Nos. 11-35661 and 11-35670
(Consolidated)

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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ALLIANCE FOR THE WILD ROCKIES, *et al.*,
and
CENTER FOR BIOLOGICAL DIVERSITY, *et al.,*

Plaintiffs-Appellants,

v.

KEN SALAZAR, in his official capacity
as Secretary, Department of the Interior, *et al.,*

Defendants-Appellees,

and

MONTANA FARM BUREAU FEDERATION, *et al.*,
and
ROCKY MOUNTAIN ELK FOUNDATION, *et al.*,
and
SAFARI CLUB INTERNATIONAL, *et al.*

Intervenor-Appellees.

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On Appeal from the United States District Court for the District of Montana, Missoula,
Civil Action Nos. 09:11-cv-00070-DWM and 09:11-cv-00071-DWM
The Honorable Donald W. Molloy, District Judge

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**RESPONSE BRIEF OF MONTANA FARM BUREAU FEDERATION, IDAHO FARM BUREAU FEDERATION, AND MOUNTAIN STATES LEGAL FOUNDATION**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 28(a)(3) and Fed. R. App. P. 26.1, the undersigned attorney for Montana Farm Bureau Federation, Idaho Farm Bureau Federation, and Mountain States Legal Foundation certifies that none of these entities has a parent corporation and, because none have ever issued stock, there is no publicly held corporation that owns ten percent or more of the stock of any of these entities.

Dated this 14th day of October, 2011.

/s/ Steven J. Lechner
Steven J. Lechner

Attorney for Intervenor-Appellees, Montana Farm Bureau Federation, Idaho Farm Bureau Federation and Mountain States Legal Foundation

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page**

## CASES

**Page**

**OTHER AUTHORITIES**

## COUNTER-STATEMENT OF THE ISSUE PRESENTED FOR REVIEW[1]

Whether the District Court correctly ruled that Section 1713 of the Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. 112-010, 125 Stat. 38 ("§ 1713") does not violate the Separation of Powers Doctrine.

## PERTINENT STATUTORY PROVISION

Section 1713 of the Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. 112-010, 125 Stat. 38 ("§ 1713") provides:

> 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.

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[1] Montana Farm Bureau Federation, Idaho Farm Bureau Federation, and Mountain States Legal Foundation (collectively "Farm Bureaus") object to the Statement of Issues Presented for Review contained in the Opening Brief of Alliance for the Wild Rockies, Friends of the Clearwater, and WildEarth Guardians, which constitute factual allegations and legal argument, rather than a statement of the issues presented for review.

# COMBINED COUNTER-STATEMENT OF THE CASE AND STATEMENT OF FACTS[2]

On April 2, 2009, the U.S. Fish and Wildlife Service ("FWS") issued *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 (Apr. 2, 2009) ("Delisting Rule"). The Delisting Rule designated the portion of gray wolves in Montana, Idaho, Wyoming, the eastern one-third of Washington and Oregon, as well as a small part of north-central Utah, as a distinct population segment, the Rocky Mountain Wolf Distinct Population Segment ("RMW DPS"). Then it removed the RMW DPS from the Endangered Species Act's ("ESA") protections, except in Wyoming.

Before doing so, the FWS found that the State of Montana's "wolf [management] plan and regulatory framework met the requirements of the [ESA]" and that "Montana's wolf management plan would maintain a recovered wolf

[2] The Farm Bureaus object to the Statement of the Case and Statement of the Facts of Alliance for the Wild Rockies, Friends of the Clearwater, and WildEarth Guardians, and to that of Center for Biological Diversity, Cascadia Wildlands, and Western Watersheds Project. Together, they set out a great deal of information concerning wolves and their conservation that are entirely irrelevant to the issue of whether § 1713 violates the Separation of Powers Doctrine. Furthermore, these Statements of Facts include off-the-record statements of members of Congress, which are irrelevant and of no persuasive value. Finally, these statements contain inadmissible, irrelevant hearsay with no foundation, and the documents on which they rely have not been authenticated. Other so-called statements of "fact" constitute legal arguments that should have been made, if at all, in the Argument.

population and minimize conflicts with other traditional activities in Montana's landscape." *Id*. at 15,168. Thus, the FWS concluded that "Montana's . . . wolf management plan, and implementing regulations, provide the necessary regulatory mechanisms to assure maintenance of the State's numerical and distributional share of a recovered wolf population well into the foreseeable future." *Id*.

The FWS also found that that the State of Idaho's . . . wolf management plan "constitute[s] a biologically-based and scientifically sound wolf conservation strategy [that] will maintain the wolf population well above recovery minimums, and the methods that they will utilize to establish the hunting quota system and harvest season will promote natural connectivity from Idaho into the [Greater Yellowstone Area]." *Id*. 15,169–70. Thus, the FWS concluded that "Idaho's wolf management plan, and implementing regulations, provide the necessary regulatory mechanisms to assure maintenance of the State's numerical and distributional share of a recovered wolf population well into the foreseeable future." *Id*. at 15,170.

The FWS also considered the plans for the States of Washington, Oregon, Utah and Tribal lands. *Id*. at 15,172–75. It concluded that "[c]ompared to Montana, Idaho, and Wyoming, the portion of the RMW DPS containing suitable habitat within Oregon, Washington, Utah, and Tribal lands is small, [and though] a few packs may become established within these portions of the RMW DPS, . . .

their role in the overall conservation of the . . . DPS is inherently small given the limited number of packs that habitat there is likely to support. *Id.* at 15,174.

Thus, the FWS concluded:

> [A]dequate regulatory mechanisms are in place in all portions of the . . . DPS except Wyoming. . . . All sources of mortality will be carefully managed. . . . As long as populations are maintained well above minimal recovery levels, wolf biology (namely the species' reproductive capacity) and the availability of large, secure blocks of suitable habitat, will maintain strong source populations capable of withstanding all other foreseeable threats.

*Id.*

The Delisting Rule also provided for post-delisting monitoring:

> Section 4(g)(1) of the Act, added in the 1988 reauthorization, requires us to implement a system, in cooperation with the States, to monitor for not less than 5 years, the status of all species that have recovered and been removed from the Lists of Endangered and Threatened Wildlife and Plants . . . . The purpose of this post-delisting monitoring is to verify that a recovered species remains secure from risk of extinction after it no longer has the protections of the Act. Should relisting be required, we may make use of the emergency listing authorities under section 4(b)(7) of the Act to prevent a significant risk to the well-being of any recovered species.

*Id.* at 15,184–85.

Thus, although the Delisting Rule removed ESA protections and relied upon the states' wolf management plans to adequately protect and maintain the species, the FWS continued to monitor to assure that the states complied with and properly implemented their plans, and that the projected results would be achieved. If not, the RMW DPS would be relisted as set forth at 15,184–85.

On June 2, 2009, Defenders of Wildlife, Natural Resources Defense Council, Sierra Club, Humane Society of the United States, Center for Biological Diversity, Jackson Hole Conservation Alliance, Friends of the Clearwater, Alliance for the Wild Rockies, Oregon Wild, Cascadia Wildlands, Western Watersheds Project, Wildlands Network, and Hells Canyon Preservation Council, filed a Complaint in the U.S. District Court for the District of Montana against Kenneth Salazar, in his official capacity as Secretary of the Interior, and Kenneth Gould, in his official capacity as Director of the United States Fish and Wildlife Service (collectively "FWS"), challenging the validity of the Delisting Rule under the ESA. Case No. 09-cv-77 DWM, Dkt. No.1. On June 10, 2009, the Greater Yellowstone Coalition filed a Complaint in the same court seeking judicial review of the same Delisting Rule. Case No. 09-cv-82 DWM, Dkt. No. 1. On June 12, 2011, the District Court consolidated those cases and ordered that all future pleadings be filed under Case No. 09-cv-77, Dkt. No. 16. On June 30, 2009, the District Court granted the Montana Farm Bureau Federation, Idaho Farm Bureau Federation, and Mountain States Legal Foundation (collectively "Farm Bureaus") motion to intervene in the consolidated cases. Dkt. No. 37. Other parties were also allowed to intervene.

On August 5, 2010, after all the parties had briefed their respective motions for summary judgment and the District Court had heard oral argument, the District

Court vacated and set aside the Delisting Rule. Dkt. No. 164. On September 30, 2010, the Farm Bureaus appealed this decision, Dkt. No. 167, as did the FWS and the other intervenors. Those appeals remain pending before this Court. Consolidated Case Docket Nos. 10-35885, 10-35886, 10-35894, 10-35897, 10-35898, and 10-35926. No briefs have been filed and the cases have been stayed several times by the Circuit Mediator. Dkt. No. 46.

Meanwhile, on April 15, 2011, President Obama signed the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. 112-010, 125 Stat. 38. Section 1713 thereof required that the Secretary, "without regard to any other provision of statute or regulation that applies to issuance of such rule" reissue the Delisting Rule within 60 days. It also provided that "reissuance (including this section) shall not be subject to judicial review" for non-compliance with the ESA o APA, or other statute that might otherwise apply to the reissuance of the Delisting Rule. On May 5, 2011, as directed by Congress, the FWS reissued the Delisting Rule. *Endangered and Threatened Wildlife and Plants; Reissuance of 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,*76 Fed. Reg. 25590 (May 5, 2011).

On May 5, 2011, Alliance for the Wild Rockies, Friends of the Clearwater, and WildEarth Guardians (collectively, "Alliance") filed suit against the FWS in the District of Montana seeking a declaration that § 1713 is unconstitutional (docketed as Case No. CV 11-70-M-DWM). Alliance ER 89. On the same day, the Center for Biological Diversity, Cascadia Wildlands, and Western Watersheds Project (collectively "CBD") filed a similar suit (docketed as Case No. CV 11-71-M-DWM). On May 24, 2011, the District Court consolidated the Case Nos. 11-70 and 11-71. Dkt. No. 16. On May 27, 2011, the Farm Bureaus moved to intervene as of right and permissively in each of the consolidated cases to defend the constitutionality of § 1713. Dkt. No. 24. On June 1, 2011, four days after the Farm Bureaus filed their motion to intervene, the District Court denied the motion. Dkt. No. 37.

On August 3, 2011, after the parties had briefed and argued their respective positions, the District Court entered summary judgment in favor of the FWS upholding the constitutionality of § 1713. Dkt. No. 86, Alliance ER 3–20. That decision was based on the binding precedent of this Court in *Consejo De Desarrolo Economico de Mexicali,* discussed below. *Id*. Alliance ER 17, 19–20.

On August 8, 2011, Alliance filed a Notice of Appeal, Dkt. No. 88, Alliance ER 35–36, and, on August 11, 2011, CBD also filed a Notice of Appeal. Dkt. No. 90, CBD ER 19–21. These appeals are docketed with this Court as Nos. 11-35661 and 11-35670, respectively. On August 18, 2011, the Farm Bureaus moved to intervene in each of these appeals. Dkt. No 9-1 in Case No. 11-35661 and Dkt.

No. 9-1 in Case No. 11-35670. On August 25, 2011, this Court consolidated the two appeals. Dkt. No. 23 in Case No. 11-35561. Finally, on September 19, 2011, this Court granted the Farm Bureaus' Motion to Intervene to defend the constitutionality of § 1713. Dkt. No. 39.

## SUMMARY OF THE ARGUMENT

Alliance failed to demonstrate that it had Article III associational standing by failing to file any declarations or affidavits supporting and establishing standing. Instead, it relied on its participation in other cases, wrongly assuming that this participation demonstrated its standing in this case.

Alliance and CBD have not demonstrated associational Article III standing even if their allegations are taken as true. Both parties alleged that the injury to their members consisted of viewing wolves and that § 1713 might reduce the opportunity to do so, resulting in injury to their members' aesthetic, conservational, recreational, scientific, educational, and wildlife preservation interests. The reissued Delisting Rule, issued pursuant to § 1713, however, provided for the maintenance of state wolf management plans, with continued monitoring by the FWS to assure the States' compliance, and providing for relisting if the RWM DPS became threatened with endangerment

Neither Alliance nor CBD offered credible evidence in the District Court that any of their members' viewing of wolves has in fact been diminished as the result of the wolf management plans of the States. Furthermore, neither has demonstrated that restoring the wolf management to the FWS under the ESA would redress their members' alleged injury of a diminished opportunity to view wolves. Thus, their members' alleged injuries are conjectural, hypothetical, and speculative, constituting generalized grievances in common with the public at large.

Moreover, neither Alliance nor CBD have prudential standing. The zone of interest protected by separation of powers principles is individual liberty. Alleged injury to the opportunity to view wolves, possibly within the zone of interests protected by the ESA, has nothing to do with liberty. It is difficult to believe that the Framers envisioned that the "right" to view wolves was protected by separation of powers principles. Thus, Alliance and CBD have generalized grievances, common to the public, which should be more properly addressed to Congress.

*United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), on which Alliance and CBD rely, is a unique case, limited to its unusual circumstances of the Reconstruction period after the Civil War. *Klein* is highly difficult to understand, as is its actual holding, and at least three courts, including the Supreme Court, have expressed reservations concerning whether the holding ascribed to it by Alliance and CBD is correct. Moreover, in the 140 years since *Klein*, the only case to strike down a law explicitly on *Klein* grounds was *Klein* itself. Thus, reliance on *Klein* to strike down congressional legislation on separation of powers principles is highly suspect.

In any event *Klein* does not apply if Congress did not direct a court to make any particular findings of fact or applications of law to fact, but instead, simply amended existing law. Section 1713 amended the ESA to exempt the RMW DPS from the expressed provisions of the ESA, but it also provided in the reissued Delisting Rule for state wolf management plans and continued monitoring by the FWS.

Alliance and CBD argue that Congress does not amend existing law for *Klein* purposes unless it substitutes a new law. Certainly, this is one way that Congress may amend a statute, but it may also do so by simply exempting a particular subject or matter from the statute's application, here, the ESA, but merely exempting a statute from its application in a particular instance is sufficient. Moreover, Congress, though it did exempt the RMW DPS from the application of the ESA, also substituted the reissued Delisting Rule in its place.

Section 1713 does not constitute a failed attempt in an appropriations statute to repeal the ESA by implication, as Alliance and CBD argue. Though § 1713 is contained in an appropriations bill, it does not appropriate money, so the rule against repeals by implication based on withholding or providing appropriations for a particular project does not apply. Moreover, congressional intent to amend the ESA is explicit in the "without regard to" clause, which applies only to a provision of "statute or regulation that applies to the issuance of such [reissued Delisting Rule]." Because this clause refers to the ESA and the Administrative Procedure Act ("APA") and because § 1713 contains a direction to the Secretary to reissue the Delisting Rule within 60 days, there is nothing implied about this clause; it is express, clear, and unambiguous.

Finally, § 1713 does not prohibit constitutional review. Limitations of jurisdiction should be construed narrowly to avoid constitutional problems. Section 1713 provides that the "reissuance [of the Delisting Rule] (including this section) shall not be subject to judicial review[.]" Because the reference to non-review of § 1713 is merely a parenthetical to non-review of the reissuance, it should be read together. Therefore, the most reasonable interpretation of the non-review provision is that it denies review of § 1713 only insofar as it is challenged under the EPA, APA or some other statute that relates to the reissuance of the Delisting Rule.

## ARGUMENT

### I. ALLIANCE AND CBD HAVE NOT MET THEIR HEAVY BURDEN OF PROVING STANDING.

#### A. Alliance And CBD Have Not Demonstrated Article III Standing.

Separation of powers is an essential feature of the American constitutional system and is necessary for the preservation of individual liberty. *Clinton v. New York*, 524 U.S. 417, 450 (1998) ("Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty.") (Kennedy, J., concurring). Pursuant to the Separation of Powers Doctrine, the Framers limited the judicial power of the United States to "Cases" and "Controversies." U.S. Const. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992) ("*Defenders*"). "One of those landmarks, setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III—serv[ing] to identify those disputes which are appropriately resolved through the judicial process,—is the doctrine of standing." *Defenders*, 504 U.S. at 560 (internal quotations omitted).

Thus, the Article III requirement of standing is an essential part of the separation of powers. *Allen v. Wright,* 468 U.S. 737, 752 (1984) ("[T]he law of Article III standing is built on a single basic idea—the idea of separation of powers"). "To permit a complainant who has no concrete injury to require a court to rule" on important questions of national importance "would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction." *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 222 (1974); *see also United States v. Richardson,* 418 U.S. 166, 192 (1974) (Powell, J., concurring) ("[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens.").

The Supreme Court held that the "irreducible constitutional minimum of standing contains three elements:"

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest, which is: (a) concrete and particularized, and (b) actual or imminent, not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be "redressed by a favorable decision."

*Defenders*, 504 U.S. at 560–61 (internal citations omitted) (emphases added). To be "particularized" "the injury must affect the plaintiff in a personal and individual way." *Id.* at 560, n.1.

Furthermore, the party invoking federal jurisdiction bears the burden of establishing standing. *Id*. at 561; *see Renne v. Geary*, 501 U.S. 312, 316 (1991) (a federal court must presume that it lacks jurisdiction "unless the contrary appears affirmatively from the record"). These are not merely:

> [P]leading requirements but rather [are] an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.

*Defenders*, 504 U.S. at 561. Thus, at the summary judgment stage, a plaintiff "can no longer rest on 'mere allegations' but must set forth by affidavit or other evidence 'specific facts' that establish the plaintiff's right to invoke the jurisdiction of the federal court." *Id*. at 561 (quoting Fed. R. Civ. P. 56(e)). In fact:

> [A] court is obliged to examine standing *sua sponte* where standing has erroneously been assumed below. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998) ("'[I]f the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it'") (quoting *United States v. Corrick*, 298 U.S. 435, 440 (1936)).

*Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 488 (1980) ("Although respondents have not challenged Boeing's standing, we are obligated to consider the issue *sua sponte*, if necessary.").

In order for an association, such as Alliance and CBD, to have standing to bring suit on behalf of its members it must prove:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

*Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. at 343 (1977).

### 1. Alliance made no attempt to demonstrate that it has associational standing under Article III.

Alliance asserted that its standing was established by its participation in other cases without the necessity of independently demonstrating its standing in this case. *See* Alliance Statement of Undisputed Facts, § 1, Dkt. No. 28, in Case No. 11 cv 170 DWM. In short, Alliance took for granted that its presence in previous lawsuits was sufficient, without more, to support standing in this case. The District Court made no findings concerning Alliance's associational standing, and, Alliance did not set forth, by affidavit or declaration, specific facts that established its right to invoke the jurisdiction of the District Court or of this Court. Accordingly, this Court must dismiss Alliance's appeal for failure to demonstrate associational Article III standing. *Mollan v. Torrance*, 22 U.S. (9 Wheat) 537, 539 (1824) ("It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought . . . ."); *Defenders*, 504 U.S. at 569, n 4 (Article III standing may not be created retroactively).

### 2. Alliance and CBD have not alleged facts that demonstrate associational standing under Article III.

In the instant case, Alliance alleged that its members seek "to view wolves and signs of wolf presence in the wild throughout the northern Rockies." Alliance Compl. at ¶ 8, Alliance ER 94. It alleged that the reissued Delisting Rule decreased its members' opportunity to view wolves, and thereby caused an "injury to its members' "aesthetic, conservational, recreational, scientific, educational and wildlife preservation interests." *Id.*

Likewise, CBD alleged that the reissued Delisting Rule will reduce its members' opportunity to "view wolves and signs of wolf presence in the wild" because "more wolves will be killed and harassed under state management." CBD Second Am. Compl. at ¶ 12, CBD ER 153. CBD also alleged that this resulted in injury to the "aesthetic, conservational, recreational, scientific, educational, and wildlife preservation interests" of its members. *Id.* CBD further alleged that its members "are being adversely and irreparably injured by the deprivation of the judgment obtained in the challenge to the Delisting Rule. *Id.*, ER 53–54.[3]

In an ESA case, to survive a challenge to Article III standing, Alliance and CBD "had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened, but also that one or more

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[3] CBD, unlike Alliance, did submit affidavits in a futile attempt to support these allegations. CBD ER 75–124.

of [their] members would thereby be 'directly' affected apart from their 'special interest' in th[e] subject." *Defenders*, 504 U.S. at 564. This, Alliance and CBD failed to do.

Indeed, Alliance and CBD could not have done so because the reissued Delisting Rule does not leave the RMW DPS unprotected. Rather, under the Delisting Rule, states' "wolf management plan[s] and implementing regulations provide the necessary regulatory mechanisms to assure maintenance of the State numerical and distributional share of a recovered wolf population well into the foreseeable future." 74 Fed. Reg. 15,168, 15,170. Moreover, the Delisting Rule provides for continued monitoring by FWS, pursuant to § 4(g) (15 U.S.C. § 1533(g)) of the ESA, to "verify that the species remains secure from the risk of extinction." *Id.* at 15,174. In the event that relisting becomes necessary, the reissued Delisting Rule prescribes that FWS may "make use of the emergency listing under § 4(b)(7) (15 U.S.C. § 1533(b)(7)) of the ESA.

Neither Alliance nor CBD offered credible evidence in the District Court that any member's wolf-viewing has in fact been diminished as the result of § 1713 or the states' wolf management plans. Moreover, neither Alliance nor CBD offered credible evidence in the District Court that restoring the wolf management to FWS under the ESA would redress their members' alleged injury of diminished wolf-viewing opportunity. Thus, their members' alleged injuries are conjectural, hypothetical, and speculative, constituting generalized grievances in common with the public at large. Consequently, Alliance and CBD both failed to demonstrate associational Article III standing, and this Court should dismiss their appeals.

**B. Alliance and CBD Lack Prudential Standing.**

"In addition to the immutable requirements of Article III, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing[, and] [l]ike their constitutional counterparts, these judicially self-imposed limits on the exercise of federal jurisdiction are founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (internal quotations and citations omitted). "[A]mong these prudential requirements is the doctrine . . . that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the . . . constitutional guarantee invoked in the suit." *Id*. Thus, the "prudential standing requirement denies a right of review if the plaintiff's interests are . . . [only] marginally related to . . . the [relevant constitutional provision]." *City of Los Angeles v. County of Kern*, 581 F.3d 841, 847 (9th Cir. 2009), *cert. denied*, __U.S. __, 130 S. Ct. 3355 (2010) (internal citations omitted). Thus, "[a]s the name implies, the zone of interests test turns on the *interest* sought to be protected, not the *harm* suffered by the plaintiff." *Id*. at 848 (emphasis in original).

In bringing the instant lawsuit, premised on separation of powers concerns, Alliance and CBD must demonstrate that their alleged injury falls within the zone of interests protected by the Separation of Powers Doctrine. The zone of interest protected by the Separation of Powers Doctrine is liberty: "The ultimate purpose of . . . separation of powers is to protect the liberty and security of the governed." *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991). That is, the "essence of the separation of powers concept . . . is that each branch, in different ways, within the sphere of its defined powers and subject to the distinct institutional responsibilities of the others, is essential to the liberty and security of the people." *Id*. (internal quotations omitted).

Here, the stated interest of Alliance and CBD is that the reissued Delisting Rule poses of the possibility of diminished wolf-viewing under the states' wolf management plans. This interest certainly does not fall within the scope of protecting liberty. Although the alleged interests of Alliance and CBD might possibly fall within the scope of interests protected by the ESA, they are not within the zone of interests protected by the Separation of Powers Doctrine.[4]

Therefore, the complaints of Alliance and CBD that separation of powers principles may have been abridged are no more than generalized grievances, more

[4] It is hard to imagine that the Framers intended that the liberty protected by federalism and separation of powers principles was the purported "right" to the potential increase of the possibility of viewing a predator like the wolf.

properly addressed to the legislature. *Valley Forge Christian College v. Americans United for Separation of Church and States*, 454 U.S. 464, 474–75 (1982) ("[T]he Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." (internal quotations omitted)); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (An important prudential principle is the "'rule barring adjudication of generalized grievances more appropriately addressed in the representative branches[.]'" (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Thus, Alliance and CBD lack prudential standing and this Court should dismiss their appeals.

## II. THE DISTRICT COURT PROPERLY HELD THAT SECTION 1713 DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE AND IS CONSTITUTIONAL.

The District Court properly ruled that Congress may amend a law without specifically mentioning it, using a phrase such as "notwithstanding any other provisions of law," citing *Consejo De Desarrollo Economico de Mexicali*, *A.C. v. United States*, 482 F.3d 1157, 1168–69 (9th Cir. 2007) ("*Consejo*"). Alliance ER 17. Following *Consejo*, the District Court held that "the language of the rider (§ 1713) can be construed to amend the ESA because the directive states the 2009 Rule should be reissued 'without regard to any other provisions of statute or regulation.'" Alliance ER 19. Therefore, "the reissuance of the Rule pursuant to congressional directive . . . amended the ESA as to this particular delisting. *Id*. Accordingly, the District Court properly held, in accordance with Supreme Court and Ninth Circuit precedent, that Separation of Powers concerns did not apply to § 1713. Alliance ER 20.

### A. *Klein* Constitutes Questionable And Unreliable Authority To Support The Position of Alliance and CBD.

Alliance and CBD both argue that § 1713 violates the Separation of Powers Doctrine by directing the outcome of pending litigation, relying principally on a 140 year old case, *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), decided during the turbulent reconstruction period after the Civil War. Alliance Op. Br. at 35–38, CBD Op. Br. at 16–17. Because the facts of *Klein* are unique, and the holding of *Klein* obtuse, reliance upon it here is highly questionable.

In 1863, Congress passed the Abandoned and Captured Property Act, 12 Stat. 820. *Klein*, 80 U.S. at 137. In so doing, Congress provided that the owner of property seized during the Civil War could sue in the Court of Claims to recover damages only on proof that the owner had never given aid or comfort to the rebellion. *Id*. at 138–39. Six years later, the Supreme Court held that a presidential pardon renders the pardoned as innocent as if he had never committed the offense, and that proof of such pardon consisted of proof that the person had not aided the rebellion. *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 642–43 (1869).

Congress responded to *Padelford* by passing an appropriations rider directing the Court of Claims to take the fact of a pardon as conclusive evidentiary proof that the claimant *had* "given aid or comfort to the rebellion." *Klein*, 80 U.S. at 142–43. Therefore, the Court of Claims had to dismiss suits brought by pardoned claimants. *Id*. The rider also removed the Supreme Court's jurisdiction to hear appeals of such suits. *Id*. at 144–45.

Klein, the administrator of the estate of a person who had been given a presidential pardon, sued to recover the proceeds of seized property on behalf of that person's estate. *Klein*, 80 U.S. at 136. The Supreme Court found that the rider was unconstitutional for two reasons: First, the legislature "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it . . . [thus,] forbidd[ing] the court] to give the effect to evidence . . . such evidence should have, and [the court] is directed to give it an effect precisely contrary." *Id*. at 146–47. Second, "the rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive, [to whom] alone is intrusted (sic) the power of pardon, and it is granted without limit." *Id*. at 147.

*Klein* cannot be separated from the context in which it arose:

> *Klein* is a product of a unique time—the Civil War and Reconstruction—and a unique set of political and constitutional pathologies. That pathology included Union efforts to bring rebellious states and citizens back into the fold, a unique class of confiscated enemy property, and efforts by property owners to recover proceeds; and a three-way power struggle among Radical Republicans dominating Congress, Democratic President Andrew Johnson (and his non-Radical Republican successor, Ulysses S. Grant), and the Supreme Court.

Howard M. Wasserman, *The Irrepressible Myth of Klein*, 79 U. Cin. L. Rev. 53, 57 (2010) ("*Myth of Klein*"); *see also Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1170 (10th Cir. 2004) ("*Klein* involved one episode in a series of conflicts between the Reconstruction Congress and the balking President, Andrew Johnson."). These conditions led to a decision that was not at all clear: "[T]he opinion by Chief Justice Chase is 'opaque' 'deeply puzzling,' 'disjointed,' 'delphic' 'generally difficult to follow,' and contains broad language and exaggerated rhetorical flourishes, with statements of principles that cannot literally be true and often are dead wrong." *Myth of Klein*, 79 U. Cin. L. Rev. at 56; *see also id*. at 56 n.4 (collecting scholarly articles).

Demonstrating this lack of clarity, "in almost 140 years, the only case to strike down a law explicitly on *Klein* grounds was *Klein* itself; every *Klein*-based challenge to federal legislation has, quite appropriately, failed." *Id*.; *see also id.* at n.17 (collecting cases). The Supreme Court and federal circuit courts, likewise, have expressed their concern about the continued vitality of *Klein*. *See, e.g.*, *Plaut* *v. Spendthrift Farm, Inc*, 514 U.S. 211, 218 (1995) (expressing uncertainty as to the "precise scope" of *Klein*); *Nat'l Coal. To Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001) (en banc) ("*Save Our Mall*') ("*Klein's* meaning is far from clear."); *Biodiversity Assocs.*, 357 F.3d at 1170 ("*Klein* is a notoriously difficult decision to interpret.").

Indeed, courts generally find that *Klein* does not apply, and have expressed reservations concerning its continuing vitality. In *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992) ("*Seattle Audubon*"), the Supreme Court held that *Klein* did not apply because, as a matter of statutory interpretation, Congress "compelled changes in law, not findings or results under old law." *Id*. at 438. As the Court explained:

> We have no occasion to address any broad question of Article III jurisprudence. The Court of appeals held that [the statute] was unconstitutional under *Klein* because it directed a decision in pending cases without amending any law. Because we conclude that [the statute] did amend applicable law, *we need not consider whether this reading of Klein is correct*.

*Id*. at 441 (emphasis added); *see also Save Our Mall*, 269 F.3d at 97 (having found a change in the law, expressed no view on whether "*Klein* can be read [to hold] that Congress may not direct the outcome in a pending case without amending the substantive law"); *Biodiversity Assoc.*, 357 F.3d at 1164 n.8 ("We underscore that by relying on the fact that . . . the Rider changed applicable law, we do not mean to suggest, any more than did *Seattle Audubon*, that if the Rider had not changed the law it would necessarily have run afoul of . . . *Klein*.”).

Thus, as a result of *Klein*’s lack of clarity, its unique factual context, and the refusal of courts since *Klein* to find a violation of separation of powers principles under *Klein*, the case retains little, if any, precedential value. That Alliance and CBD rely primarily on *Klein* demonstrates the weakness of their arguments.

### B. ***Klein*** Does Not Apply Because Section 1713 Changes Underlying Law And Does Not Prescribe A Rule Of Decision In A Pending Case.

#### 1. Congress may change the underlying law that applies in a pending case and the court must enforce that change.

*Seattle Audubon* determined that *Klein* did not apply because Congress may, without violating separation of powers principles, amend the underlying law at issue in a pending case, which the court must follow. *Seattle Audubon*, 503 U.S. at 440–41. The case arose out of the government’s continuing efforts to allow harvesting and sale of timber from old-growth forests in the Pacific Northwest. *Id.* at 431. These forests were the home of the spotted owl, a bird listed as threatened on the endangered species list. *Id*. Various parties filed suit challenging the timber management practices of the U.S. Forest Service and the Bureau of Land Management in these forests under various statutes, including the Migratory Bird Treaty Act (“MBTA”), the National Environmental Policy Act (“NEPA”) the

National Forest Management Act ("NFMA"), and the Federal Land Policy Management Act ("FLPMA"). *Id.* at 432. The District Court dismissed the action and the parties appealed to this Court, which enjoined certain challenged harvesting practices, pending appeal. *Id.* at 433.

In response to this ongoing litigation, Congress passed a rider to an appropriations act, § 318, which temporarily governed timber harvesting in a geographical area known to contain spotted owls. *Id*. Section 318 provided that compliance with its provisions met the statutory requirements "that are the basis for the [pending appeals]." *Id*. at 436. The government sought dismissal of the lawsuit, arguing that § 318 superseded all the underlying laws at issue in the case, which appellants resisted. *Id*. at 435–36. The appellants responded that § 318 violated *Klein* by dictating that a court reach a specific result and make certain factual findings. *Id*. at 436–37. Appellants also argued that because § 318 did not "modify old requirements," but rather "deemed compliance with new requirements to meet the old requirements" the case was controlled by *Klein*. The Supreme Court, which had granted certiorari, did not "appreciate the difference."[5] *Id*. at 439.

[5] One might argue that a congressional directive providing that certain facts constitute compliance with an existing law, which law clearly requires for its satisfaction that other facts be proved, is just what *Klein* prohibited. The Supreme Court, however, did not agree. This result suggests that *Klein* retains no present vitality.

The Supreme Court first cautioned that "'as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.'" *Id*. at 441 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). Utilizing this principle, the Supreme Court reversed, finding that § 318 "compelled changes in law, not findings or results under the old law" by "modi[fying] the old provisions," and that nothing in § 318 "purported to direct any particular findings of fact or applications of law, old or new, to fact." *Id*. at 438.

The Supreme Court concluded that "to the extent that [§ 318] affected the adjudication of the cases, it did so by effectively modifying the provisions at issue in those cases," *id*. at 440, which a court was bound to honor and enforce;[6] *see also Plaut.*, 514 U.S. at 227 ("It is the obligation of the last court in the [judicial] hierarchy that rules on the case to give affect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court at every level must decide according to existing laws.").

In the instant case, much like in *Seattle Audubon*, there is no provision anywhere in § 1713 that directs any court to make any findings or to make any

[6] Importantly, nothing in *Seattle Audubon* suggests that "modification" of an old law requires the substitution of a new law. Certainly, the case arose in that factual context. But a "modification" could occur simply by changing old law by exempting the particular subject matter from its application.

particular application of law to facts. Rather, § 1713 modifies the ESA by exempting the RMW DPS from its terms and replacing the ESA with state wolf management plans and continued federal monitoring. Thus, pursuant to *Seattle Audubon*, § 1713 is constitutional.

**2. This Court's precedent holds that Congress does not violate separation of powers principles when it exempts a particular matter from the application environmental laws.**

Both pre- and post-*Seattle Audubon*, this Court has held that Congress amends underlying law, and does not violate separation of powers principles, when Congress provides exemptions to environmental laws that affect the outcome in pending cases. For example, in *STOP H-3 Assoc'n v. Dole*, 870 F.2d 1419 (9th Cir. 1989), the construction of an "interstate highway" in Hawaii, the H-3, had been the subject of litigation for sixteen years. *Id*. at 1421. The various complaints alleged violations of NEPA and Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 303 ("§ 4(f)"). *Id*. at 1422.

Congress, growing weary of the ongoing litigation, and desiring that the highway be built, attached a rider to a continuing appropriations bill that "ordered the Secretary to approve construction of the H-3 'notwithstanding' § 4(f)." *Id*. at 1423. This was a simple exemption of one project from the application of § 4(f), and did not involve a substitution for or replacement of that law with new requirements. The government moved for dismissal of the complaint, which the

District Court granted. *Id*. at 1423. The plaintiffs appealed to this Court, arguing, *inter alia*, that the rider was unconstitutional because it violated separation of powers principles. *Id*.

This Court ruled that "we have found no authority forbidding Congress . . . from carving out a local exception to a national policy." *Id*. at 1430. This Court then ruled that there is "nothing illegitimate about a decision to enact legislation exempting a particular project, the subject of pending litigation, from the requirements of existing statutes." *Id*. at 1432. Therefore, this Court "could not conclude that Congress violated the separation of powers[;] Congress may change its mind[.]" *Id.* at 1435. That is, "Congress could achieve the construction of H-3 notwithstanding the 4(f) statutes by legislatively ordering the Secretary to approve the project." *Id.*

Furthermore, this Court held that the rider did not "deprive the courts of any of the 'essential attributes' of judicial power." *Id*. at 1437. That is, it did not "strip the courts of jurisdiction over [all] claims of noncompliance with Section 4(f), [but] [r]ather it withdraws the protections of the 4(f) statutes from one project." *Id*. Thus, this Court affirmed the dismissal of the challenge to the rider. *Id*. at 1438. *STOP H-3* requires that this Court hold that § 1713 is constitutional.

In *Consejo*, this Court also held that Congress may exempt a specific project from the application of its laws. *Consejo*, 482 F.3d at 1170. In that case, a lawsuit was filed to enjoin a Bureau of Reclamation project to build a concrete-lined canal to replace an unlined portion of the All-American canal. *Id*. at 1161, 1165. The claims were based on NEPA, the Administrative Procedure Act ("APA"), the ESA, and the MBTA. *Id.* at 1166. Before this Court issued its decision on appeal, though, Congress enacted, and the President signed into law, a 274 page omnibus tax bill that included a section directed to the canal project. *Id*. That section provided that "[n]otwithstanding any other provision of law . . . the Secretary shall, without delay, carry out the All American Canal Project." *Id*.

Following the passage of this section, the United States filed a motion to dismiss the case as moot. *Id*. at 1168. The environmentalists opposed the motion, arguing, *inter alia*, that the section in question violated separation of powers by dictating a specific result in a pending case. *Id*. at 1170. This Court disagreed, ruling that "Congress may exempt specific projects from the requirements of environmental laws." *Id*. at 1168 (citing, *inter alia*, *STOP H-3 Ass'n*, 870 F.2d at 1432).

According to this Court, the term, "notwithstanding any other provision of law," is not always construed literally." *Id*. But "when Congress has directed immediate implementation 'notwithstanding any other provision of law,'" the legislation "exempt[s] the affected project from the reach of the environmental statutes which would delay implementation." *Id*. Indeed, if "Congress had intended for the Lining Project to proceed under the usual course of administrative proceedings it would have been unnecessary . . . to act at all."[7] *Id*.

Therefore, this Court held that the exemption, without substitution of any other law in its place, had mooted the lawsuit, and that it did not "direct us to make any findings or to make any particular application of law to facts." *Id*. at 1169–70. Rather, "the legislation changes the substantive law governing pre-conditions to commencement of the Lining Project [by exempting the project from those laws]." *Id*. Consequently, this Court held that the rider "does not violate the constitutional separation of powers." *Id*. Thus, *Consejo* requires that this Court hold that § 1713 is constitutional.

### 3. Decisions from other circuits support this circuit's separation of powers precedent.

Decisions from other circuits are in accord with the precedent from this Court. In *Save Our Mall*, a group of organizations filed suit seeking an injunction against the construction of a proposed World War II Memorial on the National Mall. 269 F.3d at 1093. The complaint alleged that in the design and construction,

[7] This is virtually identical to § 1713's direction to the Secretary to reissue the Delisting Rule within 60 days "without regard to any other provision of statute or regulation that applies to issuance of such rule," and providing that the reissuance was not subject to judicial review. Congress was even more explicit in § 1713 because Congress clearly referred to the ESA, not all laws, as was the case in *Consejo*. Moreover, had Congress intended that the matter proceed in the ordinary course, it would not have commanded the Secretary to reissue the Delisting Rule in 60 days.

federal agencies violated a variety of statutes, including NEPA, the National Historic Preservation Act ("NHPA"), and the Commemorative Works Act. *Id*. at 1093–94.

While the case was pending in District Court, Congress passed a law exempting construction of the Memorial from statutory obstacles. *Id*. at 1094. It provided that "[n]otwithstanding any other provision of law, the World War II memorial . . . shall be constructed expeditiously . . . consistent with [previously approved] plans and permits," which were the subject of the objections in the lawsuit. *Id*. It also provided that "the decision to locate the memorial . . . and acts taken by [various commissions], and the issuance of a special use permit . . . shall not be subject to judicial review." *Id*.

The District Court dismissed on the ground that it lacked jurisdiction and the matter was appealed. *Id.* The D.C. Circuit, in holding that the law was constitutional, ruled that *Klein* "cannot be read as a prohibition against Congress's changing the rule of decision in a pending case, or changing the rule to assure a pro-government outcome." *Id*. at 1096. The D.C. Circuit concluded that if "Congress has the power to impose standards for final judgments in the form of injunctions, it must have the power to impose new substantive rules on suits . . . which . . . had not been resolved on the merits when Congress acted." *Id*. at 1097. Thus, the D.C. Circuit upheld the exemption as a change to the underling law.

*Save Our Mall* is, therefore, consistent with cases from this Circuit that require that § 1713 be upheld as constitutional.

In *Biodiversity Assocs.*, the dispute involved forest management techniques challenged by certain environmental groups. 357 F.3d at 1158. A settlement agreement was signed and approved by the District Court, resulting in the time-intensive development of a new forest management plan. *Id*. Meanwhile, the mountain pine beetle infestation in a particular portion of the Black Hills reached epidemic proportions. *Id*. at 1159.

As a result, Congress passed a rider to an appropriations act involving terrorism that required the FES to take a variety of actions that violated the settlement agreement. *Id*. The rider directed that certain forest management techniques "shall proceed immediately to completion notwithstanding any other provision of law, including but not limited to NEPA and NFMA." *Id*. at 1160. Moreover, it provided that "such actions, shall not be subject to the notice, comment, and appeal requirements of the Appeals Reform Act" and that "any action authorized by this section shall not be subject to judicial review." *Id*.

The rider was challenged as unconstitutional for mandating "specific results without changing the underlying environmental laws." *Id*. at 1163. The Tenth Circuit disagreed, finding that "[b]efore the Rider, Fish and Wildlife was prohibited by law from cutting trees without meeting the requirements of various environmental laws; after the Rider, it is required to cut trees in the Black Hills ‘notwithstanding” those laws. *Id*. at 1163. Therefore, the Tenth Circuit upheld the rider as constitutional. *Id*. at 1164 (citing, *inter alia*, *Save Our Mall*, 269 F.3d at 1097, and *STOP H-3 Ass'n*, 870 F.2d at 1434). Thus, *Biodiversity Assocs.* is consistent with cases from this Circuit that require that § 1713 be upheld as constitutional.

## III. THE ARGUMENTS OF ALLIANCE AND CBD THAT SECTION 1713 IS UNCONSTITUTIONAL ARE WITHOUT MERIT.

### A. A Change Or Amendment To Underlying Law Does Not Require Substitution Of New Law To Replace It.

Both Alliance and CBD argue that Congress does not change or amend underlying law unless it substitutes a new law therefor. Alliance Op. Br. at 40–43; CBD Op. Br. at 31–34. Both rely primarily on *Seattle Audubon* and *The Ecology Center v. Castaneda*, 426 F.3d 1144 (9th Cir. 2005). For example, Alliance argues that “Congress may amend applicable law by creating new methods to satisfy statutory requirements, i.e., when ‘compliance with certain new law constituted compliance with certain old law.’” Alliance Op. Br. at 40–41 (quoting *Seattle Audubon*, 503 U.S. at 440). Alliance also pointed to *The Ecology Center* as another example in which old law was replaced by new law, thus changing applicable law. Thus, Alliance implies, but does not explicitly state, that there is no change or amendment to underlying law unless a new law is substituted. CBD is more explicit, stating that, because "Section 1713 provides no new standards that the courts can apply," it violates separation of powers principles. CBD Op. Br. at 34.

To be sure, one way to change or amend a law is to provide a new law to replace the old law, as was the case in *Seattle Audubon* and *The Ecology Center*. But there is nothing in either case to suggest that substituting new standards is the *only* way to amend a law. *Seattle Audubon* required no more than that the old law be modified; as demonstrated above, it did not require substitution of a new law, even though that was the case there. *Seattle Audubon*, 503 U.S. at 438.

Likewise, *The Ecology Center* made no such requirement. First, this Court prefaced its analysis by emphasizing that "'[a] court should invalidate a statutory provision only for the most compelling constitutional reason.'" *Id*. at 1148 (quoting *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993). Indeed, this Court emphasized the deference due Congress even when it purports to change a law applicable to pending cases: "[I]n *Gray*, this Court recognized that [*Seattle Audubon*] '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*.'" *Id*. at 1150 (emphasis added) (quoting *Gray*, 989 F.2d at 1569–70)).

Nor did *The Ecology Center* require the substitution of a new law to constitute an amendment to old law. Instead, this Court supported its decision by citing to *STOP H-3 Ass'n*, which held that a mere exemption—without any substitution of new law—constituted a change or amendment to underlying law: "'[N]o authority forbids Congress from *exempting* a project, which is the subject of pending litigation, from the requirements of the statute [that] the project is alleged to violate.'" *Id*. at 1149 (emphasis added) (quoting *STOP H-3 Ass'n*, 70 F.3d at 1438, n.27).

As a result, Alliance and CBD, by placing great weight on Congress's failure to replace the exemption of the RMW NPS with a new law, makes an illusory distinction. Indeed, it is difficult to ascertain how, when a law applies to a particular project (or species), exempting the law's application to that project (or species) does not constitute a change or amendment to the underlying law. All that is required for an amendment is that there be *any detectable* change; there is no requirement that a new law must be substituted. Tellingly, neither Alliance nor CBD cite a single case for the proposition that an exemption without substitution does not constitute a change or amendment to the underlying law. Rather, the case law, as demonstrated above, is to the contrary.

In any event, § 1713 did not simply exempt the RMW DPS from application of the ESA, though Congress had the power to do so. Instead, it replaced the ESA, insofar as it affected protection for the RMW DPS, with the reissued Delisting Rule. As demonstrated above, the reissued Delisting Rule relies upon states' wolf management plans and provides for continued monitoring by Fish and Wildlife to verify that the states follow through. If the RMW DPS becomes threatened with extinction, Fish and Wildlife may relist it on an emergency basis.

### B. Alliance And CBD Wrongly Argue That The "Without Regard To" Language Does Not Evince An Intent To Amend The ESA.

Both Alliance and CBD argue that the language in § 1713, "without regard to any other provision of statute or regulation that applies to issuance of such rule," constitutes an attempt at implied repeal contained in an appropriations bill, and that that there is insufficient evidence of congressional intent to amend the ESA. Alliance Op. Br. at 49–52; CBD Op. Br. at 23–26. This is plainly wrong.

Though § 1713 is contained in an appropriations bill, it does not appropriate or withhold money for a particular project, from which an implication of repeal or amendment might be deduced. Rather, it explicitly amends the law; there is nothing "implied" about it. Therefore, the rule against repeals by implication based on appropriations for, or withholding appropriations from, a particular project discussed in *Envtl. Def. Ctr. v. Babbitt,* 73 F.3d 867, 871 (9th Cir. 1995), on which Alliance and CBD rely, are inapposite.[8] Furthermore, the fact that it is attached as a rider to an appropriations measure is irrelevant; the provisions upheld in *Seattle Audubon*, *STOP H-3 Assoc'n*, *Consejo*, and *Biodiversity Assocs*. were riders to appropriations bills.

Alliance and CBD overlook that the issue here is whether § 1713 is constitutional, and that a cardinal rule in constitutional interpretation is "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." *Seattle Audubon*, 503 U.S. at 441. This rule requires this Court to find that § 1713 amended the ESA, if at all possible, in order to construe it as constitutional.

Alliance and CBD's arguments fail to comprehend that there is nothing "implied" about a "without regard to" or "notwithstanding" clause. The Supreme

[8] In *Envtl. Def. Ctr.*, Congress had passed an appropriations measure appropriating funds for the Department of the Interior. *Id*. at 870. But it later rescinded $1,500,000,00 for any funding for "determinations whether a species is a threatened or endangered species and whether habitat is critical habitat under the Endangered Species Act of 1973." *Id*. The Secretary contended that taking final action on the California red-legged frog listing proposal would necessarily require the use of previously appropriated funds, in direct violation of the law and the current resolution continuing a moratorium on funding. *Id.* He contended that the appropriations rider effected a substantive repeal of the final listing provisions of the ESA. *Id*. This Court held that the rider did not impliedly repeal the Secretary's listing duty under the ESA by defunding such listings. *Id*. at 871. However, it did prevent the Secretary from taking final action on the petition to list for the time.

Court has determined that such clauses in legislation clearly indicate the intention to override conflicting provisions of law. *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) ("[T]he use of . . . a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." This Court has modified this rule somewhat and has held that it will not "always accord[] universal effect to the 'notwithstanding' language standing alone" but will determine its reach "by taking into account the whole of the statutory context in which it appears." *United States v. Novak*, 476 F.2d 1041, 1046 (9th Cir. 2007).

Section 1713 meets this Court's standard for such explicit amendment to existing law. Indeed, in *Consejo*, 482 F.3d at 1169, this Court found that if such a clause is combined with a direction to proceed, the intent to amend inconsistent statutes is clear. Therefore, the "without regard to" clause in § 1713, which directs the Secretary to reissue the Delisting Rule within 60 days, unequivocally signals Congress's intent to override conflicting provisions.

Moreover, § 1713, unlike the general clause in *Consejo*, explicitly provides that the "without regard to" clause applies only to a "statute or regulation that applies to the issuance of such rule." Clearly, the ESA and the APA are such statutes. Making its intent even more clear, Section 1713 provides that the reissuance of the Delisting Rule "shall not be subject to judicial review," even though it may conflict with provisions of the ESA and APA. Finally, the specificity concerning what statutes and regulations it amends further indicates Congress's intent to amend the ESA as it applied to the RMW DPS.

Thus, § 1713 amended the ESA by exempting the RMW DPS from its application and substituting the reissued Delisting Rule, which adopts state protections and provides for further federal monitoring. Congress's intent to do precisely that is clear and unmistakable, and the language of § 1713 is not ambiguous.

### C. Section 1713 Does Not Prohibit Review Of Its Constitutionality.

Alliance mistakenly contends that § 1713 is unconstitutional because it precludes constitutional review of its terms. Alliance Op. Br. at 47–49. Limitations of jurisdiction should be construed narrowly to avoid constitutional problems. *See Johnson v. Robison*, 415 U.S. 361, 367 (1974). Though § 1713 does deny judicial review of its terms, it does not refer to challenges based on the U.S. Constitution.

Instead, § 1713's reference to non-review of its terms is contained in a parenthetical to the statement that review is denied to any statute or regulation *that applies to the reissuance of the Delisting Rule*. Therefore, the most reasonable interpretation of the review provision is that it denies review of § 1713 only insofar as it is challenged under the EPA, APA or some other statute that relates to the

Delisting Rule. Thus, § 1713 does not preclude review of constitutional challenges.

## CONCLUSION

For the foregoing reasons this Court should affirm the judgment of the District Court.

Dated this 14th day of October 2011.

Respectfully submitted,

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## STATEMENT OF RELATED CASES

This case is related to pending appeals of the District Court's denial of motions to intervene filed in the proceedings below, docketed as Nos. 11-35568 and 11-35636. This case is also related to pending appeals challenging the District Court's vacation of the Delisting Rule, docketed as Nos. 10-35885, 10-35886, 10-35894, 10-35897, 10-35898, and 10-35926, and are currently stayed.

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and 29(d). It contains 10, 067 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced 14 point Times New Roman typeface using Microsoft Word 2003.

Dated this 14th day of October 2011.

/s/ Steven J. Lechner
Steven J. Lechner

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 14, 2011. I further 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/ Steven J. Lechner
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