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IN THE 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,	CASE NO. CV 11-70-M-DWM CASE NO. CV 11-71-M-DWM (consolidated) AMICI CURIAE BRIEF OF STATE OF IDAHO, AND GOVERNOR C.L. "BUTCH" OTTER
CENTER FOR BIOLOGICAL DIVERSITY, et al., Plaintiffs, vs. KEN SALAZAR, et al., Defendants.	

INTRODUCTION

The State of Idaho and Governor C.L. "Butch" Otter were granted leave to file an amici curiae brief by this Court's Order of June 1, 2010 (Dkt. No. 35). Throughout this and related litigation, Idaho and Governor Otter have maintained that the Northern Rocky Mountains distinct population segment of gray wolves is biologically recovered and should be removed from the list of endangered and threatened species ("delisted"). Delisting of gray wolves, however, has been frustrated by non-biological obstacles, as summarized in this Court's finding that partial delisting "may be a pragmatic solution to a difficult biological issue, but it is not a legal one." Defenders of Wildlife v. Salazar, 729 F. Supp. 2d 1207, 1211 (D. Mont. 2010).

Congress resolved such dilemma by legalizing the United States Fish and Wildlife Service's ("Service") "pragmatic" solution in the form of a mandate to reissue the final rule delisting a portion of the Northern Rocky Mountains gray wolf distinct population segment[1] without regard to pre-existing laws or regulations that may otherwise prohibit such delisting. Congress' power to do so is beyond question: the weighing and balancing of conflicting public interests and policies to resolve difficult issues, such as those barring the partial delisting of the gray wolf distinct

[1] 74 Fed. Reg. 15,123 (April 2, 2009) (hereinafter "2009 Delisting Rule" or "2009 Rule").

population segment, are the purview of Congress, not the courts. Idaho and Governor Otter respectfully submit that Congress' policy choice to resolve pragmatically an otherwise intractable situation must be honored.

ARGUMENT

In its summary judgment ruling in Defenders of Wildlife v. Salazar, 729 F. Supp. 2d 1207 (D. Mont. 2010), this Court held that the 2009 Delisting Rule violated the Endangered Species Act ("ESA"). In response, Congress enacted the following rider in the Department of Defense and Full-Year Continuing Appropriations Act of 2011:

> 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. 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.

Section 1713, P.L. 112-10, 125 Stat. 38 (April 15, 2011) (hereinafter "Section 1713").

Section 1713 complies with the principles established in United States v. Klein, 80 U.S. 128 (1871), wherein the Court held that Congress encroaches upon the judiciary's Article III powers when it attempts "to prescribe a rule for the decision of a cause in a particular way," but specifically excepted situations where

"new circumstances have been created by legislation." Id. at 146-47. Riders intended to supersede court injunctions create new circumstances if "Congress was changing the law applicable" to a case instead of "compel[ling] results under old law." Ileto v. Glock, Inc., 565 F.3d 1126, 1139 (9th Cir. 2009).

Congress' compliance with Klein is evident on the face of Section 1713. While Section 1713 was plainly motivated by this Court's ruling in Defenders of Wildlife, Congress did not attempt to instruct the courts as to how the ESA should be applied to the delisting of gray wolves or otherwise compel an outcome under existing ESA provisions. Instead, Congress imposed upon the Service the duty to reissue the 2009 Delisting Rule as a ***new*** rule, and replaced the legal standards that would otherwise govern such publication with a ***new*** legal standard: to publish the Rule "without regard to any other provision of statute or regulation that applies to issuance of such rule."

The scope of statutes and rules to be disregarded is not open-ended but is defined by reference to the laws applicable to the 2009 Delisting Rule, including those laws that this Court interpreted to prohibit the partial delisting of distinct population segments. Such laws are to be disregarded to the extent necessary to implement the re-issued Rule while not interfering with ongoing obligations imposed upon the Service by the United States District Court for the District of Wyoming in Case Numbers 09–CV–118J and 09–CV–138J.

In combination, the mandate to reissue the 2009 Delisting Rule and the mandate to disregard general laws that may otherwise apply to the Rule supersede any duty the Service may have had under the ESA to refrain from the partial delisting of the distinct population segment. Such mandates not only fulfill the "new circumstances" requirement of Klein, they leave intact this Court's determination that the 2009 Rule violated those legal standards of the ESA that applied prior to enactment of Section 1713, thus distinguishing Section 1713 from unconstitutional directives to the courts to apply general laws in a particular matter.

1. Section 1713 explicitly amends the legal standards applicable to delisting of the Northern Rocky Mountains gray wolf distinct population segment.

As Plaintiffs note, the general provisions of the ESA are not amended by Section 1713. Plaintiffs fail to recognize, however, that Section 1713 nonetheless changes the legal standards applicable to the partial delisting of gray wolves in the Northern Rocky Mountains by exempting the Service from complying with general laws that may otherwise prohibit such delisting. Congressional exemptions from existing laws are commonplace and do not violate the Constitution's separation of powers.

The seminal case approving a specific exemption from general law is Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U.S. 421 (1855). There, the Supreme Court had enjoined the construction of two bridges across the Ohio River, finding such construction to be in violation of general federal laws securing to the

public the free and unobstructed navigation of the river. Id. at 422-23. The bridges were nonetheless constructed, and Congress subsequently inserted a rider into an appropriations act that not only designated the bridges as post roads but also declared the bridges "to be lawful structures in their present positions and elevations . . . any thing in the law or laws of the United States to the contrary notwithstanding." Id. at 429.

In upholding the appropriations rider, the Court did not resolve the question of "whether or not congress possess the power, under the authority in the constitution, 'to establish post offices and post-roads,' to legalize this bridge." Id. at 431. Rather, it concluded that under the commerce clause Congress had "the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation." Id. Thus, Congress "having the power to control and regulate [navigation], the statute authorizing the structure, though it may be a real impediment to the navigation, makes it lawful." Id. at 432.

In the years since the Wheeling and Belmont Bridge decision, courts have repeatedly confirmed that Congress may enact project-specific exemptions from general laws to avoid court decrees enjoining such projects. Such exemptions, coupled with mandatory directives to proceed, make the newly-directed actions lawful. In Section 1713 the exemption from preexisting general laws takes the form of a directive to "disregard" any general laws applicable to the original rule delisting

a portion of the distinct population segment. Such a directive states explicitly what is more commonly stated implicitly in the form of directives to agencies to perform specified actions "notwithstanding any other provision of law."

The convergence of "notwithstanding" and "without regard to" is demonstrated by Ninth Circuit decisions holding that the "notwithstanding" directive should be interpreted as "requiring the disregard" or "direct[ing] the disregard" of federal environmental and natural resource laws otherwise applicable to the congressionally-mandated action. Oregon Natural Resources Council v. Thomas, 92 F.3d 792, 796-97 (9th Cir. 1996). Likewise, the Federal Circuit recently held language authorizing an agency to terminate its employees "notwithstanding any other provision of law" essentially directed the agency to proceed "without regard to any other provision of law" and "renders inapplicable general federal statutes that otherwise would apply." Knight v. Merit Systems Protection Bd., 2011 WL 864759, 2 (Fed. Cir. 2011), quoting, in part, Conyers v. Merit Sys. Prot. Bd., 388 F.3d 1380, 1382 (Fed. Cir. 2004).

When Congress directs an agency to carry out an action "without regard to" or "notwithstanding" general laws, such directive does not encroach upon judicial authority by directing courts to apply general laws in a certain manner. Rather, it changes the controlling law. Examples from the Ninth Circuit include Stop H-3 Ass'n v. Dole, 870 F.2d 1419 (9th Cir. 1989), addressing an appropriations rider

ordering the Secretary of Transportation to proceed with construction of a specific highway "notwithstanding" the environmental protections provisions of section 4(f) of the Department of Transportation Act of 1966. At the time, construction had been enjoined "pending the Secretary's compliance with section 4(f)." Id. at 1425. When the opponents of the highway challenged the rider's constitutionality, the court of appeals characterized the "notwithstanding" provision as "superseding legislation," id. at 1433, that, when coupled with the directive to proceed with the agency's planned action, did not "strip the courts of jurisdiction over claims of noncompliance with section 4(f)," but instead "withdraws the protections of the 4(f) statutes from one project." Id. at 1437. Or, put another way, "we have found no authority forbidding 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." Id. at 1438 n.27. The same reasoning applies to Section 1713: no authority prohibits Congress from exempting the re-issued Delisting Rule from the requirements of the ESA which this Court concluded were violated by the original Rule.

2. Separation of power concerns do not require that Congress provide amended substantive standards to be applied to resumption of an agency action enjoined by court decree; it is sufficient if Congress exempts the agency action from general statutory requirements and directs the agency to proceed with the action as previously described in agency documents.

Congress, in amending laws to resolve pending litigation, sometimes provides new legal standards to be applied, as was the case in Robertson v. Seattle Audubon

Society, 503 U.S. 429 (1992), where Congress amended spotted owl protection standards for timber harvests in certain national forests. Id. at 433; see also The Ecology Center v. Castaneda, 426 F.3d 1144 (9th Cir. 2005) (amending legislation redefined old growth retention requirements for certain projects on Kootenai National Forest). More commonly, Congress resolves pending legal disputes by simply exempting the agency from otherwise-applicable general laws and directing the agency to proceed with the action as defined in agency documents. For example, in the Stop H-3 decision discussed supra, the court found the "clear intent and effect" of the directive to proceed "notwithstanding" general laws that would otherwise prohibit the agency action was "to exempt the H-3 project from the requirements of" such general laws. 870 F.2d at 1425. No substitute requirements were provided by Congress. The court agreed with the district court's conclusion that the bare exemption was "superseding legislation," that "did not intrude upon the authority of the other branches." Id. at 1433-34.

Another example of the Ninth circuit upholding a bare exemption is Consejo de Desarrollo Economico de Mexicali, A.C. v. United States, 482 F.3d 1157 (9th Cir. 2007), where the appellate court had enjoined the lining of an irrigation canal pending determination of claims that the lining project violated the ESA and other environmental laws. In response, Congress attached a rider to an omnibus tax bill directing the Secretary of Interior to carry out, "[n]otwithstanding any other

provision of law," the "Lining Project identified . . . as the preferred alternative in the record of decision for that project." Id. at 1167.

The court interpreted the rider to exempt the lining project from the ESA and other environmental laws that were at issue in the pending litigation. Id. at 1169. The court expressed no concern about the lack of accompanying general law amendments or project-specific standards—instead, it recognized that "[a]ssuming it uses constitutional means, Congress may exempt specific projects from the requirements of environmental laws." Id. at 1168. Such exemption, in the court's view, "changes the substantive law governing pre-conditions to commencement of the Lining Project." Id. at 1170; see also National Coalition to Save our Mall v. Norton, 269 F.3d 1092, 1097 (D.C. Cir. 2002) (holding that statute, enacted in response to pending litigation and directing agency to initiate construction of a war memorial in accordance with terms of agency-issued special use permit "[n]otwithstanding any other provision of law", "presents no more difficulty than the statute upheld in Robertson [and] similarly amends the applicable substantive law").

As in Stop H-3 and Consejo, the directive in Section 1713 to delist the gray wolf distinct population segment within 60 days of the Section's enactment "without regard to any other provision of statute or regulation that applies to issuance of such rule" was plainly intended to override existing law by exempting the re-issued Delisting Rule from conflicting ESA requirements to the extent necessary to carry

out the directive. Any other interpretation ignores the plain language of Section 1713. Moreover, any doubts that Congress intended to exempt, supersede, or repeal the general laws of the ESA to the extent they prevent implementation of the Delisting Rule must be resolved in favor of finding such intent. See Apache Survival Coalition v. United States, 21 F.3d 895, 903 (9th Cir. 1994) (any doubts that act was intended to repeal ESA to the extent necessary to allow project to proceed as directed by Congress must be resolved in favor of repeal, for given "a construction of [the act] that renders it constitutional and one that creates substantial constitutional doubt, we are required to take the path that results in clear constitutionality").

The decisions in Stop H-3 and Consejo confirm that the lack of amending language is not the touchstone for determining an infringement upon the Article III powers of the judiciary. A congressional directive to proceed with a specific agency action, coupled with a project-specific exemption from general laws, does not violate separation of power principles since it "does not direct [the courts] to make any findings or to make any particular application of law to facts." Consejo, 482 F.3d at 1170.

3. The "legislative history" cited by Plaintiffs does nothing more than confirm that ESA provisions remain unchanged as applied to all species other than the Northern Rocky Mountains gray wolf distinct population segment.

While the "legislative history" cited by Plaintiffs consists mostly of materials

that are not reliable indicators of congressional intent, it does nothing more than corroborate that Section 1713 was intended to "overturn" this Court's decision by directing re-issuance of the 2009 Delisting Rule accompanied by an exemption from, rather than an amendment of, the general provisions of the ESA. Such intent does not rise to the level of a constitutional violation.

In the Stop H-3 decision discussed supra, the court was presented with a conference committee report criticizing the court's holding as "highly technical" and confirming that the rider at issue "was designed to overturn this court's reading of section 4(f)." 870 F.2d at 1432. The court held that such statements do "not represent 'adjudication' by Congress but rather [are] the legitimate result of investigation and analysis upon which legislative decisions are based." Id. at 1438.

In short, separation of powers principles do not prohibit Congress from "overturning" court decisions—such principles only restrict the means by which Congress may act. The Ninth Circuit has noted that there must be "a high degree of judicial tolerance for an act of Congress that is intended to affect litigation so long as it changes the underlying substantive law in any detectable way." Gray v. First Winthrop Corp., 989 F.2d 1564, 1570 (9th Cir. 1993; see also Ileto, 565 F.3d at 1139-40 (the "mere fact that members of Congress wanted to preempt *this* pending case by name" does not violate separation of powers).

Likewise, the congressional statements affirming that Section 1713 does not

amend the general provisions of the ESA are of no concern, since it is not necessary that the general laws themselves be altered—a congressional directive to proceed immediately with a specified action without regard for or notwithstanding existing environmental laws that may prohibit or delay such action has the practical effect of "amend[ing] the applicable substantive law" even if the general laws are otherwise left intact. National Coalition to Save Our Mall, 269 F.3d at 1097; see also Consejo, 482 F.3d at 1170 (direction to proceed "notwithstanding" existing environmental laws "changes the substantive law governing" the project sufficiently to avoid separation of power concerns).

4. The plain language of Section 1713 does not bar judicial determinations of its constitutionality.

It is unnecessary to decide whether Congress may bar judicial review of Section 1713's constitutionality given the plain language of the statute. After directing the Service to reissue the 2009 Delisting Rule, Section 1713 provides "[s]uch reissuance (including this section) shall not be subject to judicial review." In short, the plain language of Section 1713 precludes judicial review only of the "reissuance" of the 2009 Rule, and judicial review of Section 1713 is precluded only to the extent its directives are included in such "reissuance." The obvious intent of such a provision is "to prevent courts from struggling to harmonize a statute with prior ones in the name of the presumption against implied repeal." National Coalition to Save our Mall, 269 F.3d at 1095. In essence, the preclusion of judicial

review of "reissuance (including this section)" reinforces the directive to proceed "without regard" to general laws that may otherwise apply to the Delisting Rule. In short, because the re-issued Rule is exempted from compliance with applicable statutes and regulations, judicial review to determine compliance with such laws and regulations would be pointless.

Plaintiffs' attempts to use the prohibition on judicial review to undermine Congress' plain directive to delist the gray wolf distinct population segment are misplaced: nothing in Section 1713 purports to exempt either the re-issued Rule or Section 1713 itself from constitutional requirements or to prohibit judicial review of Section 1713's constitutionality. Under such circumstances, this Court must apply the "cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the (constitutional) question(s) may be avoided." Johnson v. Robison, 415 U.S. 361, 367 (1974) (internal quotation marks omitted); see also Gray, 989 F.2d at 1568 (in addressing claim that statute violates separation of powers, court is "obliged to impose a saving interpretation of an otherwise unconstitutional statute so long as it is fairly possible to interpret the statute in a manner that renders it constitutionally valid") (internal quotation marks omitted). In Johnson, the Court applied this "cardinal principle" to find that a statue barring judicial review of an agency action did not bar review of constitutional claims. Id. Here, the Court must likewise conclude Congress did not intend to bar

challenges to the constitutionality of Section 1713, given the lack of plain language purporting to impose such a barrier.

CONCLUSION

Section 1713 complies with the requirements of the United States Constitution and must be upheld by this Court.

RESPECTFULLY SUBMITTED this 14th day of June 2011.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is in compliance with the word limit of 3,250 words established for this amici curiae brief by the Court's order of June 1, 2011 (Dkt. No. 35), in that it consists of 3,236 words, excluding the caption and this certificate, as calculated by the word count function of the word processor used to prepare the brief.

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