Nos. 11-35661, 11-35670 [consolidated cases]

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 8, 2011

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALLIANCE FOR THE WILD ROCKIES, et al., *Plaintiffs-Appellants*,
v.
KEN SALAZAR, Secretary of the Interior, et al., *Defendants-Appellees*,
and
ROCKY MOUNTAIN ELK FOUNDATION, INC., et al.,
Intervenors-Appellees,
and
SAFARI CLUB INTERNATIONAL, et al., *Intervenors-Appellees*,
and
MONTANA FARM BUREAU, et al., *Intervenors-Appellees*.

CENTER FOR BIOLOGICAL DIVERSITY, et al., *Plaintiffs-Appellants*,
v.
KEN SALAZAR, Secretary of the Interior, et al., *Defendants-Appellees*,
and
ROCKY MOUNTAIN ELK FOUNDATION, INC., et al.,
Intervenors-Appellees,
and
SAFARI CLUB INTERNATIONAL, et al., *Intervenors-Appellees*,
and
MONTANA FARM BUREAU, et al., *Intervenors-Appellees*.

On Appeal from the U.S. District Court for the District of Montana

PLAINTIFFS – APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3(a) FOR INJUNCTION PENDING APPEAL

RELIEF REQUESTED WITHIN 21 DAYS: BEFORE NOVEMBER 7, 2011

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CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Ninth Circuit Rule 27-3(a) Movants certify that to avoid irreparable harm, injunctive relief is needed in less than 21 days. Movants' appeal asserts that Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, protection has been removed for all Gray Wolves in the Northern Rocky Mountain Gray Wolf Distinct Population Segment outside of Wyoming, an area which includes the States of Idaho and Montana, by virtue of an unconstitutional act of Congress, Section 1713 of H.R. 1473, the Department of Defense and Full Year Continuing Appropriations Act of 2011. P.L. 112-10 § 1713, 125 Stat. 38 (April 15, 2011) (hereinafter "Section 1713"). The State of Idaho commenced a wolf-hunting season throughout the State beginning on August 30, 2011. *See* Ex. 3 at 2. Idaho's wolf-hunting season will run until December 31, 2011, March 31, 2012, or June 30, 2012 depending on the specific hunting area concerned. *Id*. The State of Montana commenced a wolf hunting season beginning with an archery season on September 3, 2011, and a backcountry rifle season shortly thereafter, on September 15, 2011. *See* Ex. 4 at 1. Montana's general rifle hunting season for wolves will begin on October 22, 2011 and run until December 31, 2011. *Id*. But for Section 1713, these wolf-hunting seasons could not legally take place.

On August 13, 2011, Movants previously sought emergency relief enjoining these wolf-hunting seasons before they began. Dkt. 6-1. On August 25, 2011, the Court denied Movants' initial request for emergency relief without prejudice and stated it was subject to renewal in front of the panel that will hear the merits of this appeal. Dkt. 23. Oral argument on merits of this appeal is set for November 8, 2011. Dkt. 40-1. Accordingly, this Motion should be forwarded to the panel that is hearing the merits of this appeal rather than the motions panel.

Wolf hunting is now underway in both Idaho and Montana. Thus, Movants' interests are already being subjected to irreparable harm. Additionally, Movants assert that the number of wolves killed in these states is about to dramatically increase causing them further irreparable harm. Already approximately 216 wolves have been killed in Idaho and Montana in 2011 – largely as a result of the removal of ESA protection. As of October 13, 2011, recreational hunters had killed approximately 53 wolves in Idaho. Ex. 5, ¶ 4. Between January 1, 2011 and September 30, 2011 an additional 81 wolves were killed in Idaho by state and federal control actions, legal protection of pets and livestock, illegal killing, and unknown causes. *Id*. ¶ 5. As of October 14, 2011, recreational archery and backcountry hunters had killed 11 wolves in Montana. *Id*. ¶ 7.

Additionally, so far in 2011 an additional 71 wolves were killed in Montana by state and federal agents, legal and illegal kills, and vehicle and train collisions. *Id*. ¶ 8.

Movants contend that the number of wolves killed by recreational hunters in both Idaho and Montana is about to dramatically increase. General "big game" (Deer & Elk) rifle hunting season, including a general rifle season on wolves, opens in Montana on October 22, 2011. *Id*. ¶ 10. In Idaho the majority of big game hunting zones opened for rifle hunting on October 10th or 15th. *Id*. Accordingly, there will soon be many more hunters in the field using more effective equipment (rifles as opposed to archery equipment). *Id*. Additionally, as snowfall increases, it will soon become easier for hunters to track and find wolves. *Id*. Idaho has issued approximately 25,500 wolf-hunting permits. *Id*. ¶ 6. Montana has issued approximately 11,401 wolf-hunting permits. *Id*. ¶ 9. At the end of 2010, the U.S. Fish and Wildlife Service estimated that there were 705 wolves in Idaho and 566 wolves in Montana. Ex. 6 at 7. As detailed in the Garrity Declaration, Ex. 5, ¶¶ 4, 5, 7 & 8, thus far in 2011 at least 216 wolves have been killed in Idaho and Montana. In sum, nearly 37,000 humans are, or soon will be, attempting to kill slightly more than 1,000 remaining wolves in Idaho and Montana – using more effective equipment and operating in more

favorable hunting conditions than have existed thus far in the wolf-hunting season.

Accordingly, Movants' interests in protecting both individual Gray Wolves in Idaho and Montana and the Gray Wolf population in the Northern Rocky Mountain Gray Wolf Distinct Population Segment outside of Wyoming are suffering, and are about to suffer further, irreparable injury. *See* Ex. 5, ¶¶ 11-12.

In keeping with Circuit Rule 27-3(a)(1) Movants notified counsel for all parties, as detailed below, of their intent to file the present motion via e-mail on October 13, 2011. Counsel for the Defendants – Appellees, Ken Salazar, Dan Ashe, and U.S. Fish and Wildlife Service; counsel for Defendants-Intervenors – Appellees, Montana Farm Bureau Federation, Idaho Farm Bureau Federation, and Mountain States Legal Foundation; counsel for Defendants-Intervenors – Appellees, Rocky Mountain Elk Foundation, Inc., Arizona Sportsmen for Wildlife, Big Game Forever, LLC, Idaho Sportsmen for Fish & Wildlife, Montana Sportsmen for Fish & Wildlife, The Mule Deer Foundation, Sportsmen for Fish & Wildlife, and The Wild Sheep Foundation; and counsel for Defendants-Intervenors – Appellees, Safari Club International and National Rifle Association of America all indicated that they oppose the present motion for emergency

relief. Counsel for Plaintiffs – Appellants Center for Biological Diversity and Cascadia Wildlands indicated they take no position on the present motion for emergency relief. Counsel for Plaintiff – Appellant Western Watersheds Project indicated they do not object to the present motion for emergency relief.

Additionally, on October 14, 2011 Movants' counsel notified the Clerk of the Court by calling the Motions Unit and discussing this Motion with an attorney on duty. As required by Circuit Rule 27-3(a)(2) this Motion is filed electronically through the CM/ECF system.

In keeping with Circuit Rule 27-3(a)(3)(i) the telephone numbers, e-mail addresses, and office addresses of the attorneys for the parties are as follows:

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The requirements of Circuit Rule 27-3(a)(3)(ii) & (iii) have been discussed above.

Pursuant to Circuit Rule 27-3(a)(4) Movants state that preliminary injunctive relief was available in the District Court. However, before Movants sought preliminary injunctive relief below, the District Court set the case for expedited summary judgment briefing on a timeline essentially consistent with that that which would have governed a motion for preliminary injunctive relief. Movants lost on the merits at summary judgment. *See* Exhibits 1 (District Court Order) & 2 (Judgment). Because the District Court determined it had to rule against Movants on the merits, Movants can no longer show a likelihood of success on the merits or raise serious legal questions going to the merits in the District Court. *See* Exhibit 1 at 6 ("If I were not constrained by what I believe is binding precedent from

the Ninth Circuit, and on-point precedent from other circuits, I would hold Section 1713 is unconstitutional because it violates the Separation of Powers doctrine articulated by the Supreme Court in U.S. v. Klein, 80 U.S. 128 (1871).").

Accordingly, injunctive relief is no longer realistically available in the District Court because it is "impracticable" or futile within the meaning of F.R.A.P. 8(a)(2)(A)(i). Several courts have found it impracticable to seek an injunction in the district court before making such a request from the court of appeals on analogous facts. *See e.g. Walker v. Lockhart*, 678 F.2d 68, 70 (8th Cir. 1982)(proper to seek an injunction pending appeal from the court of appeals without first applying to the district court because the decision on the merits by the district court suggested that it would not grant relief). *See also McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996)(Paul Kelly Jr. J. in chambers), *stay vacated due to mootness of case*, 100 F.3d 863 (10th Cir. 1996); *Wright & Miller, et al.*, 16A Fed. Prac. & Proc. Juris. § 3954 (4th Ed.) n.39 (collecting cases).

Moreover, in the present case, further evidence that moving the District Court for an injunction before proceeding in the Court of Appeals was impracticable and futile is supplied by the District Court's denial of an analogous request for a preliminary injunction of the wolf hunts in Montana

and Idaho in a predecessor case in which the Alliance for the Wild Rockies and Friends of the Clearwater were movants. *Defenders of Wildlife v. Salazar*, 2009 WL 8162144, *4-5 (D. Mont. 2009). Though Movants' believe the District Court's legal analysis in that instance was in error, the Court's prior ruling further substantiates the Movants' claim that moving the District Court for a similar injunction here was impracticable and futile.

All Movants' arguments as to the serious legal questions raised by this Motion and their appeal were presented to the District Court at summary judgment. *See* Exhibit 1. Therefore, this Motion should neither be remanded nor denied for failure to raise all grounds advanced in support of this Motion below.

Dated this 17th day of October 2011.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, Appellants, Alliance for the Wild Rockies, a Montana nonprofit corporation, Friends of the Clearwater, an Idaho nonprofit corporation, and WildEarth Guardians, a New Mexico nonprofit corporation, hereby state, by the through their attorneys, that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Dated this 17th day of October 2011.

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I. EMERGENCY MOTION

Pursuant to Ninth Circuit Rule 27-3(a), Plaintiffs – Appellants, Alliance for the Wild Rockies, Friends of the Clearwater, and WildEarth Guardians (collectively "the Alliance") respectfully move this Court to enjoin the operation of Section 1713 until its constitutionality can be fully adjudicated. The Alliance further respectfully moves this Court to enjoin the operation of the regulation issued by Defendants – Appellees, 76 Fed. Reg. 25590 (May 5, 2011), under the direction contained in Section 1713 until the constitutionality of Section 1713 can be fully adjudicated.

II. ARGUMENT IN SUPPORT

A. INTRODUCTION

In April 2009, Defendants - Appellees (collectively "FWS") issued a final rule (the "2009 Rule") which removed ESA protections for all wolves living in the Northern Rocky Mountain Gray Wolf Distinct Population Segment outside of Wyoming. *See* Ex. 1 (District Court Order appealed from) at 1-2, *citing* 74 Fed. Reg. 15213 *et seq*. Multiple conservation organizations challenged the 2009 Rule as having been issued in violation of the ESA.[1] The District Court held the 2009 rule violated the ESA by protecting a listed species only across part of its range, and vacated the

[1] Two of the present Movants, Alliance for the Wild Rockies and Friends of the Clearwater challenged the 2009 Rule.

unlawful Rule. *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1228 (D. Mont. 2010). *See also* Ex. 1 (District Court Order) at 2. FWS, Idaho, Montana, and three sets of Defendant-Intervenors appealed the District Court's ruling in *Defenders of Wildlife*. Ex. 1 at 2. These appeals remain pending.[2]

During the pendency of the appeals resulting from the District Court's ruling in *Defenders of Wildlife*, Congress passed and the President signed Section 1713 into law. Section 1713 states in its entirety:

> Before the end of the 60-day period beginning on the date of enactment of this Act, the Secretary of the Interior shall reissue the final rule published on April 2, 2009 (74 Fed. Reg. 15213 et seq.) without regard to any other provision of statute or regulation that applies to issuance of such rule. Such reissuance (including this section) shall not be subject to judicial review and shall not abrogate or otherwise have any effect on the order and judgment issued by the United States District Court for the District of Wyoming in Case Numbers 09-CV-118J and 09-CV-138J on November 18, 2010.

Pursuant to the congressional direction in Section 1713, FWS reissued the 2009 Rule previously vacated and set aside by the District Court in *Defenders of Wildlife*, in a new Federal Register publication, 76 Fed. Reg. 25590 (hereinafter the "2011 Rule").

Because Section 1713 directed FWS to re-issue the 2009 Rule the District Court held to violate the ESA in *Defenders of Wildlife* unchanged as

[2] Ninth Circuit Appeal Numbers: 10-35885; 10-35886; 10-35894; 10-35897; 10-35898; and 10-35926.

the 2011 Rule, without amending the ESA in any detectable manner, the Alliance sued alleging Congress had acted in violation of the constitutional separation of powers doctrine by merely directing the outcome of the pending appeals in *Defenders of Wildlife* without amending the underlying substantive law. The Alliance based its suit on *U.S. v. Klein*, 80 U.S. 128 (1871), in which the Supreme Court held that when Congress passes a law directing the judiciary to reach a particular outcome in a pending case under existing law and does not amend the existing law, Congress exceeds its constitutional authority and treads on the judiciary's authority to construe the law.

The District Court agreed with the Alliance that Section 1713 violates the separation of powers doctrine articulated by the Supreme Court in *Klein*. However, the District Court further held that this Circuits' interpretation of *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), constrained its ability to rule for the Alliance and thus entered summary judgment for FWS.

> If I were not constrained by what I believe is binding precedent from the Ninth Circuit, and on-point precedent from other circuits, I would hold Section 1713 is unconstitutional because it violates the Separation of Powers doctrine articulated by the Supreme Court in U.S. v. Klein, 80 U.S. 128 (1871). However, our Circuit has interpreted Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992), to hold that so long as Congress uses words "without regard to any other provision of statute or regulation that applies," or something similar, then the doctrine of constitutional avoidance requires the court to impose a saving interpretation provided the statute can be

fairly interpreted to render it constitutional.

Ex. 1 at 6-7.

In light of the District Court's exceptionally strong reluctance to rule for FWS and its apparent conclusion that this Circuit has misinterpreted or extended *Robertson* too far, so as to eviscerate *Klein* and thus the constitutional separation of powers doctrine, the Alliance believes that its appeal raises "serious legal questions" on the merits. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). The Alliance further believes that because, at base, its appeal involves compliance with both the Constitution and the ESA that "the balance of hardships tips sharply in [its] favor." *Id*. Accordingly, as argued below, the Alliance satisfies the test for an injunction pending the resolution of its appeal on the merits.

B. BACKGROUND

The Alliance's constitutional challenge to Section 1713 hinges on the interpretation of the separation of powers doctrine. The separation of powers doctrine, setting apart the executive, legislative, and judicial functions of government is one of the basic "checks and balances" contained in the Constitution. As Chief Justice Marshall wrote nearly two hundred years ago, "[t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judicial construes the

law." *Wayman v. Southard*, 23 U.S. 1 (1825). *See also Marbury v. Madison*, 5 U.S. 137 (1803) (establishing authority of judicial branch, including authority to overrule acts of Congress). "Time and again" the Supreme Court has affirmed "the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches." *Morrison v. Olson*, 487 U.S. 654, 693 (1988).

Defending the Constitution in *The Federalist Papers*, James Madison wrote: "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointive, or elective, may justly be pronounced the very definition of tyranny." *The Federalist No. 47* at 324 (J. Cooke ed. 1961) (J. Madison)).

In particular, the Framers were concerned with the expansion of legislative power at the expense of the judiciary. This fear arose from direct experience during the Confederation of States that preceded the constitutional convention: "One abuse that was prevalent during the Confederation was the exercise of judicial power by the state legislatures." *INS v. Chadha*, 462 U.S. 919, 961-63 (1983) (Powell, J., concurring) (noting contemporaneous records of legislatures exercising the judicial power). Accordingly, in light of this experience, the Supreme Court views the "system of separated powers and checks and balances [adopted by the

Framers as] 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another.'" *Morrison*, 487 U.S. at 693, *quoting Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

Two early decisions of the Supreme Court, *State of Pennsylvania v. The Wheeling and Belmont Bridge Company*, 59 U.S. 421 (1855) and *United States v. Klein*, 80 U.S. 128 (1871) establish the limits the separation of powers doctrine imposes on Congress' ability to direct the court's interpretation and application of the law to the facts in particular cases. Considered together, *Klein* and *Wheeling Bridge* stand for the proposition that Congress cannot direct the outcome of a pending litigation by instructing the courts how to interpret and apply the existing law to the specific pending claims. Such an effort involves Congress in the adjudication of cases under Article III, a role forbidden to it by the separation of powers doctrine.

More than a century after *Klein*, the Supreme Court returned to its analysis of the relevant aspects of the separation of powers doctrine in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). In *Robertson* the Supreme Court upheld the "Northwest Timber Compromise," Section 318 of the Department of the Interior and Related Agencies appropriations Act of 1990, against a separation of powers challenge. Subsection

318(b)(6)(A) of this Act provided:

> [T]he 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 [identifying the conservations groups' litigation by case name and docket number].

See Robertson, 503 U.S. at 434-35.

The Supreme Court held that Section 318 did not run afoul of *Klein*, as the Ninth Circuit had previously found, by reasoning that "subsection (b)(6)(A) compelled changes in law, not findings or results under old law" because "under subsection (b)(6)(A), the agencies could satisfy their MBTA [Migratory Bird Treaty Act] obligations in either of two ways: by managing their lands so as neither to 'kill' nor 'take' any northern spotted owl within the meaning of § 2 [of the MBTA, 16 U.S.C. § 703], or by managing their lands so as not to violate the prohibitions of subsections (b)(3) and (b)(5) [of Section 318 of the Act]." *Id*. at 438. The Supreme Court thus reversed the Ninth Circuit, not based on any contrary interpretation of *Klein*, but on the ground that the challenged Act amended the underlying statute and was thus constitutional.

The Supreme Court further illuminated the space between *Klein* and *Robertson* in *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995).

"Whatever the precise scope of Klein … later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut*, 514 U.S. at 218, *citing Robertson*, 503 U.S. at 441. *Plaut* thus firmly sets forth the principle that a statute that amends applicable law, even if it is meant to determine the outcome of pending litigation, does not violate the separation of powers doctrine. As *Plaut* recognizes, *Robertson* does not moot *Klein's* holding, but provides that Congress amends applicable law when it creates a new method to satisfy the existing statutory requirements, i.e. when "compliance with certain *new law* constituted compliance with certain old law." *Robertson*, 503 U.S. at 440 (emphasis added).

In *Ecology Center v. Castaneda*, this Court subsequently examined the space between *Robertson* and *Klein* on facts similar to those at issue in *Robertson*. 426 F.3d 1144, 1147-48 (9th Cir. 2005). *Ecology Center* began with an injunction issued by same District Court Judge who authored the opinion appealed from in the present case. In *Ecology Center*, the District Court enjoined certain timber sales because the Forest Service had failed to document the existence of a minimum of 10% old growth habitat at elevations below 5,500 feet on a forest-wide basis in the Kootenai National Forest as required by the Kootenai National Forest Plan. *Id*. at 1146. During the pendency of the case Congress enacted a new law that changed

the applicable old-growth retention standard from one requiring the retention of 10% old growth on a forest-wide basis to one requiring the retention of 10% old growth in the specific project areas. *Id*. at 1147. The District Court subsequently rejected the Ecology Center's argument that new law violated the separation of powers doctrine holding "Congress has not impermissibly directed findings … by the terms of [the new law], this Court could still, somehow, find there wasn't 10% [old growth] on an area and prevent the [timber] sales … Congress has changed the underlying law." *Id*. at 1147-48. This Circuit agreed, holding the new Act changed the underlying law because it did not "direct particular findings of fact or the application of old or new law to fact" but still left to the District Court the role of determining whether the new criteria were met. *Id*. at 1148.

> This test remains that used by the Ninth Circuit:
>
> > It has long been recognized that Congress may not prescribe rules of decision to the Judicial Department of the government in cases pending before it. […] Whatever the precise scope of Klein, however, later decisions have made clear that its prohibition does not take hold when Congress amends applicable law. […] Thus, if a statute compels changes in the law, not findings or results under old law, it merely amends the underlying law, and is therefore not subject to a Klein challenge. […]

Ileto v. Glock, Inc., 565 F.3d 1126, 1139 (9th Cir. 2009) (internal citations and quotations omitted).

As the Ninth Circuit candidly acknowledged after its reversal by the Supreme Court in *Robertson*, "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*." *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1569-70 (9th Cir. 1993) (emphasis added). In the present situation, as argued below, it is the absence of any such "detectable" change in the "underlying substantive law" that renders Section 1713 unconstitutional and renders this case unlike either *Robertson* or *Ecology Center*.

C. STANDARD OF REVIEW

Though this case presents constitutional issues, in terms of applying the standard for an injunction pending appeal it is appropriate to focus on the underlying statute at issue, the ESA. As a general matter, constitutional issues are reviewed de novo. *Berry v. Department of Social Services*, 447 F.3d 642, 648 (9th Cir. 2006). Challenges to the constitutionality of a federal statute or regulation are also reviewed de novo. *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006). *See also Ecology Center v. Castaneda*, 426 F.3d 1144, 1147 (9th Cir. 2005) (separation of powers challenge to constitutionality of statute reviewed de novo).

The standard of review for an injunction pending appeal is essentially the same as that applied to a motion for a preliminary injunction. *Lopez*, 713 F.2d at 1435. In this Circuit,

> serious questions going to the merits[] and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.

Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

However, in cases involving the ESA, both the Supreme Court and the Ninth Circuit have consistently held that Congress has already determined that both the equities and the public interest weigh in favor of preliminary injunctive relief. In *Weinberger v. Romero-Barcelo*, the Supreme Court noted that requests for injunctions under the ESA were not subject to the traditional equitable discretion afforded to requests for injunctive relief under the Clean Water Act:

> In *TVA v. Hill*, we held that Congress had foreclosed the exercise of the usual discretion possessed by a court of equity. There, we thought that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer" than that before us. [citation omitted] … The purpose and language of the statute limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act.

465 U.S. 305, 313-14 (1982).

This Circuit follows the Supreme Court's direction:

> Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as "institutionalized caution." … the balance of hardships and the public interest tip heavily in favor of endangered species. [citation omitted]. We may not use equity's scales to strike a different balance.

Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9th Cir. 1987). In *Marsh*, this Circuit held that a plaintiff is entitled to an injunction if the defendant has violated a substantive or procedural provision of the ESA. 816 F.2d at 1383-84; *see also Thomas v. Peterson*, 753 F.2d 754, 764 (1985) ("Given a substantial procedural violation of the ESA in connection with a federal project, the remedy must be an injunction of the project pending compliance with the ESA").

This Circuit has also held that in cases alleging a "take" (including hunting or killing) of a member of a protected species in violation of the ESA, the standard for injunctive relief is that the plaintiff must simply show that prospective harm is likely. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 786 (9th Cir. 1995); *National Wildlife Federation v. Burlington Northern R.R., Inc.*, 23 F.3d 1508, 1512 (9th Cir. 1994). A plaintiff in a case alleging the illegal take of members of a protected species does not need to show certainty of future harm, nor does it need to show a threat of extinction from the challenged activity, before an injunction will be

granted. *National Wildlife*, 23 F.3d at 1512 n.8. Prospective harm may be shown if the challenged activity will cause "significant impairment of the species' breeding or feeding habits and … prevents, or possibly, retards, recovery of the species." *Id*. at 1513.

D. ARGUMENT

1. Serious Legal Questions Are Raised by this Appeal

As discussed above, in this case the District Court stated that it would like to hold Section 1713 unconstitutional under *Klein*. Exhibit 1 at 6. The District Court further stated,

> The way in which Congress acted in trying to achieve a debatable policy change by attaching a rider to the Department of Defense and Full-Year Continuing Appropriations Act of 2011 is a tearing away, an undermining, and a disrespect for the fundamental idea of the rule of law. The principle behind the rule of law is to provide a mechanism and process to guide and constrain the government's exercise of power. Political decisions derive their legitimacy from the proper function of the political process within the constraints of limited government, guided by a constitutional structure that acknowledges the importance of the doctrine of Separation of Powers.

Ex. 1 at 3.

However, the District Court declined to rule for the Alliance based solely on its view of how this Circuit has interpreted *Robertson*. Ex. 1 at 6. In particular, the District Court felt constrained by cases such as *Consejo de Desarrollo Economico de Mexicali*, 482 F.3d, 1157, 1168-69 (9th Cir. 2007), in which this Circuit found language such as "[n]otwithstanding any other

provision of law" sufficient to work a change in underlying substantive law. *See* Ex. 1 at 15. The District Court was obviously frustrated that this Circuit has found such "notwithstanding" or "without regard to any other provision of statute or regulation" language to operate "as a talisman that *ipso facto* sweeps aside Separation of Powers concerns." Ex. 1 at 18. The District Court's frustration arises from an apparent belief that this Circuit has gone beyond *Robertson* and prior precedents like *Ecology Center* and inappropriately chipped away *Klein* and the separation of powers doctrine.

The District Court is correct. In *Robertson*, the Supreme Court held that "subsection (b)(6)(A) [of the challenged legislation] compelled changes in law, not findings or results under old law" because "under subsection (b)(6)(A), the agencies could satisfy their MBTA [Migratory Bird Treaty Act] obligations in either of two ways: by managing their lands so as neither to 'kill' nor 'take' any northern spotted owl within the meaning of § 2 [of the MBTA, 16 U.S.C. § 703], or by managing their lands so as not to violate the prohibitions of subsections (b)(3) and (b)(5) [of Section 318 of the Appropriations Act]." 503 U.S. at 438. The referenced subsections, (b)(3) and (b)(5), clearly indicated detectable changes in underlying law. 503 U.S. at 434 n.1.

Similarly, in *Ecology Center*, the challenged act changed the applicable old-growth retention standard from one requiring the retention of 10% old growth on a forest-wide basis to one requiring the retention of 10% old growth in the specific project areas. 426 F.3d at 1147. Thus in both *Robertson* and *Ecology Center*, Congress clearly made detectable changes in the underlying law.

Here there are no such detectable changes in underlying law. Section 1713 does not compel changes in law. Instead it attempts to compel results under old law – that the 2009 Rule previously stuck down by the District Court, as contrary to the ESA should be returned to force as *an identical* 2011 Rule. As the District Court observed this is a direct violation of the separation of powers doctrine. Accordingly, the Alliance believes its appeal raises serious legal questions as to: (a) whether Section 1713 violates the separation of powers doctrine; (b) whether the planned killing of hundreds of wolves in the next few months violate the ESA; (c) whether the District Court properly interpreted *Consejo de Desarrollo Economico de Mexicali* as expanding the reach of *Robertson* in all subsequent cases; and (d) if the District Court's interpretation of cases like *Consejo* was correct, whether that expansion, which allows reviewing courts to rely on "talismanic" language to invent or hypothesize what changes in underlying law Congress

intended, rather than search for actual, detectable changes in underlying law, is proper.

2. The Balance of Hardships and the Public Interest Tip Sharply in Appellants' Favor

As explained above, in a case such as this where the fundamental issue is compliance with the ESA, the Supreme Court has held that "Congress [] foreclosed the exercise of the usual discretion possessed by a court of equity … only an injunction could vindicate the objectives of the [ESA]." *Weinberger*, 465 U.S. at 313-14. *See also Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002) ("the balance of hardships and the public interest tip heavily in favor of endangered species"). Indeed, as this Court has stated, because "the balance of hardships and the public interest tip heavily in favor of endangered species," it "may not use equity's scales to strike a different balance." *Marsh*, 816 F.2d at 1383.

3. The Killing of Hundreds of Wolves is Irreparable Harm

A plaintiff challenging the "take" or killing of members of a species protected by the ESA need not show certainty of future harm or a threat of extinction before an injunction will be granted. *National Wildlife*, 23 F.3d at 1512 n.8. Prospective harm sufficient to grant an injunction exists if there will be "significant impairment of the species' breeding or feeding habits" or

impacts that might "prevent[], or possibly, retard[], recovery of the species." *Id*. at 1513. Where, as here, the failure to grant preliminary injunctive relief, will result in the death of half the individual members of a protected species, this is not a debatable issue.

Wolf hunting began on August 30th in Idaho and on September 3rd in Montana. Ex. 3 & 4. Idaho has not set a quota for the number of wolves that may be taken during this hunting season. Ex. 3. At the beginning of 2011, Idaho had 705 wolves according to FWS. *See* Ex. 6 at 7. 134 wolves have been killed in Idaho thus far in 2011. *See* Ex. 5, ¶¶ 4 & 5. Idaho has issued 25,500 hunting permits to kill its remaining wolves. Ex. 5, ¶ 6. Idaho also has planned a wolf-trapping season. Ex. 3. Hunters in Idaho are required to report wolf kills within 72 hours to the State, ostensibly to avoid reducing the population below 150 wolves, although such a proposition is speculative given the large number of hunters potentially in the field and the 72-hour lag time. At the beginning of 2011, Montana had 566 wolves according to FWS. Ex. 6 at 7. 82 wolves have been killed in Montana thus far in 2011. *See* Ex. 5, ¶¶ 7 & 8. Montana has sold 11,401 wolf-hunting licenses to kill a quota of 220 wolves. *See* Ex. 5, ¶ 9 (11,401 licenses) & Ex. 4 (quota of 220 wolves).

In sum, freed of the requirements of the ESA by Section 1713, Idaho and Montana have authorized the killing of at least 775 wolves (assuming Idaho's estimated population of 705 wolves is reduced to 150 and that 220 wolves will be killed in Montana). The entire population of wolves in the Northern Rocky Mountain Distinct Population Segment, including Wyoming and those portions of Washington, Oregon & Utah also included in the Distinct Population Segment, was estimated by FWS at 1,651 in 2010. Ex. 6 at 2. It is undisputable that hundreds of wolves in Montana and Idaho will die during this hunting season, approximately half of the total wolf population in the Northern Rockies including the surrounding states, and that Montana and Idaho have issued tens of thousands more wolf-hunting licenses – than the total number of wolves that exist in these states.

The above facts are certainly sufficient to show "significant impairment of the species' breeding or feeding habits" or impacts that might "prevent[], or possibly, retard[], recovery of the species." *National Wildlife*, 23 F.3d at 1513. Any contention by FWS that a "recovered" population of wolves will remain in Idaho and Montana (150 wolves in Idaho and Montana's 2010 population of 566 less the quota of 220 and less additional mortality, *see* Ex. 5, at ¶ 8) within the meaning of the ESA is a false assumption that has never been subjected to judicial scrutiny because the

District Court enjoined FWS' initial delisting rule on alternative grounds in *Defenders of Wildlife*, 729 F.Supp.2d at 1228. Recent independent, peer-reviewed scientific studies reject the conclusion that a "recovered" population of wolves existed in the Northern Rockies even prior to the current hunting season. *See e.g. Bergstrom, et al., The Northern Rocky Mountain Gray Wolf Is Not Yet Recovered*, BioScience, Vol. 59, No. 11 at 991-999 (December 2009)(copy attached as Ex. 7). Additionally, a recent scientific study from Montana State University concludes that a "sustainable harvest" of wolves from the Northern Rocky Mountains must be lower than that allowed under Idaho and Montana's current hunting regime. *Creel & Rotella, Meta-Analysis of Relationships between Human Offtake, Total Mortality and Population Dynamics of Gray Wolves (Canius lupus)*, PLoS One, Vol. 5, Issue 9 (September 2010) at 6 (copy attached as Ex. 8).

The philosophy behind granting an injunction pending appeal is to preserve the status quo so that irreparable harm that might occur in violation of law does not occur before a favorable appellate decision can be granted.

> … the court of appeals' preliminary decisions as to whether to grant injunctive relief *pendente lite*, including stays, is determinative of the ultimate outcome of the litigation. In such cases, judges must be particular sensitive to the practical consequences of their initial action or inaction, not only because of the effect on the transactions involved, but because of the need to ensure that the court does not inadvertently lose its ability to enforce an important Congressional mandate.

Kettle Range Conservation Group v. U.S. Bureau of Land Management, 150 F.3d 1083, 1087-88 (9th Cir. 1998) (Reinhardt, J., concurring). This is particularly true in the present case. If this Court does not grant preliminary injunctive relief wolf hunting seasons in Idaho and Montana will continue and hundreds of wolves the Alliance contends should be protected from hunting under the ESA will die as a result. Moreover, because the number of wolf hunting licenses issued by Montana and Idaho (nearly 37,000) far outnumbers the actual population of wolves in these States, estimated by the FWS at 1,271 at the beginning of 2011 (and ignoring the 216 wolves killed to date in those states, *see* Ex. 5, ¶¶ 4, 5, 7 & 8), there is a possibility that the current hunting season could eliminate the entire population before these States close their wolf-hunting seasons or this Court is able to rule on the merits. This Court can neither return dead wolves to life, nor remedy the injuries the Alliance will have suffered, even if it is ultimately successful in its appeal. *See* Ex. 5 ¶¶ 11, 12. Accordingly, the Alliance will suffer irreparable harm if an injunction is not granted during the pendency of this appeal.

E. CONCLUSION

For all of the reasons set forth above, the Alliance respectfully requests this Court grant the present Motion for emergency relief.

Respectfully submitted this 17th day of October 2011.

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STATEMENT OF RELATED CASES

This case is potentially related to pending appeals of the District Court's denial of motions to intervene filed in the proceedings below. Ninth Circuit appeal numbers: 11-35552; 11-35568; and 11-35636. Additionally, this case is potentially related to pending appeals challenging the District Court's decision in *Defenders of Wildlife* that the 2009 Rule delisting a portion of the Northern Rocky Mountains Gray Wolf District Population Segment violated the Endangered Species Act. Ninth Circuit Appeal numbers: 10-35885; 10-35886; 10-35894; 10-35897; 10-35898; and 10-35926.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to F.R.A.P. 27(d)(2), and F.R.A.P. 32(a)(5) and (a)(6), the foregoing motion and argument in support is proportionately spaced, has a typeface of 14 points, and does not exceed 20 pages, excluding the cover, certificate required by Circuit Rule 27-3, corporate disclosure statement, statement of related cases, certificates of compliance and service, and accompanying documents authorized under F.R.A.P. 27(a)(2)(B).

S/ James Jay Tutchton
James Jay Tutchton

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2011, I electronically filed the foregoing Motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I further certify that all participants in this case are registered CM/ECF users will be served by the appellate CM/ECF system.

S/ James Jay Tutchton
James Jay Tutchton