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

_____ )	Case No. CV-11-70-M-DWM
ALLIANCE FOR THE WILD )	Case No. CV-11-71-M-DWM
ROCKIES, <i>et al.</i> , )	[Consolidated]
)	
Plaintiffs, )	<b>PLAINTIFFS' REPLY</b>
)	<b>IN SUPPORT OF THEIR</b>
vs. )	<b>MOTION FOR SUMMARY</b>
)	<b>JUDGMENT and</b>
KENNETH SALAZAR, <i>et al.</i> , )	<b>OPPOSITION TO</b>
)	<b>DEFENDANTS' CROSS-</b>
Defendants. )	<b>MOTION FOR SUMMARY</b>
_____ )	<b>JUDGMENT</b>

## INTRODUCTION

At base the Federal Defendants' arguments rest on two pillars neither of which is stable. First, Defendants ask this Court to put words in Congress' mouth (or more accurately to "write" statutory language Congress did not). Second, Defendants ask this Court to interpret U.S. v. Klein, 80 U.S. 128 (1871), and thus the separation of powers doctrine, out of existence. The first suggestion ignores the Court's proper roll. The second would eviscerate a fundamental tenant of the Constitution. This Court should not follow along either primrose path.

## THE SEPARATION OF POWERS TEST

Absent rhetorical flourish, the parties agree on the test this Court must apply to evaluate the Alliance's separation of powers challenge. "When a party claims that legislation "impermissibly interferes with the adjudicatory process" in violation of the separation of powers doctrine, [the Ninth Circuit has] recognized a two-part disjunctive test." Ecology Center v. Castaneda, 426 F.3d 1144, 1148 (9<sup>th</sup> Cir. 2005), *citing* Gray v. First Winthrop Corp., 989 F.2d 1564, 1568 (9<sup>th</sup> Cir. 1993).

The constitutional principle of separation of powers is violated where (1) "Congress has impermissibly directed certain findings in pending litigation, without changing any underlying law," or (2) "a challenged statute is independently unconstitutional on other grounds."

Id., quoting Gray, 989 F.2d at 1568. See Defendants' Brief, Dkt. 57 at 5 (setting forth the same test, citing Ecology Center, Gray and subsequent authority).

As the Alliance has acknowledged, the Ninth Circuit applies this test with 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, 989 F.2d at 1569-70.

Accordingly, the dispute between the parties is not over the appropriate test, but rather over the application of this test to the facts of this case. As argued below, the Alliance asserts that here Congress has impermissibly directed the outcome of pending litigation without changing the underlying substantive law *in any detectable way*. Defendants' arguments improperly ask this Court to find such a detectable change in underlying law where none was either expressed or intended. Moreover, despite Defendants' assertions to the contrary, a high degree of judicial tolerance is not *carte blanche*. Klein remains good law and if our constitutional separation of powers doctrine is to have any continuing validity it must be heard to speak again.

## ARGUMENT

As this Court is well aware, on April 2, 2009, Defendants designated and listed under the ESA a distinct population segment of the gray wolf in the northern Rocky Mountains and simultaneously delisted only a portion of this district population segment, removing ESA protection for the wolf everywhere outside of Wyoming. 74 Fed. Reg. 15125. When the Alliance and others challenged this Final Rule, the Court construed the ESA and determined that the plain language of the statute did not allow Defendants to list or delist “species” at a level below that of the entirety of a distinct population segment.<sup>1</sup> Accordingly, the Court vacated the April 2, 2009 Final Rule. Defenders of Wildlife, et al. v. Salazar, et al., 729 F.Supp.2d 1207, 1211, 1221-22, 1228-29 (D.Mont. 2010). That case remains pending on appeal.

The challenged legislative enactment, P.L. 112-10 § 1713 (hereinafter “Section 1713”) effectively reverses this Court’s holding in Defenders of Wildlife by directing reissuance of the Final Rule this Court vacated and

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<sup>1</sup> The ESA defines a “species” eligible for listing or delisting action as (1) a species; (2) a subspecies; or (3) distinct population segment of a vertebrate species of fish or wildlife. 16 U.S.C. § 1532(16). Thus listing or delisting an entity that is not a full species, subspecies, or designated distinct population segment of a vertebrate species of fish or wildlife is not allowed by the plain language of the ESA.

prohibiting judicial review of the Statute and reissued Final Rule.<sup>2</sup>

The Alliance argues that Section 1713 is unconstitutional because it does not amend the ESA in any “detectable way,” Gray, 989 F.2d at 1569-70, but rather simply directed Defendants to reissue the Final Rule, previously vacated by this Court, and thus reverses the outcome of pending litigation by compelling results under old law. Alliance Opening Brief, Dkt. 29 at 21-26.

Defendants retort with two central arguments. First they argue that Section 1713 amends underlying substantive law. Second, they argue that Section 1713 does not violate the constitution by prescribing rules of decision to the judicial branch. Defendants’ are wrong in both respects.

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<sup>2</sup> Defendants apparently agree with the Alliance that if Section 1713’s double prohibition of judicial review - “[s]uch reissuance (including this section) shall not be subject to judicial review” - is construed to prohibit judicial review of the Statute or reissued Final Rule on constitutional grounds, Section 1713, would be independently unconstitutional and thus violate the second prong of the Ninth Circuit’s disjunctive separation of powers test – the “challenged statute is independently unconstitutional on other grounds.” Ecology Center, 426 F.3d at 1148, *quoting Gray*, 989 F.2d at 1568. See Alliance Opening Brief, Dkt. 29 at 19-21 and Defendants’ Brief, Dkt. 57 at 26 n. 7 (both discussing how canon of constitutional avoidance requires interpretation of Statute so as not to preclude judicial review on constitutional grounds).

**I. Section 1713 Does Not Amend the ESA**

Here the parties agree in part, Section 1713 does not amend the ESA, *generally*. Alliance Opening Brief, Dkt. 29 at 22-23, citing SOF # 12; Defendants' Brief, Dkt 57 at 19-20 (both agreeing with Solicitor that Section 1713 does not amend the ESA generally). Accordingly, to the extent any amendment of ESA via Section 1713 is to be detected it must be specific to the wolf Final Rule alone.

In their search for a wolf specific amendment of the ESA, Defendants argue by analogy that Section 1713 is “materially similar” to other laws upheld by the Courts. Dkt. 57 at 7-11. It is not.

Defendants first point to the Supreme Court's Wheeling Bridge decision. 59 U.S. 421 (1855). The Alliance has previously discussed Wheeling Bridge, pointing out (1) that it was decided before Klein, 80 U.S. 128 (1871), and thus does not call Klein into question; and more importantly, that in Wheeling Bridge, the Supreme Court found Congress changed the underlying law by designating the controversial bridges “post-roads for the passage of the mails of the United States.” 59 U.S. at 429. This change in underlying law consequently changed the Court's analysis of the interstate commerce and nuisance issues controlling its prior ruling. As subsequently explained in Klein:

No arbitrary rule of decision was prescribed in [Wheeling Bridge], but the court was left to apply its ordinary rules to the new circumstances created by the act.

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

In the present case, through Section 1713 Congress did not amend the ESA, generally. Moreover, it did not say anything specific about this Court's prior ruling that the ESA does not allow listing or delisting action at a level below that of a distinct population segment. See Defenders of Wildlife, 729 F.Supp.2d at 1211, 1221-22, 1228-29; and footnote 1, *supra*. Here, Congress, as in Klein, has provided an "arbitrary rule of decision," directing this Court to allow a specific violation of the ESA, in the precise manner the Court previously found illegal (i.e. delisting less than an entire distinct population segment). Accordingly, this case is not like Wheeling Bridge in which underlying changes in substantive law were made, but like Klein in which an arbitrary rule of decision was prescribed. Defendants' argument by analogy to Wheeling Bridge cuts in exactly the opposite direction they intend.

Defendants' other arguments by analogy fair no better. The two most analogous cases discussed by all the parties are the Supreme Court's decision in Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992), and this Court's prior experience with the separation of powers doctrine in

Ecology Center, 426 F.3d 1144 (9<sup>th</sup> Cir. 2005). Examination of the challenged legislation at issue in these cases is most instructive.

In Robertson, the “Northwest Timber Compromise,” or § 318 of the Department of the Interior and Related Agencies appropriations Act of 1990, provided in subsection 318(b)(6)(A):

[T]he Congress hereby determines and directs that management of areas *according to subsections (b)(3) and (b)(5) of this section* on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned [identifying the conservations groups’ litigation by case name and docket number].

See Robertson, 503 U.S. at 434-35 (emphasis added).

The Supreme Court upheld the challenged subsection by finding that it amended the applicable underlying statute and thus passed constitutional scrutiny. “[S]ubsection (b)(6)(A) 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 Appropriations Act].” Id. at 438 (emphasis added).

The key distinction between Robertson and the present case is that in Robertson, the other referenced subsections of Section 318, *subsections (b)(3) and (b)(5) (emphasized above)*, provided substantive changes in the underlying laws governing forest management and protection of the northern spotted owl:

The Compromise both required harvesting and expanded harvesting restrictions. Subsections (a)(1) and (a)(2) required the Forest Service and the BLM respectively to offer for sale specified quantities of timber from the affected lands before the end of fiscal year 1990. On the other hand, *subsections (b)(3) and (b)(5) prohibited harvesting altogether from various designated areas within those lands, expanding the applicable administrative prohibitions and then codifying them for the remainder of the fiscal year.*

Robertson, 503 U.S. at 433 (emphasis added). Thus, in Robertson changes in the underlying governing law were clearly detectable. Subsections (b)(3) and (b)(5) provided a new protective regime for both the forests and the owl and provided room for the courts to interpret and evaluate compliance with these new requirements.

The present case is simply not analogous. Here, Congress did not make any changes in underlying law indicating whether the ESA allows the delisting of less than a complete distinct population segment of gray wolf. Instead, Congress just directed Defendants to do (again) what this Court held the ESA does not allow. Here there can be no finding that “compliance with certain new law constituted compliance with certain old law,” Robertson,

503 U.S. at 440, because unlike subsections (b)(3) and (b)(5) of the statute at issue in Robertson, nothing in Section 1713 gives this Court any new law to apply. Congress simply directed contrary findings under existing law in direct violation of the separation of powers doctrine.

Close analysis of the second instructive case, Ecology Center, also cuts in opposition to Defendants' arguments by analogy. 426 F.3d 1144 at 1147-48. In Ecology Center this Court originally enjoined certain timber sales because the Forest Service had failed to document the existence of a minimum of 10% old growth habitat (meeting certain requirements) on a forest-wide basis in the Kootenai National Forest as required by the Forest Plan. Id. at 1146. Congress subsequently passed an act changing 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. Id. at 1147. This Court had previously found that the specific project areas in which the logging was to occur did have 10% qualifying old growth habitat. Id. at 1146.

Accordingly, this Court held that "Congress has not impermissibly directed findings ... by the terms of [the new act, because] this Court could still, somehow, find there wasn't 10% [old growth] on an area and prevent the [timber] sales ... Congress has changed the underlying law." Id. at

1147-48. The Ninth Circuit agreed, holding the new act changed the underlying law because it did not “direct particular findings of fact or the application of old or new law to fact” but still left to the district court the role of determining whether the new criteria were met. Id. at 1148.

In the present case, Section 1713 does precisely the opposite. It directs this Court to apply the same underlying law to the same facts and reach a different outcome – i.e. that delisting less than an entire distinct population segment of gray wolf is now legal. This is exactly what Klein and subsequent authority say Congress may not do constitutionally. See e.g. Iletto v. Glock, Inc., 565 F.3d 1126, 1139 (9<sup>th</sup> Cir. 2009) (congressional acts that direct findings or results under old law are subject to a Klein challenge).

Finally, in both their Brief, Dkt. 57, and in their Statement of Genuine Issues, Dkt. 54, Defendants object to the Alliance’s use of legislative history and extra congressional record remarks by the sponsors of Section 1713. The Alliance agrees with Defendants that resort to legislative history is only used when a statute is ambiguous. See Alliance Opening Brief, Dkt. 29 at 22; Defendants’ Brief, Dkt. 57 at 17. Both the Alliance and Defendants contend Section 1713 is unambiguous. Id. Nonetheless, because Defendants argue that Section 1713 must, by “implication,” rather than its express terms, amend the ESA in some respect the Alliance continues to

resort to the “legislative history,” such as it is, to establish that whatever “implications” lurk beneath the plain language of Section 1713 – Congress did not intend - by implication or otherwise - to amend the ESA.

The Alliance has acknowledged the weakness of the paltry legislative history in this case. Alliance Opening Brief, Dkt. 29 at 25. Nonetheless, the Court can evaluate whatever legislative history exists for whatever value it possesses. In normal situations, where ample formal legislative history exists, courts often give particular weight to the statements of the sponsors of legislation. See e.g. Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976) (statement of legislation’s sponsor “deserves to be accorded substantial weight in interpreting the statute”); Church of Scientology v. U.S. Department of Justice, 612 F.2d 417, 424 n.13 (9<sup>th</sup> Cir. 1979) (“Courts look to the statements by the initiators or sponsors of proposed legislation when the meaning of words used in a statute is in doubt.”); In re Knudsen, 389 B.R. 643, 661 n.5 (N.D. Iowa 2008) (senator’s comments “were entitled to considerable weight, because he was the sponsor of the amendment ...”).

In the present case, the sponsors of Section 1713 did not make any remarks in the formal legislative history, but only in press statements and releases. Ordinarily, these extra congressional record remarks are not

considered. See e.g. Montana Wilderness Ass'n v. Forest Service, 655 F.2d 951, 957 (9<sup>th</sup> Cir. 1981). However, when nothing else exists and the extra congressional record remarks of the sponsors of legislation are not contradicted by anything in the record, there is no apparent reason they cannot be considered.<sup>3</sup>

Defendants further attempt to keep this Court from looking at the extra congressional record remarks of the sponsors of Section 1713 by raising foundation and hearsay objections. Defendants' Brief, Dkt. 57 at 18. However, as Defendants acknowledge newspaper articles and periodicals are self-authenticating. Fed. R. Evid. 902(5).

Moreover, as to Defendants' hearsay objection, these material are not put forth to establish the truth of the matter asserted (that Congress did not amend the ESA), but rather that the sponsors of Section 1713 did not *intend* to amend the ESA. Accordingly these materials are admissible under Fed. R. Evid. 803(3) (allowing statement of a declarant's intent).

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<sup>3</sup> Defendants also fault the Alliance for referring to the extra record press statements of the sponsors of Section 1713 as "contemporaneous remarks." Defendants' Brief, Dkt. 57 at 19. The Alliance maintains these remarks, occurring during Congress' consideration of Section 1713 and immediately prior to and after its signature by the President are "contemporaneous." See American Constitutional Party v. Munro, 650 F.2d 184, 188 (9<sup>th</sup> Cir. 1981) (post-passage statement of Representative "might be entitled to some weight if it had been made contemporaneously with the passage of the legislation," but not coming *one-year later*).

Additionally, press releases from members of Congress may be admitted under the hearsay exception for public records containing “reports” or “statements” of public officials. Fed. R. Evid. 803(8). See e.g. Patterson v. Central Mills, Inc., 64 Fed. Appx. 457, 462 (6<sup>th</sup> Cir. 2003) (admitting press release published by Consumer Products Safety Commission under Rule 803(8)); Byrd v. ADC, 2011 WL 2194137 at \*4, n.3 (M.D. Tenn. 2011) (Department of Labor press release); Stepski v. Norasia, 2010 WL 6501649 (S.D.N.Y. 2010) (U.S. Coast Guard press release).

Lastly, all the Alliance’s challenged evidence may be admitted under the residual exception to the hearsay rule, Fed. R. Evid. 807. The out-of-court statements offered by the Alliance go to a material fact (the intent of the sponsors of Section 1713), they are more probative on this point than other evidence the Alliance could procure through reasonable efforts (deposition of reporters, members of Congress, or their spokespeople), and the admission of the Alliance’s evidence would serve the interests of justice (allowing some analysis of legislative intent in the near absence of formal legislative history).

Accordingly, to further the efficient and timely resolution of this case via summary judgment, the Alliance contends Defendants’ foundation and hearsay objections to otherwise uncontroverted evidence should be rejected.

## II. Section 1713 Prescribes Rules of Decision to the Court by Compelling New Results Under Old Law

Defendants final argument applicable to the Alliance's claim is that even assuming *arguendo*, that Section 1713 does not amend the ESA and is thus subject to a Klein challenge, Section 1713 should still survive constitutional scrutiny because it does not prescribe rules of decision to the judicial branch. Defendants' Brief, Dkt. 57 at 20-21. Defendants' argument misses the point of Klein. Klein is not limited to situations in which Congress has provided how courts must weigh evidence, but also covers situations in which Congress has directed the courts how to interpret existing law. See Ecology Center, 426 F.3d at 1148 (Congress may not "direct ... application of old or new law to fact").

This Court previously construed the ESA and determined that its plain language did not allow delisting action at a "partial" distinct population segment level. Rather than address that problem, through Section 1713, Congress merely directed reissuance of a Final Rule delisting only part of the northern Rocky Mountains gray wolf distinct population segment. Accordingly, Congress is directly telling this Court how to construe existing law – i.e. to allow exactly what the Court said the governing law does not. It is harder to find a more direct and intentional effort to compel results under "old law." Indeed, as stated by the sponsors of Section 1713, their precise

intent was to reverse this Court without amending the ESA. Whatever, the dubious wisdom of such an approach as a general matter of governance, it runs afoul of the separation of powers doctrine and should not stand.

### **CONCLUSION**

For all of the reasons set forth above the Alliance respectfully requests this Court grant its Motion for Summary Judgment and deny the Defendants' Cross-Motion.

Respectfully submitted this 21<sup>st</sup> day of June, 2011,

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### **CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1(d)(2), I hereby certify that the foregoing brief contains 3,238 words, excluding caption and certificates, in compliance with the 3,250 word limit established by L.R. 7.1(d)(2)(B) and this Court's Order of May 13, 2011 (Dkt. 8). In making this certification, I have relied on the word count feature of the word processing system used to prepare this brief.

/s/ James Jay Tutchton  
James Jay Tutchton

### **CERTIFICATE OF SERVICE**

I hereby certify that on June 21, 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