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## Alliance for the Wild Rockies v. Salazar

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*Alliance for the Wild Rockies v. Salazar*, 672 F.3d 1170 (9th Cir. 2012).

Jack G. Connors

**I. ABSTRACT**

In *Alliance for the Wild Rockies v. Salazar*,<sup>1</sup> the Ninth Circuit affirmed that Congress could remove a portion of the gray wolf population from the protections of the Endangered Species Act (ESA) even though litigation was pending on the issue.<sup>2</sup> The Ninth Circuit held Congress had not directed the judiciary on how to decide the pending litigation, which would violate the separation of powers doctrine, but instead, amended the ESA to delist gray wolves in an acceptable manner.<sup>3</sup> However, wolf protection advocates are free to challenge future rules they believe would negatively affect the recovery of the gray wolf.<sup>4</sup>

**II. FACTUAL AND PROCEDURAL BACKGROUND**

In 1995, the U.S. Fish and Wildlife Service (FWS) reintroduced gray wolves into Yellowstone National Park. After a limited recovery, the FWS decided to delist the gray wolf to remove them from the protections of the ESA.<sup>5</sup> In April 2009, the FWS issued a rule known as the “2009 Rule,” which delisted the gray wolves in Montana and Idaho, placing them under state control; however, the FWS did not delist the gray wolves in Wyoming, which remained under the protections of the ESA.<sup>6</sup> Wolf protection advocates asserted the ESA does not permit the FWS to delist only a portion of a species and challenged the rule.<sup>7</sup> The trial court agreed and struck down the 2009 Rule.<sup>8</sup> The federal government, the States of Idaho and Montana, and

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<sup>1</sup> *Alliance for the Wild Rockies v. Salazar*, 672 F.3d 1170 (9th Cir. 2012).

<sup>2</sup> *Id.* at 1171 (citing *Alliance for the Wild Rockies v. Salazar*, 800 F. Supp. 2d 1123 (D. Mont. 2011)).

<sup>3</sup> *Id.* at 1174.

<sup>4</sup> *Id.* at 1175.

<sup>5</sup> *Id.* at 1171.

<sup>6</sup> *Id.* at 1172 (the 2009 Rule was issued as 74 Fed. Reg. 15123 (April 2, 2009)).

<sup>7</sup> *Alliance for the Wild Rockies*, 672 F.3d at 1172 (citing *Defenders of Wildlife v. Salazar*, 729 F.Supp.2d 1207 (D. Mont. 2010)).

<sup>8</sup> *Id.* at 1172.

various intervenors appealed.<sup>9</sup> While the appeal was pending, proponents of the 2009 Rule, including the states of Montana and Idaho, and the FWS, convinced Congress to add “Section 1713” to the 2011 Appropriations Bill.<sup>10</sup> The section directed the FWS to reissue the 2009 Rule within 60 days, without regard to the ESA, and without judicial review.<sup>11</sup>

Congress enacted the section and on May 5, 2011, the FWS reissued the 2009 Rule, and the plaintiffs filed the instant case.<sup>12</sup> The plaintiffs asserted Congress had violated the separation of powers doctrine when it enacted Section 1713, which directed the judiciary to reach a specific outcome in the pending gray wolf cases.<sup>13</sup> The district court disagreed, and granted summary judgment to the defendants.<sup>14</sup> The plaintiffs appealed, and the Ninth Circuit reviewed the district court’s decision *de novo*.<sup>15</sup>

### **III. ANALYSIS**

The plaintiffs based their separation of powers challenge on two 19th century U.S. Supreme Court cases.<sup>16</sup> In the first case, *United States v. Klein*,<sup>17</sup> the Supreme Court held Congress could not dictate the outcome in pending litigation.<sup>18</sup> A noncombatant confederate landowner received a Presidential pardon and sued the federal government to recover the proceeds from the sale of his land during the Civil War.<sup>19</sup> The Supreme Court had previously held a Presidential pardon was sufficient proof of loyalty to the union for a former confederate to receive monetary compensation for the taking of his/her land.<sup>20</sup> The Court of Claims awarded

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (citing Pub. L. 112–10, 125 Stat. 38 § 1713 (2011)).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Alliance for the Wild Rockies*, 672 F3.d at 1172.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *U.S. v. Klein*, 80 U.S. 128 (1871).

<sup>18</sup> *Alliance for the Wild Rockies*, 672 F3.d at 1172.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

the confederate landowner compensation, and the federal government appealed.<sup>21</sup> While the government's appeal was pending, Congress enacted a new statute classifying a Presidential pardon as proof of disloyalty, and instructed the Supreme Court to dismiss all cases in which a former confederate based his/her proof of loyalty to the union on a Presidential pardon.<sup>22</sup> The Supreme Court declared the statute unconstitutional and explained when Congress "prescribe [d] a rule for the decision of a cause in a particular way," it "passed the limit which separates the legislative from the judicial power."<sup>23</sup>

In the other case the plaintiffs relied on, *Pennsylvania v. The Wheeling and Belmont Bridge Company*,<sup>24</sup> the Supreme Court held Congress could amend existing law as long as it did not direct the outcome in associated litigation. Prior to *Wheeling Bridge*, the Supreme Court held the Wheeling Bridge was an illegal obstruction to river navigation.<sup>25</sup> Later, Congress made the bridge a U.S. Mail postal road and forbade river users from interfering with the bridge.<sup>26</sup> In *Wheeling Bridge*, the Supreme Court concluded, from that time on, "although [the bridge] still may be an obstruction in fact, [it] is not so in the contemplation of law."<sup>27</sup> The Supreme Court concluded Congress had not directed a particular result in the litigation but, rather, amended the existing laws so the bridge was no longer an illegal obstruction to navigation.<sup>28</sup>

The Ninth Circuit had previously relied on *Klein*'s holding in *Seattle Audubon Society v. Robertson*,<sup>29</sup> to strike down a statute enacted to affect pending litigation about logging and the spotted owl.<sup>30</sup> The Ninth Circuit held the statute was unconstitutional because it did not repeal

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (quoting *Klein*, 80 U.S. at 146–147) (alterations added by author).

<sup>24</sup> *Penn. v. The Wheeling and Belmont Bridge*, 59 U.S. 421 (1855).

<sup>25</sup> *Alliance for the Wild Rockies*, 672 F.3d at 1172 (citing *U.S. v. Padelford*, 76 U.S. 531 (1869)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1173 (quoting *Wheeling Belmont*, 59 U.S. at 430) (alterations added by the Ninth Circuit).

<sup>28</sup> *Id.*

<sup>29</sup> *Seattle Audubon Society v. Robertson*, 914 F.2d 1311 (9th Cir. 1990), *rev'd*, 503 U.S. 429 (1992).

<sup>30</sup> *Alliance for the Wild Rockies*, 672 F.3d at 1173–1174.

existing laws but directed the judiciary “to reach a specific result and make certain factual findings under existing law” in the pending spotted owl cases.<sup>31</sup> Reversing the Ninth Circuit, the Supreme Court held the requirement that the repeal of a law be explicit did not apply in this case because Congress had “amended,” not repealed, the existing laws associated with the litigation.<sup>32</sup> Thus, Congress had not violated the constitutional prerogative of the courts under the separation of powers doctrine.<sup>33</sup>

In the instant case, the Ninth Circuit relied on the Supreme Court’s holding in *Robertson* to hold that even while litigation is pending on the 2009 Rule, Congress could amend the ESA.<sup>34</sup> In addition, when Congress directs a result, “notwithstanding any other provision of law,” it amends by implication existing laws to allow for the result in a constitutional manner.<sup>35</sup> Therefore, Section 1713 permissibly amended the ESA to allow for the delisting of the gray wolves in Montana and Idaho, but not Wyoming.<sup>36</sup>

The Ninth Circuit quickly resolved the plaintiff’s contention that Section 1713 was unclear.<sup>37</sup> The section was “perfectly clear”: a partial delisting as designated in the 2009 Rule was to occur within 60 days, without review from the courts.<sup>38</sup>

In dicta, the court observed Section 1713 had not modified the ESA standards the FWS uses to evaluate the population of an endangered species.<sup>39</sup> Under the ESA and settled precedent, the FWS cannot issue a rule that protects only a portion of the population of an endangered species, which, after Section 1713 and this case, is the current state of gray wolves in

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<sup>31</sup> *Id.* (quoting *Robertson*, 914 F.2d at 1316).

<sup>32</sup> *Id.* at 1174 (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978)).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (citing *Apache Survival Coal. v. U.S.*, 21 F.3d 895 (9th Cir. 1994); *Stop H-3 Ass’n v. Dole*, 870 F.2d 1419 (9th Cir. 1989); *Consejo de Desarrollo Economico, Mexicali v. U.S.*, 482 F.3d 1157 (9th Cir. 2007)).

<sup>36</sup> *Alliance for the Wild Rockies*, 672 F.3d at 1174–1175.

<sup>37</sup> *Id.* at 1175.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

the northwest.<sup>40</sup> In the future, wolf protection advocates can challenge any rule that allow for the partial delisting of wolves to continue until Congress explicitly amends the ESA or the FWS delists the entire gray wolf population.<sup>41</sup>

#### **IV. CONCLUSION**

Although this case marks a turning point in strategy in the battle over wolf management, it is not the end of gray wolf litigation. In Section 1713, Congress allowed the federal government to delist the gray wolves in Montana and Idaho. The Ninth Circuit found Congress is free to manage wolves as they see fit; however, the court anticipates future controversies because Congress did not reach a final solution, but rather, enacted a temporary solution, which does not address the future of the gray wolf recovery process.

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*