NOS. 11-35661 and 11-35670 (consolidated)
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALLIANCE FOR THE WILD ROCKIES; FRIENDS OF THE CLEARWATER; and WILDEARTH GUARDIANS,

Plaintiffs - Appellants,

and

CENTER FOR BIOLOGICAL DIVERSITY; CASCADIA WILDLANDS; and WESTERN WATERSHEDS PROJECT,

Plaintiffs - Appellants,

v.

KEN SALAZAR, in his official capacity as United States Secretary of the Interior; DAN ASHE, in his official capacity as Director of the United States Fish and Wildlife Service; and UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants - Appellees,

and

MONTANA FARM BUREAU FEDERATION; IDAHO FARM BUREAU FEDERATION; MOUNTAIN STATES LEGAL FOUNDATION; SAFARI CLUB INTERNATIONAL; NATIONAL RIFLE ASSOCIATION OF AMERICA, and WILDLIFE CONSERVATION GROUPS,

Intervenors - Appellees.

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on appeal from the
United States District Court for the District of Montana, Missoula Division
Nos. CV 11-70-M-DWM and CV 11-71-M-DWM (consolidated)

STATE OF MONTANA'S AND MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS' AMICUS-CURIAE BRIEF IN SUPPORT OF FEDERAL DEFENDANTS' BRIEF OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

PURPOSE AND POSITION

The State of Montana and Montana Department of Fish, Wildlife and Parks ("Montana" or "MFWP") files this amicus-curiae brief in support of the Federal Defendants and Appellees, Ken Salazar, Dan Ashe, and the United States Fish and Wildlife Service ("Federal Defendants") and in support of affirmance of the District Court's August 3, 2011 Order. (Excerpt of Record 1)

This amicus-curiae brief is filed pursuant to Fed. R. App. P. 29(a) that allows a state to file an amicus-curiae brief.

MFWP, which includes the Montana Fish, Wildlife and Parks Commission, manages wildlife under the authority of Title 87, Mont. Code Ann. Montana has been managing wolves as a resident wildlife species since the reissuance of a final rule that removed the Northern Rocky Mountain distinct population segment of gray wolves from the Endangered Species Act ("ESA") list of endangered and threatened wildlife. 76 Fed. Reg. 25590 (May 5, 2011). (Center for Biological Diversity Addendum 91)

Montana's position is that Congress acted within its constitutional power to pass laws when it mandated a rule delisting a population of gray wolves.

SUMMARY

Congress amended the ESA by requiring the issuance of a rule to delist the distinct population segment of the Northern Rocky Mountain gray wolf throughout

its range except for Wyoming where Congress left it on the list of endangered species. This act of Congress does not violate the separation of powers between the legislative and executive branches because Congress amended the ESA by specifically and conditionally exempting a portion of the Northern Rocky Mountain gray wolf distinct population segment from the Department of Interior, Fish and Wildlife Service's list of endangered and threatened wildlife.

REFERENCE TO STATUTE AND RULES

Montana is following the requirements of Fed. R. App. P. 29 for a brief of an amicus-curiae which does not require an addendum of referenced statutes and rules as otherwise required by Fed. R. App. P. 28(f) and Ninth Circuit Rule 28-2.7. Appellant Center for Biological Diversity, et al., ("Center for Biological Diversity") has attached to their opening brief an addendum of the same statute and rules that Montana references in this brief. Montana will cite to the Center for Biological Diversity addendum as "CBD AD" followed by the bates number (e.g. CBD AD 1).

BACKGROUND

On April 15, 2011, Congress passed and President Obama signed into law the Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. 112-10, 125 Stat. 38 ("Appropriations Act of 2011"). Section 1713 of the Appropriations Act of 2011 ("Section 1713") provides as follows:

> SEC. 1713. 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.

Under the authority of Section 1713, the United States Fish and Wildlife Service, Department of Interior, reissued the final rule of April 2, 2009 removing the Northern Rocky Mountain gray wolf population, except in Wyoming, from the list of endangered and threatened species by amending part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations. 76 Fed. Reg. 25590, 91-92 (May2, 2011) (CBD AD 93-95).

The ESA, 16 U.S.C. §1531, et seq., continues to apply to the Northern Rocky Mountain gray wolf distinct population segment as a non-listed species as specified in the reissued rule meaning this population of the gray wolf will be subject to monitoring, a potential status review, and the potential for relisting if warranted. 74 Fed. Reg. 15123, 184-6 (April 2, 2009) (CBD AD 83-85); §4 of ESA, 16 U.S.C. §1533.

The newly reissued rule provides for a mandatory 5-year post-delisting monitoring period as required by §4(g)(1) of the ESA (16 U.S.C. §1533 (g)(1)). 74 Fed. Reg. at 15184 (April 2, 2009) (CBD AD 83). The purpose of the post-

delisting monitoring, as stated in the delisting rule, is:

> To ascertain wolf population distribution and structure and to analyze if the wolf population might require a Service-led status review (to determine whether it should again be listed under the Act), …

Id. at 15185 (CBD AD 84).

The U.S. Fish and Wildlife Service established in the delisting rule specific population conditions that would require a status review and relisting determination:

> Three scenarios could lead us to initiate a status review and analysis of threats to determine if relisting was warranted including: (1) If the wolf population falls below the minimum NRM [Northern Rocky Mountain] wolf population recovery level of 10 breeding pairs of wolves and 100 wolves in either Montana or Idaho at the end of the year; (2) if the wolf population segment in Montana or Idaho falls below 15 breeding pairs or 150 wolves at the end of the year in any one of those States for 3 consecutive years; or (3) if a change in State law or management objectives would significantly increase the threat to the wolf population.

Id. at 15186 (CBD AD 85).

The final rule of April 2, 2009 was reissued effective on May 5, 2011. The April 2, 2009 delisting rule had been vacated and set aside by U.S. District Court for the District of Montana. *Defenders of Wildlife v. Salazar*, 729 F.Supp. 2d 1207 (D. Montana 2010). The District Court held that a distinct population segment, as a species, could not be delisted in a significant portion of its range while it remains listed in a remaining significant portion of its range which was the State of Wyoming. *Id*. at 1211. Numerous parties, including the State of Montana, appealed from this rule. Those appeals are currently stayed.

Two groups, Alliance for the Wild Rockies, et al., ("Alliance") and the Center for Biological Diversity, challenged the passage of Section 1713 by Congress claiming it was unconstitutional because it violated the separation of power requirements of the United States Constitution. The District Court ruled that Section 1713 does not unconstitutionally infringe on the separation of powers relying upon United States Supreme Court and Ninth Circuit precedents. *Alliance for the Wild Rockies v. Salazar*, CV 11-70-M-DWM, 2011 U.S. Dist. LEXIS 85476 (D. Mont. 2011) (Excerpt of Record 1).

Both plaintiff groups, Alliance and the Center for Biological Diversity, appealed the District Court decision, Alliance moving for an emergency injunction from this Court pending appeal to stay the effect of the District Court ruling that upheld the reissued rule delisting the Northern Rocky Mountain gray wolf throughout their range except in Wyoming. This Court denied the emergency motion without prejudice. (Dkt Entry: 23)

APPLICABLE LAW

The Ninth Circuit has recognized a two-part, disjunctive test. The first part is applicable to this case. "The constitutional principle of separation of powers is violated where (1) 'Congress has impermissibly directed certain fining in pending litigation, without changing any underlying law,' …" *Ecology Center Inc. v. Castenada*, 426 F.3d 1144, 1148 (9th Cir. 2005) (quoting *Gray v. First Winthrop*

Corp., 989 F.2d 1564, 1568 (9th Cir. 1993) (additional references omitted)).

Gray holds that an act of Congress can be "directed at a specific judicial ruling so long as that legislation modifies the law" and that the act of Congress need only change "the underlying substantive law in any detectable way." *Gray*, 989 F.2d at 1569, 1570.

The United States Supreme Court and the Ninth Circuit have decided the separation of powers issue for a number of factual scenarios that help define the parameters of the doctrine as applied.

In *United States v. Klein*, 80 U.S. 128 (1872), the Supreme Court overruled the attempt of Congress to deny claimant's attempt to recover property seized during the Civil War. Pursuant to a statutory process, recovery required proof of the petitioner's loyalty. Presidential pardons and grants of amnesty were given a Catch-22 effect by an act of Congress. Because the pardons were granted based on an admission of former disloyalty, a subsequent act of Congress then deemed that admissions were conclusive proof of disloyalty that disqualified claimants' qualification for recovery. Congress did not amend the statutory claim process itself. The act was directing the Court of Claims to find facts in cases involving private rights. The Court found this was an unconstitutional invasion of the judiciary.

A bridge over the Ohio River was first found by the Supreme Court to be an

unlawful obstruction of navigation but a subsequent act of Congress declared the bridge a lawful structure and "shall be so held and taken to be, anything in the law or laws of the United States to the contrary not withstanding." The Court found the previous acts of Congress were modified by the subsequent legislation and held "…although it still may be an obstruction in fact, it is not so in the contemplation of law." *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 59 U.S. 421, 429-430 (1856).

In the prior case adjudicating the status of this bridge, the Supreme Court found that the bridge was an obstruction of navigation based on a compact made by Virginia with Kentucky that, in effect, agreed that navigation should not be obstructed on the Ohio River, and based on the testimony and report of a special commissioner appointed by the Court that the bridge obstructed navigation. The Court found that "[t]his compact, by the sanction of Congress, has become a law of the Union". *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 54 U.S. 518, 559, 565-6 (1852). Subsequent to this initial ruling, Congress did not directly amend the compact itself but instead declared the bridge to be a lawful structure "anything in the law or laws of the United States to the contrary not withstanding." *The Wheeling and Belmont Bridge*, 59 U.S. at 429.

The Supreme Court found that Congress, in an appropriation bill, amended statutes governing timber sales by exacting two new standards for timber harvest in

potential spotted owl habitat without amending the statutes that would otherwise apply. The amendment stated the new guidelines were "adequate consideration for the purpose of meeting statutory requirements" and that the guidelines "shall not be subject to judicial review." *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 435 n. 3 (1992) (reciting the applicable rider to the appropriations bill).

The Supreme Court found that Congress "may amend substantive law in an appropriations statute, as long as it does so clearly" and that the rider because it "provided by its terms that compliance with certain new law constituted compliance with certain old law, the intent to modify was not only clear, but express." *Id.* at 440 (emphasis in original). The Court found the rider constitutional because it amended previously existing law. *Id.* at 441.

Robertson held that Congress may change the substantive law governing a pending case so long as it does not "direct any particular findings of fact or applications of law, old or new, to fact." *Id*. at 438.

The Ninth Circuit found an act of Congress in exempting a section of highway construction from statutorily required findings was in itself legislation and that Congress could "alter a legislative grant of authority by means of new legislation directed at a particular project" without violating the doctrine of separation of powers between Congress and the executive branch or the judicial branch. *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1435, n. 24, 1438, n. 27 (9th Cir.

1989).

The phrase "not withstanding any other provision of law" in an act of Congress may exempt a government project from compliance with environmental statutes if the context of the act supports that Congress intended to exempt the project. *Consejo De Desarrollo Economico De Mexicali, A.C. (Consejo) v. U.S.*, 482 F.3d 1157, 1168-9 (9th Cir. 2007). This Court found that Congressional direction to proceed with the All American Land Lining Project "without delay" made it clear that the Bureau of Reclamation was exempted from otherwise applicable statutory environmental statutes. *Id*. at 1168-9. Because Congress changed the substantive law by directing the Lining Project should proceed "without delay" and "not withstanding any other provision of law", Congress did not violated the constitutional separation of powers. *Id*. at 1168-9, 1170.

Ecology Center, 426 F.3d at 1148, recognized the general principle that an act of Congress should be invalidated "only for the most compelling constitutional reasons." (citing, *Mistretta v. United States*, 488 U.S. 361, 384 (1989)).

ARGUMENT

A. The reissued rule amends the ESA by directing adoption of a rule.

A primary purpose of the ESA is to provide a structure and authority for the Secretary of Interior to determine those species that need protection under the ESA and to list them through rulemaking as threatened or endangered species. Congress

enacted Section 1713 that specifically and conditionally exempted the Northern Rocky Mountain gray distinct population segment, except for Wyoming, from the Department Interior, Fish and Wildlife's list of endangered and threatened wildlife. This is an amendment of the ESA.

When Congress grants an agency the authority to adopt rules, it is delegating to the agency the ability to exercise a part of the legislative power of the United States granted by the Constitution. The Supreme Court defines the proper grant of rulemaking as follows:

> [T]he legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.

Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979).

Rules issued pursuant to statutory authority that implement a statute are designated legislative, or substantive, regulations and have the force and effect of law. *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977) (referencing U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act, at 30 n.3 (1947)); see also, *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-4 (1984)) ("When Congress has 'explicitly left a gap for an agency to file, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,").

Congress has explicitly left it to the Department of Interior the task of determining through rulemaking when a species should be listed as threatened or endangered and when a listed species should be removed, i.e. delisted, from the rule that names threatened or endangered species.

Threatened species and endangered species are defined in section 3(6) and 3(20) of the ESA; the criteria for determining by regulation whether to list or delist a species are in section (4)(a)(1) (A through E); and, the Secretary of Interior is required by §4(c)(1) to publish in the Federal Register a list of all species determined to be endangered or threatened. 16 U.S.C. §1532(6) and (20); 16 U.S.C. §1533(a)(1)(A through E); and 16 U.S.C. §1533 (c)(1), respectively.

Under the requirements of the ESA, the Secretary of the Interior applies the listing criteria of the ESA to determine by rulemaking which species are to be or not to be listed as threatened or endangered. The statutory authority of the Secretary of the Interior to adopt rules listing or delisting species is a delegation of legislative authority to the agency. Therefore, when Congress amended the threatened and endangered rule by requiring the Secretary of the Interior to reissue a rule removing the Northern Rocky Mountain gray wolf from the list of threatened species, Congress amended the ESA. Section 1713 of the Appropriations Act of 2011 (CBD AD 1); 76 Fed. Reg. 25590, 91-92 (May 5, 2011) (delisting rule) (CBD AD 93-95); Part 17, subchapter B of chapter I, title 50 of the Code of

Federal Regulations (amended listing rule) (CBD AD 93-95).

The mandated amendment to the rule listing endangered species was an exercise of the authority of Congress to legislate by statute or by an amendment of an agency rule. The result was to partially and conditionally exempt a population of wolves, the Northern Rocky Mountain gray wolf distinct population segment, from the ESA by delisting these wolves "not withstanding" the statutory delisting criteria. However, the mandated rule specifically provides for criteria for relisting of wolves if the wolf populations in either Montana or Idaho falls below levels set in the reissue rule or "if a change in state law or management would significantly increase the threat to the wolf population." 74 Fed. Reg. 15186 (April 2, 2009) (CBD AD 85). Congress wisely did not exempt wolves as a species from the protection of the ESA but instead retained the potentially future protection of the Northern Rocky Mountain gray wolf under the ESA if state management proved to be inadequate to protect this species of wolves.

B. Section 1713 is a constitutionally valid amendment of the ESA through a Congressionally required rule that partially and conditionally delists a population of wolves.

When the Secretary of Interior reissued the final rule of April 2, 2009 (74 Fed. Reg. 15123 et seq.) (CBD AD 2), the one result was to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations by removing gray wolves in Montana and Idaho, as well as portions of eastern Oregon, eastern

Washington, and north-central Utah from the List of Endangered and Threatened Wildlife. 76 Fed. Reg. 25590, 91-92 (May 5, 2011) (CBD AD 93-95). The list is all the species determined by the Secretary of the Interior or by the Secretary of Commerce to be endangered species or threatened species.

Congress by directing the reissuance of the 2009 delisting rule amended the underlying statute. Listing and delisting rules are acts of legislation delegated by Congress in the ESA itself to the Department of the Interior. It is important to understand what Section 1713 does. By reinstating the delisting rule, Congress accomplished a legislative act, the adoption or amendment of a substantive rule.

Congress could have completely exempted the wolf from the ESA as a valid amendment to the act. Section 1713 only partially amended by ESA because this distinct population of the gray wolf is subject to the same post-delisting monitoring as any other delisted species. It can be relisted if necessary. In fact, the 2009 reissued delisting rule establishes criteria for a status review and potential relisting based on minimum population levels or a threat to the species if state management proves to be inadequate. 74 Fed. Reg. 15186 (April 2, 2009) (CBD AD 85). The wisdom of Congress is demonstrated in Section 1713 because it solves a difficult wildlife management issue while still providing future protection for these wolves under the ESA if state management fails. The District Court, in its order upholding the constitutionality of Section 1713, recognized wolf management as a "difficult

biological issue". *Alliance of the Wild Rockies v. Salazar*, 11-70-M-DWM, 2011 U.S. Dist. LEXIS 85476, *23 (D. Mont. Aug. 3, 2011) (Excerpt of Record 18).

Congress can exempt a specific project from statutory provisions that would otherwise apply. *Stop H-3 Ass'n*, 870 F.2d 1419 (9th Cir. 1989) (exempting a section of highway construction from an otherwise required statutory finding); *Consejo*, 482 F.3d 1157 (9th Cir. 2007) (exempting a canal lining project from compliance with environmental statutes that would delay the project). It follows that Congress can partially exempted a distinct population segment of wolves from the requirements of the ESA by directing that the Northern Rocky Mountain population of the gray wolf be removed from the rule listing threatened and endangered species and, therefore, bypassed the delisting criteria of §4 of the ESA, 16 U.S.C. §1533.

Congress can amend substantive law as long as it does so clearly. *Robertson*, 503 U.S. at 440. When Congress substituted new timber harvest guidelines to apply only in specific forests having potential spotted owl habitat by stating the new guidelines were adequate consideration for meeting the statutory criteria and were not subject to judicial review, *Robertson* found this statutory language was not only clear, but express.

Section 1713 has by its terms made it clear that its purpose is to direct the delisting of most of the Northern Rocky Mountain gray wolf population. The

language ensures the delisting is effective "without regard to any other provision of statute or regulation that applies to issuance of such rule" and that the delisting rule "shall not be subject to judicial review." Section 1713 of the Appropriations Act of 2011 (CBD AD 1).

Section 1713 meets the Ninth Circuit's test to avoid unconstitutionally directing a result in ongoing litigation because it changes the underlying law prospectively. *Ecology Center*, 426 F.3d 1144; *Gray*, 989 F. 2d 1564. After Section 1713 was enacted and the delisting rule reissued, the status of the Northern Rocky Mountain gray wolf distinct population segment was altered by exempting it from the delisting criteria of §4 of the ESA. Thus the wolf was specifically exempted analogous to the exemption of a highway project in *Stop H-3 Ass'n* or a canal lining project in *Consejo.*

Similar modifications of otherwise applicable underlying statutes were not invalid as violations of the doctrine of separation of the powers of the legislative and judicial branches. The criteria for timber harvests were modified by exempting the harvests from the underlying criteria and substituting new criteria just for specific forests. *Robertson*, 503 U.S. 429; *Ecology Center*, 426 F.3d 1144.

In *United States v. Klein*, the United States Supreme Court declared an act of Congress unconstitutional because it directed the Court of Claims to make factual findings. Here, there is no attempt to direct or require any court to make

prescribed factual determinations.

If Congress had passed an act that declared the Northern Rocky Mountain distinct population segment of gray wolves throughout its range, except in Wyoming, complied with the delisting criteria of Section 4 of the ESA, there would be a significant separation of powers constitutional issue. Such an act would be both directing findings of fact and the application of law to facts in violation of the separation of the constitutional powers between the legislative and judicial branches. *Robertson*, 503 U.S. at 438; and *Klein*, 80 U.S. at 147.

Section 1713 only applies to a specific distinct population segment of the gray wolf. It does not apply to any other species, subspecies, or distinct population segments. It does not attempt to modify this Court's conclusions of law in *Defenders of* Wildlife, 729 F.Supp 1207, as the decision will still apply as precedent for agency actions and judicial review of the listing or delisting of any other species. It simply exempts one distinct population segment of the gray wolf from the delisting criteria only.

C. An act of Congress amending the underlying law does not need to create new standards for the courts to apply in order to avoid a separation power violation.

Center for Biological Diversity argues that the courts must be left with an adjudicatory function to perform when Congress amends the underlying law that directs an outcome in pending litigation. Center for Biological Diversity's Opening

Brief, p. 29-34. Center for Biological Diversity claims Section 1713 is unconstitutional because it "provides no new standards that the courts can apply" and "the courts are left with no adjudicatory function to perform". Id. at 34. This made up requirement is not logical and is not supported by Supreme Court and Ninth Circuit precedent.

The test is whether Congress has clearly amended the underlying law in some detectable way, not whether an exemption from otherwise applicable statutes has substituted in some fashion "new standards". Some acts of Congress, examined by the Supreme Court and Ninth Circuit, do substitute new criteria and some do not. All have been upheld as constitutional as long as Congress has clearly amended the underlying law.

An exemption of the construction of a segment of a highway from the application of a statutorily required finding did not substitute new standards. It was simply a clear exemption. *Stop H-3 Ass'n*, 870 F.2d at 1435, 1438. Congress directed a canal lining project to proceed without delay and exempted it from otherwise applicable statutory environmental statutes without substituting new standards. *Consejo*, 482 F.3d at 1168-9. Describing the project exempted as "the preferred alternative in the record of decision for that project" in the Congressional act is not a new standard but a specific description and limitation on what Congress authorized to be exempted. *Id*. at 1167.

In some cases there are new standards recognized by the reviewing court. *Robertson*, 503 U.S. 429 (9th Cir. 1992) (allowing timber sales in spotted owl habitat under two new standards as a substitute or adequate consideration for statutory requirements that were otherwise left unamended); *Ecology Center*, 426 F.3d 1144 (9th Cir. 2005) (Congress modified criteria for the percentage of old growth timber as a predicate for timber sales). In both cases the review court upheld the acts of Congress as constitutional under a separation of powers analysis.

The specific terms of Congress must be complied with. Congress approved the construction of telescopes in endangered red squirrel habitat deeming that Section 7 of the ESA was satisfied by compliance with the terms and conditions of Reasonable and Prudent Alternative Three (RPA 3) of a Biological Opinion. When the construction site of a large binocular telescope was changed to a site outside the parameters of RPA 3, the construction of the telescope lost its Congressional exemption from the ESA and the National Environmental Policy Act. *Mount Graham Coalition v. Thomas*, 53 F.3d 970 (9th Cir. 1995).

The teaching is that the terms of Congress must be complied with. Under Section 1713, the reissued rule must be properly adopted, the substance of the rule must not be changed, and the terms of the rule regarding status reviews and relisting must be complied with. All of these things are subject to judicial review and are new standards to the extent "new standards" are needed.

CONCLUSION

Based on the reasons presented by the Federal Defendants and amicus-curiae Montana, this Court is respectfully requested to affirm the August 3, 2011 Order of the District Court granting Federal Defendants motion for summary judgment and hold that Section 1713 of the Appropriations Act of 2011 is a constitutional enactment of Congress and is not a violation of the separation of powers between the legislative and judicial branches.

Dated this October 14, 2011.

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s/ Robert N. Lane
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CERTIFICATE OF COMPLIANCE

This brief complies with the FRAP 29(c) and (d); and FRAP 32(a)(4), (5), (6), and (7). It is proportionately spaced typeface using Microsoft Word 2007 14 point Times New Roman and does not exceed 4432 words.

s/ Robert N. Lane
Robert N. Lane
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing will be electronically filed this 14th day of October 2011, and will be automatically served upon counsel of record, all of whom appear to be subscribed to receive notice from the ECF system.

s/ Robert N. Lane
Robert N. Lane
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