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**UNITED STATES DISTRICT COURT  
FOR DISTRICT OF MONTANA  
MISSOULA DIVISION**

|                                  |   |                            |
|----------------------------------|---|----------------------------|
| ALLIANCE FOR THE WILD            | ) |                            |
| ROCKIES, <i>et al.</i> ,         | ) | Case No. CV-11-70-M-DWM    |
|                                  | ) | Case No. CV-11-71-M-DWM    |
| Plaintiffs,                      | ) | [Consolidated]             |
|                                  | ) |                            |
| vs.                              | ) | <b>PLAINTIFFS’</b>         |
|                                  | ) | <b>STATEMENT OF</b>        |
| KENNETH SALAZAR, <i>et al.</i> , | ) | <b>UNDISPUTED FACTS</b>    |
|                                  | ) | <b>IN SUPPORT OF THEIR</b> |
| Defendants.                      | ) | <b>MOTION FOR SUMMARY</b>  |
| _____                            | ) | <b>JUDGMENT</b>            |

Pursuant to L.R. 56.1(a) Plaintiffs Alliance for the Wild Rockies, Friends of the Clearwater, and WildEarth Guardians hereby provide the following Statement of Undisputed Facts:

## **I. Facts Concerning the Wolf and Plaintiffs' Standing**

1. This Court has already made many relevant factual determinations in related litigation. See e.g. Defenders of Wildlife, et al. v. Salazar, et al., 729 F.Supp.2d 1207, 1229 (D. Mont. 2010). In this prior litigation Plaintiffs established their legal standing to pursue litigation related to the Endangered Species Act (“ESA”) listing status of the Northern Rocky Mountain Population of the Gray Wolf. See Defenders of Wildlife, et al. v. Salazar, et al., 9:09-cv-00077-DWM, Dkt. 58-8 (Declaration of Michael Garrity); see also Defenders of Wildlife, et al. v. Hall, et al., 9:08-cv-00014-DWM, Dkt. 64-5 (Declaration of Michael Garrity); Id., Dkt. 150-1 (Declaration of Robert Hoskins); and Id., Dkt. 150-2 (Second Declaration of Michael Garrity). Plaintiffs do not believe there are any material factual disputes concerning their standing in this new litigation among the same parties.

## **II. Facts Concerning Procedural History**

2. On August 5, 2010, this Court vacated and set aside the Federal Defendants' April 2, 2009 Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a District Population Segment, 74 Fed. Reg. 15123. Defenders of Wildlife, et al. v. Salazar, et al., 729 F.Supp.2d 1207, 1229 (D. Mont. 2010). The Court reached this conclusion

by construing the ESA and determining that the challenged Final Rule violated the plain language of the Statute by taking de-listing action at a level below that allowed by the ESA – i.e. treating different portions of a unified DPS differently. Id. at 1211. See also Id. at 1221-22 (“By listing and/or protecting something less than a DPS, the Service violated the plain terms of the ESA.”); Id. at 1228 (“The northern Rocky Mountains DPS must be listed, or delisted, as a district population and protected accordingly.”).

3. The Federal Defendants and Defendant-Intervenors in Defenders of Wildlife, et al. v. Salazar, et al., 729 F.Supp.2d 1207 (D. Mont. 2010) appealed the Court’s ruling. These appeals remain pending. U.S. Ninth Circuit Court of Appeals Docket Numbers: 10-35885; 10-35886; 10-35894; 10-35897; 10-35898; and 10-35926.

### **III. Facts Concerning the Challenged Budget Rider**

4. On April 15, 2011, the President signed into law H.R. 1473, the Department of Defense and Full-Year Continuing Appropriations Act of 2011. P.L. 112-10 § 1713, 125 Stat. 38 (April 15, 2011). Section 1713 of this Act states in its entirety:

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 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.

Id. Section 1713 of the Act is the only section of the approximately 459-page budget bill discussing the wolf-delisting rule.

5. On May 5, 2011, pursuant to the Congressional direction above, the Secretary of Interior reissued the April 2, 2009 Final Rule previously vacated and set aside by this Court as contrary to the plain language of the ESA. 76 Fed. Reg. 25590.

6. Section 1713 of H.R. 1473 grew out of a bill introduced by Senators Max Baucus and Jon Tester of Montana on February 10, 2011. S. 321. See Cong. Rec. Vol. 157, No. 21 (February 10, 2011) at S642. This bill the “Delisting Gray Wolves to Restore State Management Act of 2011” provided:

Notwithstanding any other provision of law (including regulations), effective beginning on the date of enactment of this Act, the final rule, entitled 'Endangered and Threatened Wildlife and Plants; 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. 15123 (April 2, 2009)), shall have the full force and effect of law.

Id.

7. A provision similar to S. 321 also appears as Section 1713 in H.R. 1, the House’s initial budget bill for Fiscal Year 2011.

Before the end of the 60-day period beginning on the date of enactment of this division, 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 a rule. Such reissuance (including this section) shall not be subject to judicial review.

H.R. 1 at 266.

8. On February 16, 2011 Rep. Cynthia Lummis of Wyoming attempted to amend Section 1713 of H.R. 1 to change the reference to the April 2, 2009 delisting rule to the February 27, 2008 delisting rule, 73 Fed. Reg. 10514, that included Wyoming. Her amendment failed. Cong. Rec. Vol. 157, No. 25 (February 16, 2011), at H984.

9. Section 1713 of H.R. 1 was considered in the Senate on March 9, 2011 when Senator Cardin stated:

And finally, the Senate bill is a dramatic improvement over H.R. 1 in terms of environmental policy. The other body approved legislative riders that would stop EPA from being able to protect the air Americans breathe every day and it would stop dead in its tracks the Chesapeake Bay restoration effort. The Senate bill, to its credit, eliminates these terrible policy directives. The Senate bill, however, does include a provision that would legislatively de-list the gray wolf from the endangered species list. I continue to oppose legislative efforts to delist endangered species. We have a regulatory process that is based on scientific data, and we should use it. All that is needed is for the States in the Northern Rockies to submit appropriate management plans to the Department of Interior so that the law can work the way Congress intended.

Cong. Rec. Vol. 157, No. 35 (March 9, 2011), p. S1477. H.R. 1 failed in the Senate on March 9, 2011. Id.

10. H.R. 1473 was introduced on April 11, 2011. Between April 11<sup>th</sup> and April 15<sup>th</sup> 2011, when H.R. 1473 became law, Section 1713 was mentioned only three times in the Congressional Record. On April 13, 2011 Senator Cardin criticized Section 1713:

I will make it clear, Mr. President. I am very disappointed by many of the provisions included in this compromise. It is a true compromise. It is not what the Democrats would have written, I can assure you of that, and it is not what the Republicans would have written. It is a true compromise, and that is what we had to go through, I understand, but I feel compelled to at least let the people of Maryland know the cost of the compromises... There is a rider that was attached that did survive that deals with the delisting of the great wolf under the Endangered Species Act. That is not how we should be acting. There is a remedy for dealing with the delisting. There is a process we go through. We shouldn't go down a dangerous precedent that starts congressional or political action on delisting species that are included under the Endangered Species Act.

Cong. Rec. Vol. 157, No. 54, at S2421. On April 14, 2011, Senator Cardin again criticized Section 1713:

I pointed out yesterday that on the environmental front regarding the Endangered Species Act, there is a provision that delists the great wolf. That shouldn't be targeted for congressional action. That is a dangerous precedent for us to set.

Cong. Rec. Vol. 157, No. 55, at S2473. Finally, on April 14, 2011, the text of Section 1713 of H.R. 1473 as passed appears in the Congressional Record. Cong. Rec. Vol. 157, No. 55, at H2720.

11. At no time in its consideration of Section 1713 of H.R. 1473, or its predecessors, did Congress consider, or believe it was amending, the

ESA. Rather, Congress was merely trying to return the April 2, 2009 delisting rule, vacated by this Court, to force without amending the governing Statute.

12. The Solicitor of the U.S. Department of the Interior has considered the impact of Section 1713 of H.R. 1473 and concluded it does not amend the Endangered Species Act. On May 4, 2011, the Solicitor issued a Memorandum, M-37024, withdrawing her predecessor's March 16, 2007, Opinion, M-37013, on the Meaning of "In Danger of Extinction Throughout All or a Significant Portion of its Range." This Court had previously concluded that the prior Solicitor's Opinion M-37013 was contrary to the plain language of the ESA. Defenders of Wildlife, et al. v. Salazar, et al., 729 F.Supp.2d 1207, 1229 (D. Mont. 2010). The Solicitor's new May 4, 2011 Memorandum, M-37024, states:

As noted above Sec. 1713 of P.L. 112-10 directed reissuance of the 2009 Northern Rocky Mountain wolf rule. Nothing in that section affects my authority to withdraw Opinion M-37013. The statute is applicable only to the issuance of this single rule; it makes no reference to Opinion M-37013 *nor does it amend the Endangered Species Act generally.*

Memorandum M-37024 at n. 4 (emphasis added). A copy of this Memorandum is attached as Exhibit A.

13. The statements of the drafters of Section 1713 of H.R. 1473, P.L. 112-10 § 1713, outside of the sparse official Congressional debates

makes it clear that they designed Section 1713 to reverse this Court's decision in Defenders of Wildlife v. Salazar, 729 F.Supp.2d 1207, without amending the ESA.

14. On February 10, 2011, Senator Jon Tester of Montana posted an entry on his official Facebook page, announcing the filing of his bill, S. 321, with Senator Max Baucus, stating: “[t]he Baucus-Tester bill would restore management practices as they were before the 2010 court ruling that resulted in the return of the gray wolf to federal management under the endangered species act.” A copy of Senator Tester's February 10, 2011 Facebook entry is attached as Exhibit B.

15. On February 15, 2011, Idaho Congressman Mike Simpson issued a press release stating he was “spearheading an effort to undo the August 2010 ruling by Judge Molloy that put wolves back on the endangered species list.” A copy of this press release is attached as Exhibit C.

16. On March 18, 2011 Representative Mike Simpson of Idaho issued a press release stating that he had included language in H.R. 1, legislation continuing operations for the federal government for the remainder of the fiscal year, “to overturn Judge Molloy's decision and return management of wolf populations in the region to states with approved

management plans ....” A copy of this press release is attached as Exhibit D.

17. On April 12, 2011 Representative Mike Simpson of Idaho issued a press release stating that his language in H.R. 1473 “overturns the August 2010 decision by a district court in Montana to put wolves in Idaho, Montana, Oregon, Washington, and Utah back on the endangered species list ....” A copy of this press release is attached as Exhibit E.

18. Also on April 12, 2011, the Associated Press wrote an article on the H.R. 1473, quoting Jon Tester, and stating: “[l]awmakers said they inserted the rider to circumvent a federal judge who repeatedly blocked proposals to hunt [wolves].” A copy of this article is attached as Exhibit F.

19. Finally on April 12, 2011, Senator Jon Tester gave an interview to E&E Daily in which he is quoted as saying H.R. 1473 “didn’t amend the Endangered Species Act.” A copy of this article is attached as Exhibit G.

20. On April 13, 2011, the New York Times published an article on Section 1713 of H.R. 1473 describing it as a proposal from Senator Jon Tester of Montana and Representative Mike Simpson of Idaho and quoting Senator Tester as saying “[w]e didn’t amend the Endangered Species Act.” The New York Times attributed Senator Tester as having made this statement in an interview with E&E Daily. A copy of this article is attached

as Exhibit H.

21. On April 14, 2011, Senator Jon Tester issued a press release stating that Congress had approved his plan to remove gray wolves in Montana from the endangered species list. Tester's press release also thanked Representative Mike Simpson for his leadership on the issue in the House of Representatives and stated: "[a]fter a judge's ruling against Montana's wolf management plan last year, Tester has fought hard to put wolves back under the management of the state." A copy of this press release is attached as Exhibit I.

22. On May 5, 2011, KPAX, Missoula published a story on this litigation in which they quoted Senator Jon Tester's spokesman, Aaron Murphy as stating: "... Jon's provision doesn't explicitly repeal a judicial ruling, nor does it even change the Endangered Species Act." A copy of this article is attached as Exhibit J.

23. On Friday, May 6, 2011, the Missoulian published a story on this litigation similarly quoting Senator Jon Tester's spokesman, Aaron Murphy as stating "... Jon's provision doesn't explicitly repeal a judicial ruling, nor does it even change the Endangered Species Act." The Missoulian reported Mr. Murphy made this statement in a Thursday, May 5, 2011, email. A copy of this article is attached as Exhibit K.

Respectfully submitted this 31<sup>st</sup> day of May, 2011,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 31, 2011, I electronically filed the foregoing document with the clerk of the U.S. District Court for the District of Montana using the Court's CM-ECF System which will send a Notice of Electronic Filing to all counsel of record.

/s/ James Jay Tutchton  
James Jay Tutchton