IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-35661

ALLIANCE FOR THE WILD ROCKIES, FRIENDS OF THE CLEARWATER, and WILDEARTH GUARDIANS
Plaintiffs – Appellants,

vs.

KEN SALAZAR, in his official capacity as U.S. Secretary of the Interior, DAN ASHE, in his official capacity as Director of the U.S. Fish and Wildlife Service, and U.S. FISH AND WILDLIFE SERVICE,
Defendants – Appellees.

On appeal from the United States District Court for the District of Montana, Missoula Division, No. 9:11-cv-00070-DVM

PLAINTIFFS – APPELLANTS REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT RULE 27-3(a) FOR INJUNCTION PENDING APPEAL

RELIEF REQUESTED BY AUGUST 30, 2011

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In their Response, Defendants-Appellees (collectively the "Secretary") advance four arguments in opposition to Plaintiffs-Appellants' (collectively the "Alliance") Emergency Motion. Each is discussed and rejected in turn below.

I. The Alliance Has Complied With Rule 8

The Secretary first faults the Alliance for failing to establish that moving for injunctive relief in the District Court would have been "impracticable" under F.R.A.P. 8(a)(2)(A)(i). Dkt. 15-1 (Response) at 6.[1] In making this argument the Secretary ignores the Alliance's explanation of how the District Court expedited summary judgment briefing below on a timeline analogous to that which would have controlled a motion for a preliminary injunction -- making such an injunctive motion unnecessary. Dkt. 6-1 (Motion) at 4-5.

Moreover, the Secretary's argument focuses only the "timing" aspect of the word "impracticable" and ignores the "futility" aspect. As the Alliance explained in its Motion, it would have been a waste of both the parties and judicial resources to move for an injunction pending appeal in the District Court. Dkt. 6-1 at 5. As the Secretary acknowledges elsewhere in his brief, if the District Court thought it were legally possible to rule for the Alliance on the merits it "gave every indication that it would have done so." Dkt. 15-1 at 11. However, because the District Court concluded it could not do so – the Alliance had a zero percent chance of prevailing

[1] Page numbers refer to ECF page numbers, not internal page numbers.

on the likelihood of success on the merits prong of the injunction test in the District Court – making it impracticable ("not practicable")[2] as a matter of law, i.e. futile, to trouble the District Court with an injunction request that would surely be denied.[3] Additionally, as discussed below, the District Court clearly indicated that only this Court would have the authority to issue a different ruling on the merits of Alliance's claim. *See e.g*. Dkt. 6-2, Exhibit 1 at 6. Several courts have found it impracticable to seek an injunction in the district court before making such a request from the court of appeals on analogous facts. *See e.g., Walker v. Lockhart*, 678 F.2d 68, 70 (8th Cir. 1982) (proper to seek an injunction pending appeal from the court of appeals without first applying to the district court because the decision on the merits by the district court suggested that it would not grant relief).[4]

Finally, the *Baker* case, cited by the Secretary as standing for the proposition that the failure to apply to the district court for an injunction pending appeal before

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[2] The *Merriam-Webster's Collegiate Dictionary*, 10th Ed. (1996) defines impracticable as "not practicable: incapable of being performed or accomplished by the means employed or at command."

[3] Additionally, the District Court denied an analogous request for a preliminary injunction of wolf hunts in Montana and Idaho in a predecessor case in which the Alliance was a movant. *Defenders of Wildlife v. Salazar*, 2009 WL 8162144, *4-5 (D. Mont. 2009). Though as argued, *infra*, the Alliance believes the District Court's legal analysis in that instance was in error, the Court's prior ruling further substantiates the Alliance's claim that moving the District Court for a similar injunction here was futile.

[4] *See also McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996)(Paul Kelly, Jr. J., in chambers), *stay vacated due to mootness of case*, 100 F.3d 863 (10th Cir. 1996)); *Wright & Miller, et al.*, 16A Fed. Prac. & Proc. Juris. § 3954 (4th Ed.) n.39 (collecting cases).

making the same request of the court of appeals is grounds for denial of such a motion, is not on point and not legal precedent in this Circuit. *See* Dkt. 15-1 at 5, *citing Baker v. Adams County / Ohio Valley School Bd.*, 310 F.3d 927, 931 (6th Cir. 2002). In *Baker*, the Sixth Circuit held seeking relief from the district court first was particularly important on the facts of that case because the requested injunction "would require significant judicial oversight" that could best be performed by the district court. 310 F.3d at 931. *See also Wright & Miller, et al.*, 16A Fed. Prac. & Proc. Juris. § 3954 (4th Ed.) n.39 (similarly explaining *Baker*). Such is not the case here, as the requested injunction does not require "significant judicial oversight" best performed by a district court. Accordingly, the Alliance is in full compliance with F.R.A.P. 8 on the unique facts of this case.

II. The Alliance's Appeal Raises Serious Legal Questions

The Secretary's argument that the Alliance's appeal does not raise serious legal questions overlooks an important nuance in the Alliance's arguments. The Alliance acknowledges that the District Court concluded that it was bound by Ninth Circuit precedent to rule against it. However, the District Court did not conclude that Supreme Court precedent compelled this result. The District Court stated:

> If I were not constrained by what I believe is binding precedent from the Ninth Circuit, and on-point precedent from other circuits, I would hold Section 1713 is unconstitutional because it violates the Separation of Powers

> doctrine articulated by the Supreme Court in U.S. v. Klein, 80 U.S. 128 (1871).

Dkt. 6-2, Exhibit 1 at 6. Thus, the District Court concluded Section 1713 did violate the Supreme Court's holding in *Klein*. However, the District Court continued stating:

> However, our Circuit has interpreted Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992), to hold that so long as Congress uses words "without regard to any other provision of statute or regulation that applies," or something similar, then the doctrine of constitutional avoidance requires the court to impose a saving interpretation provided the statute can be fairly interpreted to render it constitutional.

Dkt. 6-2, Exhibit 1 at 6-7.

Accordingly, it is not Supreme Court precedent that thwarted the Alliance in the District Court, but this Circuit's subsequent interpretation of the Supreme Court's holding in *Robertson*. This is an important distinction. Though the District Court was bound by this Circuit's interpretation of Supreme Court precedent, this Circuit is free to re-examine its own precedents and interpretations of the Supreme Court's rulings. The District Court clearly believed that such a re-examination is in order and thus the Alliance believes its appeal does raise serious legal issues.[5]

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[5] In particular, the District Court was concerned that this Circuit's precedents were allowing an erosion of the Separation of Powers Doctrine. The District Court stated: "The way in which Congress acted in trying to achieve a debatable policy change by attaching a rider to the Department of Defense and Full-Year Continuing Appropriations Act of 2011 is a tearing away, an undermining, and a

The Secretary's arguments hinge on cases such as *Consejo de Desarrollo Economico de Mexicali*, 482 F.3d, 1157, 1168-69 (9th Cir. 2007), in which this Circuit found language such as "[n]otwithstanding any other provision of law" sufficient to work a change in underlying substantive law. *See* Dkt. 15-1 at 7-8. The District Court acknowledged it was bound by the holding in *Consejo*, but was obviously frustrated that this Circuit has found such "notwithstanding" language to operate "as a talisman that *ipso facto* sweeps aside Separation of Powers concerns." Dkt. 6-2, Exhibit 1 at 18. The District Court's frustration arises from its apparent belief that this Circuit has gone beyond the Supreme Court's holding in *Robertson* and its own prior precedents like *Ecology Center v. Castaneda*, 426 F.3d 1144, 1147-48 (9th Cir. 2005), and inappropriately chipped away *Klein* and the Separation of Powers Doctrine.

The District Court's concern is well founded. This Circuit originally interpreted *Robertson* as indicating "a high degree of judicial tolerance for an act of Congress that is intended to affect litigation *so long as it changes the underlying substantive law in any detectable way*." *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1569-70 (9th Cir. 1993) (emphasis added). However, the "notwithstanding"

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disrespect for the fundamental idea of the rule of law. The principle behind the rule of law is to provide a mechanism and process to guide and constrain the government's exercise of power. Political decisions derive their legitimacy from the proper function of the political process within the constraints of limited government, guided by a constitutional structure that acknowledges the importance of the doctrine of Separation of Powers." Dkt. 6-2, Exhibit 1 at 3.

language found to work such a detectable change in underlying substantive law in *Consejo* is a far cry from the language the Supreme Court found to work such a change in underlying substantive law in *Robertson*, or that which this Circuit upheld in earlier holdings such as *Ecology Center*.

In *Robertson*, the Supreme Court held that:

> subsection (b)(6)(A) [of the challenged legislation] compelled changes in law, not findings or results under old law [because] under subsection (b)(6)(A), the agencies could satisfy their MBTA [Migratory Bird Treaty Act] obligations in either of two ways: by managing their lands so as neither to "kill" nor "take" any northern spotted owl within the meaning of § 2 [of the MBTA, 16 U.S.C. § 703], or by managing their lands so as not to violate the prohibitions of subsections (b)(3) and (b)(5) [of Section 318 of the Act].

503 U.S. at 438. The referenced subsections, (b)(3) and (b)(5), clearly indicated detectable changes in underlying law. *See* 503 U.S. at 434 n.1. Similarly, in *Ecology Center*, the challenged act changed the applicable old-growth retention standard from one requiring the retention of 10% old growth on a forest-wide basis to one requiring the retention of 10% old growth in the specific project areas. 426 F.3d at 1147.

Thus in both *Robertson* and *Ecology Center*, Congress clearly made detectable changes in the underlying law. Here there are no such detectable changes in underlying law. Section 1713 does not change underlying law. Instead it attempts to compel results under old law – requiring that the 2009 Rule previously stuck down by the District Court as contrary to the Endangered Species

Act ("ESA") should simply be returned to force as *an identical* 2011 Rule.[6] As the District Court reasoned this is a direct violation of the Separation of Powers Doctrine as articulated in *Klein*. Accordingly, the Alliance believes its appeal raises serious legal questions as to whether the expansion of *Robertson* in cases like *Consejo* – which allows reviewing courts to rely on "talismanic" language to invent or hypothesize what changes in underlying law Congress intended, rather than search for actual, detectable changes in underlying law – is proper.

III. The Alliance Will Suffer Irreparable Harm Absent an Injunction

The Secretary's arguments that the Alliance will not suffer irreparable harm absent an injunction rely on two defective assumptions. First, that there is a "recovered" population of Gray Wolves in the Northern Rocky Mountains that will remain "recovered" in spite of recreational hunting of over one thousand wolves in Idaho and Montana each year, and second, that a finding of irreparable harm requires a finding of a threat to the very survival of a species - rather than a finding that individual animals that would otherwise be protected by the ESA will be harmed or killed. The Secretary is wrong in both respects.

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[6] The Secretary is incorrect that the Alliance does not explain how Section 1713 directs a particular outcome in a pending case. *See* Dkt. 15-1 at 9. Section 1713 changes the Alliance from a winner in *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010) to a loser in that case which remains pending on appeal. *See* Dkt. 15-1 at 2 (Secretary's discussion of the Alliance's victory in *Defenders of Wildlife* and acknowledgement it remains pending on appeal).

First, the idea that a "recovered' population of Gray Wolves exists in the Northern Rockies Mountains within the meaning of the ESA is a false assumption that has never been subjected to judicial scrutiny because the District Court enjoined the Secretary's delisting rule on alternative grounds in *Defenders of Wildlife*. 729 F. Supp. 2d at 1228. Recent independent, peer-reviewed scientific studies reject the Secretary's assumption. *See e.g. Bergstrom, et al., The Northern Rocky Mountain Gray Wolf Is Not Yet Recovered*, BioScience, Vol. 59, No. 11 at 991-999 (December 2009) (copy attached as Exhibit 7).[7]

Similarly, the Secretary's assumption that the Wolf population can tolerate hunts "more extensive than those carried out in 2009" is also scientifically suspect. *See* Dkt. 15-1 at 15. A recent scientific study from Montana State University concludes that a "sustainable harvest" of wolves from the Northern Rocky Mountains must be both lower than that allowed by current State Management Plans and lower than that which occurred in 2009. *Creel & Rotella, Meta-Analysis of Relationships between Human Offtake, Total Mortality and Population Dynamics of Gray Wolves (Canis lupus)*, PLoS One, Vol. 5, Issue 9 (September 2010) at 6 (copy attached as Exhibit 8).

More importantly, contrary to the Secretary's arguments, the Alliance need not prove a threat to the entire Wolf population to establish irreparable harm in this

[7] The Alliance has numbered its Exhibits consecutively with those accompanying its Motion (Exhibits 1-6).

case. This Court has previously addressed the appropriateness of granting injunctive relief in a case involving impacts to the Northern Rockies Gray Wolf. In that case, this Court granted an injunction against a road-building project in a National Forest without requiring any proof that a single wolf would actually be harmed, much less requiring proof that the survival of the entire wolf population was at stake. *Thomas v. Peterson* 753 F.2d 754, 764 (9th Cir. 1985).

Moreover, the substantive provisions of the ESA prohibit the take of "any" member of an endangered species. 16 U.S.C. § 1538(a)(1)(B). Thus, if the wolf has been illegally delisted, each and every individual wolf that is hunted is an illegal "take" in violation of the ESA. As this Court noted in *Thomas*, a violation like this, of the ESA's substantive provisions, is "impermissible." 753 F.2d at 764. Thus, in this case, Alliance must only show that individual wolves will be taken in violation of the ESA by operation of Section 1713. Though the District Court did previously conclude that "the measure of irreparable harm is taken in relation to the health of the overall species rather than individual members," *Defenders of Wildlife v. Salazar*, 2009 WL 8162144, *4-5, a long line of cases[8] have reached the

[8] *See e.g. Fund for Animals v. Turner*, 1991 WL 206232, *8-9 (D.D.C. 1991)(finding likely future "takes" of three to nine grizzly bears constituted irreparable injury within the rubric of the ESA, despite the fact that there was "not the remotest possibility that the limited hunting … [would jeopardize] the species" as a whole); *Am. Rivers v. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 258-59 (D.D.C. 2003)(agreeing with *Fund for Animals v. Turner* that the ESA supported injunctive relief regardless of whether an ESA violation would eradicate the

opposite conclusion, including the implicit and explicit analysis of this Court in *Thomas*, as discussed above.

IV. The Balance of Equities and the Public Interest Tip in the Alliance's Favor

The Secretary's final argument that the balance of equities and the public interest tip against granting the Alliance an injunction here runs squarely afoul of the Ninth Circuit's precedent and requires little analysis. *See e.g. Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002) ("the balance of hardships and the public interest tip heavily in favor of endangered species"). *See also* Dkt. 6-1 (Motion) at 22 (argument).

CONCLUSION

For all of the reasons set forth above, the Alliance respectfully request that this Court grant its emergency motion for an injunction pending appeal.

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species); *Swan View Coalition v. Turner*, 824 F. Supp. 923, 938 (D. Mont. 1992)(rejecting argument for a species-level analysis); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996)(same); *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F. 3d 781 (9th Cir. 1995)(same); *Beech Ridge Energy*, 2009 WL 4884520 (ordering an injunction for likely future "takes" of Indiana bats without species-level analysis, and where there was no proof of an impact on the species-wide population of nearly 600,000 Indiana bats).

Respectfully submitted this 23rd day of August, 2011.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to F.R.A.P. 27(d)(2), and F.R.A.P. 32(a)(5) and (a)(6), the foregoing reply in support of emergency motion is proportionately spaced, has a typeface of 14 points, and does not exceed 10 pages, excluding the cover, certificates of compliance and service, and accompanying documents authorized under F.R.A.P. 27(a)(2)(B).

s/ James Jay Tutchton
James Jay Tutchton

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2011, I electronically filed the foregoing Reply in Support of Motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

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

s/ James Jay Tutchton
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