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 Secretary of the Interior, DAN ASHE, in his official capacity as Director of the United States Fish and Wildlife Service,[1/] and UNITED STATES 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-DWM

DEFENDANTS-APPELLEES' RESPONSE IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3(a) FOR INJUNCTION PENDING APPEAL

IGNACIA S. MORENO
Assistant Attorney General
DAVID C. SHILTON
DAVID GUNTER
Environment & Natural Resources Division
Department of Justice
P.O. Box 23795
Washington, D.C. 20026
202-514-5580

[1/] Dan Ashe, Director of the Fish and Wildlife Service, is substituted for Rowan Gould, former Acting Director, pursuant to Fed. R. App. P. 43(c)(2).

INTRODUCTION AND SUMMARY

Defendants-Appellees Ken Salazar, Secretary of the Interior, et al., oppose the Emergency Motion Under Circuit Rule 27-3(a) for Injunction Pending Appeal filed by appellants Alliance for the Wild Rockies, et al. ("the Alliance") on August 13, 2011. This dispute arises out of a long-running controversy regarding the status of gray wolves in the Northern Rocky Mountain area. In 2009, the United States Fish and Wildlife Service ("FWS") issued a final rule that designated a gray wolf distinct population segment in the Northern Rocky Mountains, and that removed that distinct population segment (except for the Wyoming portion) from the protections of the Endangered Species Act ("ESA"). *See* 74 Fed. Reg. 15,123 (Apr. 2, 2009) ("2009 Rule"). In this final rule, FWS concluded that gray wolves had recovered sufficiently to remove the protections of the ESA in those areas where state regulatory mechanisms were adequate to maintain recovered populations. Upon challenge by appellants and others, the district court set aside the rule on grounds that the statute did not permit removing the protections of the ESA from only a portion of a distinct population segment. *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010). Appeals from that ruling were filed by a number of parties, including the federal parties, and those appeals are currently stayed.

Congress then enacted legislation requiring the Secretary to reissue the 2009 Rule, without regard to any other provision of statute or regulation. Section 1713 of the Department of Defense and Full-Year Continuing Appropriations Act of 2011, P.L. 112-10 § 1713, 125 Stat. 38 (Apr. 15, 2011) provides in full:

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

As directed by Congress, the Secretary on May 5, 2011, reissued the 2009 Rule. 76 Fed. Reg. 25,590. The reissued rule identifies the Northern Rocky Mountain distinct population segment as a "species" under the ESA and then specifies the State of Wyoming as the "portion of its range [where] it is endangered." Also on May 5th, the Alliance and other parties filed the present litigation, which seeks to set aside the reissued rule solely on the ground that Section 1713 is unconstitutional.

On cross-motions for summary judgment, the district court ruled that under Supreme Court and Ninth Circuit precedents, Section 1713 does not

unconstitutionally infringe on the separation of powers, and granted judgment for the federal defendants. *Alliance for the Wild Rockies v. Salazar*, CV 11-70-M-DWM (D. Mont. 2011) (Appellants' Exhibit 1). The Alliance brought this appeal, but did not seek an injunction pending appeal from the district court pursuant to Fed. R. Civ. P. 62(c). It now seeks an emergency injunction in this Court staying the effect of the May 5, 2011 reissued rule.

The requested injunction should be denied. First, since there was nothing to prevent the Alliance from seeking an injunction pending appeal first in the district court, it cannot show compliance with Fed. R. App. P. 8(a)(1). Second, this Court and others have repeatedly held that it is constitutional for Congress to require an agency to take a particular action, even one that has been blocked by litigation, notwithstanding any other provision of law. Accordingly, the Alliance cannot show any likelihood of success on the merits of its appeal, or even serious questions going to the merits. Third, the Alliance has not produced any credible evidence that the viability of wolf populations nor its members' interests in viewing wolves will be irreparably harmed by the transfer of management authority over wolves to the States of Montana and Idaho. Nor can the Alliance demonstrate that the balance of harms or the public interest favors injunctive relief simply by pointing to the policies of the ESA, particularly where Congress has

made a recent, clear and specific determination that management of wolves should be returned to those States that have adequate regulatory programs. The motion for injunction pending appeal should be denied.

STANDARD FOR INJUNCTION PENDING APPEAL

An injunction pending appeal is similar in effect to a preliminary injunction, which is "an extraordinary and drastic remedy," "never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (internal citations omitted). It "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC,* 555 U.S. 7, 23 (2008). To obtain the "extraordinary remedy" of an injunction pending appeal, the Alliance must clearly establish four elements: "that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *See Winter*, 555 U.S. at 22 (describing factors in the context of preliminary injunction).[2/]

[2/] In some circumstances under this Circuit's precedents, an injunction may be appropriate if an appellant can show "serious questions" on the merits, if it carries its burden on the other three factors and if the balance of hardships "tips sharply" in its favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Here, this test requires at a minimum that the Alliance show a "substantial case for relief on the merits." *Leiva-Perez v. Holder*, ___ F.3d ___, 2011 WL 1204334, *5 (9th Cir., Apr. 1, 2011).

ARGUMENT

I. The Alliance Has Not Complied With Rule 8(a)(1).

A party moving for an injunction pending appeal "must ordinarily move first in the district court." Fed. R. App. P. 8(a)(1); *see also* Goelz, Christopher A., and Meredith J. Watts, CALIF. PRACTICE GUIDE: FED. 9TH CIR. CIV. APP. PRACTICE, § 6:652 (2011) ("the movant should be certain to exhaust all alternatives in the lower court or agency"). The district court "is best and most conveniently able to exercise the nice discretion" needed to adjudicate a motion for an injunction pending appeal, for it "has considered the case on its merits, and therefore is familiar with the record." *Cumberland Tel. & Tel. Co. v. La. Pub. Serv. Comm'n*, 260 U.S. 212, 219 (1922). For this reason, the prerequisite of seeking relief in the district court is "[t]he cardinal principle with respect to stay applications under Rule 8." 16A Charles A. Wright, *et al.*, FED. PRACTICE & PROCEDURE § 3954, at 588 (4th ed. 2008).

The Alliance does not claim that seeking relief first in the district court would have been "impracticable" within the meaning of Rule 8(a)(2)(A)(i), and expressly concedes that "preliminary injunctive relief was available in the District Court." *See* Alliance Rule 27-3 certificate at *iii*. The only excuse offered by the Alliance for not seeking an injunction pending appeal in the district court is that

the court had found in its ruling on the merits that the Alliance's arguments were contrary to binding precedent. *See* Rule 27-3 certificate at *iv*. That circumstance exists in virtually every appeal, however, and if it were sufficient to excuse the requirement of seeking relief first in the district court, the requirement in Rule 8(a)(1) would effectively be negated. The Alliance's clear failure to comply with Rule 8(a)(1) is sufficient in itself to warrant denial of its motion for injunction pending appeal. *See Baker v. Adams County / Ohio Valley School Bd.*, 310 F.3d 927, 931 (6th Cir. 2002).

II. The Alliance Fails to Show a Likelihood of Success on the Merits or to Raise Serious Legal Issues Going to the Merits.

The district court's conclusion that Ninth Circuit precedent bars the Alliance's constitutional challenge is plainly correct. Ex. 1 at 13-18. In *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1167 (9th Cir. 2007) (*Consejo*), this Court considered a virtually identical separation of powers claim. In that case, while a challenge to a canal lining project was pending before this Court, Congress enacted a statute providing (*inter alia*), that "'[n]otwithstanding any other provision of law, upon the date of enactment of this Act, the Secretary shall, without delay, carry out the [Project]....'" *Consejo*, 482

F.3d at 1167 (quoting Tax Relief and Health Care Act of 2006, P.L. No. 109-432, 120 Stat. 2922). This Court rejected the separation of powers claim because:

> [T]he 2006 Act does not direct us to make any findings or to make any particular application of law to facts. Rather, the legislation changes the substantive law governing pre-conditions to commencement of the Lining Project. As such, it does not violate the constitutional separation of powers.

482 F.3d at 1170.

Likewise, Section 1713 does not direct any court to make findings or any particular application of law to facts. Instead, just as in *Consejo*, Section 1713 directs the agency to proceed with a particular initiative (the 2009 Rule) that had been blocked by litigation "without regard to any other provision of statute or regulation that applies to issuance of such rule." In this way, Section 1713 amends the ESA insofar as that statute might otherwise prevent issuance of the Rule that Congress wanted to go forward. *See Sierra Club v. U.S. Forest Serv.*, 93 F.3d 610, 614 (9th Cir. 1996) (reading statute instructing federal agency to award permit "notwithstanding any other provision of law" as exempting project from statutory environmental requirements).

As *Consejo* also points out, *see* 482 F.3d at 1170, this sort of congressional enactment has been held constitutional many times by this Court and by the Supreme Court. *See, e.g.*, *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429,

437-38 (1992); *Ecology Ctr. v. Castaneda*, 426 F.3d 1144, 1148 (9th Cir. 2005); *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 991 (9th Cir. 1999); *Mt. Graham Coalition v. Thomas*, 89 F.3d 554, 556-68 (9th Cir. 1996); *Apache Survival Coalition v. United States*, 21 F.3d 895, 903 (9th Cir. 1994); *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1457-61 (9th Cir. 1993); *Stop H-3 Association v. Dole*, 870 F.2d 1419, 1432 (9th Cir. 1989); *see also Natl. Coal. to Save our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001).

The Alliance relies on *United States v. Klein*, 80 U.S. 128 (1871), which the Alliance contends establishes that separation of powers is breached "when Congress passes a law directing the judiciary to reach a particular outcome in a pending case under existing law." Motion at 3. But the Alliance never explains how Section 1713 directs a particular outcome in a pending case, let alone directs a court to give certain effect to particular evidence. Thus, it falls not within the Supreme Court's holding in *Klein*, but rather the Supreme Court's holding in *Robertson v. Seattle Audubon Society*. In legislating that "any other provision of statute or regulation" is inapplicable to the reissued rule, Section 1713 "compelled changes in law," rather than changing "findings or results under old law." *Robertson*, 503 U.S. at 438.

Moreover, even if Section 1713 could be read to direct a particular outcome in a pending case, there is a reasonable alternative reading that avoids any constitutional problem and must therefore be adopted. As the Supreme Court made clear in *Robertson*, "'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.'" 503 U.S. at 441, quoting from *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). Here, Section 1713 may be interpreted simply to amend or supersede any statutes or regulations that might otherwise conflict with the 2009 Rule. The district court was plainly correct in finding no merit in the separation of powers claim here.

Rather than grapple with the district court's holding, the Alliance uses concerns expressed in the district court opinion as a platform to argue that it has made a strong showing of success on the merits. Motion at 4 (arguing that the success on the merits prong is satisfied due to "the District Court's exceptionally strong reluctance to rule for the Federal Defendants. . ."); *id*. at 13-16 (same). The district court's opinion demonstrates the opposite – that strongly-felt considerations regarding the proper role of Congress or the administration of the ESA cannot create any serious merits question in the face of clear, binding, and dispositive Supreme Court and Circuit precedent relating to the Alliance's specific

separation of powers claim. If it were legally possible to hold Section 1713 unconstitutional, the district court gave every indication that it would have done so.[3/] However, the district court found that a searching review yielded only one appropriate legal conclusion: that "under Ninth Circuit law a constitutional reading of Congress's directive to reissue the Rule is possible." Ex. 1 at 18.

Accordingly, the Alliance cannot show that it has a likelihood of success on the merits of its appeal, or that it has raised serious questions going to the merits.

III. The Alliance Fails to Show That Irreparable Harm is Probable Absent an Injunction.

To obtain the "extraordinary remedy" of an injunction pending appeal, the Alliance must also establish that it is "likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 374. Relying on several pre-*Winter* decisions of this Court, the Alliance first contends that the burden of showing irreparable harm is less in cases claiming violations of the procedural or substantive requirements of the ESA, or claiming violations of the prohibition against "takes" of endangered species found in Section 9 of that statute, 16 U.S.C.

[3/] The Alliance contends that the district court "agreed with Appellants that Section 1713 violates the separation of powers doctrine articulated by the Supreme Court in *Klein*." Motion at 3. But even if the district court was sympathetic to the Alliance's interpretation of *Klein*, it acknowledged that "[o]ur Circuit has not seen *Klein* or *Robertson* this way," and accordingly concluded that there could be no finding of a constitutional violation based on this theory. Ex. 1 at 15.

§ 1538. Motion at 11-13. This attempt to lighten the Alliance's burden fails at the outset because this case does not involve any claimed violations of the ESA. As made clear in the Alliance's complaint, *see* Exhibit A, this case seeks to block implementation of an Act of Congress (Section 1713) on grounds that it allegedly violates the separation of powers. The Alliance's contention (motion at 16) that in this case "the fundamental issue is compliance with the ESA" is simply incorrect. Thus, the cases the Alliance relies upon, even if they survive *Winter*,[4/] have no application here, and the Alliance has cited no cases suggesting that a lesser burden falls on plaintiffs who seek injunctive relief aimed at blocking the implementation of an Act of Congress.

The Alliance plainly fails to show that irreparable harm is "likely" without an injunction pending appeal. As a result of Section 1713, management of gray wolf populations in Montana and Idaho has been returned to those States. In its

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[4/] *See, e.g., Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010) (interpreting *Winter* to mean that "[a]n injunction should issue only if the traditional four-factor test is satisfied," and as not permitting a presumption that injunctive relief should be granted for certain types of statutory violations); *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009) (applying *Winter* factors to request for stay, and finding that "similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined").

2009 Rule, FWS carefully analyzed the capacity of both Montana and Idaho to manage their wolf populations, and concluded that regulatory mechanisms in these two States were adequate to preserve the status of gray wolves as recovered populations. *See* 2009 Rule, 74 Fed. Reg. 15,167-69. This analysis specifically recognized that Montana and Idaho would have discretion to conduct regulated wolf hunts as part of their management programs. *Id*. The Alliance focuses narrowly on the States' plan to allow regulated hunting, but presents no evidence to contradict FWS's expert conclusion that state law protections in Montana and Idaho are adequate to preserve recovered populations of gray wolves.

All of the Alliance's claims of irreparable harm from state-managed wolf hunts stem from the premise that Congress has provided a special protective status to gray wolves, and that state management would impinge on that special status. Congress, however, has specifically determined that the 2009 Rule should take effect and that management should return to certain States, including Montana and Idaho. Thus, it cannot reasonably be contended that management by those two States, including regulated wolf hunts, conflicts with a congressional determination to give special protection to gray wolves in Montana and Idaho pursuant to the ESA.

Even if this Court were to find that plaintiffs are likely to prevail on the merits, such that the ESA would still apply to gray wolves in Montana and Idaho, an injunction would not be justified. In denying a request for a preliminary injunction in 2009 against planned wolf hunts in Montana and Idaho, Judge Molloy pointed out that the purpose of the ESA is to protect "species" from extinction, and that accordingly "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 (D. Mont. 2009); *accord Water Keeper Alliance v. U.S. Department of Defense*, 271 F.3d 21, 34 (1st Cir. 2001) (to make a showing of cognizable "irreparable harm," plaintiff must make showing of probable take of listed species and species-level impact). Applying this rule, Judge Molloy found that "[t]he Plaintiffs fail to offer evidence that the [distinct population segment] will suffer irreparable harm if the Idaho and Montana wolf hunting seasons occur in 2009 – even assuming hunters manage to kill 330 wolves." *Defenders of Wildlife*, 2009 WL 8162144, at *4-5. Wolf hunts took place in Idaho and Montana in 2009, but after those hunts – in the period of exclusive State management – wolf populations increased. *See* Exhibit C, Rocky Mountain Wolf Recovery 2010

Interagency Annual Report, at Table 4b (demonstrating change in minimum estimated population from 2008 to 2009 in Idaho and Montana).[5/]

While the hunts planned by Idaho and Montana are more extensive than those carried out in 2009, the Alliance has failed to offer any evidence that wolf populations in either Idaho or Montana will suffer any irreparable harm from these state-managed hunts. The Alliance simply points to the number of hunting licenses that have been issued by these States, but that is not an indicator of how many wolves will be taken, since only a small percentage of hunters who receive a license actually kill a wolf. Although over 40,000 tags were issued to hunters in Idaho and Montana in 2009, only 206 wolves were taken. *See* Exhibit B, 2009 Interagency Annual Report, at 6.[6/] The Alliance's contention that hunters will take "perhaps two-thirds of the total wolf population in the Northern Rockies," *see* Motion at 18, is unsubstantiated speculation.

The number of licenses issued is also not an indicator of the impact of hunting on the population as a whole. Wolf populations "can rapidly recover from

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[5/] Full reports may be found at: http://www.fws.gov/mountain-prairie/species/mammals/wolf/annualrpt09/index.html (last checked 8/22/2011).

[6/] Idaho extended its 2009 hunting season into 2010, but the Annual Report contains data only for the original season. In the extended season, hunters took an additional 48 wolves. Thus, for the entire season, Idaho issued 26,428 licenses for hunters to fill a statewide quota of 220 wolves, but only 182 wolves were taken.

severe disruptions," and "can maintain themselves despite sustained human caused mortality rates of between 30 and 50 percent per year." 2009 Rule, 74 Fed. Reg. at 15,151, 15,162. FWS found that much of the Northern Rocky Mountain wolf habitat is at or above its population carrying capacity, but that if the population were reduced below its habitat's carrying capacity, the population would grow rapidly. *See id.* at 15,140, 15,165-66. More recently, FWS has noted that "[b]y every biological measure the NRM DPS wolf population is fully recovered," with "very high" genetic diversity. *See* Exhibit C, 2010 Interagency Annual Report, at 8. Particularly in light of these findings, the Alliance has submitted no evidence that one season of regulated hunting will irreparably harm the Northern Rocky Mountain wolf population.

For these reasons, the Alliance's claims of irreparable harm are speculative and conjectural, and insufficient to demonstrate entitlement to the extraordinary relief of an injunction pending appeal. *Goldie's Bookstore, Inc. v. Superior Ct. of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) (purely speculative injury does not constitute irreparable injury).

IV. The Balance of Equities and the Public Interest Favor Denial of Injunctive Relief.

A party seeking injunctive relief pending appeal "must establish . . . that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. The Alliance seeks to meet this test simply by repeating its argument that the balance of equities always tips in favor of protecting species listed pursuant to the ESA. Motion at 16. That argument is flawed, for reasons set out *supra* at 10-12.

The Alliance is correct that congressional enactments are an important factor in determining the balance of equities and the public interest. *See United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497-98 (2001) ("a court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation.") (internal quotation omitted). However, the relevant congressional determination here is Section 1713. That provision is a recent and specific directive relating to the subject matter of this suit. Congress considered the particular issue whether management of gray wolves should be returned to some States, and determined that it should in accordance with the 2009 Rule. Even if the Alliance were correct that there is a constitutional infirmity in Section 1713, that

statute serves as a clear statement of Congress's view of the public interest. Accordingly, the Alliance has failed to carry its burden on this part of the test for injunctive relief.

The public interest served by the 2009 Rule is also well documented in the record. As the FWS stated in publishing the Rule, "[r]egulated public hunting is a valuable and cost-effective wildlife management tool to conserve healthy wildlife populations, fund wildlife conservation, maintain and improve local human tolerance of wolves, and manage the numbers and distribution of wildlife populations to reduce conflicts with people." 74 Fed. Reg. at 15,162.[7] This Court's public interest analysis must also include the benefits that State management (including regulated hunting) may have for farmers and ranchers negatively affected by wolves; FWS found that "State management will reduce economic losses caused by livestock depredation." *Id.* at 15,155.

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[7] *See also* 2009 Rule, 74 Fed. Reg. At 15,151 ("State management of wolves will be in alignment with the classic state-led North American model for wildlife management which has been extremely successful at restoring, maintaining, and expanding the distribution of numerous populations of other wildlife species, including other large predators, throughout North America."); Exhibit B, 2009 Interagency Annual Report, at 9 ("Delisting the NRM wolf population would allow implementation of a more efficient, sustainable, and cost-effective wildlife conservation model...").

The Supreme Court in *Nken v. Holder*, 129 S. Ct. 1749 (2009), noted that "[t]he parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders that the legislature has made final." *Id*. Here, as we have shown, the Alliance has not made any of the showings necessary to justify the extraordinary relief of an injunction pending appeal. But even if it had, the interest in promptly executing the determination made by the legislature in Section 1713 would outweigh any of the concerns raised by the Alliance.

CONCLUSION

For the foregoing reasons, the motion for an injunction pending appeal should be denied.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

s/ David Gunter
DAVID C. SHILTON
DAVID GUNTER
Environment & Natural Resources Division
Department of Justice
P.O. Box 23795
Washington, D.C. 20026
202-514-5580

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2011, I electronically filed the foregoing Response in Opposition to Appellants' Emergency Motion for Injunction Pending Appeal 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/ David Gunter