

No. 11-35670

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY; CASCADIA WILDLANDS;
WESTERN WATERSHEDS PROJECT,
Appellants,

v.

KEN SALAZAR, SECRETARY OF THE U.S. DEPARTMENT OF THE
INTERIOR; DAN ASHE, DIRECTOR OF THE U.S. FISH AND WILDLIFE
SERVICE; U.S. FISH AND WILDLIFE SERVICE,
Appellees.

**APPELLANTS' MOTION TO EXPEDITE AND CONSOLIDATE
PROCEEDINGS**

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I. INTRODUCTION

Appellants Center for Biological Diversity, Cascadia Wildlands, and Western Watersheds Project hereby move to expedite proceedings in this matter for good cause pursuant to Ninth Circuit Rule 27-12. Appellants seek expedited review of the August 3, 2011 Order and final judgment of the U.S. District Court for the District of Montana, ruling against Appellants' motion for summary judgment. *See Ex. 1 (Alliance for the Wild Rockies et al. v. Salazar et al., Civ. No. 11-70; Center for Biological Diversity et al. v. Salazar et al., Civ. No. 11-71, slip op. (D. Mont. Aug. 3, 2011))*. The District Court's ruling upheld the constitutionality of an appropriations rider that removed federal protections under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* ("ESA"), from gray wolves in the northern Rocky Mountains. *See id.*

Expedited resolution of this appeal would allow other matters – six pending but stayed appeals in a related case – to be briefed and resolved. In addition, expedited review is necessary because as a result of the District Court's August 3, 2011 Order, the hunting of wolves in Montana is proceeding now and will soon begin in Idaho. The reduction in the gray wolf population in these two states will injure Appellants' interests in viewing healthy wolves and wolf populations in the wild in the northern Rocky Mountains and surrounding regions.

In addition, Appellants move to consolidate this appeal with *Alliance for the Wild Rockies et al. v. Salazar et al.*, Case No. 11-35661 (“*AWR v. Salazar*”), an appeal filed on August 8, 2011. *AWR v. Salazar* appeals the same District Court order and presents the same constitutional issue presented in this appeal. Judicial economy favors consolidation.

Amy Atwood, counsel for Appellants, conferred with David Shilton, who will be counsel for Federal Defendants-Appellees, but did not hear back on their position before the present motion was filed. She also conferred with Jay Tutchton, counsel for Appellants in *AWR v. Salazar*, who stated that they do not oppose consolidation of the two appeals.

II. FACTUAL BACKGROUND

A. This Appeal

The narrow issue presented in this appeal is whether an appropriations rider violates the Separation of Powers in the U.S. Constitution. Specifically at issue is a rider to the Department of Defense and Full-Year Continuing Appropriations Act of 2011, *Pub. L. 112-10*, 125 Stat. 38 (“Section 1713”) that directed the Secretary of the U.S. Department of the Interior to “reissue” a final rule delisting the population of gray wolves in the northern Rocky Mountains from the ESA (“2009 Delisting Rule”).¹

¹ Section 1713 provides as follows:

The 2009 Delisting Rule was previously vacated by the same District Court from which this appeal is brought. *See Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010) (“*DOW v. Salazar*”). The District Court vacated the rule as illegal under the ESA and the Administrative Procedure Act, 5 U.S.C. § 706(a)(2). *See id.*; *see also* Ex. 1 at 19 (“[T]his Court previously found the 2009 Rule is an illegal solution to a difficult biological issue”). Six appeals of *DOW v. Salazar* were consolidated and pending before this Court when Section 1713 was passed by Congress and signed by the President.² Those six appeals are presently stayed pending the outcome in this litigation.³

SEC. 1713. Before the end of the 60-day period beginning on the date of enactment of this Act, the Secretary of the Interior shall reissue the final rule published on April 2, 2009 (74 Fed. Reg. 15123 et seq.) without regard to any other provision of statute or regulation that applies to issuance of such rule. Such reissuance (including this section) shall not be subject to judicial review and shall not abrogate or otherwise have any effect on the order and judgment issued by the United States District Court for the District of Wyoming in Case Numbers 09–CV–118J and 09–CV–138J on November 18, 2010.

Section 1713, *Pub. L. 112-10*, 125 Stat. 38 (Apr. 15, 2011).

² These six appeals are: *DOW et al. v. State of Idaho et al.*, Civ. No. 10-35885; *DOW, et al. v. Montana Farm Bureau Fed’n et al.*, Civ. No. 10-35886; *DOW, et al. v. Ken Salazar, et al.*, Civ. No. 10-35894; *DOW, et al. v. Safari Club International, et al.*, Civ. No. 10-35897; *DOW, et al. v. State of Montana, et al.*, Civ. No. 10-35898; *DOW, et al. v. Ken Salazar, et al.*, Civ. No. 10-35926.

³ In addition to these six pending appeals, three pending appeals are before the Court arising from the District Court’s denial of several motions to intervene under Fed. R. Civ. P. 24(a) in the underlying action here: Case No. 11-35552, Case No. 11-35568, Case No. 11-35636.

Congress violates the U.S. Constitution's Separation of Powers when it passes legislation that directs an outcome in pending litigation without amending underlying substantive law. *See U.S. v. Klein*, 80 U.S. 128 (1871) ("*Klein*"); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992) ("*Robertson*"). Here, Section 1713 will – if upheld as constitutional – direct an outcome in those appeals, as it could require those appeals to be dismissed as moot. *See Consejo De Desarrollo Economico De Mexicali, A.C. v. U.S.*, 482 F.3d 1157, 1168 (9th Cir. 2007) ("If legislation passing constitutional muster is enacted while a case is pending on appeal that makes it impossible for the court to grant any effectual relief, the appeal must be dismissed as moot."). Thus, the question in this appeal is whether Ninth Circuit precedent applying *Klein* and *Robertson* can allow a finding that Section 1713 is constitutional, when the provision directs an outcome in the pending appeals but does not clearly amend the ESA. *See generally* Ex. 1 (District Court Order) at 17 ("The heart of the debate turns on whether Congress can insert into its directive a nonspecific phrase" – *i.e.*, "without regard to any other provision of statute or regulation that applies to issuance of such rule" – "that by itself sweeps aside concerns that Congress is infringing upon the judicial power").

Although the District Court ultimately ruled in favor of Federal Defendants-Appellees and upheld the constitutionality of Section 1713, it also determined that absent Ninth Circuit precedent, it would have found a Separation of Powers

violation. *See* Ex. 1 at 4 (Section 1713 is a “tearing away, an undermining, and a disrespect for the fundamental idea of the rule of law”); *id.* at 7 (“If I were not constrained by what I believe is binding precedent from the Ninth Circuit . . . , I would hold that Section 1713 is unconstitutional because it violates the Separation of Powers doctrine as articulated [in *Klein* and *Robertson*.]”).

B. Wolf Hunts in Idaho and Montana

Because of Section 1713 and the subsequent delisting rule issued by the U.S. Fish and Wildlife Service (a Federal Defendant-Appellee), the gray wolf is no longer federally protected in Idaho and Montana, as well as several other states. *See* 76 Fed. Reg. 25,590 (May 5, 2011) (reissued delisting rule directed by Section 1713). Now with wolves under state management, Montana and Idaho have planned and issued permits for wolf hunting seasons. *See* Ex. 2 (Idaho wolf hunt); Ex. 3 (Montana wolf hunt). These hunts will result in the killing of hundreds of wolves and has the potential to vastly reduce the northern Rocky Mountain wolf population. Montana has set a quota of 220 dead wolves during its hunting season, and Idaho has set no harvest limit at all in many areas. *See* Ex. 3 at 7 (setting harvest quotas that total 220 legally-taken wolves across Montana); Ex. 2 at 3 (setting no harvest limits for eight wolf management zones in Idaho). Appellants filed standing declarations with the District Court that discuss how their interests in viewing individual wolves and in a healthy gray wolf population in the northern

Rocky Mountains will be injured by the killing of wolves under state management. See Ex. 4 (Robinson Dec.); Ex. 5 (Greenwald Dec.); Ex. 6 (Mildrexler Dec.); Ex. 7 (Laughlin Dec.) Ex. 8 (Cole Dec.); Ex. 9 (Marvel Dec.); Ex. 10 (Edwards Dec.).

III. ARGUMENT

A. This Appeal Should Be Expedited To Serve Judicial Economy And For Equitable Considerations.

This appeal should be expedited because it presents a narrow constitutional issue that can be resolved on the merits on an expedited basis. Ex. 11 (District Court Order Dated May 13, 2011) (setting an expedited summary judgment briefing schedule after finding that “prompt resolution of the case is possible” “because it appears the case turns on a legal question”). Importantly, six pending appeals of *DOW v. Salazar* cannot go forward and be briefed and decided until this appeal is resolved.

Moreover, as a result of Section 1713 – the constitutionality of which is in serious dispute – wolves are being hunted in Montana now, and will soon be hunted and trapped in Idaho. This will lead to a yet-unknown reduction in the northern Rocky Mountains gray wolf population, injuring Appellants’ interests in seeing healthy members of these animals in their wild habitat and potentially undermining the long-standing effort to recover this wolf population.⁴

⁴ See Ex. 4 at ¶¶ 15-16 (Robinson Dec.) (killing of wolves harms his ability to see wolves, decreases his enjoyment in recreating in the northern Rocky Mountains,

Accordingly, principles of judicial economy and equity favor expediting this appeal. Appellants thus propose the following schedule:

Opening Briefs: August 31, 2011
Answering Briefs: September 28, 2011
Optional Reply Briefs: 14 days after service of last-filed Answering Brief(s)
Oral Argument: To be calendared for first available date as soon as briefing is complete.

B. This Appeal Should Be Consolidated With *AWR v. Salazar*.

So that it may also be quickly resolved and to further judicial economy, Appellants also move to consolidate this appeal with *AWR v. Salazar*, Case No. 35661, the other pending appeal that presents the same constitutional issue as this appeal. The District Court consolidated Appellants' case below with that of *AWR v. Salazar* and decided the plaintiffs' constitutional claims following an expedited

and impairs his personal and professional interest in wolf recovery); Ex. 5 at ¶¶ 10, 12 (Greenwald Dec.) (killing of wolves harms his ability to see wolves during his travels to the northern Rocky Mountains and makes it less likely that wolves will disperse westward into the Cascades, where he frequently recreates); Ex. 6 at ¶¶ 14, 18 (Mildrexler Dec.) (killing of wolves makes it less likely that wolves will reestablish viable populations near his property in eastern Oregon and harms his personal and professional interest in wolf recovery); Ex. 7 ¶¶ 17-19 (Laughlin Dec.) (killing of wolves harms his interest in seeing wolves, decreases his enjoyment of recreating in the northern Rocky Mountains, and lessens the positive impacts that wolves have on ecosystems in which he recreates); Ex. 8 ¶ 32 (Cole Dec.) (killing of wolves harms his longtime interests in wolves and wolf recovery); Ex. 9 ¶¶ 16, 26, 28 (Marvel Dec.) (killing of wolves makes it less likely he will observe wolves in areas that he visits, adversely affects wolves and their habitats, and harms his interest in wolf preservation and recovery); Ex. 10 ¶¶ 17 and 18 (Edwards Dec.) (killing of wolves harms his interests and efforts in recovering wolves in the northern Rocky Mountains and makes it less likely that he will observe wolves in and near his Montana ranch).

summary judgment briefing schedule. *See* Ex. 12 (District Court Order Dated May 24, 2011) (granting consolidation); Ex. 11 (District Court Order Dated May 13, 2011) (setting expedited summary judgment briefing schedule). Thus, because these appeals present a common question of law, they should also be consolidated here. *See* Fed. R. App. P. 3(b)(2) (providing for consolidation when two or more parties are entitled to appeal from a district-court order).

IV. CONCLUSION

In summary, this appeal should be resolved on an expedited basis so that the six pending appeals from *DOW v. Salazar* may move forward and be resolved in a timely manner. In addition, this case presents a narrow constitutional question that should and can be expeditiously resolved, particularly where the northern Rocky Mountains gray wolf population stands to be substantially reduced during wolf hunting seasons. Moreover, to serve judicial economy, the Court should consolidate this appeal with the related appeal in *AWR v. Salazar*. For all of these reasons, the Court should consolidate these matters and set an expedited briefing schedule as set forth above.

Respectfully submitted this 12th day of August, 2011.

s/ Collette L. Adkins Giese
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