevations below 5,500 feet on a forest-wide basis in the Kootenai National Forest as required by the Kootenai National Forest Plan. Id. at 1146. During the pendency of the case Congress enacted the Flathead and Kootenai National Forest Rehabilitation Act, Department of Interior and Related Agencies Appropriations Act of 2004, Pub.L. No. 108-

108, 117 Stat. 1241. Id. at 1147. This Act changed the applicable old-growth retention standard from one requiring the retention of 10% old growth on a forest-wide basis to one requiring the retention of 10% old growth in the specific project areas. Id. at 1147. This Court had previously found that although the Forest Service was out of compliance with the Kootenai Forest Plan because it had failed to show that 10% old growth habitat existed on a forest-wide basis, the specific project areas in which the logging was to occur did have 10% old growth habitat. Id. at 1146.

Accordingly, when litigation in the district court resumed, this Court, relying on Robertson, rejected Ecology Center's argument that the Appropriations Act violated the separation of powers doctrine and held that "Congress has not impermissibly directed findings … by the terms of [the Appropriations Act], this Court could still, somehow, find there wasn't 10% [old growth] on an area and prevent the [timber] sales … Congress has changed the underlying law." Id. at 1147-48. The Ninth Circuit agreed, holding the Act changed the underlying law because it did not "direct particular findings of fact or the application of old or new law to fact" but still left to the district court the role of determining whether the new criteria were met. Id. at 1148.

The Ninth Circuit has recently summarized the current state of the

separation of powers doctrine in a manner entirely consistent with the above analysis of the doctrine's recent development:

> It has long been recognized that Congress may not prescribe rules of decision to the Judicial Department of the government in cases pending before it. […] Whatever the precise scope of Klein, however, later decisions have made clear that its prohibition does not take hold when Congress amends applicable law. […] Thus, if a statute compels changes in the law, not findings or results under old law, it merely amends the underlying law, and is therefore not subject to a Klein challenge. […]

Ileto v. Glock, Inc., 565 F.3d 1126, 1139 (9th Cir. 2009) (internal citation and quotation omitted). As the Ninth Circuit candidly acknowledged after its reversal by the Supreme Court in Robertson, "Robertson indicates a high degree of judicial tolerance for an act of Congress that is intended to affect litigation *so long as it changes the underlying substantive law in any detectable way*." Gray v. First Winthrop Corp., 989 F.2d 1564, 1569-70 (9th Cir. 1993) (emphasis added). In the present case, as argued below, it is the absence of any such "detectable" change in the "underlying substantive law" that renders the legislative enactment challenged here constitutionally infirm.

MATERIAL FACTS

As required by L.R. 56.1(a), Plaintiffs have set for the material facts of the instant dispute in an accompanying Statement of Facts (hereinafter cited as "SOF"). They are only briefly summarized here.

Plaintiffs have standing to pursue this action. SOF # 1. There should be no need to re-file standing declarations submitted to the Court in related predecessor litigation on the same matter involving the same parties.

This Court previously vacated and set aside the Federal Defendants' April 2, 2009 Final Rule to Indentify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment, 74 Fed. Reg. 15125. Defenders of Wildlife, 729 F.Supp.2d at 1229. This Court reached this conclusion by construing the ESA and determining the Final Rule violated the plain language of the Statute. Id. at 1211, 1221-22, and 1228. SOF # 2. That case remains pending on appeal. SOF # 3.

On April 15, 2011, the President signed into law H.R. 1473, the Department of Defense and Full-Year Continuing Appropriations Act of 2011. P.L. 112-10 § 1713, 125 Stat. 38 (April 15, 2011). Section 1713 of this Act states in its entirety:

> Before the end of the 60-day period beginning on the date of enactment of this Act, the Secretary of the Interior shall reissue the final rule published on April 2, 2009 (74 Fed. Reg. 15213 et seq.) without regard to any other provision of statute or regulation that applies to issuance of such rule. Such reissuance (including this section) shall not be subject to judicial review and shall not abrogate or otherwise have any effect on the order and judgment issued by the United States District Court for the District of Wyoming in Case Numbers 09-CV-118J and 09-CV-138J on November 18, 2010.

Id. SOF # 4. Section 1713 is the only section of the approximately 459-page budget bill discussing the wolf-delisting rule. Id. Because Section 1713 is an isolated matter, stuck in the larger budget bill it is appropriately described as a "budget rider."

Pursuant to the congressional direction in Section 1713, the Federal Defendants reissued the April 2, 2009 Final Rule, 74 Fed. Reg. 15123, previously vacated and set aside by this Court as contrary to the plain language of the ESA. 76 Fed. Reg. 25590. SOF # 5.

Upon review of the plain language of P.L. 112-10 § 1713, 125 Stat. 38 (April 15, 2011), the Solicitor of the U.S. Department of the Interior concluded that it does not amend the Endangered Species Act. SOF # 12.

Section 1713 of H.R. 1473, which became P.L. 112-10 § 1713, 125 Stat. 38 (April 15, 2011), was primarily supported in the House by Representative Mike Simpson of Idaho and in the Senate by Senators Jon Tester and Max Baucus of Montana. See SOF ## 6, 7, 14-16, & 21.

The primary drafters and supporters of Section 1713 of H.R. 1473, which became P.L. 112-10 § 1713, 125 Stat. 38 (April 15, 2011), stated throughout the legislative process that their goal in passing this legislation was to reverse this Court's decision in Defenders of Wildlife, 729 F.Supp.2d 1207, without amending the ESA. SOF ## 13-23.

The only debate in the Congressional Record relating to Section 1713 of H.R. 1713 and its predecessors concerns an attempt to amend the legislation to change the reference from the April 2, 2009 delisting rule to the February 27, 2008 delisting that included Wyoming, an amendment which failed, and three statements by Senator Cardin arguing against the bill. Senator Cardin expressed a preference for using the existing process established by the ESA as opposed to the pending legislation to address the wolf issue. SOF ## 8-10.

At no time during the legislative debate did any Representative or Senator describe Section 1713 of H.R. 1473 as an attempt to amend the ESA. SOF ## 11, 13.

ARGUMENT

I. The Separation of Powers Test

In Ecology Center, the Ninth Circuit stated: "When a party claims that legislation "impermissibly interferes with the adjudicatory process" in violation of the separation of powers doctrine, we have recognized a two-part disjunctive test." 426 F.3d at 1148, *citing*, Gray, 989 F.2d at 1568 (Discussing Klein and related Supreme Court authority).

> The constitutional principle of separation of powers is violated where (1) "Congress has impermissibly directed certain findings in pending litigation, without changing any underlying law," or (2) "a challenged statute is independently unconstitutional on other grounds."

Ecology Center, 426 F.3d at 1148, *quoting* Gray, 989 F.2d at 1568 (quoting Robertson).

In light of this disjunctive test, the bulk of Plaintiffs' arguments relate to the first prong: "Congress has impermissibly directed certain findings in pending litigation, without changing any underlying law." However, before proceeding to that analysis, Plaintiffs argue under the second prong as well: the "challenged statute is independently unconstitutional on other grounds."

II. The Challenged Statute is Independently Unconstitutional on Other Grounds

The challenged budget rider contains a "double" prohibition of judicial review. After directing the Secretary of Interior to reissue the Final Rule previously struck down by this Court, Section 1713 states: "[s]uch reissuance (including this section) shall not be subject to judicial review …" P.L. 112-10 § 1713. Thus the budget rider attempts to preclude judicial review of both the reissued Final Rule and Section 1713 itself. To the extent these prohibitions of judicial review are interpreted to include prohibitions on constitutional challenges – both are independently unconstitutional.

First by attempting to preclude review of the statute, Section 1713, Congress violates the fundamental principle of judicial review on constitutional grounds first established in Marbury v. Madison, 5 U.S. 137

(1803) (establishing authority of judicial branch, including authority to overrule acts of Congress for violations of the Constitution). See also Constitution, Article III (vesting the judicial power in the courts and providing that this power shall extend "to all Cases, in Law and Equity, arising under this Constitution"); Webster v. Doe, 486 U.S. 592, 603 (1988) (Serious constitutional questions arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.); Biodiversity Associates v. Cables, 357 F.3d 1152, 1160 (10th Cir. 2004) (Challenged legislation's jurisdictional bar did not apply to preclude Court of Appeal's review as to legislation's constitutional validity.).

Second to the extent that the budget rider attempts to preclude judicial review of the reissued Final Rule on constitutional grounds, it again treads in unconstitutional territory. See Johnson v. Robison, 415 U.S. 361, 367 (1974); Paluca v. Secretary of Labor, 813 F.2d 524, 526 (1st Cir. 1987) (Statute which precluded judicial review of statutory claims, cannot apply to district court's jurisdiction over constitutional challenges.).

Accordingly, in light of these precedents, and heeding the Supreme Court's guidance in Johnson, 415 U.S. at 366-67, that limitations of jurisdiction are to be construed narrowly to avoid constitutional problems, this Court should find the double attempt to preclude judicial review in

Section 1713 does not apply to constitutional claims. To construe Section 1713 as precluding judicial review on constitutional grounds would render the statute unconstitutional, and thus in violation of the second prong of the Ninth Circuit's disjunctive separation of powers test – i.e. the "challenged statute is independently unconstitutional on other grounds." Ecology Center, 426 F.3d at 1148, *quoting* Gray, 989 F.2d at 1568. To avoid this immediate constitutional violation, this Court should find that despite Congresses' preclusion of judicial review, this Court does have jurisdiction to review constitutional challenges to the legislation. Otherwise, Section 1713 immediately fails the second prong of the separation of powers test used by the Ninth Circuit in Ecology Center and Gray.

Plaintiffs turn now to the heart of their argument under the first prong of the Ninth Circuit's separation of powers test.

III. Congress has impermissibly directed certain findings in pending litigation, without changing any underlying law

Here Plaintiffs' argument is straightforward. Through the budget rider, Section 1713 of P.L. 112-10, Congress did not amend the ESA in any "detectable way." Gray, 989 F.2d at 1569-70. Rather, Congress simply directed the Secretary of Interior to reissue the Final Rule previously vacated by this Court.

"In determining whether Congress intended the appropriations rider to repeal or modify the listing provisions of the Endangered Species act, we focus on the language of the rider." Environmental Defense Center v. Babbitt, 73 F.3d 867, 871 (9th Cir. 1995). "To the extent the language is ambiguous, we look to the legislative history." Id.

"Repeal of legislation by implication is disfavored." Id., *citing* Tennessee Valley Authority v. Hill, 437 U.S. 153, 190 (1978). "This rule 'applies with even *greater* force when the claimed repeal rests solely in an Appropriations Act.'" Environmental Defense Center, 73 F.3d at 871, *quoting* TVA v. Hill, 437 U.S. at 190 (emphasis in TVA v. Hill). "Only a 'clear repugnance' between the previous legislation and the appropriations bill warrants a finding that Congress intended to repeal the previous legislation." Environmental Defense Center, 73 F.3d at 871, *citing* In re Glacier Bay, 944 F.2d 577, 581 (9th Cir. 1991).

Accordingly, turning first to the plain language of the budget rider, it is apparent that Congress made no detectable amendments to the ESA. The rider mentions neither the ESA, nor the provisions of the ESA this Court previously found were violated by the Final Rule. The Federal Defendants' own attorney, the Solicitor of the U.S. Department of the Interior, has

considered the impact of the challenged budget rider and concluded it does not amend the ESA. SOF # 12.

Instead of amending the ESA, the budget rider contains only a general statement that the Final Rule is to be reissued "without regard to any other provision of statute or regulation that applies to issuance of such rule." The budget rider does not even "deem" that reissuance of the Final Rule is in compliance with the relevant provisions of the ESA, language the Ninth Circuit found sufficient to change underlying law in Mount Graham Coalition v. Thomas, 89 F.3d 554, 557 (9th Cir. 1996) (rejecting a separation of powers challenge to legislation providing a particular location for a telescope "shall be deemed" to be authorized by the underlying statute).

More importantly, the present case is unlike either Robertson or Ecology Center in which Congress created alternative methods for complying with existing law or made substantive changes to existing law. In Robertson, the Supreme Court held that "subsection (b)(6)(A) [of the challenged legislation] compelled changes in law, not findings or results under old law" because "under subsection (b)(6)(A), the agencies could satisfy their MBTA [Migratory Bird Treaty Act] obligations in either of two ways: by managing their lands so as neither to 'kill' nor 'take' any northern spotted owl within the meaning of § 2 [of the MBTA, 16 U.S.C. § 703], or

by managing their lands so as not to violate the prohibitions of subsections (b)(3) and (b)(5) [of Section 318 of the Appropriations Act]." 503 U.S. at 438.

Similarly, in Ecology Center, the challenged act changed the applicable old-growth retention standard from one requiring the retention of 10% old growth on a forest-wide basis to one requiring the retention of 10% old growth in the specific project areas. 426 F.3d at 1147. Thus in both Robertson and Ecology Center, Congress clearly made detectable changes in the underlying law.[2]

Here there are no such detectable changes in underlying law. Accordingly, the challenged budget rider fails to satisfy the Ninth Circuit's separation of powers test based on its plain language. The challenged budget rider does not compel changes in law. Instead it attempts to compel results under old law – i.e. that the Final Rule previously stuck down by this Court as contrary to the ESA should be returned to force. This is a direct violation of the separation of powers doctrine.

---

[2] See also Ileto, 565 F.3d at 1139 (holding the Protection of Lawful Commerce in Arms Act amended the applicable law and did not compel results under old law); Gray, 989 F.2d at 1569 (holding section of Securities Act compelled changes in law, not findings or results under old law); Wheeling Bridge, 59 U.S. at 30 (upholding new law making bridges "post roads" for U.S. Mail against separation of powers challenge because new law changed substantive law governing interstate commerce and bridges).

Moreover, even were the language of the challenged budget rider somehow ambiguous, resort to the sparse legislative history concerning its passage does not alter, but rather, supports the conclusion the rider did not change the underlying law in any detectable way.

Plaintiffs are "mindful of the limited persuasive value of the remarks of an individual legislator." Ileto, 565 F.3d at 1137, *citing* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980) ("[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history."). See also Ileto, 565 F.3d at 1137, *citing* Brock v. Writers Guild of Am. W., Inc., 762 F.2d 1349, 1356 (9th Cir. 1985) ("The remarks of legislators opposed to legislation are entitled to little weight in the construction of statutes."). However, in the present case, where there is almost zero legislative history of Section 1713 of H.R. 1473, P.L. 112-10 § 1713, other than "contemporaneous remarks" of the legislators sponsoring the bill (SOF ## 11-23) and the formal remarks of a legislator opposed to the legislation (SOF # 10), the Court and the parties must make do with the legislative history such as it is, and analyze what legislative history does exist, despite its "limited persuasive value."

Here the legislative history establishes only two things. First, that the formal remarks of a legislator opposed to the legislation indicated a preference for using the existing procedures found in the ESA to deal with the wolf controversy as opposed to attempting an end run of the ESA, and this Court's decision, through the budget rider. SOF ## 8-10.

Second, that the primary drafters and supporters of the budget rider believed their legislation would reverse this Court's decision in Defenders of Wildlife, 729 F.Supp.2d 1207, without amending the ESA. SOF ## 13-23. At no time during the legislative debate, either on the formal record, or outside of it, did any Representative or Senator describe Section 1713 of H.R. 1473 as an attempt to amend the ESA. SOF ## 11, 13.

Accordingly, analysis of the legislative history results in the same conclusion as analysis of the plain language of the budget rider itself: The rider does not amend the ESA. It attempts to compel a result, re-institution of the Final Rule struck down by this Court under existing law, without changing the existing law. This is precisely what is prohibited by the separation of powers doctrine.

CONCLUSION

As stated at the outset, this Court is again faced with what some believe to be a pragmatic solution to a long-running controversy. Yet, the

Court's task remains, not to evaluate the pragmatic nature of the proffered congressional solution to this controversy, but to evaluate its legality. Here, as approximately a hundred and forty years ago, Congress has again acted from political expediency "with perhaps little consideration in either House of Congress." Klein, 80 U.S. at 143. In so doing, Congress has attempted to direct this Court how to construe and apply existing law to the facts of the Final Rule, without changing the governing law in any "detectable way." See Gray, 989 F.2d at 1569-70. The present situation is not analogous to that previously faced by this Court in Ecology Center, where Congress changed the governing law during the course of pending litigation, but did not "impermissibly direct[] findings." Ecology Center, 426 F.3d at 1147. Here, Congress has left the Court no choice. Congress is treating this Court as a mere functionary instituting Congresses' will as to who should prevail before it. Congresses' action, placing its thumb firmly on one side of the scales of justice in pending litigation, but without exercising its constitutional authority to amend existing law, impermissibly directs the Court what to do and robs it of its constitutional function in violation of the separation of powers doctrine.

Accordingly, Plaintiffs respectfully request this Court to zealously guard its constitutional roll and grant their Motion for Summary Judgment.

Respectfully submitted this 31st day of May, 2011,

/s/ James Jay Tutchton
James Jay Tutchton
Tutchton Law Office, LLC
6439 E. Maplewood Ave.
Centennial, CO 80111
(720) 301-3843
jtutchtontlo@gmail.com

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I hereby certify that the foregoing brief contains 5,806 words, excluding caption and certificates, in compliance with the 6,500 word limit established by L.R. 7.1(d)(2)(A) and this Court's Order of May 13, 2011 (Dkt. 8). In making this certification, I have relied on the word count feature of the word processing system used to prepare this brief.

/s/ James Jay Tutchton
James Jay Tutchton

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2011, I electronically filed the foregoing document with the clerk of the U.S. District Court for the District of Montana using the Court's CM-ECF System which will send a Notice of Electronic Filing to all counsel of record.

/s/ James Jay Tutchton
James Jay Tutchton