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Alliance for the Wild Rockies v. Salazar

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Alliance for the Wild Rockies v. Salazar, ___F. Supp. 2d ___, 2011 WL 3330821
(D. Mont. Aug. 3, 2011).

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I. INTRODUCTION

In *Alliance for the Wild Rockies v. Salazar*,¹ the plaintiffs, non-profit environmental associations, challenged the constitutionality of a rider attached to the Defense Appropriations bill that required the U.S. Fish and Wildlife Service (FWS) to reissue a rule the United States District Court for the District of Montana had previously found invalid.² The 2009 FWS rule removed Endangered Species Act (ESA) protections from the Northern Rocky Mountain gray wolf (gray wolf) in all northern rocky states except Wyoming.³ The court held that the re-issuance of the 2009 rule pursuant to congressional direction amended the ESA, viewed through the lens of Ninth Circuit precedent. Therefore, it did not raise Separation of Powers concerns.⁴

II. FACTUAL AND PROCEDURAL BACKGROUND

The court overturned the FWS’s “2009 rule,” which removed ESA protections from population segments of gray wolves outside of Wyoming, in *Defenders of Wildlife v. Salazar*⁵ (*Defenders*).⁶ In *Defenders*, the court found the 2009 rule violated the ESA because the ESA does not permit treating part of the protected wolf population differently for the purposes of “recovery.”⁷ In response, Congress attached a rider to the Department of Defense and Full Year Continuing Appropriations Act of 2011, which directed the FWS to reissue the 2009 rule.⁸ The

¹ *Alliance for the Wild Rockies v. Salazar*, ___F. Supp. 2d ___, 2011 WL 3330821 (D. Mont. Aug. 3, 2011).

² *Id.* at *1.

³ *Id.*

⁴ *Id.* at **7–8.

⁵ *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010).

⁶ *Alliance for the Wild Rockies*, 2011 WL 3330821 at *1. *See Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010) (providing further information about the nature of the rider and the history of the wolf delisting issue).

⁷ *Defenders*, 729 F. Supp. 2d at 1228.

⁸ *Alliance for the Wild Rockies*, 2011 WL 3330821 at *1.

FWS reissued the rule on May 5, 2011.⁹ Two groups of plaintiffs sued and the actions were consolidated.¹⁰ The plaintiffs argued the appropriations rider violated the Separation of Powers doctrine because it would moot pending litigation without amending the ESA.¹¹ The FWS relied on Ninth Circuit precedent that suggested Congress could involve itself in pending litigation and exempt a project from environmental laws impliedly by including the language “notwithstanding any other provision of law.”¹²

III. ANALYSIS

The court’s decision hinged on whether the rider changed the law or directed a particular application of existing law in violation of the Separation of Powers doctrine.¹³ If the rider changed the law and directed courts to apply the new law, it was acceptable. However, if the rider directed application of existing law, it unconstitutionally infringed on the power of the judiciary.¹⁴ The court began by reviewing the tripartite structure of government proscribed by the Constitution as a means for administering the rule of law and emphasized the role of courts and precedent.¹⁵

Next, the court discussed *U.S. v. Klein*¹⁶ and *Robertson v. Seattle Audubon Society*,¹⁷ two cases in which the Supreme Court has laid out a framework to assess whether the legislative branch has stepped into the judiciary’s domain.¹⁸ In *Klein*, the Court held that the legislature could not direct the courts to make a particular finding as to the probative weight of a fact central

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at *3.

¹² *Id.* at *7.

¹³ *Id.* at *4.

¹⁴ *Alliance for the Wild Rockies*, 2011 WL 3330821 at *4.

¹⁵ *Id.*

¹⁶ *U.S. v. Klein*, 80 U.S. 128, 146 (1871).

¹⁷ *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429 (1992).

¹⁸ *Alliance for the Wild Rockies*, 2011 WL 3330821 at *4.

to a proceeding.¹⁹ The *Klein* Court distinguished its holding from its decision in *Pennsylvania v. Wheeling & Belmont Bridge Co.*,²⁰ in which it upheld a statute that characterized two bridges as lawful, when a court had previously found otherwise.²¹ The key fact, the Court explained, was that in *Wheeling Bridge*, the court could simply apply its normal rules to new circumstances created by the legislation.²² Conversely, in *Klein*, the legislation directed a particular result to the Court’s application of existing law.²³ The court in *Klein* found this a violation of the Separation of Powers doctrine.²⁴ In a more recent, decision, *Robertson v. Seattle Audubon Society*,²⁵ the Court held that legislation affecting the outcome of a case was lawful as long as it “compelled changes in law, not findings or results under old law.”²⁶

In the case at bar, the court would have found that the 2009 rule violated the *Klein* standard, but other binding Ninth Circuit precedent required a different outcome.²⁷ The Ninth Circuit previously held that a project may be exempted from environmental requirements regardless of whether such exemption is consistent with the policy purpose of the applicable legislation.²⁸ By inserting limiting language, such as “notwithstanding any other provision of law,”²⁹ the legislature may imply a narrow change to a legislative mandate.³⁰ Thus, the legislature may amend legislation by implication and avoid unlawfully directing application of existing law.

¹⁹ *Id.*

²⁰ *Pennsylvania v. Wheeling Bridge Co.*, 59 U.S. 421 (1855).

²¹ *Alliance for the Wild Rockies*, 2011 WL 3330821 at *5.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Robertson v. Seattle Audubon Society*, [503 U.S. 429 \(1992\)](#).

²⁶ *Alliance for the Wild Rockies*, 2011 WL 3330821 at *5.

²⁷ *Id.* at *3.

²⁸ *Id.* at **6–7 (discussing *Consejo de Desarrollo Economico de Mexicali v. U.S.*, 482 F.3d 1157 (9th Cir. 2007)).

²⁹ *Id.* at *7.

³⁰ *Id.*

While repeals based on implied changes are disfavored, they are not prohibited.³¹ According to *Robertson* and the doctrine of constitutional avoidance, when a statute can be interpreted as either constitutional or unconstitutional, the court should apply the interpretation that renders the statute constitutional.³² Since a view that the statute requiring reissuing the 2009 rule as constitutional was “possible,” the court granted the federal defendants’ motion for summary judgment and upheld the statute.³³

IV. CONCLUSION

In *Alliance for the Wild Rockies v. Salazar*, the court upheld what it believed was an erroneous precedent in the interest of preserving the rule of law. The opinion stated: “[I]n my view [the doctrine of Separation of Powers] is violated when there is an effort to change a political policy by resolution that is not clear, does not identify what law is specifically being changed, does not state what rules apply in the future, and is inconsistent with the underlying political purposes of the law that is being changed.”³⁴ The court advances a compelling critique of the Ninth Circuit’s interpretation of Supreme Court precedent around the Separation of Powers doctrine.

³¹ *Id.*

³² *Id.*

³³ *Id.* at *8.

³⁴ *Id.* at *6.