

Nos. 11-35661, 11-35670

[consolidated cases]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLIANCE FOR THE WILD ROCKIES, et al., Plaintiffs-Appellants,
v.
KEN SALAZAR, in his official capacity as United States Secretary of the Interior,
et al., Defendants - Appellees

CENTER FOR BIOLOGICAL DIVERSITY, et al., Plaintiffs-Appellants,
v.
KEN SALAZAR, in his official capacity as United States Secretary of the Interior,
et al., Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

PLAINTIFFS-APPELLANTS
ALLIANCE FOR THE WILD ROCKIES, ET AL.'S OPENING BRIEF

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I. CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Appellants Alliance for the Wild Rockies, Friends of the Clearwater, and Wildearth Guardians hereby state, by and through their attorneys, that they have no parent corporations and that there is no publicly held corporation that owns 10% or more of their stock.

Dated this 8th Day of September, 2011.

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IV. JURISDICTIONAL STATEMENT

A. Basis for jurisdiction in the District Court

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction).

B. Basis for jurisdiction in the Court of Appeals

This Court has jurisdiction over this appeal under 28 U.S.C. §1291 by virtue of the district court's entry of final judgment on all counts on August 3, 2011. ER

1.

C. Timeliness of appeal

The entry of final judgment on all counts was entered on August 3, 2011. ER 1. Plaintiffs-Appellants Alliance for the Wild Rockies, et al. filed a notice of appeal to this Court on August 8, 2011, ER 35, within the 60 day time period for appealing from a district court judgment. The appeal is therefore timely under 28 U.S.C. § 2107(b) and Fed. R. App. P. 4(a)(1)(B).

V. INTRODUCTION

Thinking Like A Mountain

by Aldo Leopold

In those days we had never heard of passing up a chance to kill a wolf. In a second we were pumping lead into the pack, but with more excitement than accuracy: how to aim a steep downhill shot is always confusing. When our rifles were empty, the old wolf was down, and a pup was dragging a leg into impassable slide-rocks.

We reached the old wolf in time to watch a fierce green fire dying in her eyes. I realized then, and have known ever since, that there was something new to me in those eyes—something known only to her and to the mountain. I was young then, and full of trigger-itch; I thought that because fewer wolves meant more deer, that no wolves would mean hunters' paradise. But after seeing the green fire die, I sensed that neither the wolf nor the mountain agreed with such a view.

Since then I have lived to see state after state extirpate its wolves. I have watched the face of many a newly wolfless mountain, and seen the south-facing slopes wrinkle with a maze of new deer trails. I have seen every edible bush and seedling browsed, first to anaemic desuetude, and then to death. I have seen every edible tree defoliated to the height of a saddlehorn. Such a mountain looks as if someone had given God a new pruning shears, and forbidden Him all other exercise. In the end the starved bones of the hoped for deer herd, dead of its own too-much, bleach with the bones of the dead sage, or molder under the high-lined junipers.

I now suspect that just as a deer herd lives in mortal fear of its wolves, so does a mountain live in mortal fear of its deer. And perhaps with better cause, for while a buck pulled down by wolves can be replaced in two or three years, a range pulled down by too many deer may fail of replacement in as many decades. So also with cows. The cowman who cleans his range of wolves does not realize that he is taking over the wolf's job of trimming the herd to fit the

range. He has not learned to think like a mountain. Hence we have dustbowls, and rivers washing the future into the sea.

We all strive for safety, prosperity, comfort, long life, and dullness. The deer strives with his supple legs, the cowman with trap and poison, the statesman with pen, the most of us with machines, votes, and dollars, but it all comes to the same thing: peace in our time. A measure of success in this is all well enough, and perhaps is a requisite to objective thinking, but too much safety seems to yield only danger in the long run. Perhaps this is behind Thoreau's dictum: In wildness is the salvation of the world. Perhaps this is the hidden meaning in the howl of the wolf, long known among mountains, but seldom perceived among men.

ALDO LEOPOLD, *A SAND COUNTY ALMANAC, AND SKETCHES HERE AND THERE*, Thinking Like a Mountain, at 129–133, Commemorative edition 1989, © 1949, Oxford University Press, Inc.

VI. STATEMENT OF THE ISSUE

The issue presented is whether the reissuance of the 2009 rule removing gray wolves in the northern Rockies outside Wyoming from the endangered species list violates the United States Constitution by violating the separation of powers between the judicial and legislative branches of the federal government. In 2010, the District Court vacated the 2009 rule because it violates the Endangered Species Act (ESA). Appeals of the District Court's decision are currently pending before this Court. In 2011, a Congressional budget rider ordered the reissuance of the same 2009 rule that was found to be illegal and vacated by the District Court. The

Congressional budget rider failed to include any detectable amendment of the ESA that would now render the 2009 rule in conformance with the ESA.

VII. PERTINENT STATUTORY PROVISION

Pursuant to Federal Rule of Appellate Procedure 28(f) and Ninth Circuit Rule 28-2.7, the pertinent statutory provision for this case is set forth below 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.

P.L. 112-10 § 1713, 125 Stat. 38.

VIII. STATEMENT OF THE CASE

A. Nature of the case

This case is a challenge to the U.S. Fish and Wildlife Service's (hereinafter "Wildlife Service" or "agency") reissuance of the 2009 rule removing gray wolves in all areas of the Northern Rocky Mountains Distinct Population Segment (DPS) outside of Wyoming from the list of species protected under the ESA (hereinafter referred to as "2009 rule"). 76 Fed. Reg. 25590 (May 5, 2011)(ER 108); 74 Fed. Reg. 15123 (April 2, 2009)(ER 182). The U.S. District Court for the District of

Montana (hereinafter “District Court”) previously vacated and set aside the 2009 rule because it violates the ESA. *Defenders of Wildlife, et al. v. Salazar, et al.*, 729 F.Supp.2d 1207 (D. Mont. 2010).

Subsequently, while the District Court’s decision vacating the 2009 rule remained pending on appeal, Congress passed, and the President signed, H.R. 1473, the Department of Defense and Full Year Continuing Appropriations Act of 2011. As set forth above, Section 1713 of this Act directed the agency to reissue the same 2009 rule that was vacated by the District Court in 2010. P.L. 112-10 § 1713, 125 Stat. 38 (April 15, 2011) (hereinafter “Congressional budget rider” or “budget rider”). The budget rider does not amend the ESA in any manner and is simply a legislative effort to circumvent the District Court’s holding in *Defenders of Wildlife*, 729 F.Supp.2d 1207.

As a legislative enactment designed to direct the outcome of a particular pending case – without amending the underlying statute involved – the budget rider violates the separation of powers doctrine enshrined in the U.S. Constitution and is therefore unconstitutional. *See U.S. v. Klein*, 80 U.S. 128 (1871). Accordingly, Appellants Alliance for the Wild Rockies, Friends of the Clearwater, and Wildearth Guardians (collectively “Alliance”) seek a declaratory judgment that the budget rider is unconstitutional and seek injunctive relief prohibiting its implementation.

B. Course of proceedings and disposition below

On May 5, 2011, the agency reissued the 2009 rule pursuant to the April 15, 2011 budget rider discussed above. 76 Fed. Reg. 25590 (May 5, 2011)(ER 108). On the same day, Alliance filed a lawsuit in the District Court challenging the budget rider and resultant reissuance of the 2009 rule as unconstitutional. ER 89. On August 3, 2011, the District Court filed an order and final judgment in the agency's favor. ER 1, 3. On August 8, 2011, Alliance appealed to this Court. ER 35. On August 13, 2011, Alliance filed an emergency motion for injunction pending appeal that requested a temporary injunction against the hunting and killing of hundreds of delisted gray wolves in Montana and Idaho, which was scheduled to commence on August 30, 2011. *See* ER 449 at Dkt 6. On August 25, 2011, the motions panel of this Court denied the motion without prejudice, subject to renewal in front of the panel assigned to hear the merits of this case. ER 31-34. At that time, the motions panel also expedited the briefing and oral argument for this case and consolidated this case with *Center for Biological Diversity, et al. v. Salazar*, No. 11-35670. ER 31-34. . The motions panel also allowed the State of Idaho and the State of Montana to file amicus briefs regarding the emergency motion, and referred several pending motions to intervene to the merits panel. ER 31-34.

IX. STATEMENT OF FACTS

A. Gray wolf biology

The gray wolf (*Canis lupus*) is the largest wild member of the dog family (*Canidae*). 74 Fed. Reg. 15123 (ER 182). Wolves range in color from white to shades of gray to coal black. *See id.* Wolves are social animals with strong familial bonds and normally live in packs of two to twelve animals. *Id.* Packs of wolves usually consist of a breeding pair (the alpha male and alpha female), their pups, their offspring from previous years, and an occasional unrelated wolf. 68 Fed. Reg. 15804, 15805 (Apr. 1, 2003) (ER 370). In general, only the alpha male and alpha female breed. Wolves also have territorial instincts that limit the number of packs in any given region. Together, these two characteristics serve to naturally limit wolf numbers. *See* 74 Fed. Reg. 15123, 15138 (ER 182, 197). Wolf litters are generally born in April and may have one to eleven pups. 74 Fed. Reg. 15123 (ER 182). All wolf pack members help feed, protect, and play with the pups as they grow. *See* 74 Fed. Reg 15123-15124 (ER 182-183).

Wolves primarily prey on medium and large mammals, including large ungulates such as elk. *See* 74 Fed. Reg. 15123 (ER 182). For this reason, they are considered a top predator and “keystone” species. Although wolves, by their very nature, exist to serve an ecological niche to regulate ungulate populations, more than a decade after the reintroduction of wolves to the northern Rockies, the agency

itself acknowledged that “many ungulate herds and populations in Idaho, Montana, and Wyoming are at or above State management objectives and most of those below management objectives are most affected by factors other than wolves.” 73 Fed. Reg. 4720, 4723 (Jan. 28, 2008)(ER 305, 308). In a more recent survey of studies, one researcher found that wolves have had mixed impacts on elk herds: some herds declined, some herds increased (such as in southwestern Montana), and some herds showed little or no effect from wolves. ER 23. Other recent studies have also found that gray wolves in Idaho account for only ten percent of elk mortality, which is less than elk mortality from hunters. ER 177. Additionally, a study on elk calf mortality in Yellowstone National Park, Wyoming found that only 14-17% of elk calf mortality was from wolves, with 58-60% mortality from bears. ER 177-178.

With regard to domestic livestock mortality from wolves, a recent study found that only 3% of livestock mortality was a result of native predators. ER 175. Moreover, the state agency in Montana that manages livestock documented that in 2002, Montana’s 108 wolves caused less than 0.000008 percent of total livestock losses in Montana. ER 175-176. Additionally, in Idaho in 2001, wolves killed less than 100 livestock animals, while over 14,000 livestock animals were killed by other predators, including nine percent killed by domestic dogs and 60% killed by coyotes, as compared to .005 percent killed by wolves. ER 176. A similar study

in 2009 demonstrated that in Montana, wolves were responsible for the deaths of less than one percent of Western Montana's cattle and sheep populations. ER 23.

B. Eradication and reintroduction of gray wolves in the northern Rockies

Genetic studies indicate that – prior to European settlement – approximately 380,000 gray wolves inhabited the American West in the contiguous United States and Mexico. ER 176. By the 1930s, humans had almost completely eradicated gray wolves from the region. *See* 74 Fed. Reg. 15123 (ER 182). Hunting, together with an active eradication program sponsored and carried out by the Wildlife Service and its predecessor agency, resulted in the extirpation of wolves from more than 95 percent of their range in the lower 48 states. *See* 68 Fed. Reg. 15805 (ER 367); 72 Fed. Reg. 6106, 6125 (Feb. 8, 2007)(ER 322, 341).

In light of this history, gray wolves were among the first species to be listed by the Secretary of Interior as endangered when, alarmed by the pace of many species' decline, Congress enacted the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 et seq., in 1973. 38 Fed. Reg. 14678 (June 4, 1973)(ER 446) . The listing under the ESA served to protect gray wolves from unregulated killing by humans. With this protection, gray wolves began to return to their native landscapes in northwestern Montana from Canada. *See* 74 Fed. Reg. 15136 (ER195). In addition to the natural repopulation of wolves in northwestern Montana, in 1995 and 1996,

the Wildlife Service reintroduced 66 gray wolves into Yellowstone National Park and central Idaho. *See* 74 Fed. Reg. 15137 (ER 196).

These efforts to reintroduce wolves and allow natural repopulation to occur have resulted in an increased wolf population in the northern Rockies. At this time, there is no certain population estimate for the northern Rockies wolf population because estimates are based on a significant amount of speculation. ER 21-28. However, the agency's best guess of population estimate is approximately 1,651 wolves in the northern Rockies as of the end of 2010—including an estimated 566 wolves in Montana, 705 in Idaho, and 343 in Wyoming. ER 162.

As a top predator and “keystone” species, the wolf's return has restored a more natural balance in northern Rockies ecosystems. Among other things, the reintroduction of wolves to the northern Rockies has led to healthier and more biologically diverse riparian ecosystems along streams because elk no longer linger in valley bottoms and overgraze the vegetation there. Studies in Yellowstone National Park document an increase in available vegetation near streams that has provided important riparian habitat, including conditions ripe for the creation of new beaver pond communities, increases in native songbirds, and increases in aspen forest habitat. *See* 74 Fed. Reg. 15129 (ER 188); ER 177; ER 356-366.

C. Gray wolf recovery in the northern Rockies

In 1987, prior to the wolf reintroduction program, the agency developed a wolf recovery plan that established a northern Rockies wolf recovery goal of 300 wolves and 30 breeding pairs (meaning 2 wolves of opposite sex and adequate age, capable of producing offspring) divided evenly among 3 core recovery areas: northwest Montana, central Idaho, and the Greater Yellowstone Area. *See* 74 Fed. Reg. 15130 (ER 189). In a subsequent environmental impact statement regarding the northern Rockies wolf reintroduction, the agency reiterated the same numeric recovery standard while adding a requirement of genetic connectivity, declaring that “[t]hirty or more breeding pairs comprising some 300+ wolves in a meta-population with genetic exchange between subpopulations should have a high probability of long-term persistence.” ER 445. At the same time, the agency “redefined a breeding pair as an adult male and an adult female wolf that have produced at least 2 pups that survived until December 31 of the year of their birth, during the previous breeding season.” 74 Fed. Reg. 15130 (ER 189).

As noted above, gray wolves originally numbered at around 380,000 in the American West in the contiguous United States and Mexico. ER 176. The agency’s assertion that gray wolves will be recovered in the northern Rockies so long as the population is 300 wolves and 30 breeding pairs is considered controversial among the scientific community. The agency has never provided a

scientific rationale for these numbers, such as a population viability analysis. ER 173-174. Articles in peer-reviewed scientific journals publicly question these numeric goals; one such article suggests that the agency recalculate the numeric population goals based on the number of wolves that are necessary to fill the wolf's ecological niche. ER 177. That article found that the population estimate for an “ecologically effective” northern Rockies gray wolf population is approximately 17,000 wolves, based upon a need for 16 to 18 wolves per 1,000 square kilometers. ER 177.

D. 2003 attempt to change ESA status of gray wolves

On April 1, 2003, the agency issued a Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States. 68 Fed. Reg. 15804 (ER 368). Essentially, the regulation created three gray wolf “distinct population segments” (DPSs) – Eastern, Western, and Southwestern—and reclassified, i.e. “downlisted,” the gray wolf from “endangered” to “threatened” in the Eastern and Western DPSs. *Id.* In 2005, two federal district courts struck down the 2003 downlisting rule as illegal. *Defenders of Wildlife v. Sec’y, U.S. Dep’t of Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005); *Nat’l Wildlife Fed. v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005). Following these rulings, the gray wolf retained its listing status as endangered throughout the

conterminous United States except Minnesota, where the gray wolf remained listed as threatened. 74 Fed. Reg. 15123-25 (ER182-184).

E. 2008 attempt to delist northern Rockies gray wolves

In February 2008, the agency published a rule eliminating ESA protections for the Northern Rocky Mountain DPS of gray wolves, which effectively turned over wolf management in that region to the states. 73 Fed. Reg. 10514, 10517, 10549 (Feb. 27, 2008)(ER 258, 293); *see also Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1172-75 (D. Mont. 2008). The DPS encompassed all of Montana, Idaho, and Wyoming, as well as eastern Washington, eastern Oregon, and northeastern Utah. 73 Fed. Reg. 10516 (ER 260). In preparation for the 2008 delisting rule, the agency had requested that the states of Montana, Idaho, and Wyoming prepare wolf management plans specifying how they would manage wolves once federal protections were removed. 74 Fed. Reg. 15166-67 (ER 225-226). The agency required that each of the states had to “commit[] to manage for at least 15 breeding pairs and at least 150 wolves in midwinter to ensure the[ir] population[s] never fall[] below 10 breeding pairs and 100 wolves[.]” 74 Fed. Reg. 15174 (ER 233); *see also* 73 Fed. Reg. 10546 (ER 290).

Numerous conservation groups challenged the agency’s 2008 delisting rule in the District of Montana. *Defenders of Wildlife*, 565 F. Supp. 2d at 1162-64. On July 18, 2008, the District Court granted their motion for a preliminary injunction

and, in so doing, reinstated ESA protections for the northern Rockies wolves. *Id.* at 1178. The District Court found that the groups were likely to succeed on the merits of their claim that the agency had arbitrarily departed from its own recovery standard requiring genetic exchange among the wolves in northwestern Montana, central Idaho, and the Greater Yellowstone Area. *Id.* at 1171-72. The District Court also ruled that the groups were likely to succeed on their claim that the agency had acted arbitrarily in declaring that Wyoming's regulatory mechanisms were adequate to maintain a recovered wolf population. *See id.* at 1175-76.

In response to the preliminary injunction ruling, the agency moved the District Court for a voluntary vacatur and remand. *See* ER 255-257. On October 14, 2008, the District Court granted the agency's motion, which vacated the delisting rule, remanded it to the agency, and returned the northern Rockies gray wolves to the ESA list of threatened and endangered species. *Id.*

F. 2009 attempt to delist the northern Rockies gray wolves

On October 28, 2008, two weeks after the agency's 2008 delisting rule was vacated and remanded to the agency, the agency announced the reopening of the comment period on its February 8, 2007 proposal to delist wolves in the northern Rockies—the same proposal that had resulted in agency's vacated February 2008 delisting rule. 73 Fed. Reg. 63926, 63928-29 (Oct. 28, 2008) (ER 248, 250-251); 72 Fed.Reg. 6106 (ER 322). In support of its action, the agency

offered a draft, unsigned memorandum of understanding that made vague representations about post-delisting state management to address the wolf population's need for genetic connectivity. *See* 73 Fed. Reg. 63930 (ER 252). In response to the District Court's determination that the agency had arbitrarily deemed Wyoming's management scheme adequate to maintain a recovered wolf population, the agency proposed to retain ESA protections for wolves in the northwest corner of Wyoming while delisting the remainder of the northern Rockies population. 73 Fed. Reg. 63926-29 (ER 248-251); 72 Fed. Reg. 6131 (ER 347). The agency finalized its second northern Rockies wolf delisting rule on April 2, 2009. 74 Fed. Reg. 15123 (ER 182). In the rule, the agency elected to "delist[] most of the[northern Rockies] DPS[,] "[leaving the ESA's protections in place only in Wyoming. 74 Fed. Reg. 15144 (ER 203).

Articles written by scientists in independent peer-reviewed journals criticized the 2009 rule for complying with political expediency instead of the best available science. One such article found that the 2009 rule was "not based on the best available science [and] is insufficient for maintaining a viable metapopulation" ER 173. The article notes that the population recovery goals have never been based on scientific data or a population viability analysis, and have never considered genetic diversity. ER 173-174. These issues are important because the gray wolf population has now been deemed recovered, based on these recovery

goals, even though the population numbers at less than one percent of its original population. ER 176. The article states that “both the initial recovery goals and the goals of the state management plans are unrealistically low for full recovery ER 176.

The article further finds that hunting and killing of wolves under state management plans will likely disrupt pack structure, cause inbreeding, and minimize dispersal, resulting in a loss of connectivity and gene flow: “These genetic and structural factors alone could eventually cause the decline of the NRM [Northern Rocky Mountain] population, but the wolf culling levels proposed by Idaho and Montana will directly cause an even more rapid, unsustainable decline.” ER 177. The article concludes that “[t]here is no biological basis for declaring the NRM wolf DPS recovered.” ER 177.

After gray wolves were delisted in the northern Rockies outside Wyoming by the 2009 rule, state officials once again had jurisdiction to implement wolf eradication programs in those states, so long as the minimum recovery targets of 150 wolves per state are maintained. *See* 74 Fed. Reg. 15142 (ER 201). Prior to the start of wolf eradication via a public hunting season on wolves, on June 2, 2009, conservation groups brought an action challenging the 2009 rule in the District Court. *See Defenders of Wildlife v. Salazar*, 729 F.Supp.2d 1207, 1213 (D.Mont. 2010). On August 20, 2009, the groups moved for a preliminary

injunction to prevent the killing of hundreds of wolves and the District Court denied the motion. *See id.* at 1214.

Without any preliminary injunction to prohibit the commencement of wolf eradication efforts, Idaho initiated a public hunting season and Idaho hunters killed approximately 188 wolves. ER 166. Montana also initiated a public hunting season, which was closed after only 23 days because 72 wolves had already been killed by hunters. ER 166. Additionally, 145 wolves were killed in Montana for “predator control” operations and 93 were killed in Idaho for “predator control” operations. ER 166. Thus in 2009, the first year of delisting, humans killed 37% of Idaho and Montana’s gray wolf population. ER 166.

This rapid shift from ESA protection to elimination of over one-third of the population is unprecedented. ER 166. Following the 2009 wolf exterminations, an article published in a peer-reviewed scientific journal found that the 2009 wolf mortality levels are not sustainable for the persistence of a healthy gray wolf population in the northern Rockies: sustainable wolf mortality is “lower than current Northern Rocky Mountain management plans suggest, and lower than the 2009 rate of offtake for the Northern Rockies.” ER 171.

Long after the end of the 2009 wolf extermination season, the District Court ruled in the conservation groups’ favor and found that the 2009 rule delisting

wolves in a category smaller than a DPS (i.e. delisting in Idaho and Montana, but not in Wyoming, though all are in the same DPS) violates the ESA. The District Court held that “the rule delisting the gray wolf must be set aside because, though it may be a pragmatic solution to a difficult biological issue, it is not a legal one.” *Defenders of Wildlife*, 729 F.Supp.2d at 1210 -1211. The District Court found that the agency had misconstrued the plain language of the ESA, disregarded the intent of Congress, and acted without authority by “add[ing] a new categorical taxonomy to the statute.” *Id.* at 1217.

The District Court admonished the agency that “[n]either the Court nor the agency is free to add or subtract words, phrases, or otherwise change what Congress has written, yet that is what the Service's reading of the term endangered species requires The northern Rocky Mountain DPS must be listed, or delisted, as a distinct population and protected accordingly.” *Defenders of Wildlife*, 729 F.Supp.2d at 1219, 1228. Accordingly, the District Court then vacated and set aside the 2009 rule. *Id.* at 1228 -1229.

G. 2011 legislative delisting of northern Rockies gray wolves

During the pendency of the appeals to this Court by the agency and numerous intervenors resulting from the District Court’s ruling in *Defenders of*

Wildlife, discussed above, 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. 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.

Section 1713 of the Act is the only section of the approximately 459 page budget bill that mentions the wolf delisting rule.

The legislative history for the budget rider is sparse. 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 (ER 138). 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.

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 (ER 136).

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 a reference to the February 27, 2008 delisting rule, 73 Fed. Reg. 10514 (ER 258), which had delisted wolves in Wyoming in addition to Montana and Idaho. Her amendment failed. Cong. Rec. Vol. 157, No. 25 (February 16, 2011), at H984 (ER 133).

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 (ER 131). H.R. 1 failed in the Senate on March 9, 2011. *Id.*

H.R. 1473 was introduced on April 11, 2011. Between April 11 and April 15, 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 (ER 119).

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 (ER 114).

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 (ER 115). 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 the District Court, to force without amending the governing statute.

The Solicitor of the U.S. Department of the Interior has considered the impact of Section 1713 of H.R. 1473 and concludes 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." ER 112. The District Court had previously concluded that the prior Solicitor's Opinion M-37013 was contrary to the plain language of the ESA. *Defenders of*

Wildlife, 729 F.Supp.2d at 1229. 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*.

ER 112 (emphasis added).

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 circumvent the District Court's decision in *Defenders of Wildlife*, 729 F.Supp.2d 1207, without amending the ESA. 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 of Montana, 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 [sic].” ER 139.

Likewise, 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.” ER 134.

On March 18, 2011, Simpson 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” ER 129. On April 12, 2011, Simpson 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” ER 128.

Also on April 12, 2011, the Associated Press published an article on the H.R. 1473, quoting Tester, and stating: “[I]awmakers said they inserted the rider to circumvent a federal judge who repeatedly blocked proposals to hunt [wolves].” ER 123. Additionally on April 12, 2011, 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.” ER 125. On April 13, 2011, the *New York Times* published an article on Section 1713 of H.R. 1473 describing it as a proposal from Tester and Simpson and quoting Tester as saying “[w]e didn’t amend the Endangered Species Act.” ER 120. The *New York Times* attributed Tester as having made this statement in an interview with *E&E Daily*. ER 120.

On April 14, 2011, 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 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." ER 116. On May 5, 2011, KPAX, a Missoula television station, quoted 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." ER 111. On May 6, 2011, the *Missoulian* published a story similarly quoting 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." ER 86. The *Missoulian* reported Mr. Murphy made this statement in a Thursday, May 5, 2011, email. ER 86.

Pursuant to the Congressional direction in Section 1713, on May 5, 2011, the agency reissued the same 2009 Rule that was vacated and set aside by the District Court in *Defenders of Wildlife*, in a new Federal Register publication. 76 Fed. Reg. 25590 (ER 108). This legislative delisting of an endangered species is unprecedented. ER 29. Because Section 1713 directs the agency to reissue the same 2009 rule that the District Court found to violate the ESA, without amending

the ESA in any detectable manner, Alliance filed suit on May 5, 2011 alleging Congress had acted in violation of the constitutional separation of powers doctrine by directing the outcome of the pending appeals in *Defenders of Wildlife* without amending the underlying substantive law. ER 89. Alliance bases its suit on *U.S. v. Klein*, 80 U.S. 128 (1871), in which the U.S. Supreme Court held that when Congress passes a law directing the judiciary to reach a particular outcome in a pending case under existing law and does not amend the existing law, Congress exceeds its constitutional authority and treads on the judiciary's authority to construe the law.

The District Court expedited summary judgment briefing and oral argument and issued its final order on August 3, 2011. *Alliance for the Wild Rockies v. Salazar*, --- F.Supp.2d ----, 2011 WL 3330821 (D. Mont. 2011)(also at ER 3). In the order, the District Court reiterated its former holding that the 2009 rule is “an illegal solution to a difficult biological issue.” 2011 WL 3330821 at *8. The District Court agreed with Alliance that the budget rider violates the separation of powers doctrine articulated by the U.S. Supreme Court in *Klein*, however, the District Court declined to rule in Alliance's favor because it believes that this Court's interpretation of *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), constrained its ability to rule for Alliance:

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). 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.

2011 WL 3330821 at * 3. Although the District Court ultimately ruled in the agency’s favor, it expressed extreme reluctance to do so: “In my view, the Ninth Circuit's deference to Congress threatens the Separation of Powers; nonspecific magic words should not sweep aside constitutional concerns.” 2011 WL 3330821 at * 7. The District Court stated further:

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 disrespect for the fundamental idea of the rule of law.

...

The [ESA] protects imperiled species, without regard to the popularity of the animal or plant. It does not just protect species when politically convenient. . . Section 1713 sacrifices the spirit of the ESA to appease a vocal political faction

2011 WL 3330821 at *1-2

On August 8, 2011, Alliance appealed to this Court. ER 35. On August 13, 2011, Alliance filed an emergency motion for injunction pending appeal that requested a temporary injunction against the hunting and killing of hundreds of delisted gray wolves in Montana and Idaho, which was scheduled to start on August 30, 2011. *See* ER 449 at Dkt 6. On August 25, 2011, the motions panel denied the motion without prejudice, subject to renewal in front of the panel assigned to hear the merits of this case. ER31.

Wolf extermination efforts in Montana and Idaho are now underway. . In Idaho, at the end of 2010, the agency estimated that there were approximately 705 wolves. ER 162. Idaho state officials have authorized a ten month long wolf hunting season, which runs from August 30, 2011 to June 30, 2012. ER 142-143. There is no limit on the number of wolves that can be killed in nine of the 13 wolf hunting districts in the state. ER 142-143. . Wolves may be drawn in with electronic calls to hunters, and wolves may be hunted if they are attracted to bear baiting areas. ER 142-143. Additionally, wolves may be trapped. ER 142-143. In addition to hunting and trapping, state agents in Idaho are coordinating aerial gunning of wolves on public lands. ER 54 -55. Some of the wolves killed via aerial gunning by state agents are being tracked by radio collars initially implemented for the purpose of scientific research. ER 83 -84. Idaho officials are

also granting “kill authorization” letters to local county sheriffs to kill any and all wolves in areas where wolves are allegedly “exhibiting aggressive behavior” towards elk (their natural prey) or livestock or pets. *See e.g.* ER 57. Idaho officials are also granting “kill authorization” letters to outfitters to kill wolves they encounter in the field, including wolves attracted to bear baiting sites. These “kill authorization” letters allow outfitters to use electronic wildlife calls to call in wolves for the purpose of killing them. ER 59 - 82.

In Montana, at the end of 2010, the agency estimated that there were approximately 566 wolves. ER 162. This number is impossible to verify, though, as it is based upon a calculation of immigration that is speculative. ER 21-26. Montana state officials have authorized a four month wolf hunting season from September 3, 2011 to December 31, 2011. ER 144-155. Montana has set a hunting quota of 220 wolves, ER 144-155, more than double the 2009 quota of 75, *see* ER 166. At least one peer-reviewed, published scientific study determined that the proposed Montana quota for the 2010 wolf hunt (which, at 186, was a lower quota) would likely cause a population decline of “a greater amount than management policy statements for Montana have stated.” ER 171.

X. SUMMARY OF ARGUMENT

The separation of powers doctrine is the foundation of our system of democratic governance. It ensures a system of checks and balances between the three separate branches of government so that one branch does not accumulate too much power and then abuse that power at the expense of the other two branches. It is the job of the legislative branch only to make laws, the job of the executive branch only to execute laws, and the job of the judicial branch only to construe the laws. As the final arbiter of the meaning of laws, including the meaning of the Constitution itself, it is the job of the judiciary to ensure that these separate powers actually remain separate. Thus, the duty falls upon the courts to draw a line between the legislative and judicial powers and rigorously enforce that delineation. The ESA is considered to be one of the nation's strongest and most important environmental laws, as it must be, because it carries a heavy burden – to prevent extinction. In over three decades of implementation, since the ESA was signed by President Richard Nixon in 1973, the legislative delisting of a select species listed under ESA has never before occurred.

The Supreme Court has held that Congress does have the constitutional authority to change a law that affects ongoing litigation. However, there is a limit to that authority: the Supreme Court has also held that Congress must actually amend

the existing law. Accordingly, the question of whether a law that influences the outcome of a pending case is unconstitutional in violation of the separation of powers doctrine depends on whether Congress amends existing law, and thus acts constitutionally, or whether Congress directs the judiciary as to a particular result without amending the law, and thus acts unconstitutionally.

In this case, Congress and the agency acted unconstitutionally. Here, Congress made no amendments to the underlying law – the ESA. In fact, the co-author of the Congressional budget rider at issue here explicitly stated that the rider did not amend the ESA. By failing to amend the ESA with new statutory provisions to apply (so that a reissued 2009 rule would now comply with the ESA), the budget rider simply compels results under existing statutory provisions by ordering the agency to reissue the 2009 rule despite the fact that the ESA case law that rendered the 2009 rule illegal is still good law. In other words, if a court of law did commence judicial review of the reissued 2009 rule again, the rider would not require any different result under the ESA than the result reached by the District Court in 2010 because the rider does not change the ESA provisions that the 2009 rule violates; the rider merely directs the agency to reissue a rule that violates the ESA and then prohibits judicial review of the rule under the ESA. If the ESA had actually been amended by the rider, there would be no need to prohibit judicial

review of the reissued 2009 rule. Accordingly, as argued below, the budget rider and reissuance of the 2009 rule removing ESA protections from gray wolves in the northern Rockies outside Wyoming must be vacated and set aside as unconstitutional.

XI. STANDARD OF REVIEW

This Court “review[s] the constitutionality of a statute *de novo*.” *Ecology Center v. Castaneda*, 426 F.3d 1144, 1148 (9th Cir. 2005). In addition, summary judgment “is a particularly appropriate tool for resolving claims challenging agency action.” *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985). Summary judgment is appropriate if “there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).

XII. ARGUMENT

A. Separation of powers doctrine

The separation of powers doctrine, setting apart the executive, legislative, and judicial functions of government is one of the basic “checks and balances” contained in the Constitution. As Chief Justice Marshall wrote nearly two hundred years ago, “[t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judicial construes the law.” *Wayman v. Southard*, 23 U.S. 1 (1825); *see also Marbury v. Madison*, 5 U.S. 137

(1803) (establishing authority of judicial branch, including authority to order executive to comply with law and to overrule acts of Congress). “Time and again” the Supreme Court has affirmed “the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches.” *Morrison v. Olson*, 487 U.S. 654, 693 (1988); *see also Mistretta v. U.S.*, 488 U.S. 361 (1989) (The Supreme Court “consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.”).

By incorporating the separation of powers doctrine into the basic checks and balances of the Constitution, the framers paid heed to the political philosopher Montesquieu’s warning that “[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. ...[T]here is no liberty, if the judiciary power is not separated from the legislative and executive.” Baron de Montesquieu, *The Spirit of the Laws*, bk. XI, ch. 6. Defending the Constitution in *The Federalist Papers*, James Madison agreed with Montesquieu describing the separation of powers doctrine as “essential to a free government.” *The Federalist No. 48* at 308, James Madison, *New American Library ed.*, 1861; *see also The Federalist No. 47* at 324 (J. Cooke ed. 1961) (J. Madison)

(“The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointive, or elective, may justly be pronounced the very definition of tyranny”).

In particular, the framers were concerned with the expansion of legislative power at the expense of the other branches. This fear arose from direct experience with the Confederation of States that preceded the Constitutional Convention: “The supremacy of the legislatures came to be recognized as the supremacy of factions and the tyranny of shifting majorities. The legislatures confiscated property, erected paper money schemes, [and] suspended the ordinary means of collecting debts.” Levi, *Some Aspects of Separation of Powers*, 76 *Colum. L. Rev.* 369, 374-75 (1976). “One abuse that was prevalent during the Confederation was the exercise of judicial power by the state legislatures.” *INS v. Chadha*, 462 U.S. 919, 961-63 (1983) (Powell, J., concurring) (noting contemporaneous records of legislatures exercising the judicial power). Accordingly, in light of this experience, the Supreme Court views the “system of separated powers and checks and balances [adopted by the Framers as] ‘a self executing safeguard against the encroachment or aggrandizement of one branch at the expense of another.’” *Morrison*, 487 U.S. at 693, quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

The Supreme Court has stated:

The doctrine of separation of powers is fundamental in our system. It arises, however, not from Art. III nor any other single provision of the Constitution, but because “[b]ehind the words of the constitutional provisions are postulates which limit and control.”

National Mut. Ins. Co. of the Dist. of Col. v. Tidewater Transfer Co., 337

U.S. 582, 590-91 (1949) (quoting *Principality of Monaco v. Mississippi*, 292

U.S. 313, 322 (1934)). However, where, as in the present case, the separation

of powers between the judicial and legislative branches of the government is

at issue, the starting point for analysis in the explicit allocation of governmental

powers is the Constitution. Article III, §§ 1 and 2 vest the judicial power in the

Supreme Court and the lower federal courts and provide that this power shall extend

“to all Cases, in Law and Equity, arising under this Constitution, the Laws of the

United States, and Treaties” Article I of the Constitution vests “[a]ll legislative

powers herein granted ... in the Congress of the United States”

Two early decisions of the Supreme Court, *State of Pennsylvania v. The Wheeling and Belmont Bridge Company*, 59 U.S. 421 (1855) and *United States v. Klein*, 80 U.S. 128 (1871) establish the limits Article III imposes on Congress’ ability to direct a court’s interpretation and application of the law to the facts in particular pending cases. In *Wheeling Bridge*, the Supreme Court had previously ruled two bridges over the Ohio River were an obstruction to navigation under the

existing laws that regulated navigation. 59 U.S. at 429. Subsequently, Congress enacted a new law designating the bridges “post-roads for the passage of the mails of the United States” and authorized the Wheeling and Belmont Bridge Company “to have and maintain their said bridges at their present site and elevation.” *Id.* Congress also declared that the bridges were “lawful structures, in their present positions and elevations, and shall be so held and taken to be, any thing in any law or laws of the United States to the contrary notwithstanding.” *Id.*

The Supreme Court held that the new law making the bridges post roads changed the substantive law governing interstate commerce and the bridges. *Id.* at 30. Under the new law, the Court’s prior ruling regarding the bridges no longer applied:

So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of congress, they are to be regarded as modified by this subsequent legislation; and although [the bridge] still may be an obstruction in fact, [it] is not so in the contemplation of the law.

Id. Justice McLean, in dissent, urged that the new law could not be given effect because in it Congress had exercised the judicial power of deciding a particular case in violation of the separation of powers:

The judicial power is exercised in the decision of cases; the legislative, in making general regulations by the enactment of laws. The latter acts from considerations of public policy; the former by the

pleadings and evidence in a case The act declared the bridge to be a legal structure, and, consequently, that it was not a nuisance. Now, is this a legislative or a judicial act?

Id. at 440 (McLean, J., dissenting). The majority rejected this view, not because it found Congress had permissibly exercised an adjudicative function in the case, but because Congress had legislated to change the governing substantive law: “[S]ince the decree [of the Court], this right [of navigation] has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction.” *Id.* at 432.

The Supreme Court’s subsequent decision in *Klein* added explication to this separation of powers analysis. In *Klein*, the plaintiff made a claim for money due from the government based on receipt of a pardon (which included the restoration of all property seized during the Civil War). See *United States v. Padelford*, 76 U.S. 531, 542-43 (1869) (holding that receipt of a Presidential pardon established conclusive proof of loyalty and entitled the recipient to return of his property). Congress, however, then added an amendment to an appropriations act, “with perhaps little consideration in either House of Congress,” *Klein*, 80 U.S. at 143, to address the result in *Padelford* and the pending *Klein* case:

The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it,

both in the Court of Claims and in this court on appeal.

Id. at 144.

The Supreme Court found this new law unconstitutional because in it “Congress ... inadvertently passed the limit which separates the legislative from the judicial power.” *Id.* at 147. In reaching this conclusion, the Supreme Court carefully distinguished *Wheeling Bridge*:

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. 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.

Klein and *Wheeling Bridge* thus stand for the straightforward proposition that Congress cannot direct the outcome of a particular pending case by instructing the courts how to interpret and apply the existing law to the specific pending claims. Such an effort involves Congress in the adjudication of cases under Article III, a role forbidden to it by the separation of powers doctrine.

More than a century later, the Supreme Court returned to its analysis of the relevant aspects of the separation of powers doctrine in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). *Robertson* arose, when in response to

successful litigation brought by conservation groups halting proposed logging in certain National Forests, Congress enacted the “Northwest Timber Compromise” as § 318 of the Department of the Interior and Related Agencies appropriations Act of 1990, 103 Stat. 745. 503 U.S. at 433. Subsection 318(b)(6)(A) of this Act provided:

[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.

In response to motions to dismiss based on this new statute, the conservation group plaintiffs argued that the above-quoted provision violated Article III of the Constitution. *Robertson*, 503 U.S. at 436. The district courts upheld the statute and dismissed the respective lawsuits, but this Court (on consolidated appeals) reversed, holding the Appropriations Act violated the separation of powers doctrine under *Klein* because “the first sentence of § 318(b)(6)(A) ‘does not, by its plain language, repeal or amend the environmental laws underlying this litigation,’ but rather ‘directs the court to reach a specific result and make certain factual findings under existing law in connection with the two [pending] cases.’” *Id.*

The Supreme Court reversed, holding that “subsection (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. The Supreme Court thus reversed this Court, not based on any contrary interpretation of *Klein*, but on the ground that the challenged Appropriations Act had actually amended the applicable underlying statute and thus passed constitutional scrutiny.

The Supreme Court further illuminated the space between *Klein* and *Robertson* in *Plaut v. Spendthrift Farms, Inc.*: “Whatever the precise scope of *Klein* ... later decisions have made clear that its prohibition does not take hold when Congress ‘amend[s] applicable law.’” 514 U.S. 211, 218 (*citing Robertson*, 503 U.S. at 441). *Plaut* thus set forth the principle that if a statute actually amends applicable law, even if it is meant to determine the outcome of pending litigation, it does not violate the separation of powers doctrine. However, as *Plaut* recognizes, *Robertson* does not moot *Klein*’s holding, but rather provides that Congress may amend applicable law by creating a new method to satisfy statutory requirements, i.e. when

“compliance with certain new law constituted compliance with certain old law.”

Robertson, 503 U.S. at 440. Accordingly, *Robertson* does nothing more than restate and reaffirm the holding of *Wheeling Bridge*, a case decided a decade and a half before *Klein*. *Klein* remains good law.

This Court has itself previously examined the space between *Robertson* and *Klein* on facts similar to those at issue in *Robertson*. See *Ecology Center*, 426 F.3d at 1147-48. In *Ecology Center*, the district court originally enjoined certain timber sales because the U.S. Forest Service had failed to document the existence of a minimum of 10% old growth habitat at elevations below 5,500 feet on a forest-wide basis on the Kootenai National Forest as required by the Kootenai National Forest Plan. *Id.* at 1146. During the pendency of the case, Congress enacted the Flathead and Kootenai National Forest Rehabilitation Act, Department of Interior and Related Agencies Appropriations Act of 2004, Pub.L. No. 108-108, 117 Stat. 1241. *Id.* at 1147. This Act changed the applicable old growth retention standard from one requiring the retention of 10% old growth on a National Forest-wide basis to one requiring the retention of 10% old growth in specific (smaller) project areas. *Id.* at 1147.

The district court had previously found that although the Forest Service was out of compliance with the Kootenai Forest Plan because it had failed to show that

10% old growth habitat existed on a forest-wide basis, the specific project areas in which the logging was to occur did have 10% old growth habitat. *Id.* at 1146.

Accordingly, the district court, relying on *Robertson*, rejected Ecology Center's argument that the Appropriations Act violated the separation of powers doctrine and held that "Congress has not impermissibly directed findings ... by the terms of [the Appropriations Act], 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. This Court agreed, holding that the 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.

This Court has recently summarized the current state of the separation of powers doctrine in a manner entirely consistent with the above analysis of the Doctrine's recent development:

It has long been recognized that Congress may not prescribe rules of decision to the Judicial Department of the government in cases pending before it. [...] Whatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress amends applicable law. [...] Thus, if a statute compels changes in the law, not findings or results under old law, it merely amends the underlying law, and is therefore not subject to a *Klein* challenge. [...]

Ileto v. Glock, Inc., 565 F.3d 1126, 1139 (9th Cir. 2009) (internal citation and quotation omitted). As this Court candidly acknowledged after its reversal by the Supreme Court in *Robertson*, “*Robertson* indicates 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). In the present case, as argued below, it is the absence of any such “detectable” change in the “underlying substantive law” that renders the legislative enactment challenged here constitutionally invalid.

B. Endangered Species Act

The Endangered Species Act has been analyzed and interpreted by the judicial branch of government for over 35 years. The long-standing federal court interpretation of the ESA, as established by our highest court, holds that the ESA is the “most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). The Supreme Court holds that Congress “clearly [] viewed the value of endangered species as ‘incalculable.’” *Hill*, 437 U.S. at 187. The “plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, *whatever the cost.*” *Hill*, 437 U.S. at 187 (emphasis added). Thus, the

statute reflects “a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.” *Id.* at 185. Accordingly, this Court requires that reviewing courts must “afford[] endangered species the highest of priorities,” and act with “institutionalized caution” when reviewing ESA cases. *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987). In other words, courts must “give the benefit of the doubt to the species.” *Connor v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988). As noted by the District Court in this case:

The purpose of the Act is to conserve at-risk species and the ecosystems upon which they depend. The law protects imperiled species, without regard to the popularity of the animal or plant. It does not just protect species when politically convenient. In acknowledging the political justification of the ESA President Richard Nixon said when signing the Act into law: “Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed. It is a many-faceted treasure, of value to scholars, scientists, and nature lovers alike, and it forms a vital part of the heritage we all share as Americans.”

2011 WL 3330821 at *2 (quoting President Nixon's Statement on Signing the Endangered Species Act of 1973, 374 Pub. Papers 1027, 1027–1028 (Dec. 28, 1973)).

In order to carry its heavy burden of preventing extinction, the ESA sets out a specific scientific test that must be satisfied before an endangered species will be delisted and lose its federal protections. The ESA requires the agency to examine

five factors, any one of which will justify keeping a species listed: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a)(1); 50 C.F.R. § 424.11(c,d). Delisting decisions must be made “solely on the basis of the best scientific and commercial data available,” and without reference to possible economic or other impacts of such a determination. 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b); 50 C.F.R. § 424.13. As the District Court has stated: “Delisting cannot be based on the constituent interests of economic, recreational or other purposes. The decision must be based on the best available science. It cannot be based on emotion or sentiment.” *Defenders of Wildlife*, 729 F.Supp.2d at 1214. Nor, as the District Court has implied, can the decision to delist be motivated by “stentorian agitprop.” *Id.* at 1210.

Prior to the implementation of the challenged Congressional budget rider, no endangered species had ever been delisted by Congress. Thus, the delisting of endangered northern Rockies gray wolves by a Congressional budget rider on April 15, 2011 was an unprecedented event in the history of the ESA. ER 29. Every other species delisting has followed the ESA-established legal process discussed above,

whereby the relevant federal agencies address the five delisting factors, apply the best available science, submit their rule to public notice and comment, and defend those final rules in the citizen-initiated lawsuits expressly permitted by the terms of the ESA itself. *See* 16 U.S.C. §§ 1533, 1540; 50 C.F.R. § 424.11; 50 C.F.R. § 424.13. The delisting of endangered gray wolves in the northern Rockies outside Wyoming via a one paragraph rider that was buried in a 459 page Congressional budget bill – which did not even mention the words “gray wolves” or “Endangered Species Act” and attempts to prohibit all judicial review – represents a “a tearing away, an undermining, and a disrespect for the fundamental idea of the rule of law.” *Defenders of Wildlife*, 2011 WL 3330821 at *1.

C. Application

In *Ecology Center*, this Court stated: “When a party claims that legislation ‘impermissibly interferes with the adjudicatory process’ in violation of the separation of powers doctrine, we have recognized a two part disjunctive test.” 426 F.3d at 1148 (*citing Gray*, 989 F.2d at 1568, which discusses *Klein* and related Supreme Court authority). Under the two-part test, 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.” *Ecology*

Center, 426 F.3d at 1148 (quoting Gray, 989 F.2d at 1568, quoting Robertson). In light of this disjunctive test, the bulk of Alliance’s arguments relate to the first prong: “Congress has impermissibly directed certain findings in pending litigation, without changing any underlying law.” *Id.* However, before proceeding to that analysis, Alliance argues under the second prong as well that the “challenged statute is independently unconstitutional on other grounds.” *Id.*

1. The rider is independently unconstitutional on other grounds.

The challenged budget rider contains a “double” prohibition of judicial review. After directing the Secretary of Interior to reissue the 2009 rule previously struck down by the District Court, the rider states: “[s]uch reissuance (including this section) shall not be subject to judicial review” P.L. 112-10 § 1713. Thus the budget rider attempts to preclude judicial review of both the reissued 2009 rule and the rider itself. To the extent these prohibitions of judicial review are interpreted to include prohibitions on constitutional challenges both are independently unconstitutional.

First, by attempting to prohibit judicial review of the rider itself, Congress violates the fundamental principle of judicial review on constitutional grounds first established in *Marbury v. Madison*, 5 U.S. 137 (1803) (establishing authority of judicial branch, including authority to overrule acts of Congress for violations of the

Constitution). *See also* U.S. Constitution, Article III (vesting the judicial power in the courts and providing that this power shall extend “to all Cases, in Law and Equity, arising under this Constitution”); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (serious constitutional questions arise if a federal statute is construed to deny any judicial forum for a colorable constitutional claim); *Biodiversity Associates v. Cables*, 357 F.3d 1152, 1160 (10th Cir. 2004) (challenged legislation’s jurisdictional bar did not apply to preclude Court of Appeal’s review as to legislation’s constitutional validity.).

Second, to the extent that the budget rider attempts to preclude judicial review of the reissued 2009 rule on constitutional grounds, it again treads in unconstitutional territory. *See Johnson v. Robison*, 415 U.S. 361, 367 (1974); *Paluca v. Secretary of Labor*, 813 F.2d 524, 526 (1st Cir. 1987) (statute that precluded judicial review of statutory claims cannot apply to district court’s jurisdiction over constitutional challenges). Accordingly, in light of these precedents, and heeding the Supreme Court’s guidance in *Johnson*, 415 U.S. at 366-67, that limitations of jurisdiction are to be construed narrowly to avoid constitutional problems, this Court should find the double attempt to preclude judicial review in the rider does not apply to constitutional challenges.

To construe the rider as precluding judicial review on constitutional grounds would render the rider itself unconstitutional because it would violate the second prong of this Court's disjunctive separation of powers test – i.e. the “challenged statute is independently unconstitutional on other grounds.” *Ecology Center*, 426 F.3d at 1148 (*quoting* Gray, 989 F.2d at 1568). To avoid this immediate constitutional violation, this Court should find that despite Congress' express preclusion of judicial review, this Court does have jurisdiction to review constitutional challenges to the legislation.

2. Congress has impermissibly directed findings in pending litigation, without changing any underlying law.

Alliance turns now to the heart of its argument under the first prong of this Court's separation of powers test. Here the argument is straightforward: the budget rider did not amend the ESA in any “detectable way.” *Gray*, 989 F.2d at 1569-70. Instead, Congress simply directed the Secretary of Interior to reissue the same 2009 rule previously vacated by the District Court without providing any new ESA law for a reviewing court to apply to the 2009 rule.

“In determining whether Congress intended the appropriations rider to repeal or modify the listing provisions of the Endangered Species act, we focus on the language of the rider.” *Environmental Defense Center v. Babbitt*, 73 F.3d 867, 871

(9th Cir. 1995). “To the extent the language is ambiguous, we look to the legislative history.” *Id.* “Repeal of legislation by implication is disfavored.” *Id.* (citing *Hill*, 437 U.S. at 190). “This rule ‘applies with even *greater* force when the claimed repeal rests solely in an Appropriations Act.’” *Environmental Defense Center*, 73 F.3d at 871 (quoting *TVA v. Hill*, 437 U.S. at 190)(emphasis in original). “Only a ‘clear repugnance’ between the previous legislation and the appropriations bill warrants a finding that Congress intended to repeal the previous legislation.” *Environmental Defense Center*, 73 F.3d at 871 (citing *In re Glacier Bay*, 944 F.2d 577, 581 (9th Cir. 1991)).

Accordingly, turning first to the plain language of the budget rider, it is apparent that Congress made no detectable amendments to the ESA. The rider mentions neither the gray wolf, nor the ESA, nor the provisions of the ESA that the District Court previously found were violated by the 2009 rule. The agency’s own attorney, the Solicitor of the U.S. Department of the Interior, has considered the challenged budget rider and concluded it does not amend the ESA. ER 112. Instead of amending the ESA, the budget rider contains only a general statement that the 2009 rule is to be reissued “without regard to any other provision of statute or regulation that applies to issuance of such rule.” P.L. 112-10 § 1713, 125 Stat. 38.

The budget rider does not even “deem” that reissuance of the 2009 rule is in

compliance with the ESA, which is language that this Court found sufficient to change underlying law in *Mount Graham Coalition v. Thomas*, 89 F.3d 554, 557 (9th Cir. 1996) (rejecting a separation of powers challenge because legislation stated that a particular location for a telescope “shall be deemed” to be authorized by the underlying statute). More importantly, the present case is unlike either *Robertson* or *Ecology Center*, in which Congress created alternative methods for complying with existing law or made substantive changes to existing law. 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 Appropriations Act].” 503 U.S. at 438.

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. Accordingly, the challenged budget rider fails to satisfy this Court's separation of powers test based on the rider's plain language. The challenged budget rider does not compel changes in law. Instead it attempts to compel results under old law – i.e. that the 2009 rule previously stuck down by the District Court as contrary to the ESA should be returned to force. This is a direct violation of the separation of powers doctrine.

Moreover, even if the language of the challenged budget rider somehow was ambiguous, which it is not, resorting to the sparse legislative history concerning its passage does not alter, but rather, supports the conclusion the rider did not change the underlying law in any detectable way. Alliance is “mindful of the limited persuasive value of the remarks of an individual legislator.” *Ileto*, 565 F.3d at 1137 (citation omitted). However, in the present case, where there is almost zero legislative history, other than “contemporaneous remarks” of the legislators sponsoring the bill, ER 86, 111, 116, 120, 123, 125, 128, 129, 134, 139, and the formal remarks of a legislator opposed to the legislation, ER131, 119, 114, the Court and the parties must make do with the legislative history such as it is, and analyze what legislative history does exist, despite its “limited persuasive value.” *Ileto*, 565 F.3d at 1137 (citation omitted).

Here the legislative history establishes only two things. First, the primary drafters and supporters of the budget rider explicitly stated that their legislation *did not* amend the ESA. ER 125, 120, 111, 86. Second, the formal remarks of a legislator opposed to the legislation indicated a preference for using the existing procedures found in the ESA to deal with the wolf controversy as opposed to attempting an end run of the ESA through the budget rider. ER 131, 119, 114. At no time during the legislative debate, either on the formal record, or outside of it, did any Representative or Senator describe the rider as an attempt to amend the ESA. Accordingly, analysis of the legislative history results in the same conclusion as analysis of the plain language of the budget rider itself: the rider does not amend the ESA. Instead, the rider attempts to compel a result – re-institution of the 2009 rule struck down by the District Court under existing law – without changing the existing law. This is precisely what is prohibited by the separation of powers doctrine.

XIII. CONCLUSION

Here, as it did approximately one hundred and forty years ago, Congress has acted from political expediency “with perhaps little consideration in either House of Congress.” *Klein*, 80 U.S. at 143. Congress has attempted to direct this Court to find that the reissuance of the 2009 rule is legal, despite Congress’ failure to change the ESA in any “detectable way.” *See Gray*, 989 F.2d at 1569-70. This is a clear

example of compelling findings under existing statutory provisions instead of amending the law and allowing the court to apply new standards. The present situation is not analogous to the situation previously faced by this Court in *Ecology Center*, where Congress did change the governing law and did not “impermissibly direct[] findings” because it left the Court with the task of applying the new legal standard. *Ecology Center*, 426 F.3d at 1147. In contrast, here, Congress has left the Court with no new legal standard to apply. Congress is treating this Court as a mere functionary instituting Congress’ will as to who should prevail before it in pending litigation. Congress’ action impermissibly directs the rulings of this Court and robs this Court of its constitutional function, in violation of the separation of powers doctrine. Accordingly, Alliance respectfully requests this Court to zealously guard and enforce the separation of powers between the legislative and judicial branches and reverse the District Court, set aside the rider, vacate the reissuance of the 2009 rule, and enjoin implementation of the 2009 rule.

Respectfully submitted this 8th Day of September, 2011.

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XIV. STATEMENT OF RELATED CASES

This case is related to pending appeals of the District Court's denial of motions to intervene filed in the proceedings below, which are docketed as Ninth Circuit Nos. 11-35552, 11-35568, and 11-35636. Additionally, this case is related to pending appeals challenging the District Court's decision in *Defenders of Wildlife* that the 2009 rule violates the Endangered Species Act. Those appeals are docketed as Ninth Circuit Nos. 10-35885, 10-35886, 10-35894, 10-35897, 10-35898, and 10-35926, and are currently stayed. Additionally, the lead case in this appeal challenging the constitutionality of the rider, *Alliance for the Wild Rockies, et al. v. Salazar, et al.*, No. 11-35661, has already been consolidated with a related appeal challenging the same decision: *Center for Biological Diversity, et al. v. Salazar, et al.*, No. 11-35670.

XV. 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 12,942 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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XVI. CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2011, I electronically filed the foregoing brief 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 who are registered CM/ECF users will be served by the appellate CM/ECF system.

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