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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

On Appeal from the U.S. District Court for the District of Montana, Missoula,
Civil Action Nos. 9:11-cv-00070-DWM, 9:11-cv-00071-DWM

BRIEF OF THE WILDLIFE CONSERVATION GROUPS

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I. CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, Intervenor-Appellees Rocky Mountain Elk Foundation, Inc., Arizona Sportsmen for Wildlife, Big Game Forever, LLC, Idaho Sportsmen for Fish and Wildlife, Montana Sportsmen for Fish and Wildlife, the Mule Deer Foundation, Sportsmen for Fish and Wildlife, and the Wild Sheep Foundation hereby state, by and through their attorneys, that they have no parent corporations and that there is no publically held corporation that owns 10% or more of their stock.

DATED this 12th day of October, 2011.

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IV. STATEMENT OF THE FACTS

The Endangered Species Act ("ESA") was enacted, in part, to provide a "means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). The Act defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." 16 U.S.C. § 1532(3).

The ESA provides substantive protections to "species" listed as "endangered or threatened" by U.S. Fish and Wildlife Service ("FWS"). These protections include a prohibition against any "taking" of an endangered species without a permit from the FWS. 16 U.S.C. §§ 1538(a), 1539. For purposes of the ESA, "to take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

A species reaches "recovery" when there is "improvement in the status of a listed species to the point at which listing is no longer appropriate under the criteria set in [16 U.S.C. § 1533(a)(1)]." 50 C.F.R. § 402.02. Once a listed species has "recovered," it must then be delisted.

In 1974, U.S. Fish and Wildlife Service listed four subspecies of gray wolf as endangered, including the northern Rocky Mountain gray wolf (*Canis lupus irremotus*). 39 Fed. Reg. 1171 (Jan. 4, 1974). In 1978, it relisted the gray wolf as endangered at the species level (*C. lupus*) throughout the conterminous 48 States and Mexico, except for Minnesota, where the gray wolf was reclassified as "threatened." 43 Fed. Reg. 9607 (Mar. 9, 1978).

In 1987, the FWS developed a northern Rocky Mountain gray wolf recovery plan in which it established a recovery goal of 10 breeding pairs living in each of three separate areas for at least three consecutive years.

In 1994, FWS designated portions of Idaho, Montana, and Wyoming as two nonessential experimental population areas for the gray wolf under section 10(j) of the Endangered Species Act. *See* 15 U.S.C. § 1540(j); 59 Fed. Reg. 60,252 (Nov. 22, 1994); 59 Fed. Reg. 60,266 (Nov. 22, 1994). One of these populations, the Yellowstone Experimental Population Area, consists of all of Wyoming and portions of eastern Idaho and southeastern Montana. The second of these populations was designated in central Idaho. FWS subsequently introduced 66 gray wolves from Canada into these areas in 1995. 59 Fed. Reg. 60,252; 72 Fed. Reg. 36,942 (July 6, 2007).

When FWS introduced the gray wolf into the northern Rocky Mountains, it prepared an environmental impact statement that reaffirmed the 1987 recovery

goals. Since the introduction, the wolves have reproduced and established packs. *See* 74 Fed. Reg. at 15,135. There are now three sub-populations of gray wolves in the northern Rocky Mountains. *Id.* According to the FWS, the northern Rocky Mountain wolf population numbered approximately 1,639 wolves at the end of 2008 and had met its recovery goals for 9 consecutive years. *Id.*

Based on its recovery goal, FWS has attempted to remove ESA protections for distinct population segments of the gray wolf in the northern Rocky Mountains. 68 Fed. Reg. 15,804 (Apr. 1, 2003); 73 Fed. Reg. at 10,517; 74 Fed. Reg. at 15,123. These delisting rules were judicially vacated. *Defenders of Wildlife v. Sec'y, U.S. Dep't of Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005); *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008); *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010).

After *Defenders of Wildlife v. Salazar* was decided, Congress began to undertake various legislative efforts to amend the Endangered Species Act in order to remove protections from the gray wolf. These efforts resulted in the enactment of Section 1713, which was passed by Congress on April 15, 2011 as a rider to the Department of Defense and Full-Year Continuing Appropriations Act of 2011, P.L. 112-10. Pursuant to Section 1713, FWS reissued the Delisting Rule on May 5, 2011, thereby removing ESA protections from gray wolves in the northern Rocky Mountains. 76 Fed. Reg. 25,590.

V. SUMMARY OF ARGUMENT

This Court has instructed that, under *Klein*, legislation only violates the constitutional separation of powers if it directs certain findings in pending litigation, without changing any underlying law. *Consejo de Desarollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1170 (9th Cir. 2007) (interpreting *United States v. Klein*, 80 U.S. 128 (1872)).

Section 1713 does not direct the courts to make a particular finding of fact or application of law to fact in pending litigation so as to even give rise to a *Klein* issue. *See Klein*, 80 U.S. at 146. However, even if this Court were to find that Section 1713 directed a certain finding in pending litigation, the legislation still does not violate the separation of powers because it changed the underlying substantive law. *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992)

Section 1713 changed the substantive law governing the pre-conditions for delisting of the northern Rocky Mountain gray wolf population by exempting the re-issued rule from any environmental statute that would delay implementation. *See Consejo de Desarrollo de Economico de Mexicali*, 482 F.3d at 1168-70.

In addition, it was proper for the District Court to apply a "saving interpretation" because it is a well-established rule of statutory construction that the Court must presume that legislation enacted by Congress is constitutional. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

VI. ARGUMENT

Congress may direct the outcome of a pending appeal by changing the substantive law governing the case. *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992); *see also Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1432 (9th Cir. 1989) (noting that Congress may "moot a pending controversy by enacting new legislation"). However, Congress violates the separation of powers if it "prescribes a rule for the decision of a cause in a particular way." *United States v. Klein*, 80 U.S. 128, 146 (1872). Thus, Congress cannot "direct [a court to make] any particular findings of fact or application of law, old or new, to fact." *Robertson*, 503 U.S. at 438.

This Court has interpreted *Klein* and *Robertson* to mean that legislation violates the separation of powers when it directs certain findings in pending litigation, without changing any underlying law. *Consejo de Desarollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1170 (9th Cir. 2007).

The District Court properly applied Supreme Court and Ninth Circuit precedent in its "saving interpretation" of Section 1713. Section 1713 changed the substantive law governing the pre-conditions for delisting of the northern Rocky Mountain gray wolf population by exempting the delisting rule from any environmental statute that would delay implementation. Therefore, it did not violate the separation of powers.

A. Section 1713 does not violate the constitutional separation of powers.

This Court has interpreted *Klein* and *Robertson* to mean that legislation violates the separation of powers when it directs certain findings in pending litigation, without changing any underlying law. *Consejo de Desarollo Economico de Mexicali*, 482 F.3d at 1170. Contrary to Appellants' assertions, the District Court properly applied Supreme Court and Ninth Circuit precedent when affirming the constitutionality of Section 1713.

Klein is a reconstruction-era case that is the product of the unique legislative circumstances surrounding the re-unification of the nation after the Civil War. In the wake of the Civil War, Congress passed the Abandoned and Captured Property Act, which allowed the owner of property seized in the South to recover the proceeds from the Union's sale of that property if they had not "given any aid or comfort" to the rebellion. *Id.* at 138-39. At the same time, President Lincoln granted a full blanket presidential pardon to everyone who had engaged in the rebellion upon the taking and keeping of an oath of loyalty. *Id.* at 139-40.

The plaintiff in *Klein* successfully petitioned the Court of Claims for the recovery of proceeds from the sale of property seized by Union troops in the South. *Id.* at 142-43. Although the property owner committed acts that constituted "giving aid and comfort" to the rebellion, the Court of Claims determined that the subsequent pardon by President Lincoln removed the consequences of any actual

disloyalty, and so he legally, if not factually, did not "give aid and comfort" to the rebellion. *Id.* While the government's appeal was pending, the Supreme Court decided *United States v. Padelford*, a factually similar claim that was affirmed for the same reasons given by the Court of Claims in *Klein*. *Id.* at 143.

An outraged Congress responded by passing a law that directed that the courts must find acceptance of a presidential pardon to be conclusive evidence that the recipient had given aid and comfort to the rebellion. *Id.* at 143-44; *see also* Howard Wasserman, *The Irrepressible Myth of Klein*, 79 U. Cin. L. Rev. 53, 59-60 (2010). The law then effectively ordered the U.S. Supreme Court to dismiss the pending *Klein* appeal for want of jurisdiction if it found that the judgment of the Court of Claims should be affirmed because of the presidential pardon. *Id.* at 146.

The Supreme Court invalidated the law on the basis that a statute unconstitutionally violates the separation of powers if Congress "prescribes a rule for the decision of a cause in a particular way." *Klein*, 80 U.S. at 146. The Court explained what constitutes "prescrib[ing] a rule for the decision of a cause in a particular way" by distinguishing *Klein* from *Pennsylvania v. Wheeling & Belmont Bridge Company*. *See id.* at 146-47.

In *Wheeling & Belmont Bridge Company*, Congress had responded to a court's determination that the bridge in question was an abatable public nuisance by enacting legislation that specifically protected the bridge as a "post road", thus

eliminating the need for abatement. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 435-36 (1856). The Supreme Court held that the original nuisance decree was no longer enforceable because the bridge had, by virtue of the new law and new legal designation, ceased to be a nuisance and so ceased to require abatement. *Id.* at 431-32.

The Supreme Court explained that the distinction between *Klein* and *Wheeling & Belmont Bridge Company* was that:

> No arbitrary rule of decision was prescribed in [*Wheeling & Belmont Bridge Company*], 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.

Klein, 80 U.S. at 146-47.

The legislation at issue in *Klein* "prescribe[d] a rule for the decision of a cause in a particular way" because Congress drafted the statute so that either the Court made specific factual findings that would result in the *Klein* plaintiff not recovering (so that the government won) or the *Klein* plaintiff's suit was dismissed with no available jurisdiction in which to bring the claim (so that the government still won). In other words, Congress told the Court what findings it must make in the pending suit instead of leaving the decision to the Court.

In contrast, Congress did not direct the Court to make a specific finding in *Wheeling & Belmont Bridge Company*. Instead, Congress changed the legal nature of the bridge, and then allowed the Court to independently find that the bridge was no longer a nuisance based on a post-road not being a nuisance as a matter of law.

In *Robertson*, the Supreme Court clarified the subtle distinction illustrated in its comparison of *Klein* and *Wheeling & Belmont Bridge Company*. The Supreme Court explained that legislation does not violate *Klein* if it compels changes in the law, even if it directs decisions in pending cases. *Robertson*, 503 U.S. at 437, 441.

In *Robertson*, litigation by environmental groups working to protect the habitat of the northern spotted owl from timber harvesting on federally managed land had successfully tied-up federal timber sales in the Pacific Northwest. *Robertson*, 503 U.S. at 432-33. In 1990, two lawsuits were pending, which between them invoked the provisions of five separate federal statutes. *Id.* While these two lawsuits were pending, Congress attempted to settle the litigation by enacting the Northwest Timber Compromise. *Id.* at 433. The Compromise allowed increased timber harvesting on federal lands in Oregon and Washington during a limited time period, but prohibited harvesting in specified areas particularly important to the habitat of the spotted owl. *Id.* at 433-34.

The plaintiffs in *Robertson* challenged the Compromise based on *Klein*. *Id.* at 436. The challenge centered on a provision, which stated in part:

> The Congress hereby determines and directs that [the prohibition of all harvesting in the designated areas] is adequate consideration for the purpose of meeting the statutory requirements that are the basis for [the two pending conservation group lawsuits].

Id. at 434-35.

On its face, this law seems to violate *Klein* because it explicitly directed the courts to make a specific finding in the two pending appeals that compliance with the Compromise satisfies the applicable federal environmental statutes. However, the Supreme Court unanimously held that the legislation did not violate Klein because it "compelled changes in law." *Id.* at 438.

According to the Court, the effect of the legislation was the same as it would have been had Congress amended the substance of each of the five pertinent statutes. *See id.* at 437-38. For example, one of the statutes made it illegal to "kill" or to "take" any migratory bird. *Id.* at 437-38. Prior to the Compromise, stands of timber inhabited by the spotted owl could be harvested only if the harvest did not constitute a killing or taking of a spotted owl. *Id.* After the Compromise, an inhabited stand could be harvested if either that were true *or* if the harvest met the terms of the Compromise. *Id.* The same analysis would apply to each of the other four statutes. Thus, the Supreme Court concluded that the practical effect of the legislation compelled changes in the law, and so did not violate *Klein*. *Id.* at 437-38, 441. The Court then noted that it was not necessary to determine whether the legislation directed a decision in a pending case because the legislation

amended applicable law. *Id.* at 441; *see also Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 218 (1995) ("Whatever the precise scope of *Klein* … later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'").

Since *Robertson*, the Ninth Circuit has interpreted *Klein* to mean that legislation violates the separation of powers if it "directed certain findings in pending litigation, without changing any underlying law[.]" *Consejo de Desarollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1170 (9th Cir. 2007) (quoting *Ecology Ctr. v. Castaneda*, 426 F.3d 1144, 1148 (9th Cir. 2005)).

In *Consejo de Desarrollo Economico de Mexicali*, implementation of a canal lining project was halted by litigation alleging violation of four environmental statutes. *Consejo de Desarrollo de Economico de Mexicali*, 482 F.3d at 1169. During the pending appeals, Congress passed an omnibus tax bill that included a provision that:

> Notwithstanding any other provision of law, upon the date of enactment of this Act, the Secretary shall, without delay, carry out the [canal lining project] identified in the record of decision for that project, dated July 29, 1994[.]

Id. at 1167.

This legislation was challenged as violating the separation of powers under *Klein*. *Id.* at 1169. After noting that Congress may exempt specific projects from the requirements of environmental laws, this Court determined that the

"notwithstanding any other provision of law" language combined with instructions for the agency to proceed "without delay" implicitly exempted the project from any environmental statute that would delay implementation. *Consejo de Desarrollo de Economico de Mexicali*, 482 F.3d at 1168-70.

This Court reasoned that if Congress intended for the project to proceed under the usual course of administrative proceedings, then it would have been unnecessary for Congress to act at all because the environmental challenges would have eventually be resolved in due course. *Id.* at 1169. However, proceeding under the usual course of resolving environmental disputes would be inconsistent with the agency proceeding "without delay" upon enactment of the statute. *Id.*

The plaintiffs in the pending litigation alleged that the project violated various federal environmental statutes and could not proceed until the government complied with those statutes. *Id.* Thus, application of those environmental statutes could not be reconciled with the legislation's requirement that the project proceed "without delay." *Id.* Therefore, Congress must have intended the legislation to exempt the project from the reach of any environmental statute which would delay implementation. *Id.*

As such, this Court determined that the legislation did not violate the constitutional separation of powers because "[the legislation] does not direct us to make any findings or to make any particular application of law to facts. Rather, the

legislation change[d] the substantive law governing pre-conditions to commencement of [the project]." *Id.* at 1170.

1. Section 1713 does not direct certain findings in pending litigation.

The threshold inquiry for a *Klein* analysis is whether the challenged legislation directs a court to make a particular finding or to make any particular application of law to facts. *See Consejo de Desarrollo de Economico de Mexicali*, 482 F.3d at 1170 (citing *Robertson*, 503 U.S. at 438).

Appellants claim that Section 1713 directs the outcome of pending litigation; however, they fail to ever identify the particular finding of fact or particular application of law to fact that the legislation supposedly directs the courts to make. This is because the legislation does not direct any findings for the pending litigation. In fact, the legislation does not address the pending cases at all. It merely affects them collaterally by rendering them moot, which is an acceptable use of Congressional power. *See Paulson v. City of San Diego*, 475 F.3d 1047, 1048 (9th Cir. 2006).

Now, if the legislation had directed the court to find that the northern Rocky Mountain population meets the delisting criteria under the Endangered Species Act, then that would be directing a finding of fact in violation of *Klein*. Similarly, if the legislation had told the court to find that the Endangered Species Act permits the northern Rocky Mountain wolf population to be delisted at a sub-population

level, then that would be directing a particular application of law to fact in violation of *Klein*. However, Section 1713 does neither.

Rather, the legislation is comparable to *Wheeling & Belmont Bridge Company* because, as discussed below, it changes the underlying substantive law governing an agency action, and then allows the court to make its own findings based on the amended law. Since Section 1713 does not direct certain findings in pending litigation, it does not even raise a separation of powers issue under *Klein*.

2. Even if Section 1713 directs certain findings in pending litigation, it still does not violate the separation of powers because it changed the underlying substantive law.

However, even if this Court determines that Section 1713 directs certain findings in pending litigation, it still does not violate the constitutional separation of powers because it changed the substantive law governing pre-conditions for delisting the northern Gray Wolf population by exempting the May 5, 2011 rule from the reach of any environmental statute which would delay the delisting. *See Robertson*, 503 U.S. at 437, 441; *see also Consejo de Desarrollo de Economico de Mexicali*, 482 F.3d at 1168-70.

In contrast to Section 1713, the statute evaluated by the Supreme Court in *Robertson* actually named the resolution of two specific lawsuits as the object of the legislation. *Robertson*, 503 U.S. at 435. However, even this overt targeting of two pending cases was still insufficient to violate the separation of powers. *Id.* at

440. The Supreme Court effectively ignored the legislation's plain directive to make a particular finding, and instead construed the legislation to amend the underlying substantive law by providing an additional method of comply with the applicable statutes. *Id.* at 437-38.

The Supreme Court's analysis in *Robertson* demonstrates just how reluctant the Court is to invalidate legislation based on *Klein*. Section 1713 is much more passive than the aggressive legislation affirmed by the Supreme Court in Robinson, and is actually quite similar to legislation recently approved by this Court.

Although not even discussed by Appellant Alliance for the Wild Rockies in its opening brief to the Court, this Court's 2007 opinion in *Consejo de Desarrollo de Economic de Mexicali v. United States* is directly on point for the case at bar. The circumstances in *Consejo* and this case are similar. In both cases, agency action was halted by lawsuits from groups alleging that the agency action violated federal environmental statutes. In both cases, Congress passed legislation directing the relevant federal agency to proceed with the agency action without delay and without regard for any other provision of law, while litigation was pending. And, in both cases, the environmental groups claimed the legislation was unconstitutional under *Klein*.

Even the legislative provisions have little meaningful differences in structure. Compare the language of Section 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. 15213 et seq.) without regard to any other provision of statute or regulation that applies to reissuance of such rule.

with the language of the legislation at issue in *Consejo*:

> Notwithstanding any other provision of law, upon the date of enactment of this Act, the Secretary shall, without delay, carry out the [canal lining project] identified in the record of decision for that project, dated July 29, 1994[.]

482 F.3d at 1167.

In both statutes, Congress directs the relevant federal agency to perform a specific agency action without regard for any other provision of law. In addition, both statutes require that the agency perform the action promptly. Although Section 1713 does not specifically use the "without delay" language, it is nearly impossible to make any meaningful changes in the recovery of a wildlife population within 60 days. Therefore, the 60-day deadline for issuing the specified delisting rule is effectively the same as an order to perform the agency action "without delay."

This Court's reasoning in *Consejo* applies with equal force to this case. It is undisputed that Congress may exempt specific agency action from the requirements of environmental laws. *Consejo de Desarrollo de Economico de Mexicali*, 482 F.3d at 1168. Like this Court found in *Consejo*, Section 1713's "notwithstanding any other provision of law" language combined with instructions

to promptly issue the delisting rule indicates Congress's intention that the legislation change the substantive law governing the pre-conditions for delisting of the northern Rocky Mountain gray wolf population by exempting the delisting rule from any environmental statute that would delay implementation.

B. It was proper for the District Court to adopt a saving interpretation of Section 1713.

The U.S. Constitution vests Congress with the authority to create the law. U.S. Const. art. I, § 8. Out of respect for the constitutional principle of separation of powers, the U.S. Supreme Court has instructed that courts should adopt a "saving interpretation" favoring the constitutionality of statutes whenever possible. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("[A]s between two possible interpretations of a statute, by one which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act"). Therefore, when determining whether the legislation changed the underlying law in a *Klein* challenge, "the court [is] obliged to impose [a] 'saving interpretation' as long as it [is] a 'possible' one." *Robertson*, 503 U.S. at 441.

This respect for the constitutional separation of powers helps explain why, in the almost 140 years since *Klein* was decided, every *Klein*-based challenge to federal legislation has failed. *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995); *Robertson*, 503 U.S. at 439-41; *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1139 (9th Cir. 2009); *City of New York v. Beretta Corp., U.S.A.*, 524 F.3d

384, 396 (2d Cir. 2008); *Ecology Ctr. v. Castaneda*, 426 F.3d 1144, 1148 (9th Cir. 2005); *see also* Howard Wasserman, *The Irrepressible Myth of Klein*, 79 U. Cin. L. Rev. 53, 55 (2010) (noting that "in almost 140 years, the only case to strike down a law explicitly on *Klein* grounds was *Klein* itself").

Appellants Center for Biological Diversity, et al. seek to turn this basic principle of statutory construction on its head by misquoting the District Court's order and misapplying *Posadas v. National City Bank of New York*.

According to the Center for Biological Diversity, "[t]he District Court held that the ESA was repealed by implication." Opening Brief of Appellants Center for Biological Diversity et al, Dkt. No. 33-1, at 23 (citing Order at 17 (ER 17)). The Appellants then proceed to argue that repeal by implication is only allowed when "two acts are in irreconcilable conflict" or "the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it…" Dkt. No. 33-1, at 24 (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 504 (1936).

This argument by Center for Biological Diversity is disingenuous. First, the District Court actually held, "Because the 2009 Rule was invalidated, the re-issuance of the Rule pursuant to congressional directive, by implication *amended* the ESA as to this particular delisting." (ER 17) (emphasis added). This distinction is critical because the Appellants are urging this Court to ignore the Supreme

Court's admonition to adopt a "saving interpretation" based solely on repeals by implication being disfavored. Dkt. No. 33-1, at 26.

Second, the standard quoted by the Appellants is not a statutory rule of construction, but rather the test for determining whether a statute amended or repealed a statute. In *Posadas*, the issue before the court was whether legislation implicitly repealed the Federal Reserve Act or merely amended it. *Posadas*, 296 U.S. at 500-01. If the legislation implicitly repealed the Act, then the Philippine's Organic Act would allow the Philippines to levy capital and deposit taxes on U.S. national banks. *Id.* at 501-02. If the legislation merely amended the Act, then the Federal Reserve Act still applied to the Philippines, thus making such a tax illegal. *Id.* at 500. Using the standard quoted by the Appellants, the Supreme Court determined that the legislation merely amended the Act. *Id.* at 505-06.

The constitutionality of the legislation at issue in *Posadas* was never in question. The sole issue before the court was whether the legislation amended or repealed the existing law. Therefore, it is a gross distortion of the law to somehow construe the standard in *Posadas* as a limitation on the Supreme Court's clear command to adopt a "saving interpretation" of statutes when possible. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 30 ("[A]s between two possible interpretations of a statute, by one which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act").

VII. CONCLUSION

For the reasons set forth above, Intervenor-Appellees Wildlife Conservation Groups respectfully request this Court to affirm the August 3, 2011 Order of the District Court granting the Federal Defendants' motion for summary judgment.

DATED this 12th day of October, 2011.

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VIII. STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, this case is potentially related to pending appeals challenging the District Court's decision in *DOW v. Salazar* that the 2009 Delisting Rule violated the Endangered Species Act:

- *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. Salazar, et al.*, Civ. No. 10-35926.

Additionally, this case is potentially related to pending consolidated appeals of the District Court's denial of motions to intervene filed in the proceedings below, which are docketed as Ninth Circuit Nos. 11-35568 and 11-35636.

IX. CERTIFICATE OF COMPLIANCE

I certify that pursuant to F.R.A.P. 32(a)(7)(B)(i), the foregoing brief is proportionately spaced, has a typeface of 14 points, and has 4,769 words, which does not exceed 14,000 words, excluding the cover, corporate disclosure statement, table of contents, table of authorities, statement of related cases, certificates of compliance and service, and accompanying documents authorized under F.R.A.P.

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X. CERTIFICATE OF SERVICE

I hereby certify that I served this document with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 12, 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/ Ted Lyon