

IGNACIA S. MORENO, Assistant Attorney General
SETH M. BARSKY, Section Chief
KRISTEN L. GUSTAFSON, Assistant Section Chief
ERIK E. PETERSEN, Trial Attorney
ANDREA GELATT, Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Wildlife and Marine Resources Section
Ben Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369
(202) 305-0388 | (202) 305-0275 (fax)
Attorneys for Federal Defendants

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

ALLIANCE FOR THE WILD ROCKIES, et al.,)	CASE NOS.
)	11-cv-70-M-DWM;
Plaintiffs,)	11-cv-71-M-DWM
)	
v.)	FEDERAL DEFENDANTS'
)	COMBINED RESPONSE
KEN SALAZAR, et al.,)	TO STATEMENT OF
)	UNDISPUTED FACTS
Defendants.)	AND STATEMENT OF
)	GENUINE ISSUES
)	
)	
CENTER FOR BIOLOGICAL DIVERSITY, et al.,)	
)	
Plaintiff,)	
)	
v.)	
)	
KEN SALAZAR, et al.,)	
)	
Defendants.)	

INTRODUCTION

Pursuant to L.R. 56.1(b), Federal Defendants hereby respond to the Statements of Undisputed Facts submitted by both Plaintiffs filed with their

Motions for Summary Judgment in this Statement of Genuine Issues. CV 11-70-M-DWM, Dkt. # 29, 31.

STATEMENT OF GENUINE ISSUES

There are no genuine issues of material fact to be resolved by this Court in this challenge to the constitutionality of an act of Congress (the “Act”). One set of Plaintiffs, Alliance for the Wild Rockies, Friends of the Clearwater, and WildEarth Guardians (collectively “WEG”) base their claims entirely on the U.S. Constitution, claims that may be resolved as a matter of law. *See also* Order, Dkt. # 8 (May 13, 2011) (“It appears this case may turn on a legal question”). The other Plaintiffs, Center for Biological Diversity, Cascadia Wildlands, and Western Watersheds Project (collectively “CBD”), additionally challenge the Act under the Administrative Procedure Act (“APA”).

Claims based on constitutional challenges to a statute on separation of powers grounds and APA claims do not involve issues of fact. It is well-established that, in cases where Plaintiffs seek judicial review under the APA, 5 U.S.C. § 551 *et seq.*, the scope of that judicial review is properly limited to the administrative record that was before the agencies at the time the decisions were made and the district court makes no findings of fact. *See, e.g., Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985); *Camp v. Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park v. Overton*, 401 U.S. 402 (1971); *Louisiana Ass'n of Independent Producers v. FERC*, 958 F.2d 1101, 1117 (D.C. Cir. 1992); *NRDC v. Daley*, 62 F. Supp. 2d 102, 106 (D.D.C. 1999); *NRDC v. Peña*, 972 F. Supp. 9, 15 (D.D.C. 1997). Here, the challenged agency action has a very limited record as the challenged rule was simply reissued as required by Congress.

Accordingly, while Federal Defendants do not assert any genuine issues of material fact requiring resolution through a trial, pursuant to the local rules and the Federal Rules of Civil Procedure allowing such objections, 56(c)(2), we do wish to

object to several statements included in Plaintiffs' Statement of Undisputed Facts as improperly included. CBD Plaintiffs' Statement of Undisputed Facts includes a statement that "Because Section 1713 passed as an appropriations rider, it was subject to little Congressional debate and no committee hearings." Dkt. # 31, at ¶ 4. Plaintiffs provide no record citation for that statement. *Cf.* L.R. 56.1(a)(2). This statement is vague as to what constitutes "little Congressional debate," and Defendants have no ability to determine its truth or falsity. Moreover, Paragraph 4 is not a material fact. *See Consejo De Desarrollo Economico De Mexicali, A.C. v. United States*, 482 F.3d 1157, 1171-72 (9th Cir. 2007) (holding that Congress's decision whether to hold a hearing on legislation is unreviewable under the political question doctrine).

Plaintiffs cite numerous statements in newspapers and press releases that are hearsay statements, offered for the truth of the matter asserted, and should be struck from the Plaintiffs' Statement of Undisputed Facts on that basis and because they lack proper foundation. *Cf.* Fed. R. Civ. P. 56(c)(2); Fed. R. Evid. 802, 901; *See* Dkt. #28, at ¶¶ 14, 15, 16, 17, 18, 19, 20, 21, 22, 23; Dkt. #31, at ¶¶ 5, 10, 16, 17.

Much of the hearsay cited in the statement of WEG Plaintiffs, is presented in unauthenticated documents, which are therefore inadmissible on that basis as well. Fed. R. Evid. 901 (requiring authentication by, for example, testimony of a witness with knowledge); *cf.* Fed. R. Evid. 902(5) (printed materials purported to be periodicals or newspapers are self-authenticating). *See* Dkt. #28, at ¶¶ 14, 15, 16, 17, 18, 19, 21, 22.

These statements are also irrelevant to the determination of Congress's intent in passing Section 1713. *See* Fed. R. Evid. 401, Dkt. #28, at ¶¶ 14, 15, 16, 17, 18, 19, 20, 21, 22, 23; Dkt. #31, at ¶¶ 5, 10, 16, 17. Statements attributed to individual legislators or their spokespeople, made out of court in newspapers or on

social media websites, or the comments of newspapers' editorial boards, offered for the proper legal interpretation of a statute are irrelevant, inadmissible, hearsay and not properly considered as a basis for Plaintiffs' Motions for Summary Judgment. Fed. R. Evid. 401, 802, 901; Dkt. #28, at ¶¶ 14, 15, 16, 17, 18, 19, 20, 21, 22, 23; Dkt. # 31, at ¶¶ 5, 10, 16, 17.

Additionally, Plaintiffs impermissibly use their Statements Of Undisputed Fact to make legal arguments. For example, the WEG Plaintiffs assert that “[a]t no time in its consideration of Section 1713 of H.R. 1473, or its predecessors, did Congress consider, or believe it was amending, the ESA.” *See* Dkt. # 28, at ¶ 11; *see also id.* at ¶¶ 12 (first sentence), 13 *and* ¶ 1 (second and third sentences are conclusion of law regarding standing where WEG itself did not participate in the litigation cited in that paragraph and thus did not submit a standing declaration; Alliance for the Wild Rockies did submit a declaration in that litigation); Dkt. # 31, at ¶¶ 10, 12, 13. These statements submitted as “facts” are, instead, the questions of law before this Court. Because many of the statements in Plaintiffs' Statements of Undisputed Facts are argument, not fact, they are not properly included in a Statement of Undisputed Facts and Defendants object to their inclusion. *Cf.* L.R. 56.1(a)(1) (requiring parties to set forth “each fact” on which the party relies to support the motion).

Lastly, many of Plaintiffs' facts simply characterize the Congressional Record, judicial opinions, Federal Register notices--documents that are subject to judicial notice and speak for themselves, and are the best evidence of their contents. *See* Dkt. # 31: 1-3, 6-9,11-15,18; Dkt. # 28: 2-10, 12.

Federal Defendants therefore object to the following paragraphs in Plaintiffs' Statements of Undisputed Facts:

1. WEG, Dkt. # 28:
 - a. Facts submitted based on inadmissible hearsay: 14-23

- b. Facts based on unauthenticated documents: 14-19, 21-22
 - c. To the extent they impermissibly include conclusions of law: 1, 11, 12 (first sentence), 13.
2. CBD, Dkt. # 31:
- a. Facts provided without record support: 4
 - b. Facts submitted based on inadmissible hearsay: 5, 10, 16, 17
 - c. To the extent they impermissibly include conclusions of law: 10, 12 (second sentence), 13 (third sentence), 17.

Dated: June 14, 2011

Respectfully Submitted,

IGNACIA S. MORENO,
Assistant Attorney General
SETH M. BARSKY, Section Chief

/s/ Andrea Gelatt
ANDREA E. GELATT
ERIK E. PETERSEN
Wildlife & Marine Resources Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 7369
Washington, D.C. 20044-7369
Tel: (202) 305-0388 | Fax: (202) 305-0275
andrea.gelatt@usdoj.gov
Counsel for Federal Defendants

CERTIFICATE OF SERVICE

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