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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.,

Plaintiff,

v.

KEN SALAZAR, et al.,

Defendants.

CASE NOS.
11-cv-70-M-DWM;
11-cv-71-M-DWM

FEDERAL DEFENDANTS' CONSOLIDATED RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Federal Defendants submit the following consolidated brief in support of their Cross Motion for Summary Judgment and in opposition to the Motions for Summary Judgment of Plaintiffs Center for Biological Diversity, Cascadia Wildlands, and Western Watersheds Project (collectively "CBD"); and Alliance for the Wild Rockies, Friends of the Clearwater, and WildEarth Guardians (collectively "WEG"). CV-11-70-M-DWM, Dkt. # 26, 27. Plaintiffs challenge both the reissued rule of the Fish and Wildlife Service ("Service") that removed from the Endangered Species Act's ("ESA") endangered status the gray wolves in several western states ("May 5 Rule") and the Congressional amendment that required its reissuance. They argue the amendment violates the separation of powers doctrine and, therefore, it must be declared unconstitutional and the May 5 Rule must be set aside.

This lawsuit concerns a bill enacted by the legislative branch and signed by the President, following the Constitution's requirements of bicameralism and presentment, which directs an executive agency, the powers of which are delegated by Congress, to take an action. Congress acted well within its Constitutional authority. In passing the amendment ("Section 1713"), Congress amended the law and did not provide an impermissible rule of decision for the judicial branch. Therefore, the amendment must be upheld as constitutional. For those reasons, as explained more fully below, Plaintiffs' Motions for Summary Judgment should be denied, and Federal Defendants' Cross-Motion granted.

BACKGROUND

I. Statutory and Regulatory Background

A. The Endangered Species Act

The Endangered Species Act of 1973, as amended, 16 U.S.C. § 1531 *et seq.*, is the primary law governing the federal government's protection of endangered and threatened species. A species is listed as endangered when it is "in danger of

extinction throughout all or a significant portion of its range" and as threatened if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(6), (20). The ESA defines "species" as including any species, subspecies, "and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). ESA Section 4(a), 16 U.S.C. § 1533(a), sets forth the criteria for identifying whether a species is subject to protection under the ESA or subject to removal from the ESA's protections. Once a species has been determined to have threatened or endangered status under the ESA, a variety of legal protections apply. These protections continue until the Service issues a rule removing the ESA's protections from that species.

B. Section 1713 of the Department of Defense and Full-Year Continuing Appropriations Act of 2011

On April 15, 2011, President Obama signed the Department of Defense and Full-Year Continuing Appropriations Act of 2011. P.L. 112-10 § 1713, 125 Stat. 38 (Apr. 15, 2011). Section 1713 of this law provided in full:

> 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. 15123 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.

I. II. Factual Background

The Service first listed subspecies of the gray wolf in 1974, *see* 39 Fed. Reg. 1,158, 1,171, 1,175 (Jan. 4, 1974), and, in March 1978, the Service published a rule re-listing the gray wolf at the species level (*Canis lupus*) to avoid certain

taxonomic problems with the subspecies listings. *See* 43 Fed. Reg. 9,607 (Mar. 9, 1978). Under the 1978 rulemaking, the gray wolf was listed as threatened in Minnesota and endangered throughout the remaining 47 conterminous United States and Mexico. *Id.* at 9,611.

In a 2009 rule, the Service proposed to revise this national listing, in part, by designating a gray wolf distinct population segment ("DPS") in Montana, Idaho, Wyoming, the eastern one-thirds of Washington and Oregon, as well as a small part of north-central Utah, and by delisting this DPS except for the Wyoming portion. 74 Fed. Reg. 15,123 (Apr. 2, 2009) ("2009 Final Rule"). The effect of the 2009 Rule was, *inter alia,* to remove ESA protections for gray wolves in all of these areas except Wyoming. However, the wolves would be subject to stringent management plans administered by Idaho and Montana and approved by the Service.

In August 2010, in litigation instituted by Defenders of Wildlife and other groups, this Court vacated the 2009 Final Rule. *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010), *appeal docketed* No. 10-35885, *et al.* (9th Cir.). By delisting something less than an ESA-defined "species," this Court held the agency illegally "add[ed] a new categorical taxonomy to the statute," which is an act solely in the province of Congress. *Id.* at 1217. The Service issued a final rule to comply with the Court's order and to reinstate the previous regulatory regime. *See* 75 Fed. Reg. 65,574 (Oct. 26, 2010).

On May 5, 2011, as directed by Congress in Section 1713, the Secretary of the Interior reissued the 2009 Final Rule. 76 Fed. Reg. 25,590 (May 5, 2011). The May 5 Rule removed endangered species protection for all of the wolves within the Northern Rocky Mountain DPS, except Wyoming. 76 Fed. Reg. 25,590. The reissued rule identifies the Northern Rocky Mountain DPS as a "species" under the ESA and then specifies the State of Wyoming as the "portion of its range [where] it is endangered," 16 U.S.C. § 1533(c)(1); *see* 50 C.F.R. § 17.11(h) (identifying the

"Wolf, gray [Northern Rocky Mountain DPS]" as the listed species).

Also on May 5th, CBD and WEG filed the present litigation, alleging that Section 1713 of the Act is unconstitutional. *Alliance for the Wild Rockies v. Salazar*, CV-11-70-M-DWM; *Center for Biological Diversity v. Salazar*, CV-11-71-M-DWM. These cases are now consolidated. *See* Order, CV-11-70-M-DWM, Dkt. #16.

STANDARD OF REVIEW

Summary judgment is proper under Federal Rule of Civil Procedure 56(a) where the record indicates that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A genuine dispute as to any material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). As this litigation involves pure questions of law, it is properly resolved on summary motion. [1]

ARGUMENT

II. III. Section 1713 fully comports with the U.S. Constitution and the separation of powers doctrine.

In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), the Supreme Court announced that a statute may be deemed unconstitutionally in violation of the separation of powers doctrine in part because Congress "prescribe[d] a rule for the decision of a cause in a particular way." *Id*. at 146. The Ninth Circuit has recently

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[1] Given that the issues here will be decided as a matter of law, Plaintiffs' claims could likewise be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). However, because the Court directed the parties to proceed through cross-motions for summary judgment, we rely on Fed. R. Civ. P. 56(a). To our knowledge, CBD has not yet served the U.S. Attorney in Montana as required by the Federal Rules. *See* Fed. R. Civ. P. 12(b)(4)-(b)(5); 4(i)(1)(A), (m); Thorn Decl, Ex. A. And if it does not do so within 120 days of commencing this action, dismissal of the complaint is mandated by the Federal Rules. *See* Fed. R. Civ. P. 4(m); L.R. 4.3(a), 4.5(b). Neither party has filed proof of service of process. *See* L.R. 4.3(a). By filing this motion consistent with the Court's scheduling order, we do not waive these additional grounds for dismissal.

explained that, under *Klein*, a Congressional enactment may be deemed an unconstitutional violation of the separation of powers doctrine only 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." *Consejo De Desarrollo Economico De Mexicali, A.C. v. United States*, 482 F.3d 1157, 1170 (9th Cir. 2007) (quoting *Ecology Ctr. v. Castaneda*, 426 F.3d 1144, 1148 (9th Cir. 2005)). This rule is interpreted in conjunction with the maxim that "[a] court should invalidate a statutory provision only for the most compelling constitutional reasons." *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993) (citing *Mistretta v. United States*, 488 U.S. 361, 384 (1989)) (internal quotations omitted). "The Ninth Circuit has interpreted [the controlling Supreme Court precedent] as indicating '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.'' *See UFO Chuting of Hawaii v. Young*, 380 F. Supp. 2d 1166, 1170 (D. Haw. 2005) (citing *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 991 (9th Cir. 1999) *and Gray*, 989 F.2d at 1570), *aff'd sub nom. UFO Chuting of Hawaii v. Smith*, 508 F.3d 1189 (9th Cir. 2007); *Ecology Center*, 426 F.3d at 1149-50; *see also Plaut v. Spendthrift Farm*, 514 U.S. 211, 218 (1995) ("Whatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress 'amends applicable law'.") (citations omitted).

Congress's very narrow modification to the ESA (and other law that would prevent the reissuance of the 2009 Final Rule) as it applied to wolves in a portion of the Northern Rocky Mountains, Section 1713, does not raise separation of powers concerns based on Congressional interference with the judicial branch. First, Congress changed the law. The fact that the modification to the ESA is very narrow is immaterial. Indeed, Section 1713 looks like many other constitutional

statutes that courts held amended underlying substantive law; some occurred in appropriations bills (but were also not appropriations measures) and some did not include the names or citations to the statues they modified, but courts upheld all of them over separation of powers challenges on the basis that they amended underlying law. Second, Congress did not impermissibly legislate a rule of decision here contrary to the holding in *Klein*.

A. Section 1713 amends underlying substantive law.

1. Section 1713 is materially similar to laws found by the Supreme Court and Ninth Circuit to amend underlying substantive law and to be constitutional.

Congress's power to modify the law, which in turn affects judicial decisions based on the old law, is broad and well established. *See Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851) (hereinafter "*Wheeling Bridge I*"); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) ("*Wheeling Bridge II*"); *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1165 (10th Cir. 2004) ("Even when the Judiciary has issued a legal judgment enforcing a congressional act … it is no violation of the judicial power for Congress to change the terms of the underlying substantive law.").

In *Wheeling Bridge I*, the Supreme Court held that a bridge across the Ohio River unlawfully obstructed the river's navigation, and ordered that the bridge be raised or removed. 54 U.S. at 578. Congress then enacted legislation declaring the bridge a "lawful structur[e]." 59 U.S. at 429. In *Wheeling Bridge II*, the Court held that Congress acted within its power in enacting the new statute. *See* 59 U.S. at 431.

Courts have interpreted *Wheeling Bridge II* as establishing Congress's broad power to modify the law to affect the propriety of a court's choice of prospective relief. *See, e.g., Miller v. French*, 530 U.S. 327 (2000); *Biodiversity Assocs.*, 357 F.3d at 1166; *Mount Graham Coal. v. Thomas*, 89 F.3d 554, 556-57 (9th Cir.

1996). And, many times since *Wheeling Bridge II*, the Supreme Court has affirmed that the word of the judicial department may be affected by Congress while the case is still pending on appeal or, even after it has been decided, if the relief issued is prospective. *See, e.g.*, *Plaut*, 514 U.S. at 227 (explaining that "[i]t is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court at every level, must 'decide according to existing laws'.") (citations omitted); *Miller*, 530 U.S. at 347 ("Prospective relief must be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law.") (citations omitted); *Cook Inlet*, 166 F.3d at 991.

Like the statute in *Wheeling Bridge II*, Section 1713 is constitutional. Section 1713 amends the law to direct the reissuance of the rule first issued as the 2009 Final Rule without regard to any other statutory requirements. *See, e.g.*, *Sequoyah v. TVA*, 480 F. Supp. 608, 611 (E.D. Tenn. 1979) ("[T]here is an expressed Congressional mandate to impound the Tellico Reservoir 'notwithstanding … any other law.' There is nothing implied or ambiguous about this language and the law of implied repeal … is inapposite"), *aff'd*, 620 F.2d 1159 (6th Cir. 1980). Contrary to Plaintiffs' suggestions, the situation here is four-square with *Wheeling Bridge II*. In that case, Congress effectively reversed a Supreme Court decision by legislating that certain bridges were no longer a nuisance by operation of law. 59 U.S. at 430. The Court explained that Congress, by declaring the bridge at issue in *Wheeling Bridge II* not to be a nuisance, altered the rights to free navigation of the river at issue. 59 U.S. at 430. Likewise, in the present case, Congress changed the law to alter public rights under the ESA, such that challenges to the 2009 Final Rule as reissued are no longer valid. Because Congress altered public rights by law, it did not legislate in violation of the

constitutional requirement of separation of powers. *Cf. Biodiversity Assocs.*, 357 F.3d at 1167 (the court decision altered by a later Congressional enactment "merely prohibited future interference with the enjoyment of a public right that remained revocable at Congress's pleasure."). Under *Wheeling Bridge II* alone, Section 1713 may be upheld.

A virtually unbroken string of Supreme Court and Ninth Circuit decisions involving Congressional enactments materially similar to Section 1713 further confirm its constitutionality. This is the case even though the challengers in those cases, as here, claimed that the Congressional action impermissibly interfered with pending litigation. In *Robertson v. Seattle Audubon Society*, the Supreme Court construed a rider contained, as here, in an appropriations bill that provided in relevant part:

> 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 Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR.

See 503 U.S. 429, 435 n.2 (1992). There, as here, the petitioners contended that this language did not amend the underlying statute and impermissibly directed particular results in specifically identified judicial cases. The Supreme Court firmly rejected these arguments. The Court found this language did in fact amend the law and went on to hold that even the inclusion of specific cases in litigation did not dictate particular results, but instead "served only to identify the five 'statutory requirements that are the basis for' those cases." *Id.* at 440. The language in

Section 1713 is not materially different from that upheld in *Seattle Audubon*. Indeed, unlike the statute at issue there, Section 1713 does not even mention the case or decision from this Court. Instead, Section 1713's only reference to litigation, its mention of the District of Wyoming's order regarding the agency's consideration of Wyoming's state management plan, is used to expressly *exempt* that decision from Congressional impact.

The Ninth Circuit reached similar conclusions in *Consejo De Desarrollo Economico*. There, the Ninth Circuit upheld legislation that directed the Secretary of the Interior to line a canal. 482 F.3d at 1163, 1167. The challenged law provided:

> Notwithstanding any other provision of law, upon the date of enactment of this Act, the Secretary shall, without delay, carry out the All American Canal Lining Project identified-(1) as the preferred alternative in the record of decision for that project, dated July 29, 1994; and (2) in the allocation agreement allocating water from the All American Canal Lining Project, entered into as of October 10, 2003.

Id. The Ninth Circuit upheld the law as permissibly "chang[ing] the substantive law governing pre-conditions to the commencement of the Lining Project." *Id.* at 1170. Likewise, in *Apache Survival Coal. v. United States*, the court construed a statutory provision that stated that ''the requirements of section 7 of the Endangered Species Act shall be deemed satisfied as to the issuance of a Special Use Authorization for the first three telescopes.'' 21 F.3d 895, 902 (9th Cir. 1994) (addressing telescope construction in an environmentally and archeologically sensitive area). The petitioners contended that the challenged statutory provision "infringe[d] on the Judicial Branch's powers by 'prescrib[ing] a rule of decision of a cause in a particular way, without changing the underlying laws." *Id.* at 901 (citation omitted). The Ninth Circuit disagreed and upheld the provision because it changed the underlying law and thus did not run afoul of *Klein*. *Id.* at 902. The

court noted that the statute expressly suspended the requirements of NEPA with respect to the construction of the first three telescopes and ‘‘implicitly suspended … and replaced’’ the requirements of the ESA. *Id.* Like that statutory provision, Section 1713 "suspended the requirements of [the ESA] with respect to [the agency decision at hand]," and mandated reissuance of the 2009 Final Rule. 21 F.3d at 902.[2]

2. Plaintiffs' attempts to distinguish the controlling Supreme Court and Ninth Circuit caselaw do not withstand scrutiny.

Recognizing the uphill battle they face, Plaintiffs attempt to distinguish the controlling cases by making fine distinctions between Section 1713 and the laws at issue in those cases. Plaintiffs' fine parsing of the cases does not withstand scrutiny.

CBD first attempts to distinguish *Consejo De Desarrollo* by claiming that the challenged law in *Consejo* involved an example of Congress providing new standards for the judiciary to apply, without requiring the judiciary to make findings or to make particular applications of law to facts, while Section 1713 does not. CBD Br. at 18 n.9 (paraphrasing the above-cited reasoning of the Ninth Circuit). However, it is unclear what meaningful distinction can be made between the statute in that case, requiring the agency to act without further delay, and

[2] It is of no moment that Section 1713 does not contain the words "Endangered Species Act." The provision at issue in *Seattle Audubon* also did not specifically mention a particular statute and in fact applied to five distinct statutes. The Supreme Court, nonetheless, found that the provision "effectively modified" underlying law. 503 U.S. at 440. Section 1713 does likewise. By exempting the reissuance of the 2009 Final Rule from the requirements of the ESA, the Act has "effectively modified" the ESA. *See also Mount Graham Coal.*, 89 F.3d at 557 (explaining that when Congress authorized the Forest Service's "alternative 2," as consistent with underlying law, this reference served as a shorthand that exacted "a change in [the underlying law], which Congress is entitled to make."); *Apache Survival Coal.*, 21 F.3d at 903 n.8 (recognizing that the statute in *Robertson* applied to five distinct statutes even though none of them were mentioned in the relevant statutory language.).

Section 1713 in the present litigation, requiring the Secretary to act within 60 days. In *Consejo*, prior to the legislative amendment, agencies would have been required to comply with a series of statutes—statutes under which the district court had evaluated the project. *See* 482 F.3d at 1167 (describing the proceedings in the district court where the government prevailed on the counts that were not dismissed for lack of standing). Between oral argument and the appellate decision, Congress passed, as a rider to an omnibus tax bill, the above-quoted legislation. *Id.* Citing, among others, *Stop H-3 Association v. Dole*, 870 F.2d 1419, 1432 (9th Cir. 1989) (regarding Congressional direction for the government to approve a stretch of highway, "notwithstanding" two provisions of otherwise applicable statutes), and *Ecology Ctr.* (upholding a law that required courts to hold that, if a percentage of old-growth forest existed in project areas, all statutory requirements were deemed met), the Ninth Circuit held that this "notwithstanding" language amended the law so that there was no separation of powers problem. The same result applies to Section 1713.[3]

Likewise, contrary to WEG's suggestion, Br. at 23, there is nothing magical about the use of the phrase "deem" or "notwithstanding," as opposed to the "without regard to any other provision of statute or regulation" formulation used here. Courts outside this Circuit have consistently upheld statutes using the

[3] Indeed, the Ninth Circuit and other courts have routinely upheld Congressional enactments against separation of powers challenges that use the similar phrase "notwithstanding any other provision of law" to amend the law to exempt a specific project that was the subject of pending litigation from various statutes. *See, e.g.*, *Sierra Club v. U.S. Forest Serv.*, 93 F.3d 610 (9th Cir. 1996); *Stop H-3 Ass'n*, 870 F.2d at 1425; *National Coal. to Save our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001) (upholding, over separation of powers challenge, statute that directed the World War II memorial to be conducted expeditiously in accordance with the special use permit issued by the Secretary of the Interior, notwithstanding any other provision of law, and insulating from judicial review the decision to site the memorial at the Rainbow Pool).

construction in Section 1713, "without regard to" other laws. For example, "without regard to any other provision" appears in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989), which grants the Director of the Office of Thrift Supervision the ability to fix compensation "without regard to the provisions of other laws applicable to officers or employees of the United States." 12 U.S.C. § 1462a(h)(1). Such language has been taken as a "sweeping dispensation from all legal restraints." *See Am. Fed'n of Gov't Emps v. Fed. Labor Relations Auth.*, 46 F.3d 73, 76 (D.C. Cir. 1995) (suggesting that "without regard to" has the same effect as statutes with the alternative "notwithstanding" language); *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 946 (D.C. Cir. 1971) (in authorizing a board to carry out the District of Columbia Stadium Act "without regard to any other provision of law," Congress intended to place the activities of the board outside many otherwise-relevant laws, like federal procurement regulations, that would frustrate the purpose of creating a stadium operated largely like a private venture).

Plaintiffs fare no better with their argument that Section 1713's validity is somehow undermined because it was passed as part of an appropriations bill. This fact does not affect the conclusion that Section 1713 altered underlying substantive law. While Section 1713 is contained in an appropriations bill, it does not appropriate money, so the rule against repeals by implication based on appropriations measures, discussed in *Environmental Def. Ctr. v. Babbitt*, 73 F.3d 867 (9th Cir. 1995), and *TVA v. Hill*, 437 U.S. 153 (1978), does not apply. *Cf.* WEG Br. at 22. In those cases, courts declined to find an amendment to a substantive statute on the basis of Congressional decisions to fund or defund particular programs. Section 1713, in contrast, does change the applicability of the ESA to most wolves in the Northern Rocky Mountains. In fact, the provision upheld in *Seattle Audubon* was also contained in an appropriations bill. Yet, the

Supreme Court rejected the argument that Section 318 could not "effect an implied modification of substantive law because it was embedded in an appropriations measure." *See Seattle Audubon*, 503 U.S. at 440. The Court observed that Congress can amend substantive law in an appropriations measure if it does so clearly. *See id.* Thus, Section 1713's placement in an appropriations bill does not cast doubt on its constitutionality. Moreover, like Section 318 at issue in *Seattle Audubon*, Congress's intent to modify the law with Section 1713 "was not only clear, but express." *Id.* at 440.

CBD's notion that Section 1713 is infirm because, unlike the statute in *Seattle Audubon* and other cases, it "provide[d] no new standards for the courts to apply" CBD Br. at 18, fails as well. In the first instance, *Seattle Audubon* did not hold that a law may be modified if and only if Congress replaces old standards with new standards. *Seattle Audubon* suggested that this was one way to ascertain whether Congress had changed the law, and subsequent courts have relied on a similar rationale, but it did not purport to make this "new standards" test the only way to decide whether Congress had changed the law. Moreover, simply put, there is no constitutional principle behind CBD's attempts to graft on a requirement to the applicable standard. If, as plaintiffs acknowledge, Congress may validly affect on-going cases by replacing an existing scheme of regulatory standards which the law places upon a federal agency with a substitute set of obligations, then it follows that Congress may also circumscribe existing statutory mandates without substituting new ones in their place. Nothing in the Constitution requires Congress to impose new statutory obligations when it modifies or clarifies old ones. As the *Klein* court noted "[i]f [Congress] simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient." 80 U.S. at 145; *cf. Kucana v. Holder*, 130 S. Ct. 827,

838 (2010) (noting that, if Congress had wanted to insulate particular Board of Immigration decisions from judicial review, it could have codified those regulations).

In any event, Section 1713 does provide a new legal standard. It mandates the reissuance of a regulation, which has the force of law. Congress mandated that the agency republish the regulation within 60 days. Section 1713 removed the ESA protections for the Northern Rocky Mountains gray wolves outside of Wyoming. Consequently, the law changed because Congress has changed the regime governing wolves in the Northern Rocky Mountains.

At bottom, the Supreme Court in *Seattle Audubon* held that no constitutional concerns arose in the context of the rider at issue because its ruling was one of statutory interpretation, not separation of powers jurisprudence. *See Seattle Audubon* at 441 ("We have no occasion to address any broad question of Article III jurisprudence."). The Court therefore did not address whether there would be a separation of powers issue if Congress had not amended prior law. *Id.* Here, because, just as in *Seattle Audubon*, Section 1713 is properly read to have amended the law, the Constitutional separation of powers questions should be avoided and the statute should be upheld.

3. The legislative history and other statements cited by Plaintiffs do not require a different conclusion

In an attempt to salvage their cases, both CBD and WEG argue that the formal comments of a single legislator who voted against passage of the Act indicate that Section 1713 does not amend the ESA. Dkt. No. 29 at 25-26; Dkt. No. 30 at 22-23. CBD and WEG also argue that the informal remarks of legislators (*i.e.*, non-legislative history) should bear on the interpretation of Section 1713. For the reasons discussed below, the materials cited by Plaintiffs are not persuasive.

Legislative history is used only when the statute's terms are ambiguous,

Ileto v. Glock, Inc., 565 F.3d 1126, 1133 (9th Cir. 2009), which is not the case here. Section 1713 expressly amends underlying substantive law. Moreover, even if the statute were ambiguous, Plaintiffs' evidence is not probative of legislative intent. The remarks of an individual legislator are of "limited persuasive value." 565 F.3d at 1137 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 118 (1980) ("even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history")). And, as WEG concedes, "[t]he remarks of legislators opposed to legislation" are entitled to even less weight. *See* Dkt. # 29 at 25 (citing *Ileto*, 565 F.3d at 1139).[4] But, the only legislative history cited by CBD and WEG comprises comments made by U.S. Senator Benjamin Cardin, who voted against passage of the Act, in part because he disagreed with the legislative delisting of the Northern Rocky Mountain gray wolf. *See, e.g.*, Pl. WEG's Statement of Undisputed Facts, Dkt. # 28 at ¶¶ 9-10. Accordingly, whatever limited weight, if any, may be accorded to these snippets of legislative history, it certainly is not sufficient to overcome the plain language of Section 1713.

Recognizing this weakness, both CBD and WEG attempt to convince this Court that press releases, comments made in newspaper articles, and posts on social networking websites should be afforded the same or similar weight as legislative history. Dkt. No. 29 at 25-26 (citing Dkt. No. 28 at ¶¶ 11-23); Dkt. No.

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[4] While legislative history inherently has limited value, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 2011 WL 2039365, at *11 (May 26, 2011) ("Congress's 'authoritative statement is the statutory text, not the legislative history'") (citations omitted), it is well-accepted that the most persuasive form of legislative history is the final conference report. *Department of Health and Welfare v. Block*, 784 F.2d 895, 901 (9th Cir. 1986) ("Because the conference report represents the final statement of the terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent") (citation omitted). Here, the conference report for the Act does not address the issue of amendment of the ESA. Congressional Record, 112th Congress, 1st Sess. H.R. Conf. Rpt. 112-60 (Apr. 12, 2011).

30 at 23.

First, these documents are, and contain, inadmissible, irrelevant hearsay, advanced without proper foundation, and Defendants object to their consideration. *See* Fed. R. Civ. P. 56(c)(2); Fed. R. Evid. 402 (irrelevant evidence is inadmissible); 701 (requirements for lay testimony); 802; 901 (requirement for authentication); *but see* 902(5) (self-authentication for newspapers and periodicals). Consequently, Federal Defendants object to the consideration of WEG Plaintiffs' Exhibits B-K and Dkt. # 28, at ¶¶ 14-23 and any statement that relies thereon, and CBD Plaintiffs' Dkt. # 31 at ¶¶ 5, 10, 16, 17 and all statements relying thereon.

Moreover, the Ninth Circuit has made clear that such informal comments are not a reliable indicator of legislative intent. *See, e.g.*, *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1456-57 (9th Cir. 1992) (citing *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 132 (1974)) ("[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage. Such statements 'represent only the personal views of these legislators, since the statements were [made] after passage of the Act.'") (citation omitted).

WEG goes so far as to suggest that comments made in the press are "contemporaneous remarks" equivalent to the ones made in *GTE Sylvania*. Dkt. No. 29 at 25. Not so. The "contemporaneous remarks" in *GTE Sylvania* were made as part of sworn testimony in front of a congressional oversight subcommittee, which is an entirely different matter. 447 U.S. at 118. And even there, the Supreme Court refused to afford the comments any persuasive value. *Id.* In short, any comments that were made outside the formal record are irrelevant.

Lastly, while certainly not legislative history, both CBD and WEG attempt to make hay by misconstruing language contained in a memorandum issued by the

Solicitor of the Department of Interior, alleging that the memorandum stands for the proposition that Section 1713 does not amend the ESA. Dkt. No. 29 at 17 (citing Dkt. No. 28 at ¶ 12); Dkt. No. 30 at 22. Plaintiffs overreach. In the memorandum, the Solicitor states that Section 1713 of the Act does not "amend the Endangered Species Act *generally*." *See, e.g.*, Dkt. No. 28 at ¶ 12 (emphasis added). The statement of the Solicitor was nothing more than an acknowledgement that Congress had modified applicable laws as to this particular regulation only, and did not otherwise amend the ESA to either authorize or to require the interpretation found in that former Opinion in other instances.

B. The rider does not violate the rule against prescribing rules of decision to the judicial branch.

Even assuming *arguendo* the Court were to find that Congress did not amend the law in passing Section 1713, the provision still easily passes constitutional muster. As the Tenth Circuit has explained, it does not automatically follow that there is a separation of powers violation simply because the law has not changed:

> We underscore that by relying on the fact that the 706 Rider changed applicable law, we do not mean to suggest, any more than did *Seattle Audubon*, that if the Rider had not changed the law it would necessarily have run afoul of *United States v. Klein*. By interpreting the provision at issue in *Seattle Audubon* as a change in the law, the Supreme Court expressly avoided addressing any such constitutional question. 503 U.S. at 441. Thus, if a provision cannot be read as a change in the law, the most that follows from this case or *Seattle Audubon* is that the constitutional question of whether there is a *Klein* violation must be faced-not that it must be answered in the affirmative.

Biodiversity Assocs., 357 F.3d at 1164.

As explained above, Section 1713 amended the law, and the *Klein* separation of powers rule does not apply. But even if this were not the case, Section 1713 is

constitutional because it does not prescribe rules of decision to the judicial branch that require an invasion of a textually committed constitutional power. To the contrary: Section 1713 does not direct the Court to make any findings; it leaves unaltered the prior order finding a statutory violation; and Section 1713 does nothing to interfere with the persuasive effect or the reasoning in that order.

Plaintiffs argue that Section 1713 "attempts to compel results under old law" by requiring the 2009 Final Rule to be reissued. *See* Dkt. # 29 at 24; Dkt. # 30 at 14. While it is certainly true that Congress required the Secretary to take a particular action and that actions taken pursuant to Section 1713 are insulated from judicial review, it is unclear how Section 1713 meddles with judicial decision-making contrary to the *Klein* rule. Section 1713 does not require the court to do anything, much less to give a certain effect to a particular piece of evidence, let alone to a piece of evidence affecting private rights as was the case in *Klein*. 80 U.S. at 146.

As Plaintiffs explain, the purported rule that may prevent Congress from "prescribing a rule of decision" to a court originated in *Klein* where the legislation at issue imposed on the federal courts a conclusive interpretation of certain evidence in a way that interfered with the President's textually committed constitutional power to pardon under Article II. *Klein*, 80 U.S. at 146-47.

Klein was the executor of the estate of a Confederate sympathizer. He brought suit seeking to recover the value of property seized from the decedent by the United States in the Civil War. To obtain such relief under the applicable statute, Klein had to show that the decedent had not aided the Confederacy. The law appeared favorable: the decedent had obtained a presidential pardon, and the Supreme Court had held that a pardon satisfied the burden of proving no aid had been given. However, while the case was pending, Congress enacted a statute requiring courts to find a pardon to be conclusive evidence that the person had

aided the enemy. In other words, the court was required to find that the pardon meant exactly the opposite of what it otherwise would mean. See *Klein*, 80 U.S. at 146; *see also Miller v. French*, 530 U.S. 327, 348-49 (2000) (discussing *Klein*).

In finding the statute unconstitutional, the Supreme Court observed that "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." 80 U.S. at 147; *see also NSA Telecomms. Litig.*, 633 F. Supp. 2d 949, 961-62 (N.D. Cal. 2009) (explaining that, if it stands for anything, *Klein* may proscribe legislation "that prevents courts from determining the effects of evidence"), *appeal docketed* 09-16676, et al. (9th Cir.). *Klein* found that the statute impermissibly "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it" and thus impermissibly interfered with the power of the Judicial Branch. *See id.* at 146. It also ruled that Congress's attempt to change the effect of a presidential pardon impermissibly interfered with the Executive Branch. *See id.* at 147-48. Because, in the present litigation, Congress has not directed any court to make any particular evidentiary findings or to determine the effects of any evidentiary findings, to the extent that *Klein* prohibits such Congressional acts, the *Klein* rule is simply inapposite here.

The legislation at issue in *Klein* appears to have been unique. Since *Klein*, the Supreme Court has repeatedly referred to the rule *Klein* announced but has never again found the rule to be violated. *See, e.g.*, *Miller*, 530 U.S. at 348-49 (determining that the legislation at issue did not violate the *Klein* rule); *Martinez v. Lamagno*, 515 U.S. 417, 430 (1995) (same); *Plaut*, 514 U.S. at 218 (same); *United States v. Sioux Nation*, 448 U.S. 371, 405 (1980) (same). *See also* Howard W. Wasserman, *The Irrepressible Myth of Klein*, 79 U. Cin. L. Rev. 53, 55 (2010) (noting that "the only case to strike down a law explicitly on Klein grounds was Klein itself").

The reality is that *Klein* cannot be stretched as far as Plaintiffs would like. First, Congress may meddle in agency actions subject to ongoing litigation (as Plaintiffs appear to recognize). *See* CBD Br. at 14. "[N]o authority forbid[s] Congress from exempting a project which is the subject of pending litigation from the requirements of the statute which the project is alleged to violate." *Stop H-3 Ass'n*, 870 F.2d at 1438; *see also Shawnee Tribe v. United States*, 423 F.3d 1204, 1218 (10th Cir. 2005) (holding that a new law that allowed the Secretary of the Army to dispose of the property at issue allowed the court to exercise its judicial role to decide whether the case was moot by applying the law to the applicable facts); *Cobell v. Norton*, 392 F.3d 461, 467-68 (D.C. Cir. 2004) (statute that provided that Secretary of the Interior was not required to perform an accounting of Indian trust holdings "temporarily and partially repealed or modified" all statutes that the court had previously construed to require that accounting, such that *Klein* was not at issue). Second, nothing in *Klein* precludes Congress from effectively pre-ordaining results in pending litigation by shifting the legal goal-posts when the evidentiary football has already come to rest.[5] *See Ecology Center v. Castaneda*, 426 F.3d 1144, 1149 (9th Cir. 2005) (upholding legislation that changed underlying substantive law to require that, for timber sales to go forward, particular project areas marked for sale, rather than the forest as a whole, were

[5] As this Court noted in the *Ecology Center* case, while the rider in *Ecology Center* appeared to create a new standard for the court to apply, that creation was a legal fiction. CV 02-200-M-DWM, 2004 U.S. Dist. LEXIS 27858, at *7 (D. Mont. Aug. 20, 2004). This Court enjoined the agency's timber sales because the entire forest did not have the requisite ten percent old growth as required by the forest plan. It had stated in a prior order that the *project areas* appeared to have ten percent old growth. So, when, in the subsequently passed rider, Congress created a new, project-based ten percent standard, satisfaction of which meant that the record of decision was "deemed" compliant with the applicable environmental laws, Congress "wrote the law so that the result was predetermined." 2004 U.S. Dist. LEXIS 27858, at **6-7. This Court, as affirmed by the Ninth Circuit, upheld the *Ecology Center* rider as both not impermissibly directing findings and on the alternative basis that this enactment amended the applicable law. *Id.*, *aff'd* 426 F.3d 1144 (9th Cir. 2005). Here, of course, unlike in *Ecology Center*, Congress merely made way for the Secretary to act by amending the applicable law to legitimize that action.

required to have ten percent old growth at certain elevations). And, given Supreme Court precedent such as *Plaut*, *Klein* "cannot be read as a prohibition against Congress's changing the rule of decision in a pending case, or (more narrowly) changing the rule to assure a pro-government outcome." *Save Our Mall*, 269 F.3d at 1096 (citing *Plaut*, 514 U.S. at 211).

Regardless of whatever vitality *Klein* retains, it is distinguishable from the present litigation in at least four ways. First, Section 1713 requires the *Secretary* to reissue the 2009 Final Rule which has now been reissued as the May 5 Rule and does not compel any particular judicial conclusions of law or fact. Certainly Congress binds both the judiciary and the executive when it passes laws, *Seattle Audubon*, 503 U.S. at 439, but the direction in Section 1713 leaves in place this Court's 2010 order. Instead, it addresses the applicability of the ESA to a subset of a particular species—wolves in the Northern Rocky Mountain DPS—and modifies the ESA's application to some of these wolves. Indeed, notwithstanding Section 1713, as a result in part of this Court's 2010 order, the Solicitor withdrew the Solicitor's Significant Portion of the Range Opinion.[6] Moreover, courts generally retain jurisdiction to adjudicate challenges to the Service's management actions of the Northern Rocky Mountain gray wolves under the ESA and any other applicable law.

Second, Section 1713 does not require any Court to make any evidentiary

[6] On May 4, 2011, the Solicitor of the Department of the Interior withdrew a 2007 Solicitor's Opinion ("the M-Opinion"). Hilary C. Tompkins, Solicitor of the Department of Interior, Memorandum to the Secretary of the Department of the Interior, No. M-37024 (May 4, 2011); Dkt. #26-8, Ex. 6. The M-Opinion was a basis for the 2009 wolf delisting rule. The Solicitor explained that the M-Opinion had been rejected by this Court in its decision, *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010), *appeal docketed* No. 10-35885, et al. (9th Cir.), and that, "[i]n light of these adverse decisions, the Fish and Wildlife Service … has notified me of its intention to reconsider how it applies the SPR phrase and to develop guidance on how to apply the SPR phrase in making decisions to add or remove species from the lists of threatened and endangered species." *See* M-Opinion at 1.

findings, let alone dictate the effect of particular evidentiary findings.[7] Third, *Klein* involved a Congressional attempt to take from citizens previously vested private property rights, which distinguishes that case from claims regarding the 2009 Final Rule in *Defenders of Wildlife*, 729 F. Supp. 2d 1207, which challenge the agency's actions affecting public rights, including the federal management of species that reside, in part, on federal public lands—rights that are open to statutory modification. *See Biodiversity Assocs.*, 357 F.3d at 1171-72 (there is no constitutional rule that prohibits non-judicial actions from affecting the underlying legal basis for a judicial order, particularly in cases seeking equitable relief and implicating only public rights). And fourth, Section 1713 involves no infringement of a textually committed constitutional power like the pardon power in *Klein*. Rather, it overrides all existing laws for most wolves in the Northern Rocky Mountains.

For these additional reasons, *Klein* does not apply to the present action. In short, Section 1713 leaves intact the order and judgment of this court, thus preserving this Court's role, and amends the applicable law. Thus, under applicable Ninth Circuit and Supreme Court precedent, it does not run afoul of the *Klein* rule or constitutional rules governing separation of powers.[8]

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[7] And, as the underlying case was a record-review case based on the APA, this Court was not required to make evidentiary findings in the traditional sense of the word, further limiting the possible application of *Klein*. *See* 729 F. Supp. 2d at 1215 ("[T]he issues presented here address the legality of Defendants' actions based on the administrative record and do not require resolution of factual disputes so summary judgment is appropriate.").

[8] Federal Defendants agree with WEG that Section 1713 does not unconstitutionally impinge on this Court's ability to "say what the law is" and review the constitutionality of the rider provision itself. *See* WEG Br. at 19-21. Similar Congressional withdrawals of review of agency action "left the courts free to adjudicate constitutional claims against the [agency's] enabling statute," *Save Our Mall*, 269 F.3d at 1095, and, likewise the rider leaves this Court, and other courts, free to examine the constitutionality of the rider. Instead, the rider may be (and because of the canon of constitutional avoidance, must be) construed to limit judicial review of the agency's actions in reissuing the rule—not to limit judicial review of the statute itself. *See*, *e.g.*, *id.* at 1095 (quoting *Johnson v. Robison*, 415 U.S. 361, 366-74 (1974)).

III. CBD Plaintiffs have no claim under the APA on the basis of the Service's reissuance of the rule.

CBD appears to maintain its alleged APA claim on the basis of a footnote. *See* Dkt. # 30, at 24 n.12 (explaining that a court shall set aside agency action if it is taken not in accordance with law).[9] To the extent CBD is attempting to state any other claim regarding Reissuance of the 2009 Rule aside from its constitutional challenge, such claims must be rejected. Section 1713 explicitly precludes judicial review of challenges to the reissuance of the April 2009 Final Rule. While the APA confers a general cause of action upon persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, it also withdraws that cause of action to the extent the relevant statute, here Section 1713, "preclude[s] judicial review," 5 U.S.C. § 701(a)(1). Here, Congress has precluded review of the reissued rule, providing that reissuance of the final rule "shall not be subject to judicial review …." P.L. 112-10, § 1713. By enacting Section 1713, Congress exercised its prerogative to unequivocally preclude review of reissuance of the final rule delisting the wolf. Accordingly, any APA-based claim to the reissued rule brought by CBD must be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant its Motion in its entirety and deny both Plaintiffs' Motions for Summary Judgment.

Dated: June 14, 2011

Respectfully Submitted,

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[9] WEG does not allege an APA claim. *See* Dkt. # 1 at 17.

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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.	CASE NOS. 11-cv-70-DWM; 11-cv-71-DWM **CERTIFICATE OF COMPLIANCE**
CENTER FOR BIOLOGICAL DIVERSITY, et al., Plaintiff, v. KEN SALAZAR, et al., Defendants.	

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that, pursuant to Local Rule 7.1(d)(2), the foregoing brief contains 7,941 words, excluding the caption and certificates, in compliance with the Court's word limits as indicated in its orders issued as of this filing in the present litigation. In order to determine the number of words, I relied upon the word count of the word-processing system used to prepare this brief. Should the Court deny Defendants' Motion for Excess Words, Defendants seek leave to file a

brief in accordance with the order denying that Motion.

/s/ Andrea E. Gelatt

ANDREA E. GELATT

CERTIFICATE

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I HEREBY CERTIFY that today a true and correct copy of the foregoing was served on the counsel of record via the ECF system.

/s/ Andrea E. Gelatt

ANDREA E. GELATT