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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

ALLIANCE FOR THE WILD ROCKIES, et al.,

Plaintiffs,

vs.

KEN SALAZAR, et al.,

Defendants.

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Plaintiffs,

vs.

KEN SALAZAR, et al.,

Defendants.

CV 11-70-M-DWM
CV 11-71-M-DWM

CENTER FOR BIOLOGICAL DIVERSITY ET AL.'S REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Congress can resolve difficult and contested policy issues by amending the law. But that is not what Congress did through Section 1713 – the appropriations rider at issue here. After this Court held that the 2009 northern Rocky Mountains gray wolf delisting rule ("Delisting Rule") violated the Endangered Species Act ("ESA"), Congress through Section 1713 ordered FWS to reissue the rule, exempted it from all applicable law, and barred judicial review. Nothing in the plain language of Section 1713 or its legislative history indicates that Congress amended the ESA. Indeed, the sponsor of the legislation explained that Section 1713 does not amend the ESA. Thus, "Congress … passed the limit which separates the legislative from the judicial power." U.S. v. Klein, 80 U.S. 128, 147 (1872). For these reasons, and as explained below and in the Center's opening brief (Dkt. 30), Section 1713 violates the separation of powers and must be declared unconstitutional.

ARGUMENT

Section 1713 exempts the Delisting Rule from applicable law without creating any new legal standards, robbing the courts of their power to decide the legality of the Delisting Rule in the pending appeals. Accordingly, and consistent with the framework established by the Supreme Court and the Ninth Circuit, Section 1713 violates the separation of powers. Thus, the Court must conclude

that "Congress has impermissibly directed certain findings in pending litigation, without changing any underlying law." Ecology Ctr. v. Castaneda, 426 F.3d 1144, 1148 (9th Cir. 2005).

I. Section 1713 Violates The Separation Of Powers Doctrine By Directing An Outcome In Pending Litigation Without Amending The Law

Defendants claim that Section 1713 does not direct findings in pending litigation on the Delisting Rule because it leaves the persuasive value of this Court's ruling in DOW v. Salazar, 729 F.Supp.2d 1207 (D. Mont. 2010), intact, but "amends" the ESA by creating an exemption for the Delisting Rule. But these arguments have no support in Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 439 (1992) or the Ninth Circuit cases that assess the constitutionality of legislation under Klein, because unlike those cases, Section 1713 indisputably directs an outcome in DOW v. Salazar without amending substantive law. Accordingly, the Court must reject these arguments.

A. Section 1713 Directs An Outcome In The Pending Appeals

Defendants assert that Section 1713 does not direct an outcome in the litigation because it "does not require the court to do anything" and "does nothing to interfere with the persuasive effect or the reasoning" in this Court's order vacating the Delisting Rule. Dkt. No. 57 at 21. Yet Section 1713 directs an outcome in the pending appeals, even though it does not explicitly tell the courts to

do anything. As the Supreme Court has made clear, the fact that legislation directs action by the executive branch rather than explicitly directing the judiciary to reach a certain outcome is of no consequence because "[a] statutory directive binds both the executive officials who administer the statute and the judges who apply it in particular cases ... ." Robertson, 503 U.S. at 439 (emphasis in original). Given its mandate, if Section 1713 is deemed constitutional, the Ninth Circuit will have to find that the pending appeals in DOW v. Salazar are moot. Cf. Consejo De Desarrollo Economico De Mexicali, A.C. v. U.S., 482 F.3d 1157, 1168 (9th Cir. 2007) ("If legislation passing constitutional muster is enacted while a case is pending on appeal that makes it impossible for the court to grant any effectual relief, the appeal must be dismissed as moot.").[1]

Section 1713's bar on judicial review confirms that it directs an outcome in pending litigation. Any challenge to the Delisting Rule under the Administrative Procedure Act ("APA") or the ESA would fail because of the bar on judicial review, as Defendants acknowledge in seeking summary judgment on the Center's APA claim. Dkt. 57 at 26-27. Thus, as in Klein, the Congressional intent to withhold jurisdiction is an impermissible "means to an end," namely, to deny ESA

[1] The Center agrees with Defendants that this Court's order in DOW v. Salazar will retain its persuasive effect, and that FWS's management of delisted wolves in the Northern Rockies remains subject to the ESA. But this does not lessen the effect of Section 1713 on the litigation at issue here. The question is whether Section 1713 directs an outcome in the pending appeals. It does.

protections to gray wolves that this Court has restored. 80 U.S. at 145. Through this tactic, Congress attempted to "prescribe a rule for the decision of a cause in a particular way." Id. at 146. Indeed, in stark contrast to Section 1713, the Ninth Circuit has upheld statutory provisions under Klein precisely because they retained judicial review of the agency action. See Apache Survival Coal. v. U.S., 21 F.3d 895, 904 n.10 (9th Cir. 1994) (upholding statutory provision as constitutional because "judicial review … is available through the APA"); Atonio v. Wards Cove Packing Co., Inc., 10 F.3d 1485, 1492 (9th Cir. 1993) (upholding provision where it "does not purport to order any federal court to dismiss the … complaint"). Section 1713 would do just the opposite, and Defendants cannot save Section 1713 from this fundamental defect.

Likewise, Section 1713 is distinguishable from the legislation that the Supreme Court found constitutional in Wheeling Bridge. The legislation in Wheeling Bridge did not bar judicial review and did not direct an outcome in the litigation. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421, 429 (1856).[2] As the Supreme Court explained in Klein, "No arbitrary rule of decision was prescribed in [Wheeling Bridge], but the court was left to apply its ordinary

[2] In addition, the intervening legislation in Wheeling Bridge differs from Section 1713 because it created new circumstances by making the bridge a post-road for passage of U.S. mail and requiring that navigation not interfere with the bridge. Id. Unlike Section 1713, it did not merely exempt the bridge from all applicable law.

rules to the new circumstances created by the act." Klein, 80 U.S. at 146-47; accord, Robertson, 503 U.S. at 439 (intervening legislation "compelled changes in law, not findings or results under old law").

Defendants' attempt to limit Klein to its unique facts is untenable. No case interpreting Klein has held that its holding is limited to cases involving evidentiary findings, vested property rights, or presidential pardons. The Supreme Court in Robertson applied Klein to an APA case dealing with management of public natural resources. Robertson, 503 U.S. at 438. And several of the Ninth Circuit cases applying Klein were environmental cases. See, e.g., Apache Survival., 21 F.3d at 902 (applying Klein to ESA case); Mt. Graham Coal. v. Thomas, 89 F.3d 554 (9th Cir. 1996) (same). Moreover, Klein remains good law – indeed, the Robertson Court explicitly refrained from overturning or narrowing Klein. 503 U.S. at 441.

In sum, the Court must conclude that Section 1713 directs an outcome in pending litigation by requiring the Ninth Circuit to find the pending appeals moot without allowing it to fulfill its judicial role of interpreting the law.

B. Unlike All Other Legislation That The Ninth Circuit Has Found Constitutional Under Klein, Section 1713 Provides No New Standards For The Court To Apply And Thereby Does Not Amend The Law

Robertson provides the framework for assessing whether legislation violates the separation of powers. As explained in the Center's opening brief, the legislation that survived scrutiny in Robertson created new standards for the courts to apply. Dkt. 30 at 19-20. Congress exempted the timber harvests from preexisting law and provided the harvests must satisfy the two conditions set forth in the Compromise. Robertson, 503 U.S. at 434-35. The fact that the Compromise modified the legal standard was central to its constitutionality. Id. at 438-39. With new legal standards to apply, the Compromise allowed the courts to exercise their adjudicatory function and apply the new law in the Compromise to determine whether the Forest Service's timber-harvesting decisions satisfied those conditions. Id. The new standards in the Compromise demonstrated that Congress amended the law because it "modified the old provisions." Id. at 438.

The Ninth Circuit has consistently relied on this rationale, as Defendants concede. Dkt. 57 at 15. In fact, in every Ninth Circuit case applying Klein, the legislation at issue provided new standards for the courts to apply. Dkt. 30 at 24-25 n.9. Defendants' and amici's attempts to rely upon Consejo, Apache Survival, and Stop H-3 fail because – like Robertson and unlike Section 1713 – all of those

cases involve legislation that provided new or modified legal standards and did not attempt to preclude all judicial review.[3]

Consejo involved a dispute over replacement of an unlined portion of the All-American Canal. Consejo, 482 F.3d at 1162. After the Ninth Circuit granted an injunction halting work on the project pending appeal, Congress passed legislation with similarities with Section 1713. Id. at 1167. Both enactments direct an agency to take a specific action and exempted the action from certain laws. But the intervening legislation in Consejo differs in a critical way: it "change[d] the substantive law governing pre-conditions to commencement" of the project. Id. at 1170. Specifically, it provided that a treaty between the United States and Mexico and a supplementary protocol would be the exclusive authority governing the Lining Project. Id. at 1167. Congress replaced the numerous legal requirements that affected the project with those requirements in the treaty and protocol. In this way, the intervening legislation at issue in Consejo was similar to the Compromise at issue in Robertson.

[3] In some cases, like Consejo, the legislation directed an outcome by requiring the court to dismiss pending litigation. 482 F.3d at 1168. But such legislation also amended the law. Id. at 1170. A separation of powers problem is created when Congress directs certain findings in pending litigation and does so "without changing any underlying law." Ecology Ctr., 426 F.3d at 1148. Section 1713 fails under both prongs of the test. Without new standards and a bar on judicial review, Section 1713 directs an outcome in the pending appeals. And because it provides no new standards and does not amend the ESA, Section 1713 fails to change the underlying law.

Similarly, the legislation at issue in Apache Survival created a new standard for the courts to apply. There, plaintiffs sought to halt construction of telescopes on Mount Graham in Arizona. 21 F.3d at 898. Congress intervened by passing legislation providing that "Subject to the terms and conditions of Reasonable and Prudent Alternative Three of the Biological Opinion, the requirements of section 7 of the [ESA] shall be deemed satisfied ... ." Id. at 902. The Ninth Circuit reasoned that the legislation was permissible because it created "new standards" for the court to apply.[4] Id.; see also Sierra Club v. U.S. Forest Serv., 93 F.3d 610, 612 (9th Cir. 1996) (exempting certain salvage timber sales from the National Environmental Policy Act ("NEPA") but requiring "instead" the preparation of "a combined environmental and biological report"). Thus, the intervening legislation was like the Compromise in Robertson because it "substituted preexisting legal standards that governed a particular project, in this case ESA and NEPA, with the new standards, in this case Reasonable and Prudent Alternative Three." Id.

[4] The D.C. Circuit case relied upon by Defendants also involved legislation which substituted a new standard for preexisting standards. Nat'l Coal. to Save Our Mall v. Norton, 269 F.3d 1092 (D.C. Cir. 2001). Congress exempted a World War II Memorial from certain laws while still requiring that the project comply with a special use permit and that future project modifications be considered and approved in accordance with the requirements of the Commemorative Works Act. Id. at 1094. The D.C. Circuit analogized to Robertson and explained that Congress amended the applicable substantive law. Id. at 1097.

Defendants' reliance on Stop H-3 is also misplaced. There, legislation exempted a highway project from the Department of Transportation Act. Stop H-3 Ass'n v. Dole, 870 F.2d 1419, 1425 (9th Cir. 1989). But unlike Section 1713, the intervening legislation did not exempt the project from all applicable law, and the court was left to determine whether the project satisfied NEPA. Id. at 1425-27. Moreover, Stop-H-3 has limited application here. Outside of dicta in a footnote, the Ninth Circuit never analyzed the constitutionality of the intervening legislation in Stop H-3 under Klein. Id. at 1438 n.26.

Defendants suggest that the Center is trying to "graft on a requirement" to the relevant test for constitutionality. Dkt. 57 at 18. There is no dispute that a Congressional enactment may be deemed an unconstitutional violation of the separation of powers only where "Congress has impermissibly directed certain findings in pending litigation, without changing any underlying law." Ecology Ctr., 426 F.3d at 1148. It is clear from the case law the identification of new standards is how the Supreme Court in Robertson and the Ninth Circuit ascertain whether Congress directs an outcome in the litigation and amends the law. Possibly, the identification of new standards is not the only way for the courts to determine whether Congress amended the law or directed findings. Yet Defendants can point to no cases holding that legislation like Section 1713 – which

wholly exempts an agency action from all applicable law and bars it from judicial review – is constitutional under Klein.

In sum, Section 1713 fails under Klein because the court is not "left to apply its ordinary rules to the new circumstances created by the act." Klein, 80 U.S. at 147. Congress through Section 1713 ordered FWS to reissue the Delisting Rule – which was found to be illegal under existing law – and told the court that it could not review the action. That amounts to telling the court how to decide the case without amending the law. Under Klein, that is unconstitutional.

C. Section 1713 Does Not Amend The ESA By Exempting The Delisting Rule From All Applicable Law

All agree that no language of the ESA was changed through Section 1713. Instead, Defendants and amici assert that the ESA's requirements must be overlooked when it comes to the illegal Delisting Rule. See, e.g., Dkt. 51 at 4 (the Delisting Rule's violations of the ESA are to be "disregarded").

Yet no party can explain how directing reissuance of an illegal regulation equates to an amendment of "substantive law" as required under Robertson. See Gray v. First Winthrop Corp., 989 F.2d 1564, 1579 (9th Cir. 1993) ("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") (emphasis added); Cook Inlet Treaty Tribes v. Shalala, 166 F.3d

986, 990 (9th Cir. 1999) (rejecting challenge to constitutionality of statute because it "changes the underlying substantive law"). Indeed, this case stands in sharp contrast to this Court's holding in Ecology Ctr. – i.e., that "Congress has not impermissibly directed findings" as "this Court could still, somehow, find there wasn't 10% on an area and prevent the [timber] sales" and therefore, "Congress … changed the underlying law". Ecology Ctr., Inc. v. Castenada, No. 02-200-M-DWM, 2004 U.S. Dist. LEXIS 27858, *2 (D. Mont. Aug. 20, 2004). Here, the Court could not review the regulation under the ESA at all, let alone find that it has been redeemed under some change to the substantive law.

The ESA was not substantively changed by Section 1713 in any detectable way. To reach the opposite conclusion would require a finding that reissuance of an unlawful regulation amounts to a change in the substantive law. There is no precedent for this in the cases applying Klein and Robertson.

D. The Legislative History And Other Statements Are Admissible and Support The Conclusion That Section 1713 Does Not Amend The ESA

Plaintiffs established that the plain language of Section 1713 shows that Congress did not amend the ESA through its enactment. Dkt. 30 at 26-28. Even if the language of Section 1713 were ambiguous, Defendants object to consideration of legislative intent or seek to limit such consideration to the final conference report. Dkt. 57 at 17-20. Yet, the Court may consider the legislative history for

Section 1713. As the Supreme Court has said: [w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980); see also Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1456-57 (9th Cir. 1992) (giving greater weight than usual to statements of individual legislators where only three senators and three representatives spoke on the record, no committee meetings were held, and legislation was passed quickly). "Every thing" available includes the statements in the record of two legislators opposed to the act, and public statements of the act's sponsors. Consistent with the plain language of Section 1713, the available evidence shows that Congress did not amend the ESA.

Defendants also attempt to downplay the persuasiveness of an article from the New York Times, by arguing that the public remarks of Senator Tester, a chief sponsor of Section 1713, are not a reliable indicator of intent. Senator Tester's remarks were made before Congress voted on the bill, not after, as Defendants imply.[5] Thus, they are entitled to weight under GTE and are reliable indicators of legislative intent.[6]

[5] Senator Tester's statements to the New York Times were made April 13, 2011. Dkt. 30 at 14-15, 29. The House and Senate votes occurred the next day. See http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congr

Defendants also complain that Senator Tester's statements to the New York Times are "advanced without proper foundation." Dkt. 57 at 18. But as Defendants concede, newspapers and periodicals are self-authenticating. Dkt. 57 at 18, citing Fed. R. Evid. 901 (requirement for authentication) and 902(5) (newspapers and periodicals self-authenticating); see also Orr v. Bank of America, 285 F.3d 764, 778 n.24 (9th Cir. 2002) (when submitted in summary judgment motion, documents can be authenticated by review of their contents or other means). Thus, Defendants arguments about authentication fail. Defendants' bald assertions of irrelevance are similarly unavailing. The remarks made by sponsoring congressmen during the time Congress was considering Section 1713 unquestionably reveal the fact of their intent. Fed. R. Evid. Rule 401.

Defendants' arguments regarding hearsay also fail. If the statements are hearsay, then the hearsay exception for any evidence having "circumstantial guarantees of trustworthiness" surely applies, as made evident by the consideration of similar materials in cases like Mt. Graham. 954 F.2d at 1456-57 (examining legislator statements in press releases to determine persuasiveness regarding

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ess=112&session=1&vote=00061 and http://clerk.house/gov/evs/2011/roll268.xml (last visited June 20, 2011).

[6] The Solicitor's Opinion M-37024, which states that Section 1713 does not "amend the [ESA] generally" is also entitled to weight as official agency interpretations are considered so long as they offer a consistent and reasonable position. See Mt. Graham, 954 F.2d at 1457.

legislative intent); see also GTE, 447 U.S. at 118 (allowing use of "every thing" available to derive legislative intent).

Defendants cannot identify any statements or other evidence in the congressional record – or elsewhere – indicating that Congress intended to amend the ESA through Section 1713. Examination of Section 1713 itself as well as the legislative record and Senator Tester's contemporaneous statements properly demonstrate that it did not.

CONCLUSION

For all these reasons, the Court must declare that Section 1713 and FWS's reissuance of the Delisting Rule violate the separation of powers in the U.S. Constitution. The Court should vacate and enjoin the unlawful Delisting Rule, which would reinstate ESA protections for endangered gray wolves in the Northern Rockies.

Respectfully submitted this 21st day of June, 2011.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I hereby certify that the foregoing brief contains 3,250 words, excluding the caption and this certificate, as determined by the word count function of Microsoft Word.

Dated: June 21, 2011

/s/ Amy R. Atwood