

Steve Bullock  
Attorney General of Montana  
215 North Sanders  
PO Box 201401  
Helena, MT 59620-1401  
ph: (406) 444-2026  
fax: (406) 444-3549  
sbullock@mt.gov

Robert N. Lane  
Chief Legal Counsel  
Special Assistant Attorney General  
Montana Department of Fish, Wildlife and Parks  
1420 East Sixth Avenue  
PO Box 200701  
Helena, MT 59620-0701  
ph: (406) 444-4045  
fax: (406) 444-7456  
blane@mt.gov  
*Attorney for State of Montana and Montana Fish, Wildlife and Parks*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

ALLIANCE FOR THE WILD )  
ROCKIES, et al., )  
Plaintiffs, )  
 )  
v. )  
 )  
KEN SALAZAR, et al. )  
Defendants. )  
\_\_\_\_\_)  
CENTER FOR BIOLOGICAL DIVERSITY, et al., )  
Plaintiffs, )  
 )  
v. )  
 )  
KEN SALAZAR, et al., )  
Defendants. )  
\_\_\_\_\_)

Case No. CV-011-00070-DWM  
CV-011-00071-DWM

**STATE OF MONTANA'S AND  
MONTANA DEPARTMENT OF  
FISH, WILDLIFE AND PARKS'  
AMICUS BRIEF IN SUPPORT  
OF THE FEDERAL  
DEFENDANTS**

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## **INTRODUCTION**

The State of Montana and the Montana Department of Fish, Wildlife and Parks submits this amicus curiae brief in support of Defendants Ken Salazar, Rowan Gould, and United States Fish and Wildlife Service in this consolidated case.

## **SUMMARY**

Congress amended the Endangered Species Act (ESA) to delist the distinct population segment of the Northern Rocky Mountain gray wolf throughout its range except for Wyoming where Congress left it on the list of endangered species. This act of Congress does not violate the separation of powers between the legislative and executive branches because Congress amended the ESA by specifically and conditionally exempting the Northern Rocky Mountain gray wolf distinct population segment from the Department of Interior, Fish and Wildlife Service's list of endangered and threatened wildlife.

## **BACKGROUND**

On April 15, 2011, Congress passed and President Obama signed into law the Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. 112-10, 125 Stat. 38 ("Appropriations Act of 2011"). Section 1713 of the Act provides as follows:

SEC. 1713. 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.

Under the authority of Section 1713 of Public Law 112-10, the United States Fish and Wildlife Service, Department of Interior, reissued the final rule removing the Northern Rocky Mountain gray wolf population, except in Wyoming, from the list of endangered and threatened species by amending part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations. 76 Fed. Reg. 25, 590, 91-92.

The ESA, 16 U.S.C. §1531, et seq., continues to apply to the Northern Rocky Mountain gray wolf distinct population segment as a non-listed species as specified in the reissued rule meaning this population of the gray wolf will be subject to monitoring, a potential status review, and the potential for relisting if warranted. 74 Fed. Reg. 15123, 86 (April 2, 2009); §4 of ESA, 16 U.S.C. §1533.

This Court ruled that the 2009 rule delisting the Northern Rocky Mountain gray wolf distinct population segment was in violation of the ESA because the population was delisting in part of its range while it remained listed in Wyoming and, therefore, vacated the 2009 delisting rule. *Defenders of Wildlife v. Salazar*,

729 F.Supp. 1207 (D. Mont. 2010).

*Defenders of Wildlife* has been appealed to the 9th Circuit, where the appeal is now pending.

### **ISSUE PRESENTED**

The two plaintiff groups both claim Section 1713 is unconstitutional because it violates the separation of powers requirements of the United States Constitution by directing a result in pending litigation without amending the underlying statute.

However the decided cases require a conclusion that Section 1713 is constitutional.

### **APPLICABLE LAW**

This Court has previously stated the fundamental test: "Congress can pass a law that applies in ongoing legislation, as long as the law and its application are prospective, and the new law changes the underlying substantive law." *Ecology Center, Inc. v. Castenada*, 2004 U.S. Dist. LEXIS 27858, \*4 (D. Mont. Aug. 20, 2004), *affirmed*, *Ecology Center, Inc. v. Castenada*, 426 F.3d 1144 (9th Cir. 2005).

The United States Supreme Court has decided the separation of powers issue for a number of factual scenarios that help define the parameters of the doctrine as applied.

In *United States v. Klein*, 80 U.S. 128 (1872), the Court overruled the

attempt of Congress to deny claimant's attempt to recover property seized during the Civil War. Pursuant to statute, recovery required proof of the petitioner's loyalty. Presidential pardons and grants of amnesty were given a Catch-22 effect by an act of Congress. Because the pardons were granted based on an admission of former disloyalty, an act of Congress then deemed that admissions were conclusive proof of disloyalty that disqualified claimants' qualification for recovery. The act was directing the Court of Claims to find facts which the court found an unconstitutional invasion of the judiciary.

A bridge over the Ohio River was first found by the United States Supreme Court to be an unlawful obstruction of navigation but a subsequent act of Congress declared the bridge a lawful structure and "shall be so held and taken to be, anything in the law or laws of the United States to the contrary notwithstanding." The Court found the previous acts of Congress were modified by the subsequent legislation and held "...although it still may be an obstruction in fact, it is not so in the contemplation of law." *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 59 U.S. 421, 429-430 (1856).

The United States Supreme Court found that Congress, in an appropriation bill, amended statutes governing timber sales by exacting two new standards for timber harvest in potential spotted owl habitat without amending the statutes that

would otherwise apply. The amendment stated the new guidelines were "adequate consideration for the purpose of meeting statutory requirements" and that the guidelines "shall not be subject to judicial review." *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 435 n. 2 (1992) (reciting the applicable rider to the appropriations bill).

The Court found that Congress "may amend substantive law in an appropriations statute, as long as it does so clearly" and that the rider because it "provided by its terms that compliance with certain new law constituted compliance with certain old law, the intent to modify was not only clear, but express." *Id.* at 440 (emphasis in original). The Court found the rider constitutional because it amended previously existing law. *Id.* at 441.

The 9th Circuit found an act of Congress in exempting a section of highway construction from statutorily required findings was in itself legislation and that Congress could "alter a legislative grant of authority by means of new legislation directed at a particular project" without violating the doctrine of separation of powers between Congress and the executive branch or the judicial branch. *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1435, n. 24, 1438, n. 27 (9th Cir. 1989).

The 9th Circuit has recognized a two-part, disjunctive test. The first part is applicable to this case. "The constitutional principle of separation of powers is



violated where (1) 'Congress has impermissibly directed certain fining in pending litigation, without changing any underlying law,' ..." *Ecology Center*, 426 F.3d at 1148 (quoting *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1568 (9th Cir. 1993) (additional references omitted)).

*Gray* holds that an act of Congress can be "directed at a specific judicial ruling so long as that legislation modifies the law" and that the act of Congress need only change "the underlying substantive law in any detectable way." *Gray*, 989 F.2d at 1569, 1570.

*Ecology Center*, 426 F.3d at 1148, recognized the general principle that an act of Congress should be invalidated "only for the most compelling constitutional reasons." (citing, *Mistretta v. United States*, 488 U.S. 361, 384 (1989)).

## **ARGUMENT**

When the Secretary of Interior reissued the final rule of April 2, 2009 (74 Fed. Reg. 15123 et seq.), the one result was to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations by removing gray wolves in Montana and Idaho, as well as portions of eastern Oregon, eastern Washington, and north-central Utah from the List of Endangered and Threatened Wildlife. 76 Fed. Reg. 25, 590, 91-92. The list is all the species determined by the Secretary of the Interior or by the Secretary of Commerce to be endangered species or

threatened species. Congress can exempt a specific project such as a section of highway construction. *Stop H-3 Ass'n.*, 870 F.2d 1419. It follows that Congress can partially exempted a distinct population segment from the requirements of the ESA by directing that the Northern Rocky Mountain population of the gray wolf be removed from the list and, therefore, bypassed the delisting criteria of §4 of the ESA, 16 U.S.C. §1533. This is also analogous to declaring as a matter of law that a bridge is no longer an obstruction to navigation. *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 59 U.S. 421.

Congress could have completely exempted the wolf from the ESA as a valid amendment to the act. Section 1713 only partially amended by ESA because this distinct population of the gray wolf is subject to the same post-delisting monitoring as any other delisted species. It can be relisted if necessary.

Congress can amend substantive law as long as it does so clearly. *Robertson*, 503 U.S. at 440. When Congress substituted new timber harvest guidelines to apply only in specific forests having potential spotted owl habitat by stating the new guidelines were adequate consideration for meeting the statutory criteria and were not subject to judicial review, *Robertson* found this statutory language was not only clear, but express.

Section 1713 has by its terms made it clear that its purpose is to direct the

partial delisting of the Northern Rocky Mountain gray wolf. The language ensures the delisting is effective "without regard to any other provision of statute or regulation that applies to issuance of such rule" and that the delisting "shall not be subject to judicial review." Section 1713 of the Appropriations Act of 2011.

Section 1713 meets the 9th Circuit's test to avoid unconstitutionally directing a result in ongoing litigation because it changes the underlying law prospectively. *Ecology Center*, 426 F.3d 1144; *Gray*, 989 F. 2d 1564. After Section 1713 was enacted and the delisting rule reissued, the status of the Northern Rocky Mountain gray wolf distinct population segment was altered by exempting it from the delisting criteria of §4 of the ESA. Thus the wolf was specifically exempted analogous to the exemption of a highway project in *Stop H-3 Ass'n* or a bridge in *Pennsylvania v. The Wheeling and Belmont Bridge Co.*

Similar modifications of otherwise applicable underlying statutes were not invalid as violations of the doctrine of separation of the powers of the legislative and judicial branches. The criteria for timber harvests were modified by exempting the harvests from the underlying criteria and substituting new criteria just for specific forests. *Robertson*, 503 U.S. 429; *Ecology Center*, 426 F.3d 1144.

In *United States v. Klein*, the United States Supreme Court declared an act of Congress unconstitutional because it directed the Court of Claims to make factual

findings. Here, there is no attempt to direct or require any court to make prescribed factual determinations.

Section 1713 only applies to a specific distinct population segment of the gray wolf. It does not apply to any other species, subspecies, or distinct population segments. It does not attempt to modify this Court's conclusions of law in *Defenders of Wildlife*, 729 F.Supp 1207, as the decision may apply as precedent to the listing or delisting of any other species. It simply exempts one distinct population segment of the gray wolf from the delisting criteria only.

### **CONCLUSION**

Section 1713 of the Appropriation Act of 2011 is a constitutional enactment of Congress and is not a violation of the separation of powers between the legislative and judicial branches.

Dated this 13th day of June 2011.

Steve Bullock  
Attorney General  
State of Montana

/s/ Robert N. Lane  
Robert N. Lane  
Chief Legal Counsel  
Special Assistant Attorney General  
Montana Department of Fish, Wildlife and Parks

**CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1(d)(2)(A) the attached brief is double spaced, typeface of 14 point, and contains 1906 words, excluding the caption and certificates of service and compliance, as indicated by the word count of the word-processing system used to type this brief.

/s/ Robert N. Lane  
Robert N. Lane  
Chief Legal Counsel  
Special Assistant Attorney General  
Montana Department of Fish, Wildlife and Parks

**CERTIFICATE OF SERVICE**

I hereby certify that on June 13, 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/ Robert N. Lane  
Robert N. Lane  
Chief Legal Counsel  
Special Assistant Attorney General  
Montana Department of Fish, Wildlife and Parks