IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

ALLIANCE FOR THE WILD ROCKIES, et al.
Plaintiffs – Appellants,

v.

KEN SALAZAR, Secretary of the Interior, et al.,
Defendants – Appellees.

CENTER FOR BIOLOGICAL DIVERSITY, et al.,
Plaintiffs – Appellants,

v.

KEN SALAZAR, Secretary of the Interior, et al.,
Defendants – Appellees.

On Appeals from the United States District Court for the District of Montana
Nos. 9:11-cv-00070-DVM; 9:11-cv-00071-DVM

BRIEF OF APPELLEES

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JURISDICTION

In the district court, the plaintiffs asserted jurisdiction over their constitutional challenge under 28 U.S.C. § 1331. This appeal is from a final judgment of the District Court granting summary judgment to defendants, and disposing of all claims with respect to all parties. Center for Biological Diversity Excerpts of Record ("CBD ER") at 22. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

Whether, after a district court set aside a final rule of the Department of the Interior relating to the listing status of Northern Rocky Mountain gray wolves under the Endangered Species Act, Congress could enact legislation providing that the same rule must be re-issued "without regard to any other provision of statute or regulation that applies to the issuance of such rule," without violating constitutional separation of powers principles.

STATEMENT

In this action, the Center for Biological Diversity, the Alliance for the Wild Rockies, and other groups (hereafter "Conservation Groups") challenge the Department of the Interior's reissuance of a rule removing gray wolves in the Northern Rocky Mountain area (except in Wyoming) from the protections of the Endangered Species Act ("ESA"). The Department took this action pursuant to a

specific congressional directive to reissue this rule within sixty days, contained in Section 1713 of the Department of Defense and Full-Year Continuing Appropriations Act of 2011, P.L. 112-10 § 1713, 125 Stat. 38 (Apr. 15, 2011) (hereafter "Section 1713"). The rule identified in Section 1713 had been set aside by the District Court for the District of Montana as inconsistent with certain provisions of the ESA that the district court found prevented the agency from taking action under the listing provisions of the ESA with regard to only a portion of a species or distinct population segment of a species. *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010), *appeals pending*, 9th Cir. Nos. 10-35885; 10-35886; 10-35894; 10-35897; 10-35898; & 10-35926. The Conservation Groups filed this action to challenge the constitutionality of Section 1713, alleging that it violated the constitutional separation of powers, but the district court rejected that claim and granted summary judgment to the federal defendants. ER 18. The background to this controversy follows.

A. <u>Statutory and Regulatory Background</u>. – Congress enacted the ESA in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to bring any endangered or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary." 16 U.S.C. §§ 1531(b), 1532(3). The ESA directs

the Secretary of the Interior to maintain a list of threatened and endangered species, and defines the phrase "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6)."[1/] A "threatened species" is one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20). A species is "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." *Id.* § 1532(16).

Section 4(a)(1) of the ESA charges the Service with determining whether any species is an endangered species or a threatened species because of any of the following factors: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence." 16 U.S.C. § 1533(a)(1). In making this determination, the ESA requires the Service to rely "solely on the basis of the best scientific and commercial data available," 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b), and

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[1/] The responsibilities of the Secretary of the Interior under the ESA with respect to non-marine species like wolves has been delegated to the United States Fish and Wildlife Service ("the Service"). *See* 50 C.F.R. § 402.01(b).

to consider those efforts of States and foreign governments, including their political subdivisions, to protect the species "by predator control, protection of habitat and food supply, or other conservation practices." 16 U.S.C. § 1533(b)(1)(A).

Once protected as an endangered or threatened species, Section 4(f) requires the Service to develop and implement recovery plans for listed species "unless [it] finds that such a plan will not promote the conservation of the species." 16 U.S.C. § 1533(f). Recovery plans formulate a strategy designed to achieve species "recovery," meaning "improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act." 50 C.F.R. § 402.02. If the species recovers, the Service may remove the species from the list after it considers the Section 4(a)(1) listing factors. See 50 C.F.R. § 424.11(d). If the Service removes ESA protections for a recovered species, it must monitor the species for at least five years. 16 U.S.C. § 1533(g). If the monitoring reveals a significant risk to the species, the ESA permits the Service to relist the species using the Act's emergency procedures. *Id.*

1. The Service's Distinct Population Segment Policy.

As noted *supra*, the ESA defines "species" to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). In 1996, the Service issued its distinct population segment ("DPS") policy, which contains the criteria the Service uses for identifying a population that can be listed (or delisted) under the ESA. 61 Fed. Reg. 4722 (1996) (requiring a population to be "discrete" (*e.g.*, markedly separated from other populations) and "significant" to the taxon to which it belongs (*e.g.*, extirpation of the population would represent an important loss of genetic diversity)); *see Northwest Ecosystems Alliance v. U.S. Fish and Wildlife Serv.*, 475 F.3d 1136 (9th Cir. 2007) (upholding the DPS Policy). In response to growing wolf populations in Minnesota and the west, the Service began using the DPS Policy to identify individual wolf populations and decrease or remove ESA protections for those populations.

2. The Solicitor's Opinion on the Meaning of "Significant Portion of its Range."

As defined under the ESA, an "endangered species" is any species which is in danger of extinction "throughout all or a significant portion of its range," and a "threatened species" is any species likely to become endangered within the

foreseeable future throughout all or a significant portion of its range. 16 U.S.C. § 1532(6), (20). In *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001), this Court found that the definition of "endangered species" and the "significant portion of its range" phrase are "puzzling" and that the "statute is therefore inherently ambiguous." *Id.* at 1141. In response to *Defenders*, as well as other legal challenges surrounding the meaning of the "significant portion of its range" phrase, the Solicitor of the Department of the Interior issued a formal opinion on March 16, 2007, entitled: "The Meaning of 'In Danger of Extinction Throughout All or a Significant Portion of Its Range.'" *See* CBD ER 25 (Opinion M-37013). In that opinion, the Solicitor concluded that the "significant portion of its range" phrase is a substantive standard, meaning that a species can be determined to be threatened or endangered throughout all of its range, or threatened or endangered only in a significant portion of its range, and that ESA protections can be applied only to that portion of its range where it is threatened or endangered. In general, the Solicitor's opinion concluded that, pursuant to the "all or a significant portion of its range" phraseology, the Service has the authority to apply the ESA

protections to only those significant portions of a species range that are deemed threatened or endangered.[2/]

B. Gray Wolf Recovery Planning and Delisting Efforts. – The Service has prepared two recovery plans (1980 and 1987) for the Northern Rocky Mountain ("NRM") states. These focus recovery on three core recovery areas - northwestern Montana, central Idaho, and the Greater Yellowstone Area. The Service has identified a recovery goal of at least ten breeding pairs (adult male and adult female that successfully raise at least two pups until Dec. 31), and 100 wolves in each of the three recovery areas for three consecutive years, with some level of exchange between the three subpopulations. *See* 2009 Rule, 74 Fed. Reg. 15,130 (reprinted in CBD Addendum). Starting in 2002, the Service shifted from a focus on the three recovery areas to requiring Montana, Idaho, and Wyoming each to maintain an equitable share of the NRM wolf population, or ten breeding pairs and 100 wolves in each state. Further, the Service determined that, to ensure the minimum recovery goal always is met, each of the core recovery states must contain a 50% buffer above the minimum recovery goal, or above 15 breeding pairs and 150 wolves in each State. See *id*. at 15,140. The NRM wolf population

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[2/] The 2007 Solicitor's opinion was formally withdrawn by the current Solicitor on May 4, 2011. CBD ER74. We describe it here because of its relationship to the 2009 Rule mentioned in the challenged statute.

first met its numerical and distributional recovery goals in 2000 and its temporal recovery goal in 2002. Since then, the Service's minimum recovery goals have been exceeded in every year. *Id*. at 15,135.

In 2003, the Service divided gray wolves into three DPSs: the Western, Eastern, and Southwestern DPS. *See* 68 Fed. Reg. 15803 (2003) ("2003 Rule"). The 2003 rule downlisted the Eastern and Western DPSs from endangered to threatened. At the same time, the Service removed ESA protections for gray wolves in 14 southern and eastern states where they have not been present in recent times. This rulemaking was challenged and held unlawful by two federal district courts. *Defenders of Wildlife v. U.S. Dep't of Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005); *National Wildlife Fed'n v. Norton*, 386 F. Supp. 2d 553, 564 (D.Vt. 2005).

The Service initiated additional regulatory action to consider the delisting of the wolves in the Northern Rocky Mountains in 2007, and this new rulemaking effort resulted in a February 2008 regulation identifying the NRM DPS and delisting the entire DPS. 73 Fed. Reg. 10514 (2008) ("2008 Rule") (removing ESA protections for the NRM DPS, which included wolves in Idaho, Montana, and Wyoming, the eastern one-third of Washington and Oregon, and a small part of north-central Utah). The 2008 Rule was challenged in the District of Montana, and

after the district court granted a preliminary injunction against the States' authorization of regulated wolf hunts, *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1163 (D. Mont. 2008), the Service moved for voluntary remand and vacatur of the 2008 Rule.

The Service engaged in a further rulemaking to consider removal of ESA protections for the NRM gray wolf DPS, which resulted in the 2009 Rule which is the subject of the legislation and the constitutional challenge at issue here. In the "Final Rule To Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and To Revise the List of Endangered and Threatened Wildlife," 74 Fed. Reg. 15,123 (2009) ("2009 Rule"), the Service again identified and designated a DPS that includes all wolves in Idaho, Montana, Wyoming, and portions of Washington, Oregon, and Utah. 74 Fed. Reg. 15,123, 15,126 (map of the NRM DPS). The Service determined that the NRM gray wolf was not threatened or endangered throughout "all" of its range, as the populations exceeded recovery goals in all three recovery areas and state management and regulation in all of the states except Wyoming were adequate to ensure a recovered population into the foreseeable future. However, the Service determined that Wyoming constituted a significant portion of the DPS's range and that, due to inadequate State regulatory mechanisms, gray wolves remained in danger of

extinction in Wyoming. 74 Fed. Reg. at 15,170-72 & 15,179-83. Therefore, the Service concluded that gray wolves were endangered only in Wyoming and, pursuant to the Solicitor's 2007 opinion on meaning of the statutory phrase "significant portion of its range," applied the ESA protections only to that portion of the DPS's broader range. *Id*. at 15,180, 15,183.

C. <u>The Challenges to the 2009 Rule</u>. – In Montana, environmental organizations – led by Defenders of Wildlife and the Greater Yellowstone Coalition – filed two separate lawsuits challenging the 2009 Rule that were consolidated before Judge Donald Molloy.[3/] Before hunting seasons began in Montana and Idaho, the plaintiffs sought preliminary injunctive relief, arguing that the State hunts would result in irreparable harm. The district court denied the plaintiffs' motion, finding that while plaintiffs were likely to prevail on the merits, they had not demonstrated that irreparable harm was likely, and the hunts

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[3/] The State of Wyoming and Park County, Wyoming also filed lawsuits in Wyoming challenging the 2009 Rule, and the Wyoming cases were consolidated. *Wyoming v. U.S. Dep't of Interior*, 09-cv-118, 09-cv-138 (D. Wyo.). These challenges focused on the Service's consideration of Wyoming's existing regulatory mechanisms pursuant to 16 U.S.C. § 1533(a)(1). Following merits briefing, the Wyoming District Court entered an opinion and judgment holding that the Service had not provided a reasoned explanation of what types of regulatory mechanisms would support removal of ESA protections, and remanded for further consideration. *See Wyoming v. U.S. Dep't of Interior*, 2010 WL 4814950 (D. Wyo. Nov. 18, 2010).

proceeded. *See Defenders of Wildlife v. Salazar*, 2009 WL 8162144, *4-5 (D. Mont. 2009).

On August 5, 2010, the district court entered an order granting in part Plaintiffs' summary judgment motion. The court ruled that the plain language of the ESA foreclosed the interpretation set out in the 2007 Solicitor's opinion. The Court found that the ESA unambiguously defines the word "species" to mean a species, subspecies, or DPS, and thus "[t]he agency has no authority to add a new categorical taxonomy to the statute," and thus had no latitude to interpret the ESA to permit listings or delistings below the DPS level. *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d at 1217. The court found it unnecessary to reach other claims raised by the plaintiffs, and vacated the 2009 Rule in its entirety. Judgment was issued, and appeals were filed by the defendants and by several intervenors. Those appeals have been stayed, pending resolution of the appeals in these consolidated cases.

D. <u>The Challenges to Section 1713</u>. – While the appeals from the district court's ruling vacating the 2009 Rule were pending, Congress enacted legislation requiring the Secretary to reissue the 2009 Rule, without regard to any other provision of statute or regulation. On April 15, 2011, President Obama signed the

Department of Defense and Full-Year Continuing Appropriations Act of 2011, P.L. 112-10, 125 Stat. 38. Section 1713 of that Act provides 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.

As directed by Section 1713, the Secretary reissued the 2009 Rule on May 5, 2011. 76 Fed. Reg. 25,590 (CBD AD91). The preamble to the final 2011 Rule explains that, pursuant to the congressional directive to reissue the 2009 Rule:

> Gray wolves in Montana and Idaho, as well as portions of eastern Oregon, eastern Washington, and north-central Utah, are removed from the List of Endangered and Threatened Wildlife. Gray wolves in Wyoming remain on the List of Endangered and Threatened Wildlife and continue to be subject to the provisions of our experimental population regulations codified at 50 CFR 17.84(i) and (n).

76 Fed. Reg. at 25,591. The preamble also explains that the Rule will be effective upon publication in the Federal Register in order to comply with Section 1713's 60-day time limit for re-issuing the 2009 Rule. *Id.*

On May 5, 2011, complaints challenging the constitutionality of Section 1713 were filed in the District of Montana on behalf of the Alliance for the Wild Rockies, Friends of the Clearwater, WildEarth Guardians and the Center for Biological Diversity. The Center later amended its complaint to add Cascadia Wildlands and Western Watersheds Project as plaintiffs. The complaints asked for a declaration that Section 1713 violates the separation of powers established in the United States Constitution and for the 2011 Final Rule to be set aside. CBD ER 165; AWR ER 106. The cases were consolidated. Several motions to intervene by parties supporting the constitutionality of the statute and the 2011 Rule were denied by the district court on June 1, 2011, on grounds that the interests of these parties were adequately represented by the federal government.

Motions for summary judgment were filed by plaintiffs and federal defendants, and the district court issued an order granting summary judgment to defendants on August 3, 2011. CBD ER 1-18. The district court found that "Section 1713 can be read as a change in the law to the extent that it exempts the Northern Rocky Mountain Gray Wolf Distinct Population Segment from the range concerns as articulated in the ESA." CBD ER 7. The district court found that binding precedent from both the Supreme Court and this Court make clear that

Congress has the authority to make such a change in law, even if that change has the effect of depriving a plaintiff of a litigation victory. CBD ER 8, 12-18.

STANDARD OF REVIEW

The constitutionality of a statute is a question of law and is reviewed *de novo*. *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993). A court should invalidate a statutory provision only "'for the most compelling constitutional reasons.'" *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 384 (1989) and *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (Stevens, J., concurring)). Moreover, courts are 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." *Gray*, 989 F.2d at 1568 (quoting *Communications Workers of Am. v. Beck*, 487 U.S. 735, 762 (1988)).

SUMMARY OF ARGUMENT

The Conservation Groups' challenge to Section 1713, which is based entirely on *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), was correctly rejected by the district court. In *Klein*, the Supreme Court overturned a statute because it attempted to impair the effect of a presidential pardon and because it "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146. In *Robertson v. Seattle Audubon Society*, 503

U.S. 429 (1992) ("*Seattle Audubon*"), however, the Supreme Court made clear that the separation of powers problem identified in *Klein* does not arise where the course of litigation is altered by legislation that makes some detectable change in underlying law, rather than directing findings or results under old law. *Id*. at 438. Section 1713 does not direct findings or results under old law, but changes the underlying law regarding the ESA status of NRM wolves by directing that the 2009 Rule providing for the delisting of NRM wolves except in Wyoming go into effect within 60 days.

The Conservation Groups' argument that the detectable change in underlying law must be an amendment that is more generally applicable than Section 1713 is refuted by the many Supreme Court and Circuit Court decisions that have upheld legislative provisions that simply direct that certain very specific actions go forward notwithstanding statutes that otherwise would stand in the way. *See, e.g.*, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) (authorizing two specific bridges); *In re Clinton Bridge*, 77 U.S. (10 Wall.) 454, 463, (1870) (authorizing single bridge); *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1170 (9th Cir. 2007) (*Consejo*) (authorizing single canal-lining project); *Apache Survival Coalition v. United States*, 21 F.3d 895, 898 (9th Cir. 1994) (authorizing three proposed telescopes).

There is no constitutional requirement that Congress make a broader change in law than it did here to authorize a single delisting rule to be implemented notwithstanding otherwise applicable limitations on the Secretary's delisting authority.

The Conservation Groups try to make a constitutional straitjacket out of *Seattle Audubon*, by urging that the ruling in that case only applies to legislation that substitutes a new standard for the previous standard, as the appropriations rider in that case happened to do. But nothing in *Seattle Audubon* suggests such a limitation, and subsequent decisions of this Court make clear that the necessary detectable change in underlying law can take a variety of forms. Acceptable changes include provisions that simply exempt an identified federal agency action from a particular statute or statutes, by mandating that the action proceed without regard to prior congressional directives. *See, e.g., Consejo*, 482 F.3d at 1170; *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1422-23 (9th Cir. 1989) (*"Stop H-3"*).

This case cannot be distinguished from the many decisions of this Circuit and other Circuits that have found that similar congressional enactments aimed at overcoming litigation roadblocks to certain federal agency actions pose no constitutional separation of powers problems. The judgment of the district court should be affirmed.

ARGUMENT

SECTION 1713 DOES NOT DIRECT AN OUTCOME IN PENDING LITIGATION WITHOUT CHANGING UNDERLYING LAW, AND THUS RAISES NO SEPARATION OF POWERS ISSUE

Within the scope of its enumerated powers, Congress has broad authority to enact laws to govern matters of public right, including the protection of endangered and threatened species. *San Luis & Delta-Mendota Water Authority v. Salazar*, 638 F.3d 1163, 1174-77(9th Cir.), *cert. pending*, No. 10-1551, 80 USLW 3004 (2011); *Alabama–Tombigbee Rivers v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007); *Rancho Viejo v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *GDF Realty Invest. Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997). Congress may freely change these laws, and when it does, it is those amended laws that must be given prospective legal effect. *See, e.g., Miller v. French*, 530 U.S. 327, 347-50 (2000); *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801) ("if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed"); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1570 (9th Cir. 1993) ("Congress clearly has the power to amend a statute and to make that change applicable to pending cases").

While the Conservation Groups do not challenge Congress' power to make and amend statutes relating to endangered wildlife, they claim that Section 1713 improperly infringes on the powers of the Judiciary, by "impermissibly direct[ing] an outcome in pending litigation without amending underlying law." CBD Br. 20 (caption punctuation omitted); *see also* Alliance Br. at 31 (contending that Section 1713 "directs the judiciary as to a particular result without amending the law, and thus acts unconstitutionally"). As we show below, courts have consistently rejected challenges like this one claiming that Congress cannot act to change the result of a pending lawsuit by suspending or modifying application of the statute that gave rise to the lawsuit. The Supreme Court, this Court and other circuits have all made clear that there is no constitutional bar to Congress enacting legislation that brings about a result at odds with a judicial ruling, including when the case from which the ruling arises is still pending, so long as that legislation does not attempt to dictate how a court makes findings of fact, or attempt to retroactively alter private rights.

A. The Supreme Court Has Made Clear That Congress Has Broad Authority to Enact Statutes That May Alter the Results of Litigation Over Public Rights. – Courts analyzing challenges like this one generally begin their analysis with a Supreme Court decision involving Congressional action that changed the legal status of a bridge over the Ohio River. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) ("*Wheeling Bridge*"). In an earlier case, the Supreme Court had granted Pennsylvania's requested injunction requiring the bridge to be removed or raised. It there stated that because Congress had "regulated the navigation of the Ohio River, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same," the Virginia-authorized bridge impeding travel on the Ohio River was "in conflict with the acts of congress, which were the paramount law." 59 U.S. (18 How.) at 430 (summarizing earlier opinion). Congress then passed a new law authorizing the construction of the bridge and stating that the bridge and one other were "lawful structures in their present positions and elevations." *Wheeling Bridge*, 59 U.S. (18 How.) at 429. Pennsylvania sued again, claiming that the intervening enactment was an unconstitutional attempt to overturn a final decision of the Judiciary. The Supreme Court disagreed:

> Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it

> interferes with the right of navigation. If, in the mean time, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with the law * * *.

Id. at 431-32.

In a subsequent case, *The Clinton Bridge*, 77 U.S. (10 Wall.) 454, 463, (1870), the Supreme Court found that the principle set forth in *Wheeling Bridge* applied equally when an intervening congressional enactment affects pending litigation. The facts of *Clinton Bridge* were almost identical to those in *Wheeling Bridge*, except that Congress passed legislation authorizing the bridge in question while the suit over its legality was still pending, rather than after the injunction issued. *See* 77 U.S. (10 Wall.) at 462-63. The Court noted that, in so doing, Congress "gave the rule of decision for the court" in the pending case. *Id.* at 463. The Court found that to be unobjectionable under *Wheeling Bridge*, but warned that "very different considerations would have arisen" if Congress had attempted to dictate the rule of decision in a case concerning a "private right of action." *Id.*

The circumstance the Court warned about in *Clinton* arose soon after in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). Reconstruction era presidential proclamations had offered a "full pardon, with restoration of all rights of property," to certain broad classes, conditioned on taking an oath of loyalty.

Klein, 80 U.S. (13 Wall.) at 139-40. In the Abandoned and Captured Property Act, 12 Stat. 820 (Mar. 12, 1863), however, Congress provided that the owner of seized property could sue in the Court of Claims to recover its proceeds only on proof that the owner "had never given aid or comfort to the rebellion." *Id.* at 138-39. In *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 542-43 (1869), the Supreme Court held that a presidential pardon was equivalent to proof that the claimant had not aided the rebellion. Congress responded to *Padelford* by passing a law directing the Court of Claims to take the fact of a pardon, with narrow exceptions, as conclusive proof that the claimant had "given aid or comfort to the rebellion," and as grounds for dismissing the claimant's suit. *Klein*, 80 U.S. (13 Wall.) at 142-43.

In *Klein*, the administrator of the estate of V.F. Wilson, who had taken the oath and qualified for the pardon, sued to recover the proceeds of Wilson's seized property. *Id.* at 136, 143. The Supreme Court found the provision to be unconstitutional, both because it attempted to impair the effect of a presidential pardon and because it "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146. Congress had "passed the limit which separates the legislative from the judicial power." *Id.* at 147.

The Court in *Klein* emphasized that "we do not at all question what was decided in the case of *Pennsylvania v. Wheeling Bridge Company*." *Id.* at 146. That case was distinguishable because:

> No arbitrary rule of decision was prescribed in that case, but the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But 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.

Id. at 146-47.

In 1992, the Supreme Court considered whether *Klein* prevented Congress from enacting a measure that reversed the result of a successful litigation challenge to certain logging projects. *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992) ("*Seattle Audubon*"), involved the Northwest Timber Compromise of 1990, which applied to certain timber sales in thirteen national forests in the Pacific Northwest. The key section of that legislation stated that "Congress hereby determines and directs that management of areas according to [new rules set forth in the Northwest Timber Compromise] * * * meet[s] the statutory requirements that are the basis for [the litigation]." 503 U.S. at 434-35. This Court had found that this provision did not "establish new law, but direct[ed] the court to reach a specific result and make certain factual findings under existing law in connection

with two cases pending in federal court," thus encroaching on the judicial branch under *Klein*. *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311, 1316 (9th Cir. 1990). In reversing, the Supreme Court criticized this Court's focus on the form of the enactment; instead, it looked to the legal effect of the provision at issue:

> We conclude that subsection (b)(6)(A) compelled changes in law, not findings or results under old law. Before subsection (b)(6)(A) was enacted, the original claims would fail only if the challenged harvesting violated none of five old provisions. Under subsection (b)(6)(A), by contrast, those same claims would fail if the harvesting violated neither of two new provisions. Its operation, we think, modified the old provisions.

Seattle Audubon, 503 U.S. at 438.

The Court in *Seattle Audubon* made clear that it was not reaching the issue of whether Congress *must* make a change in the underlying law in order to avoid a *Klein* violation. Rather, the Court simply interpreted the statutory provision at issue as compelling a change in the law because it was possible to do so, and thus expressly avoided the constitutional question that would be presented if no such change were made. 503 U.S. at 441 (noting that a court is obliged to impose a "saving interpretation," on a statute challenged as unconstitutional as long as it is a "'possible' one," (quoting from *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1,

30 (1937)). The Court made clear that, "[w]e have no occasion to address any broad question of Article III jurisprudence." 503 U.S. at 441.[4/]

B. Following *Seattle Audubon*, This Court Has Consistently Found That Statutes Like Section 1713 Change Underlying Law By Changing the Scope of the Government's Legal Duties, And Raise No Separation of Powers Problem. – Numerous cases from this Court, as well as other circuits, have found that provisions like Section 1713 easily can be interpreted as changing the underlying law by changing the scope of the government's legal duties, thus avoiding any separation of powers problem even when pending litigation is affected by the newly enacted provision. This Court has interpreted *Seattle Audubon* 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." *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 991 (9th Cir. 1999)

[4/] As pointed out in *Biodiversity Associates v. Cables*, 357 F.3d 1152, 1164 (10th Cir. 2004), "[t]hus, if a provision cannot be read as a change in the law, the most that follows from * * * *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." CBD incorrectly interprets *Seattle Audubon* to have held that Congress is required to "make actual, detectable changes in underlying law to cure a separation of powers problem." CBD Br. 35. On the contrary, changes in the underlying law avoid the constitutional problem altogether – there is no need for a "cure."

("*Cook Inlet Tribes*"); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1570 (9th Cir. 1993).

The change in underlying substantive law can be narrow in scope, and does not have to follow any particular form. The form taken by Section 1713 was found not to present any constitutional problem in *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157 (9th Cir. 2007) (*Consejo*), which upheld a provision almost identical to Section 1713. Environmental groups had challenged the Bureau of Reclamation's approval of a canal lining project as allegedly violating the National Environmental Policy Act ("NEPA"), the ESA, and the Migratory Bird Treaty Act. *See* 482 F.3d at 1166-67. After the district court entered summary judgment for the government, the groups appealed, and a motions panel of this Court granted an injunction pending appeal. After oral argument on the merits of the appeal, Congress enacted and the President signed into law what this Court described as a "274-page omnibus tax bill" which contained two sections affecting the canal lining project. Pertinent to the environmental groups' claims, Section 395 of the Act provided that:

> (a) * * * 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.

482 F.3d at 1187 (quoting 2006 Act).

Shortly after enactment, the government asked that the injunction pending appeal be vacated, and the case remanded to the district court so that the counts brought by the environmental groups could be dismissed as moot. *Consejo*, 482 F.3d at 1167-68. This Court granted the government's requested relief, rejecting arguments that Congress lacked power to exempt identified federal actions from otherwise applicable environmental laws. The Court made clear that, "[a]ssuming it uses constitutional means, Congress may exempt specific projects from the requirements of environmental laws." *Id*. at 1168, citing *Sierra Club v. USFS*, 93 F.3d 610, 613-14 (9th Cir. 1996); *Mt. Graham Coalition v. Thomas*, 89 F.3d 554, 556-58 (9th Cir. 1996); *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1457-61 (9th Cir.1992); and *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1432 (9th Cir. 1989). The Court rejected several constitutional challenges, including a contention "that the 2006 Act violates the principle of separation of powers by dictating a specific result in a pending judicial case." The Court explained:

> As in the legislation underpinning our prior decisions, the 2006 Act does not direct us to make any findings or to make any particular application of law to facts. Rather, the legislation changes the substantive law governing pre-conditions to

> commencement of the Lining Project. As such, it does not violate the constitutional separation of powers.

Id. at 1170.

Section 1713 cannot be distinguished from the provision upheld in *Consejo*. Like Section 395(a) of the 2006 Tax Reform Act, Section 1713 identifies a specific agency action (the 2009 Rule) and directs that this action proceed, without delay, notwithstanding any contrary provision of law. Like Section 395(a), Section 1713 does not direct a court to make any findings or make any particular application of law to facts. Rather, as the Court explained in *Consejo*, provisions like Section 395(a) and Section 1713 simply render moot any pending controversy over whether the particular exempted agency action would have complied with environmental statutes prior to passage of the exempting provision. *Id*. at 1172 ("[t]herefore, we conclude that, in light of the 2006 Act, we cannot fashion effective relief and the challenges raised in Counts 5-8 based on alleged past violations of NEPA, the Endangered Species Act, the Migratory Bird Treaty Act, and the Settlement Act are moot"); *see also Cook Inlet Tribes*, *supra*, 166 F.3d at 991 (appropriations rider rendered case moot by answering the legal question posed in litigation, and raised no separation of powers problem).

CBD's contention (Br. 20) that Section 1713 violates the separation of powers because it "directs an outcome in pending litigation" is thus entirely refuted

by *Consejo's* holding that Congress *may* constitutionally enact measures that suspend the application of statutes to particular federal agency actions, thereby mooting pending litigation challenges based on those statutes. *Consejo*, 482 F.3d at 1169, 1170; *see also Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1422-23, 1438 n.27 (9th Cir. 1989) (upholding judgment that a challenge to highway project's compliance with Department of Transportation Act provision limiting use of parklands was rendered moot by the passage of an appropriations rider, and noting that "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"). Just as with the legislation considered in *Consejo*, Section 1713 "changes the substantive law governing pre-conditions to commencement of the [agency action]," by lifting for purposes of the 2009 Rule any limitations that might otherwise flow from the provisions of the ESA, particularly from the definition of the term "species" in 16 U.S.C. § 1532(16). Such congressional action, as this Court held in *Consejo*, "does not violate the constitutional separation of powers." 482 F.3d at 1170.

The ruling in *Consejo* flows directly from *Seattle Audubon*, where the Supreme Court made clear that Congress can deprive a plaintiff of a litigation victory by enacting a provision that eliminates the statutory source of the victory

for the challenged project. *See* 503 U.S. at 440. It is thus clear that whatever the statements in *Klein* regarding limits on Congress' power to direct findings may mean in other contexts, they do not limit Congress' ability to enact a measure like Section 1713 that simply moots a pending controversy by suspending the application of a particular statute or statutes relied upon by a plaintiff.

C. Congress Can Exempt an Agency Action From Existing Legislative Restrictions Without Amending or Repealing Statutes in Ways That Would Affect Cases Generally. – Like other provisions upheld by this Court and other courts, Section 1713 changed the underlying law by suspending the application of the ESA and any other provision of statutes or regulations that might have prevented implementation of the 2009 Rule delisting NRM gray wolves outside of Wyoming. The Conservation Groups object that such a change is too narrow – in their view Section 1713 does not qualify as a detectable change in the law because it "does not cover the entire subject addressed by the ESA" and "says nothing about management of endangered species generally." CBD Br. 25. The Alliance similarly argues that the only constitutional way that Congress could have achieved its desired result of putting the 2009 Rule in place would have been "to amend the ESA with new statutory provision" that would have satisfied the district court that "a reissued 2009 rule would now comply with the ESA." Alliance Br. 31.

The Conservation Groups' theory that a change in underlying law must be "general" to pass constitutional muster has no support in the cases. Both *Wheeling Bridge* and *Seattle Audubon* upheld legislation that was directed narrowly at resolving particular controversies under existing statutes, rather than at amending the underlying statutes generally to affect a broad range of cases. And the Supreme Court a few years after *Seattle Audubon* confirmed that "[i]t makes no difference whatever" in analyzing a separation of powers challenge that the statute is addressed only to a particularized problem. *Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211 (1995) ("*Plaut*").[5/] As this Court explained in *Mount Graham Coalition v. Thomas*, 89 F.3d at 557, in upholding a similar provision:

> Nor is the rider here rendered suspect because it is targeted at a single controversy. The legislation in *Wheeling Bridge* was similarly targeted, as was Congress's recent legislation known as the Northwest Timber Compromise, which declared that adherence to it provisions would constitute compliance with the existing statutes that were the basis of two named pending cases. *See Robertson v. Seattle Audubon Society*, 503 U.S. 429, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992).

[5/] In *Plaut*, the Court found that a federal statute that required federal courts to reopen final monetary judgments that had been entered before the statute's enactment was unconstitutional on separation of powers grounds. The Court there made clear that its ruling applied to "private rights" that had "passed into judgment" and "become absolute," and distinguished *Wheeling Bridge* on that basis. 514 U.S. at 226.

Indeed, this Court's decisions have frequently upheld statutes that did not generally amend or repeal the underlying statutes. *See, e.g.*, *Consejo*, 482 F.3d at 1170 (upholding legislation directed at allowing a single canal-lining project to go forward notwithstanding existing legislation); *Apache Survival Coalition v. United States*, 21 F.3d 895, 898 (9th Cir. 1994) (upholding legislation directed at allowing three proposed telescopes to be built); *see generally Cook Inlet Tribes*, 166 F.3d at 991 ("neither a remedial purpose nor specificity dooms corrective legislation").

Accordingly, the Conservation Group's reliance (CBD Br. 23; Alliance Br. 24-25) on statements of a Senator to news organizations to show that Section 1713 was not intended to generally amend or repeal the ESA is misplaced.[6/] To make a detectable change in substantive law Congress does not need to enact a general amendment that will apply beyond the particular situation of concern. Just as in *Consejo*, *Apache Survival*, *Mt. Graham Coalition* and *Stop H-3*, the legislation here brought about a narrow change in the underlying law to allow a particular federal action to proceed in the face of a particular litigation challenge. The fact that Section 1713 wasn't intended to reach controversies beyond the situation

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[6/] In any event, as the district court correctly pointed out, courts do not rely on such statements by individual legislators in determining congressional intent, particularly where the legislation is clear on its face. CBD ER at 16, n.3.

arising from the district court's vacation of the 2009 Rule does not detract from its constitutionality.[7/]

D. Congress May Exempt An Agency Action From Existing Standards Without Providing New Standards. – The Conservation Groups also argue that even if Congress can act narrowly to exempt a single agency action from existing legislation, the Constitution requires that Congress must impose a new standard that gives a reviewing court some role in determining whether the exempted action is in compliance with law. See CBD Br. 14-15 (contending that Section 1713 violates the separation of powers because "Congress directed FWS to reissue the vacated 2009 Delisting Rule * * * without providing the courts with any new standards to apply"); Alliance Br. 49 (complaining that "Congress simply directed the Secretary of Interior to reissue the same 2009 rule previously vacated by the District Court without providing any new ESA law for a reviewing court to apply to the 2009 rule"). This contention also cannot be reconciled with the many cases

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[7/] Nor is it of any moment that Section 1713 "says nothing at all about the ESA" as CBD complains at Br. 12. The provision at issue in *Seattle Audubon* also did not specifically mention any particular statute, but the Supreme Court nevertheless found that it "effectively modified" five underlying statutes that were involved in the litigation mentioned by the statutory provision. 503 U.S. at 440. *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*, 21 F.3d at 903 n.8.

that have upheld legislative enactments that resolved controversies in litigation without providing the reviewing court with the opportunity to apply new standards.

The Conservation Groups' argument derives from the happenstance that the congressional enactment upheld in *Seattle Audubon* substituted a new, relaxed standard for complying with existing statutes. 503 U.S. at 434-35 (setting out Northwest Timber Compromise provisions indicating that compliance with standards for avoiding certain spotted owl habitat areas would constitute "'adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al.* * * *'"). But the Supreme Court nowhere suggested that the particular device used in the Northwest Timber Compromise of imposing a new relaxed standard for purposes of resolving a litigation challenge was essential to its finding that the rider was a change in existing law and did not improperly direct findings. In fact, *Seattle Audubon* cited *Wheeling Bridge*, see 503 U.S. at 436, 441, which upheld a statute that did not provide any new standard for a court to apply to determine whether certain bridges were lawful, but instead simply declared that the bridges were "lawful structures in their present positions and elevations." 59 U.S. (18 How.) at 429. CBD's contention (Br. 34) that a statute is unconstitutional if it leaves a reviewing court "with no adjudicatory function to perform" is starkly

inconsistent with *Wheeling Bridge* and *Clinton Bridge*, where legislative provisions were found constitutional despite the fact that they terminated controversies without further judicial review of the question of whether the bridges in question were obstructions to navigation. There is no constitutional bar to Congress terminating a controversy by enacting new legislation. *See generally*, *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994) ("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed").

The Conservation Groups' position is also inconsistent with opinions of this Court that have upheld statutes that terminated litigation controversies without leaving a continuing role for the courts. In *Consejo*, for instance, Section 395 of the challenged 2006 Act suspended the application of environmental statutes to the domestic impacts of the canal lining project by requiring that the Secretary carry out the canal lining project "[n]otwithstanding any other provision of law." 482 F.3d at 1167. Section 395 did not provide any new standard for a court to apply to the domestic impacts of the canal lining project, yet this Court had no trouble finding it constitutional. *Id*. at 1170. CBD tries (Br. 28-29) to reconcile *Consejo* with its theory by pointing out that the 2006 Act provided that a 1944 Treaty and a supplemental treaty protocol would henceforth be the exclusive authority for

consideration of impacts outside the United States. That provision was contained in Section 397 of the 2006 Act, covering international impacts. *See* 482 F.3d at 1167. This Court found that *both* Sections 395 and 397 were constitutional. *Id*. at 1169-70. Plainly, the Court would not have upheld Section 395 if a continuing judicial role was necessary for it to be constitutional.

Similarly, in *Mount Graham Coalition v. Thomas*, 89 F.3d at 556, this Court denied an emergency motion for stay pending appeal in a published order, finding that "no serious question" had been raised regarding the constitutionality of a rider that effectively ended litigation over the propriety of the Forest Service's choice of a site for a challenged telescope project, by providing that:

> "The United States Forest Service approval of alternative site 2 (ALT 2), issued on December 6, 1993, is hereby authorized and approved and shall be deemed to be consistent with, and permissible under, the terms of Public Law 100-696 (the Arizona-Idaho Conservation Act of 1988)."

Mount Graham Coalition, 89 F.3d at 556 (quoting from rider). *See also Cook Inlet Tribes*, 166 F.3d at 989 & 991 (finding that appropriations rider enacted after appeal was filed "definitively answered" the question posed and mooted the controversy, but did not pose any separation of powers problem)*; 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 a memorial to be conducted

expeditiously in accordance with the special use permit issued by the Secretary, notwithstanding any other provision of law, and insulating from judicial review the decision to site the memorial at a particular site); *Biodiversity Associates v. Cables*, *supra*, 357 F.3d at 1160 (upholding rider that directed Forest Service to undertake certain logging projects and insulated them from judicial review).

As these cases make clear, Congress can bring about a change in underlying substantive law that avoids constitutional problems simply by directing that a particular agency action go forward, notwithstanding any contrary provision of law, in accordance with a particular standard that has been set forth in an existing document, such as the Record of Decision for the canal lining project in *Consejo*.[8/] Here, the new standard governing the status of gray wolves in the NRM area is set forth in the 2009 Rule, which is specifically identified in the statute and required to

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[8/] The Conservation Groups get no support from *The Ecology Center v. Castaneda*, 426 F.3d 1144, 1149 (9th Cir. 2005). *See* CBD Br. 31-32; Alliance Br. 51-52. In *Ecology Center*, this Court upheld an appropriations rider enacted after a district court had enjoined a timber project for failure to comply with a Forest Plan standard that the district court had found must be met on a forest-wide basis to satisfy the National Forest Management Act. The rider in that case identified the particular litigation and directed that compliance with the Forest Plan standard on a project-by-project basis would satisfy the NFMA and NEPA. 426 F.3d at 1146-47. This Court rejected claims that the rider was an unconstitutional attempt to direct particular results in an ongoing case. *Id*. at 1148-50. While the rider in that case substituted a relaxed standard for an existing standard, the Court nowhere suggested that this feature was essential to its constitutionality.

be expeditiously implemented. As is clear from *Wheeling Bridge* and *Clinton Bridge*, and from the decisions of this Court just discussed, Congress does not need to provide some continuing role for the reviewing court in order to avoid a separation of powers problem.

In sum, because Section 1713 makes a detectable change in the underlying law, by requiring the Secretary to promulgate the 2009 Rule delisting wolves in the Rocky Mountain NRM outside of Wyoming without regard to any law or regulation that might have prevented that result, no separation of powers problem is posed by the fact that Section 1713 renders moot the controversy in *Defenders of Wildlife* over the validity of the 2009 Rule. The district court's grant of summary judgment against the Conservation Groups' constitutional challenge to Section 1713 and the re-issuance of the 2009 should therefore be affirmed.[9/]

[9/] The district court held, consistent with the position of the government below, that the judicial review provision of Section 1713 should not be construed to bar courts from reviewing whether Section 1713 itself violated the constitutional separation of powers. *See* district court order at 8, n.1, citing *Webster v. Doe*, 486 U.S. 592, 603 (1988), for the proposition that "serious constitutional questions arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim"). We continue to believe that Section 1713 is best construed as not precluding this separation of powers challenge. However, if Section 1713 were construed otherwise, a constitutional problem would arise only in a case raising a "colorable" constitutional claim. *Webster*, 486 U.S. at 603. In light of the fact that this Court's cases have, without exception, found that provisions such as Section 1713 plainly do not violate the separation of powers, the Conservation Groups here did not present the sort of "colorable" constitutional claim whose

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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90-8-6-07173
OCTOBER 2011

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preclusion might itself raise a constitutional issue. Moreover, even if the statute were read to bar constitutional claims, and that were found problematic, it would not suggest that the entire provision is unconstitutional, only that the bar to raising a constitutional claim was beyond Congress' power. The result would simply be that the Court could reach the merits of this case, which, as shown, would lead to affirmance of the district court decision.

CERTIFICATION OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I certify that the foregoing Answering Brief of the Appellees complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 8,961 words. I relied on my word processing software, Word Perfect X3, to obtain this word count.

10/14/2011
Date

s/ David C. Shilton
David C. Shilton, Attorney

STATEMENT OF RELATED CASES

This case is potentially related to pending appeals in this Court from the district court's decision in *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010). Those appeals, which have been stayed, are:

DOW et al. v. State of Idaho et al., No. 10-35885;

DOW, et al. v. Montana Farm Bureau Fed'n et al., No. 10-35886;

DOW, et al. v. Ken Salazar, et al., No. 10-35894;

DOW, et al. v. Safari Club International, et al., No. 10-35897;

DOW, et al. v. State of Montana, et al., No. 10-35898; and

DOW, et al. v. Salazar, et al., No. 10-35926.

10/14/2011
Date

s/ David C. Shilton
David C. Shilton, Attorney

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2011, I electronically filed the foregoing Answering Brief of Federal Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ David C. Shilton
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