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All Bite and No Bark: Nonspecific Magic Words Sweep Aside Constitutional Concerns and Remove the Northern Rocky Mountain Gray Wolf From Endangered Species Act Protection in Alliance for the Wild Rockies v. Salazar

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ALL BITE AND NO BARK: NONSPECIFIC MAGIC WORDS SWEEP ASIDE CONSTITUTIONAL CONCERNS AND REMOVE THE NORTHERN ROCKY MOUNTAIN GRAY WOLF FROM ENDANGERED SPECIES ACT PROTECTION IN ALLIANCE FOR THE WILD ROCKIES V. SALAZAR

I. INTRODUCTION

Management of the United States’ wolf population is a tug of war between the country’s agricultural communities, concerned with the wellbeing of farms and livestock, and the federal government, obligated to prevent the wolves’ extinction.¹ During the 1900s, western settlers nearly eradicated wolves living in the Rocky Mountains in an effort to protect livestock.² By 1973, the federal government could no longer ignore the imminent threat to the Northern Rocky Mountain (NRM) gray wolf population and listed the wolf as endangered under the Endangered Species Act (ESA), thereby transferring management of the NRM gray wolf from the states to the federal government.³ Hostility toward wolves did not subside, however, and western states exerted immense political pressure on the United States Department of the Interior’s Fish and Wildlife Service (FWS) to strip the gray wolf of its federal protections and return wolf management to the states.⁴

The FWS attempted to appease western states for more than a decade through several hasty attempts to delist the NRM gray wolf from ESA protection, but federal courts rejected these efforts, refusing to delist the animal without adequate assurances that delisting would not stifle the wolf’s continued recovery.⁵ While one such

¹ For a discussion of various groups’ conflicting agendas regarding wolf management, see infra notes 76-188 and accompanying text.
² For a brief background of wolves living in the Western United States, see infra notes 56-58 and accompanying text. The wolves’ aggression toward livestock increased as western settlers overhunted the wolves’ natural prey, including the buffalo. See Northern Rocky Mountain Wolf Recovery Plan, U.S. fish and wildlife Serv. 1 (Aug. 3, 1987), www.fws.gov/mountain-prairie/species/mammals/wolf/NorthernRockyMountainWolfRecoveryPlan.pdf [hereinafter 1987 Recovery Plan] (recounting reasons for wolf population’s decline and nature of human hostility toward wolves).
⁴ For an explanation of public hostility toward wolves and efforts to assuage the public’s concerns, see infra notes 72-75 and accompanying text.
⁵ For an overview of federal delisting efforts, see infra notes 76-83 and accompanying text.
case was pending on appeal, Congress intervened and passed a one-paragraph rider in an appropriations bill ordering the wolf’s delisting, circumventing both the ESA and the pending adjudicatory process.\(^6\) In *Alliance for the Wild Rockies v. Salazar (Wild Rockies II)*,\(^7\) the United States Court of Appeals for the Ninth Circuit not only upheld this backdoor ESA exemption, but also paved the way for further congressional encroachment on the judiciary.\(^8\)

The ESA offers sweeping protection to species the FWS identifies as endangered or threatened.\(^9\) The statutory scheme outlines a strict, methodical procedure for listing or delisting a species from the ESA.\(^10\) Congress’ recent delisting of the NRM gray wolf is unprecedented because it completely bypasses the ESA’s delisting process.\(^11\) Such action calls into question the remaining efficacy of the ESA and leaves the scope of ESA protections over the NRM gray wolf and other species unclear.\(^12\)

By deferring to Congress in *Wild Rockies II* and implicitly giving judicial support to such congressional action, the Ninth Circuit contributed to the continued erosion of the separation of powers doctrine.\(^13\) The doctrine long barred legislation that directs the outcome of pending litigation where the legislation compels a spec-

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7. 679 F.3d 1170 (9th Cir. 2012) (*Wild Rockies II*) (upholding Congress’ use of appropriations bill rider to remove ESA protection).
8. See id. at 1171 (reaffirming Ninth Circuit’s commitment to deferential review of separation of powers issues). For a thorough explanation of the facts and procedure underlying the dispute in *Wild Rockies II*, see infra notes 25-44 and accompanying text.
10. For an outline of the ESA listing process, see infra notes 48-52 and accompanying text.
12. For a discussion of the impact of the Ninth Circuit’s holding in *Wild Rockies II*, see infra notes 179-208 and accompanying text.
13. For a brief summary of the origin of the separation of powers doctrine, see infra notes 102-104 and accompanying text.
specific finding of fact without changing the applicable underlying law.\footnote{See, e.g., United States v. Klein, 80 U.S. 128, 146-48 (1871) (vacating legislation that directed result in pending litigation). The Supreme Court in Klein reasoned that Congress infringed on the judiciary’s role by imposing a specific finding of fact on the court. \textit{Id.} at 147.} Now, however, the Ninth Circuit has disturbed the balance between the legislature and the judiciary by abandoning its earlier resistance to intervening legislation in favor of a more lenient review of these directives.\footnote{For a discussion of how the Ninth Circuit’s opinion in \textit{Wild Rockies II} has upset the separation of powers, see \textit{infra} notes 143-178, 202-208 and accompanying text. For a suggestion that the Ninth Circuit should revert to its earlier separation of powers analysis, see \textit{infra} notes 165-168 and accompanying text.}

Judicial deference to such an intervention is particularly problematic when Congress uses an appropriations bill as a vehicle to enact intervening directives.\footnote{See Sher & Hunting, \textit{supra} note 9, at 477-80 (elaborating on misuse of appropriations measures and warning of unforeseen consequences of such misuse).} This approach evades the traditional legislative process by sidestepping the necessary policy debates and evidentiary hearings that should accompany changes in substantive legislation.\footnote{See id. (discussing implications of Congress’ usage of appropriations bills to change substantive law). For further discussion of the harmful effects of using appropriations measures to amend environmental regulations, see \textit{infra} notes 189-208 and accompanying text.} Robust discussions are vital before delisting a species as divisive as the NRM gray wolf, whose recovery may be threatened in the absence of adequate protection.\footnote{See Kelci Block, Article, \textit{Congressional Wolf Delisting and the Erosion of the Separation-of-Powers Doctrine}, 42 \textit{Envtl. L. Rep. News & Analysis} 10993, 11002-03 (2012) (implying that using appropriations provisions to amend ESA prevented necessary debate on wolf delisting). For a synopsis of the controversies surrounding wolves in United States, see \textit{infra} notes 58, 72-75 and accompanying text.}

This Note examines the Ninth Circuit’s analysis in \textit{Wild Rockies II} in light of existing separation of powers precedent and analyzes the decision’s impact on the ESA.\footnote{For a narrative analysis of \textit{Wild Rockies II}, see \textit{infra} notes 133-146 and accompanying text. For a critical analysis of the \textit{Wild Rockies II} holding, see \textit{infra} notes 147-178 and accompanying text. For a discussion of the potential impact \textit{Wild Rockies II} will have on the ESA and future separation of powers issues, see \textit{infra} notes 179-208 and accompanying text.} Part II summarizes the facts of \textit{Wild Rockies II}.\footnote{For a summary of the facts, procedural posture, and issues presented in \textit{Wild Rockies II}, see \textit{infra} notes 25-44 and accompanying text.} Part III provides an overview of the ESA and outlines the history of the NRM gray wolf population, the various attempts to delist the wolf from ESA protection, and the evolution of the separation of powers doctrine in both the Supreme Court and
the Ninth Circuit. Next, Part IV reviews the Ninth Circuit's legal analysis in *Wild Rockies II*. Part V of this Note examines the court's rationale in *Wild Rockies II* in light of prior Ninth Circuit decisions on similar issues. Finally, Part VI analyzes the impact of *Wild Rockies II* on the ESA and future separation of powers controversies.

II. FACTS

In *Wild Rockies II*, the United States Court of Appeals for the Ninth Circuit considered whether Congress violated the separation of powers doctrine by reissuing an order to delist portions of the NRM gray wolf population from the ESA while a federal district court decision vacating that order was pending on appeal. The NRM gray wolf has been the focus of long-term recovery efforts ever since settlers wiped out most of the wolf population that once roamed the Western United States. Despite recovery efforts, states such as Montana, Idaho, and Wyoming remain deeply hostile toward wolves and are eager to take wolf management responsibility into their own hands. The FWS, responding to pressure from these states, has attempted to remove the NRM gray wolf from the ESA's broad protection several times, but federal courts have repeatedly struck down these efforts for violating the ESA.

In 2009, a Montana federal district court vacated the FWS' most recent delisting order (the 2009 Final Rule), which sought to delist the Idaho and Montana portions of the NRM gray wolf popu-

21. For background material pertaining to the ESA and the NRM gray wolf, and an overview of separation of powers jurisprudence in the United States, see infra notes 45-132 and accompanying text.
22. For a discussion of the Ninth Circuit's rationale, see infra notes 133-146 and accompanying text.
23. For a critical analysis of the Ninth Circuit's holding in *Wild Rockies II*, see infra notes 147-178 and accompanying text.
24. For a discussion of the potential impact of *Wild Rockies II*, see infra notes 179-208 and accompanying text.
25. See *Wild Rockies II*, 672 F.3d 1170, 1171, 1174-75 (9th Cir. 2012) (addressing most recent delisting affecting NRM gray wolves in Idaho and Montana regions).
26. See 1987 Recovery Plan, supra note 2, 1-3, 10 (summarizing gray wolf's history in United States). For further discussion of the gray wolf's near extinction, see infra note 58 and accompanying text.
27. For a further discussion of states' reaction to wolf recovery efforts, see infra notes 64-75 and accompanying text.
28. See *Wild Rockies II*, 672 F.3d at 1171-72 (summarizing history of delisting efforts). For a general discussion of prior efforts to delist the NMR gray wolf and court decisions striking down such efforts, see infra notes 76-89 and accompanying text.
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ulation. While the case was pending on appeal, Congress intervened by bypassing the district court’s decision with a one-paragraph policy rider (the Reissuance or Section 1715) in a 2011 appropriations bill. Without identifying the ESA or any other applicable law, the rider reissued the vacated 2009 Final Rule “without regard to any other provision of statute or regulation that applies to issuance of such rule” and barred judicial review of the Reissuance. The FWS complied with the Reissuance and delisted the specified portions of the NRM gray wolf population on May 5, 2011.

Environmental groups immediately challenged the constitutionality of the Congressional directive in the same court that vacated the 2009 Final Rule. The challengers argued the Reissuance violated the separation of powers doctrine by circumventing the judiciary and directing the result of pending litigation. In response, the United States Secretary of the Interior asserted that the legislature acted within its constitutional bounds because the Reissuance implicitly amended the law governing

29. See Defenders of Wildlife v. Salazar (Defenders), 729 F. Supp. 2d 1207, 1211 (D. Mont. 2010) (vacating 2009 Final Rule as inconsistent with ESA). The district court concluded the 2009 Final Rule violated the ESA by protecting only part of the NRM gray wolf DPS, noting “[t]he agency has no authority to add a new categorical taxonomy to the statute.” Id. at 1216-17. For a further discussion of the court’s reasoning in Defenders regarding the impermissibility of affording ESA protections to only a portion of a DPS, see infra notes 90-95 and accompanying text.


32. See Wild Rockies II, 672 F.3d at 1171-72 (tracing Reissuance’s development).

33. See Alliance for the Wild Rockies v. Salazar (Wild Rockies I), 800 F. Supp. 2d 1123, 1125 (D. Mont. 2011) (recounting procedural history and consolidation of actions), aff’d, 672 F.3d 1170 (9th Cir. 2012). Plaintiffs filed suit the same day FWS complied with the Reissuance. Wild Rockies II, 672 F.3d at 1172.

34. See Wild Rockies II, 672 F.3d at 1175 (reviewing challengers’ arguments); see also Opening Brief for Plaintiffs-Appellants, supra note 30, at *5 (discussing plaintiffs’ contentions in depth). Plaintiffs did not argue that the appropriations measure violated the Constitution’s restriction against bills of attainder. See id. For a brief discussion of bills of attainder and the appropriations process, see Todd D. Peterson, Controlling The Federal Courts Through the Appropriations Process, 1998 Wis. L. Rev. 993, 1013-16 (1998) (noting prohibition against legislation targeting specific parties is one of few limits on Congress’ appropriations power).
agency action, the ESA, and thus compelled a change of law rather than a specific finding of fact. Both sides filed cross motions for summary judgment.

On August 3, 2011, the United States District Court for the District of Montana reluctantly granted the government’s motion for summary judgment in Alliance for the Wild Rockies v. Salazar (Wild Rockies I), noting that binding Ninth Circuit precedent constrained the court and mandated the adoption of a saving interpretation of the rider in the government’s favor. The district court, however, expressed serious misgivings about Congress’ ability to use a mere paragraph filled with “nonspecific magic words” to bypass the judiciary and skirt a well-established regulatory scheme. The court noted that Congress’ action “is a tearing away, an undermining, and a disrespect for the fundamental idea of the rule of law. . . . [It] may be politically expedient, but it transgresses the process envisioned by the Constitution by avoiding the very debate on issues of political importance said to provide legitimacy.”

The environmental groups appealed the ruling to the Ninth Circuit and filed an emergency motion for a preliminary injunction to halt hunting of the NRM gray wolf. The Ninth Circuit, however, denied this motion without prejudice. Idaho and Montana then proceeded to authorize ten-month and four-month wolf-hunting seasons, respectively, which federal law would have prohibited if...
the wolves were still protected under the ESA. Congress enacted the ESA in 1973 to afford broad, sweeping protection to endangered and threatened species. A species can be listed as “endangered” if it is in danger of extinction, or as “threatened” if it is likely to become endangered throughout a significant portion of its “range.” The ESA mandates all federal agencies protect and conserve listed species consistent with the ESA’s purpose “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such species.”

The listing process begins with the FWS determining whether a given population falls within the ESA’s definition of a “species,” which can include a subspecies or a distinct population segment (DPS) within a species. A DPS is the smallest taxonomic division of a species afforded protection under the ESA. The ESA then requires the government to evaluate several enumerated factors to determine if a population qualifies as a subspecies or DPS within a species.

43. See id. at *28-29 (reviewing minimal hunting regulation). Montana’s wolf hunting quota of 220 wolves was roughly 38% of the state’s wolf population. See id.
44. See Wild Rockies II, 672 F.3d 1170, 1171 (9th Cir. 2012) (upholding delisting of non-Wyoming portion of NRM gray wolf DPS). For a discussion of the Ninth Circuit’s rationale, see infra notes 153-146 and accompanying text.
45. See Sher & Hunting, supra note 9, at 438 (discussing Congress’ intent that ESA protections be broad).
46. 16 U.S.C. §§ 1531-32 (1988) (defining “endangered” and “threatened”). For further discussion of a species’ “range” under the ESA, see infra notes 76-79.
48. 16 U.S.C. §§ 1531-32 (1988) (defining “species”). A species “includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” Id. at § 1532. Pending legislation introduced in the Senate in August 2010 may alter this definition. See id.
49. See, e.g., Defenders, 729 F. Supp. 2d 1207, 1215-16 (D. Mont. 2010) (explaining DPS is smallest species designation under ESA’s definition of “species”).
determine the species’ status under the ESA.\textsuperscript{50} This analysis must be conducted before the government lists or delists a species.\textsuperscript{51} The statutory framework emphasizes that the decision to list or delist a species must be based “solely on the basis of the best scientific and commercial data available.”\textsuperscript{52}

Few species ever fully recover under the ESA due to the difficulty of controlling population demographics and the shortcomings of federal and state regulatory mechanisms.\textsuperscript{53} In fact, only twenty-eight species have recovered under the ESA.\textsuperscript{54} There are currently 1,436 species listed as endangered or threatened in the United States, including 619 animal and 817 plant species.\textsuperscript{55}

B. The NRM Gray Wolf Cedes Control of the West

The NRM gray wolf is one of twenty-four wolf subspecies in North America.\textsuperscript{56} This dominant predator used to have free reign of the NRM region, which includes most of Idaho, Montana, and Wyoming, as well as parts of Washington, Oregon, and South Dakota.\textsuperscript{57} Approximately 380,000 gray wolves inhabited the Western

\textsuperscript{50} 16 U.S.C. § 1533 (1988) (listing factors for determining whether species is endangered or threatened). These factors are “(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.”\textit{Id.}

\textsuperscript{51} \textit{Id.} (discussing listing and delisting procedures). See also \textit{Defenders}, 729 F. Supp. 2d at 1214 (outlining strict delisting process).

\textsuperscript{52} 16 U.S.C. § 1533 (1988) (emphasis added) (noting bases on which listing and delisting decisions must be made). See also \textit{Defenders}, 729 F. Supp. 2d at 1214 (explaining that species can only be delisted if it is extinct, recovered, or erroneously listed). Recovery requires “improvement in the status of listed species to the point at which listing is no longer appropriate.”\textit{Id.}


\textsuperscript{56} \textit{See 1987 Recovery Plan, supra} note 2, at 1 (discussing NRM gray wolf and its history in United States).

United States prior to European settlement; by the 1930s, however, hunting and government-sponsored eradication programs virtually extinguished wolf populations in Montana, Idaho, and Wyoming.\textsuperscript{58}

A stable gray wolf population is integral to a healthy and balanced ecosystem in the region because wolves regulate the populations of medium and large mammals that are lower on the food chain.\textsuperscript{59} The absence of any viable wolf population in the twentieth and twenty-first centuries left the Northern Rockies with unchecked and expanding wildlife populations.\textsuperscript{60} For example, the lack of wolves in Yellowstone National Park enabled the growth of unmanageable elk populations, whose overgrazing contributed to soil erosion that resulted in the decline of area creeks and streams.\textsuperscript{61}

In light of the gray wolf’s near extinction, the Secretary of the Interior listed the NRM gray wolf DPS as endangered almost immediately upon passage of the ESA in 1973.\textsuperscript{62} In 1987, the FWS established the Northern Rocky Mountain Wolf Recovery Plan (1987 Recovery Plan).\textsuperscript{63} This plan set out NRM gray wolf recovery goals, which required maintaining a minimum of ten breeding pairs for

\textsuperscript{58} See Opening Brief for Plaintiffs-Appellants, supra note 30, at *9 (recounting changes in wolf populations). Settlers’ fears of wolves were anchored in both superstition and true conflict with the animals. Id. Human eradication efforts resulted in the wolf’s disappearance from over 95% of its historic range. Id. See also 1987 Recovery Plan, supra note 2, at I-8 (reviewing wolf’s historic range and reasons for wolf population decline). For discussion regarding humans as agents of mass extinction, see Chen, supra note 47, at 281-83 (explaining mankind’s role in ecological destruction and asserting loss in biodiversity “represents humanity’s most urgent challenge”).

\textsuperscript{59} See 2009 Final Rule, supra note 57, at 15,123 (recounting need for federal protections).

\textsuperscript{60} See id. at 15,129 (noting wolf’s effect on NRM ecosystem); Wolf Recovery Under Attack in the Northern Rockies, EARTHJUSTICE, http://earthjustice.org/features/campaigns/wolf-recovery-under-attack-in-the-northern-rockies (last visited Mar. 24, 2013) (discussing impact of gray wolf’s near extinction in Northern Rockies region).

\textsuperscript{61} See Wolf Recovery Under Attack in the Northern Rockies, supra note 60 (offering specific examples of damage to ecosystem caused by wolves’ absence); 2009 Final Rule, supra note 57, at 15,129 (examining wolf’s place in regional biodiversity). In the absence of a prominent gray wolf population, park rangers in Yellowstone National Park were forced to shoot elk to reign in overgrazing. Id.


\textsuperscript{63} See 1987 Recovery Plan, supra note 2, at 12-18 (recounting wolf’s history and establishing plan to assist wolf recovery). The 1987 Recovery Plan aimed to restore the gray wolf population through natural reintroduction in Canada or through translocation while simultaneously limiting livestock exposure. Id. at 24-33. Plan developers note that given the hostile history between Americans and wolves, public education, support, and acceptance of the gray wolf is an essential element to the wolf’s recovery. Id. at 9.
three consecutive years in each of Montana, Idaho, and Wyoming. The FWS reexamined the species’ status seven years later in its 1994 Environmental Impact Statement (1994 EIS). The 1994 EIS concluded that so long as the FWS supplemented the 1987 Recovery Plan goals with protections ensuring genetic exchange between sub-populations, the recovery goals were “reasonably sound and would maintain a viable wolf population in the foreseeable future.” In 2008, the FWS estimated the NRM DPS comprised more than 1,600 gray wolves and ninety breeding pairs, and had exceeded recovery goals for nine consecutive years.

The 1994 EIS, however, notes the Agency’s wolf recovery goals are “somewhat conservative . . . and should be considered minimal.” Further, biologists remain skeptical of the low recovery goals, particularly given that the FWS failed to provide a viability analysis or other scientific support for its goals. These skeptics estimate that a population closer to two or three thousand, or even as high as seventeen thousand is a more reasonable recovery goal to ensure an “ecologically effective” NRM population.

Current public attitude toward wolves is divided. Rural, agricultural, and ranching populations tend to have more negative attitudes toward wolves than the general population, largely because

64. Id. (outlining wolf recovery plan to promote population growth in three core recovery areas).
66. Id. app. 9 at 42 (noting genetic exchange between sub-populations of gray wolves is necessary to prevent inbreeding and encourage continued growth of viable population).
67. See 2009 Final Rule, supra note 57 at 15,123 (noting gray wolves may no longer need federal protection).
68. Id. (quoting 1994 EIS, supra note 65, app. 9 at 42) (implying recovery effort could be more aggressive).
70. See Bergstrom, supra note 69, at 995 (proposing population goals in tens of thousands); Laura Zuckerman, Idaho Seeks to Kill Hundreds of Protected Wolves, REUTERS (Aug. 6, 2010), http://www.reuters.com/article/2010/08/06/us-usa-wolves-endangered-idUSTRE66535V20100806 (asserting population levels of 2,000 to 3,000 wolves may be necessary to maintain wolf population).
wolves are viewed as a significant threat to livestock.\textsuperscript{72} Private non-profit groups try to assuage these concerns by compensating ranchers for livestock losses and pioneering efforts to reduce risks to livestock.\textsuperscript{73} Still, many groups in the NRM region think the best way to manage the wolf population is through state-sponsored eradication programs.\textsuperscript{74} Political pressure to remove the species’ federal protections, therefore, is immense.\textsuperscript{75}

C. If at First You Don’t Succeed: Attempts to Delist the NRM Gray Wolf

The first major threat to gray wolf protection occurred in 2003 when the FWS issued a final rule (the 2003 Final Rule) reclassifying much of the gray wolf population in thirty states from endangered to threatened.\textsuperscript{76} The FWS justified the 2003 Final Rule by citing the

\textsuperscript{72} See id. at 581 (examining reasons for different attitudes toward wolves). In 2009, one Montana rancher lost roughly $42,000 worth of livestock to wolf predation and intimidation. See The Wolf Returns: Call of the Wild, \textsc{Economist}, Dec. 22, 2012, at 75, available at http://www.economist.com/news/christmas/21568656-after-millennia-spent-exterminating-them-humanity-protecting-wolves-numbers-have-risen (recounting devastation at hands of wolves). Even when wolves do not kill livestock, wolves can harass and intimidate livestock, which causes the livestock to be “worn down” and underweight, which, in turn, makes the livestock less valuable at market. \textit{Id.}


\textsuperscript{74} For an overview of the delisting efforts pushed by wolf opponents, see \textit{infra} notes 76-182 and accompanying text. See also \textsc{Jeff Barnard, Wolf Population Rises in Oregon, But Number of Livestock Kills Doesn’t}, ABC News (Mar. 2, 2013), http://abcnews.go.com/m/story/id=18637214 (suggesting nonlethal wolf management programs may more effectively protect livestock).

\textsuperscript{75} For a discussion of the cost of NRM gray wolf management, see Berrett, \textit{supra} note 53, at 629-30. Federal agencies spent more than $3 million in 2009 and $4.5 million in 2010 on wolf management. \textit{Id.} Private and state compensation funds paid more than $400,000 during both 2009 and 2010 to compensate wolf damage to livestock. \textit{Id.}

\textsuperscript{76} See \textsc{Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife, 68 Fed. Reg. 15,804, 15,818 (Apr. 1, 2003)} (to be codified at 50 C.F.R. pt. 17) [hereinafter 2003 \textit{Final Rule}] (establishing three DPSs and reclassifying Eastern and Western wolf populations as threatened). NRM wolves have been the subject of court disputes since at least 1997. See \textsc{Sarah Brown, Note, The Gray Wolf Stalemate: Why Utah’s Wolf Management Law Threatens the Gray Wolf’s Recovery Throughout Its Historical Range, 32 Utah Envtl. L. Rev. 155, 159
progress made by portions of the wolf population, despite dwindling or non-existent populations in the vast majority of the species’ historic range. Federal courts in Oregon and Vermont struck down the 2003 Final Rule as illegal and contrary to both the ESA’s broad protectionist purpose and Ninth Circuit precedent requiring recovery be evaluated in light of a species’ entire historic range rather than its existing range. Thus, despite the existence of a viable population in some regions, the FWS’ delisting efforts largely failed because “there [were] major geographical areas in which [the wolf was] no longer viable but once was.”

In 2008, the FWS again attempted, unsuccessfully, to remove the NRM gray wolf from ESA protection and delegate wolf management to the states (the 2008 Final Rule). A federal court barred enforcement of the 2008 Final Rule within six months of the Rule’s passage, noting the FWS likely acted arbitrarily in transferring management to the states in light of insufficient evidence that state management plans would ensure the genetic exchange necessary to


77. See 2003 Final Rule, supra note 76 at 18,810-11 (concluding viability of one portion of wolf population is sufficient to delist entire population). The FWS explained, “[T]he progress towards recovery . . . [within part of the population] demonstrates that the species is not in danger of extinction in any significant portion of its entire range within the DPS.” Id. at 15,810. See also Defenders of Wildlife v. Sec’y, United States Dep’t of the Interior (Wildlife v. Dept’ of Int’l), 354 F. Supp. 2d 1156, 1167, 1172 (D. Or. 2005) (vacating 2003 Final Rule); Brown, supra note 76, at 155, 163 (detailing FWS’ various delisting efforts). A species “range” is the “general geographical area within which that species can be found . . . includ[ing] those areas used throughout all or part of the species’ life cycle.” New Policy to Improve Endangered Species Act Implementation: “Significant Portion of its Range” Questions and Answers, U.S. Fish and Wildlife Serv. 2, http://www.fws.gov/endangered/improving_ESA/SFR_draft_policy_FAQs_FINAL_12-7-11.pdf (last visited Mar. 24, 2013) (defining “range”).


80. See Final Rule Designating Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment from the Federal List of Endangered and Threatened Wildlife, 73 Fed. Reg. 10,514, 10,515 (Feb. 27, 2008) (to be codified at 50 C.R.F. pt. 17). The agency required that states provide wolf management plans committed to maintaining a certain population in order to ensure wolves’ continued recovery. Id.
maintain a viable population. The court held that Wyoming’s regulatory mechanisms in particular were likely inadequate to sustain a recovered population. In response, the FWS moved for a voluntary vacatur and remand, returning ESA protections to the NRM gray wolf once again.

Just two weeks after the 2008 Final Rule was remanded in federal court, the FWS re-proposed the Rule with minor amendments. The proposal provided additional assurances of genetic connectivity and split the NRM wolf population into Wyoming and non-Wyoming portions, retaining ESA protections in Wyoming to appease the federal court’s concerns about the 2008 Final Rule it recently condemned. In 2009, the FWS issued this proposal, the 2009 Final Rule, delisting non-Wyoming portions of the NRM gray wolf population from ESA protection. Scientific analyses criticized the 2009 Final Rule as a political concession supported by inadequate research, noting that the rule was “insufficient for maintaining a viable metapopulation” and that “[t]here is no biological basis for declaring the NRM wolf DPS recovered.” Nonetheless, Idaho and Montana, now responsible for wolf management within their respective borders, proceeded to authorize public wolf

81. See Defenders of Wildlife v. Hall (Hall), 565 F. Supp. 2d 1160, 1163, 1178 (D. Mont. 2008) (ruling plaintiff conservationists were likely to succeed on merits and demonstrated possibility of irreparable harm). The court’s evaluation of wolf management plans focused on regulation of public wolf hunts, commitment to managing an adequate number of breeding pairs, and promoting genetic exchange between subpopulations. Id. at 1175-76. For a discussion of the importance of genetic exchange between subpopulations, see supra note 66 and accompanying text.

82. Hall, 565 F. Supp. 2d at 1176 (criticizing Wyoming’s authorization of virtually unregulated wolf hunts and state’s failure to commit to maintaining requisite number of breeding pairs). The court determined regulatory mechanisms in Montana and Idaho were likely adequate. Id. at 1175-76. But see Wyoming v. United States Dep’t of the Interior, Nos. 09-CV-118, 09-CV-158, 2010 WL 4814960, at *45 (D. Wyo. Nov. 18, 2010) (ruling FWS’s rejection of Wyoming’s wolf management plan was arbitrary and capricious).

83. See 2009 Final Rule, supra note 57, at 15,125 (describing FWS’ vacatur request).

84. See id. (discussing rule re-proposal); Defenders, 729 F. Supp. 2d 1207, 1215 (D. Mont. 2010) (recounting FWS’ immediate work on another delisting proposal). FWS allowed for a brief comment period to gather concerns, data, and information in light of the 2008 Final Rule’s prior rejection. Id.

85. See 2009 Final Rule, supra note 57, at 15,125-25 (acknowledging inadequacy of Wyoming’s management plan).

86. Id. at 15,144 (delisting portions of NRM gray wolf population).

87. See Opening Brief for Plaintiffs-Appellants, supra note 69, at *15-16 (quoting Bergstrom, supra note 69, at 991, 995). The wolf population may not be recovered despite satisfaction of original recovery goals given that the current wolf population remains at “less than one percent of its original population.” Id. (quoting Bergstrom, supra note 69, at 994).
hunts. In the first year of delisting, humans killed thirty-seven percent of the gray wolves in these two states.

Conservationists challenged the 2009 Final Rule in federal district court in Montana, arguing that subdividing the NRM gray wolf DPS into Wyoming and non-Wyoming populations effectively created a sub-taxonomy of protection, which is a smaller classification than the ESA authorizes. In *Defenders of Wildlife v. Salazar* (Defenders), the district court agreed with the conservationists, concluding that the 2009 Final Rule was largely a political move and holding “[t]he plain language of the ESA does not allow the agency to divide a DPS into a smaller taxonomy.” The FWS and state agencies promptly appealed the court’s reapplication of ESA protections to the entire NRM population.

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88. See *Defenders*, 729 F. Supp. 2d at 1213-14 (discussing 2009 Final Rule’s effects).


90. See *Defenders*, 729 F. Supp. 2d at 1215-16 (explaining plaintiff’s argument that ESA mandates FWS designate entire DPS, “no more, no less” as endangered or threatened). Subdividing a DPS “contravenes the express Act of Congress.” *Id.* at 1216. See also Brown, *supra* note 76, at 162-64 (reviewing impermissible effect of 2009 Final Rule); Edward A. Fitzgerald, *Defenders of Wildlife v. Salazar: Delisting the Children of the Night in the Northern Rocky Mountains*, 31 PUB. LAND & RESOURCES L. REV. 1, 41 (2010) (reviewing FWS’s DPS policy and implications of *Defenders* decision). For a further explanation of species sub-categorization, see *supra* notes 48-49 and accompanying text.


93. See Eve Byron, *State and Others File Appeal on Wolf Ruling*, INDEP. REC. (Oct. 2, 2010, 12:00 AM), http://helenair.com/news/article_c92ad0d6-cde8-11df-8661-001cc4002e0.html (noting defendants appealed August 5th ruling). Chief legal counsel for Montana’s Fish, Wildlife and Parks Department discussed their strategy, noting “[B]asically, we’ll say that the judge had it wrong, that Congress intended and the language of the Act allows the (U.S. Fish and Wildlife) Service to have different classifications for different populations of species, and can do it along state lines.” *Id.*
Congress effectively mooted this appeal, however, by passing the Department of Defense and Full Year Continuing Appropriations Act of 2011 (2011 Appropriations Act). An appropriations bill, unlike other legislation, can be adopted without public review or comment. Legislators faced immense political pressure to pass the Act, and both sides of the aisle compromised on a number of issues. The final 2011 Appropriations Act included dozens of policy riders, including the most aggressive wolf delisting effort to date. Section 1713 of the Act (Section 1713 or Reissuance) states:

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. 15123 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-118] and 09-CV-138] on November 18, 2010.

Section 1713 effectively circumvented the ruling in *Defenders* by reissuing the vacated 2009 Final Rule and barring interference by


95. See Sher & Hunting, *supra* note 9, at 478 (contrasting process for passing appropriation and spending bills from processes required to pass substantive legislation).


97. See Brown, *supra* note 76, at 163 (noting delisting effort was one of more than fifty policy riders included in 2011 Appropriations Act).

other law or the judiciary.99 This marked the first time the government delisted an endangered species in an appropriations act and without adherence to the ESA's prescribed delisting procedures.100 Neither house of Congress specifically discussed Section 1713 during the bill's negotiations, and several legislators explicitly confirmed afterward that Congress designed the Reissuance to reverse the ruling in **Defenders** and did not intend it to amend the ESA.101

D. Nonspecific Magic Words and Their Progeny: The Separation of Powers Doctrine

The separation of powers doctrine, establishing that three separate and distinct branches of government are necessary to check and balance one another, is constitutionally mandated and has been among the most central tenets of the United States' government since the country's founding.102 The Supreme Court remains committed to the importance of this principle, which it views as "a


100. For a brief discussion of the unprecedented delisting circumstances at issue with the NMR gray wolf, see supra note 11 and accompanying text. For a further explanation of the enumerated factors used to determine listing status under the ESA, see supra note 50 and accompanying text.


102. See U.S. Const. art. I-III (allocating power among federal executive, legislature, and judiciary). "All legislative Powers . . . shall be vested in a Congress . . ." *Id.* art. I, § 1. "The executive Power shall be vested in a President . . ." *Id.* art. II, § 1, cl. 1. "The judicial Power . . . shall be vested in one Supreme Court . . ." *Id.* art. III, § 1. "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." The **Federalist No. 47**, at 324 (James Madison). For a general discussion of the origins of the separation of powers doctrine, see Ronner, supra note 39, at 1037-38.
self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”

Separation of powers jurisprudence concerning the legislature’s ability to pass laws affecting the court’s adjudicatory function is based on vague distinctions between law and fact and on a strong deference to congressional action.

1. Compelling a Change in Law or Fact? Separation of Powers in the Supreme Court

The modern separation of powers doctrine is largely shaped by the Supreme Court’s seminal decision in United States v. Klein. Klein concerned a federal appropriations provision directing that proof of a presidential pardon was conclusive evidence of disloyalty. Congress passed the provision while a case concerning a presidential pardon was pending and even went so far as to strip the Supreme Court of jurisdiction to hear such cases.

The Court held the provision unconstitutional, reasoning that it impermissibly directed the outcome of a particular case and that Congress had withheld appellate jurisdiction “as a means to an end . . . inadvertently pass[ing] the limit which separates the legislative from the judicial power.” The decision turned on the distinction between the facts in Klein and an earlier case in which the Court upheld a statute affecting pending litigation. The Court reasoned that in the prior case the statute was permissible because it amended the law underlying pending litigation, whereas in Klein,


104. For a thorough discussion of problems with current separation of powers jurisprudence, see infra notes 111-132 and accompanying text.


106. Klein, 80 U.S. at 128 (reviewing dispute’s underlying facts).

107. Id. at 145 (discussing statute’s attempt to direct that presidential pardons could not be used as proof of loyalty requisite to obtain property under Abandoned Property Collection Act of 1863 and subsequently stripping Supreme Court of appellate jurisdiction of such matters). For a general discussion of the political and historic background of Klein, see Ronner, supra note 39, at 1042-45.


Congress impermissibly compelled a specific finding of fact under existing, unchanged law. 110 This key distinction between statutes that change law and those that direct specific factual findings, however, is not as clear as the Court implied, leading to different and sometimes inconsistent applications of the doctrine. 111

The Supreme Court began to erode this already unclear distinction in 1992, in Robertson v. Seattle Audubon Society (Robertson II). 112 The case concerned an appropriations bill passed amid pending disputes regarding whether the United States Forest Service's timber harvesting policies afforded adequate protection to an endangered owl as required by several environmental statutes. 113 The bill identified the pending cases by name and caption number and “determine[d] and direct[ed]” that compliance with additional harvesting policies set forth in the same appropriations bill was sufficient to satisfy the environmental requirements at issue in the respective cases. 114

Initially, in Seattle Audubon Society v. Robertson (Robertson I), 115 the Ninth Circuit held the statute at issue violated the holding in Klein by impermissibly instructing the court “to reach a specific result and make certain factual findings under existing law in connec-

110. See id. (distinguishing Klein’s facts from earlier case); see also Martin H. Redish & Christopher R. Pudelski, Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein, 100 Nw. U. L. Rev. 457, 484-40 (2006) (inferred that Klein established legislative process must ensure balance of power and avoid deception). Klein suggests that “the judiciary - the one governmental branch insulated from the electorate - provides the only effective means of assuring that the democratic process operates [properly] . . . It does so by policing the legislative process to eliminate both micro and macro legislative deception.” Id. at 440.

111. See, e.g., Ronner, supra note 39, at 1045-48 (discussing several interpretations of Klein, ranging from narrow readings limited to treatment of presidential pardons or sovereign immunity to broader readings regarding congressional encroachment on judiciary). There are even wider ranges of interpretations within these categories, particularly regarding the legislature’s encroachment on the judiciary through intervention in pending litigation. See id. The Court in Klein, however, acknowledged its intent to exercise restraint in its decision. See Klein, 80 U.S. at 148.


113. See id. at 431-33 (discussing procedural history). The statutes concerning the northern spotted owl’s treatment included the Migratory Bird Treaty Act, the National Environmental Policy Act of 1969, the National Forest Management Act of 1976, the Federal Land Policy and Management Act of 1976 and the Oregon-California Railroad Land Grant Act. Id. at 440.

114. See id. at 434-36 (creating additional environmental standards).

tion with two cases pending in federal court.” 116 Although the intervening legislation did add some additional requirements to the underlying law, by its plain language the legislation did not amend or repeal the law. 117

In Robertson II, however, the Supreme Court reversed, finding the appropriations measure did amend the underlying environmental laws by explicitly setting out that compliance with the new requirements satisfied the old law. 118 Unlike the Ninth Circuit, the Supreme Court emphasized its obligation to impose a saving interpretation. 119 The Court focused on the ends Congress sought to achieve rather than its means, deferring to the fact that Congress could have achieved the same result through explicit amendment or repeal. 120 The Court dismissed the language “determine and direct” as an “empty phrase” with no impact on whether the intervening law directed findings of fact or a change of law. 121 Notably, the Court reasoned that the provision’s direct reference to pending liti-

116. See id. at 1316 (vacating statute for violating separation of powers doctrine under Klein). For an explanation of the holding and reasoning in Klein, see supra notes 105-111 and accompanying text.

117. See Robertson I, 914 F.2d at 1316 (comparing Robertson facts to earlier cases in which courts held statutes encroached on judicial functions). In the alternative, the court reasoned the statute at issue in Robertson could not amend substantive law because it was an appropriations measure. See id. at 1317 (citing Tenn. Valley Auth. v. Hill, 437 U.S. 155 (1978)). The Supreme Court rejected this interpretation, however, noting Congress can amend a law by implication in an appropriations bill if it does so clearly, and here there was clear intent to modify. See Robertson II, 503 U.S. at 440-41 (explaining amendments by implication are permissible).

118. See Robertson II, 503 U.S. at 437 (noting appropriations provisions can amend substantive law provided changes and intent to modify are clear and express). The Court did note, however, that it did not review whether the Ninth Circuit’s reading of Klein was correct. See id. at 439-40.

119. See id. at 440-41 (citing Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937)) (discussing courts’ obligation to impose saving interpretations). The Court in Robertson II emphasized its “obligation[ion] to impose [a] ‘saving interpretation’ . . . as long as it was a ‘possible’ one.” Id. at 441.

120. See id. at 430, 440-41 (reasoning Congress could have accomplished ESA amendment through other means). See also Ronner, supra note 39, at 1053 (noting Court’s focus on ends over means). The Supreme Court in Robertson II pointed out that the intervening legislation amended rather than repealed the ESA and thus did not violate the rule disfavoring implied repeals by appropriations measures. Robertson II, 503 U.S. at 440 (citing Tenn. Valley Auth., 437 U.S. at 190 (requiring repeals be explicit)).

121. Robertson II, 503 U.S. at 439-40 (rejecting environmental groups’ arguments that statutory language indicated infringement on judiciary). This approach implies that the focus is on whether Congress “could have achieved the same result through amendment or repeal . . . deeming Congressional means to be irrelevant.” Ronner, supra note 39, at 1053. The Supreme Court’s approach in Robertson II may be internally inconsistent and conflicts with the Ninth Circuit’s emphasis on means. See id. at 1052-53.

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2. Proceeding with Caution After Robertson II’s Bite: Separation of Powers in the Ninth Circuit

Following the Supreme Court’s reversal in Robertson II, the Ninth Circuit adopted a deferential approach to congressional exemptions of specific projects from environmental regulations, recognizing "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."123 The Ninth Circuit now conducts separation of powers analyses with caution, acutely aware of the Supreme Court’s reminder in Robertson II to adopt a saving interpretation in favor of congressional exemptions.124 In Stop H-3 Ass’n v. Dole (Stop H-3),125 the Ninth Circuit upheld a provision in an appropriations bill exempting the completion of a construction project from specific environmental laws.126 The court rejected the argument that Congress exceeded its authority in creating this exemption and in mooting relevant pending litigation, reasoning that Congress used the appropriations provision to amend the specified environmental law in accordance with its legislative duty.127

122. See Robertson II, 503 U.S. at 440 (explaining provision only named affected cases for expediency). But see Redish & Pudelski, supra note 110, at 457 (suggesting any reference to specific cases is suspect).

123. Gray v. First Winthrop Corp., 989 F.2d 1564, 1569-70 (9th Cir. 1993) (discussing Ninth Circuit’s interpretation of Robertson II). See also Ito v. Glock, Inc., 565 F.3d 1126, 1139 (9th Cir. 2009) (explaining decisions suggest legislation does not offend Klein when it amends underlying law). “[I]f 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 . . . .” Id.

124. See Block, supra note 18, at 11000 (discussing how Supreme Court’s overruling of Robertson I has tempered Ninth Circuit’s application of separation of powers analysis). For further discussion of the Ninth Circuit’s rationale in Robertson I and the Supreme Court’s subsequent reversal, see supra notes 112-122 and accompanying text.

125. 870 F.2d 1419 (9th Cir. 1989) (upholding congressional exemption of highway project from compliance with environmental regulations as not violating separation of powers).

126. Id. at 1433-38 (discussing intervening legislation’s specific language). The Ninth Circuit also upheld the exemption against challenges on other grounds, reasoning it was not an unconstitutional exercise of congressional power under the Spending Clause, it did not violate the Fifth Amendment’s Equal Protection Clause, and it satisfied the National Environmental Policy Act of 1969 and an earlier stipulation agreed to by the federal defendants. Id. at 1424-32.

127. Id. at 1433-38 (reasoning Congress did not attempt to execute environmental requirements with respect to H-3, but rather exempted H-3 from such re-
The Ninth Circuit has also upheld exemptions from environmental regulations that exempt by implication. In *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States* (*Consejo*), the Ninth Circuit reasoned that given a statute directing the commencement of a construction project “‘notwithstanding any other provision of law’[,] a change in the law can be gleaned by identifying statutes that would prevent the action from proceeding.” There, the intent to amend the underlying law to avoid delay was clear, and thus the statute permissibly changed the underlying law and barred judicial review. The Ninth Circuit’s deference to intervening provisions buried in large appropriations and spending bills has paved the way for a discrete yet “systematic dismantling of environmental protection legislation.”

IV. NARRATIVE ANALYSIS

In *Wild Rockies II*, the Court of Appeals for the Ninth Circuit upheld Congress’ Reissuance of the 2009 Final Rule, maintaining that its hands were tied by the Supreme Court’s decision in *Robert-

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128. See *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1169 (9th Cir. 2007) (holding “notwithstanding any other provision of law” language exempted canal project from compliance with ESA, National Environmental Policy Act, and other environmental regulations despite bill not explicitly mentioning such laws). The Ninth Circuit rejected a separation of powers challenge, noting the bill amended underlying law and did not direct findings of fact under existing law. *Id.* at 1170 (citing *Stop-H-3*, 870 F.2d at 1431).

129. 482 F.3d 1157 (9th Cir. 2007).


131. *Consejo*, 482 F.3d at 1169 (explaining Congress intended to avoid usual administrative and judicial procedures).

132. Sher & Hunting, *supra* note 9, at 456 (warning of environmental effects of less rigid separation of powers jurisprudence).
The Ninth Circuit explained that Klein was an isolated instance in which a law impermissibly infringed on the adjudicatory process, and the court begrudgingly recalled that when it used Klein to vacate legislation in Robertson I, “[t]he Supreme Court . . . told us the error of our ways.” As it did in Stop H-3 and Consejo, the Ninth Circuit in Wild Rockies II upheld an environmental exemption that intervened in a pending dispute – this time, affirming the delisting of the NRM gray wolf.

A. An Empty Phrase Amends the ESA

The Ninth Circuit reasoned that the facts in Wild Rockies II were analogous to Robertson II, and thus Robertson II mandated the court hold the appropriations provision directed a change in law rather than a finding of fact. Similar to the legislation in Robertson II, which directed agency action in accordance with new environmental regulations amending prior law, Section 1713 in Wild Rockies II ordered the FWS to delist the NRM gray wolf “without regard to any other provision of statute or regulation that applies to issuance of such a rule.” Invoking the Supreme Court’s reasoning in Robertson II that intervening legislation directing specific agency action merely amends the substantive law underlying a pending dispute, here, the Ninth Circuit reasoned the Reissuance served to amend the ESA.

Moreover, the Ninth Circuit highlighted that the language in the Reissuance in Wild Rockies II was comparable to that of the provisions in Stop H-3 and Consejo, both of which the court upheld as compelling a change in law. The language in Consejo was particularly relevant given that, as in Wild Rockies II, it did not specify the underlying law it was amending and thus amended by implica-
The Ninth Circuit reasoned the Reissuance in *Wild Rockies II* was similarly permissible because “[t]his court has held that, when Congress so directs an agency action, with similar language, Congress has amended the law.”\(^{141}\) Finally, the Ninth Circuit firmly rejected criticism that reissuing the 2009 Final Rule using an appropriations provision leaves the delisting unclear and ambiguous, finding the Reissuance was “perfectly clear” in dictating an immediate partial delisting.\(^{142}\)

### B. Judicial Review Not of Concern

The Ninth Circuit similarly swept aside concerns about the Reissuance’s bar of judicial review, noting Section 1713’s applicable language is analogous to the language in *Consejo* directing immediate agency action notwithstanding other law.\(^{143}\) The Ninth Circuit acknowledged in *Consejo* that “[t]here are no ‘magic words’ that can sweep aside constitutional concerns.”\(^{144}\) Congress can, however, use such a provision to bar judicial review when its intent to avoid review is clear.\(^{145}\) The court reasoned that, as in *Consejo*, the intent to bypass judicial review was clear in *Wild Rockies II*, “otherwise, ‘it would have been unnecessary for Congress to act at all.’”\(^{146}\)

### V. Critical Analysis

In *Wild Rockies II*, the Court of Appeals for the Ninth Circuit reaffirmed its commitment to an overly deferential review of appro-

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\(^{140}\) Id. (citing *Consejo de Desarrollo Economico de Mexico*, A.C. v. United States, 482 F.3d 1157, 1169-70 (9th Cir. 2007)).

\(^{141}\) Id. at 1174 (reasoning Reissuance permissibly amends underlying law and poses no threat to separation of powers doctrine).

\(^{142}\) Id. at 1177 (addressing contention that meaning and effect of 2009 Final Rule are unclear).

\(^{143}\) See id. (analogizing language in Reissuance, “without delay,” to that in *Consejo*, “notwithstanding any other provision of law”). The Ninth Circuit acquiesced to what it perceived as a deferential mandate, noting “Section 1713’s bar to judicial review does not remove it from the broad safe harbor recognized in [*Robertson II*].” Id.

\(^{144}\) Id. (quoting *Consejo*, 482 F.3d at 1168-69) (acknowledging concerns regarding bars to judicial review).

\(^{145}\) Id. (suggesting Congress’ intent trumps its means).

\(^{146}\) Id. (citing *Consejo*, 482 F.3d 1157 at 1169) (finding that passing Reissuance demonstrated Congressional intent to amend ESA and avoid judicial review). The Ninth Circuit noted that a provision barring judicial review of its own constitutionality is highly suspect. Id. The government renounced such an interpretation, however, so this was not a focus of the Ninth Circuit’s analysis. Id. The court noted that while Section 1713 bars judicial review of the Reissuance, it does not bar review of regulations promulgated to further the Reissuance’s directives to delist wolves and evaluate their progress and viability. Id.
pritions provisions affecting the outcome of pending environmental litigation. The Ninth Circuit failed to distinguish the facts in *Wild Rockies II* from *Robertson II* and its progeny and solidified a line of jurisprudence upholding an arbitrary distinction between congressional directives that amend law and those that direct judicial findings of fact under existing law. The decision amplifies an unfortunate chorus giving Congress the green light to intermeddle in the judiciary’s affairs and to erode the ESA and its protections when it is politically expedient to do so.

A. Walking on Egg Shells in the Wake of *Robertson II*

Since the Supreme Court reversed the Ninth Circuit in *Robertson II*, the Ninth Circuit has “inappropriately turned [the requisite] ‘high degree of judicial tolerance’ into carte blanche and in doing so inappropriately read Klein out of existence.” In *Wild Rockies II*, the Ninth Circuit was unwilling to recognize that the facts surrounding the NRM gray wolf’s delisting were distinguishable from *Robertson II* in several critical ways. First, unlike the intervening legislation in *Robertson II* that gave courts new law to apply, the provision in *Wild Rockies II* directed the Secretary of the Interior to reissue a vacated rule, barring interference by the ESA or any other law. Thus, Section 1713 is even more vague than its counterpart in *Robertson II* in that it merely serves as a blanket ban against all interference, leaving uncertain the scope and breadth of both the Reissuance and any law it amends.

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147. For a thorough explanation of the Ninth Circuit’s analysis and holding in *Wild Rockies II*, see *supra* notes 133-146 and accompanying text.

148. For a discussion of *Robertson II* and subsequent separation of powers jurisprudence, see *supra* notes 112-132 and accompanying text.

149. For an analysis of the potential impact of the Ninth Circuit’s holding in *Wild Rockies II*, see *infra* notes 179-208 and accompanying text.


151. For a synopsis of the Ninth Circuit’s conclusion that the facts in *Wild Rockies II* were analogous to *Robertson II* and prior cases upholding intervening legislation, see *supra* notes 133-146 and accompanying text.

152. For a discussion of the text and effect of the Reissuance, see *supra* notes 94-101 and accompanying text. See also Reply Brief for Plaintiffs-Appellants, *supra* note 150, at *5 (distinguishing *Wild Rockies II* from *Robertson II*). For further discussion of the additional environmental regulations created by the intervening legislation in *Robertson II*, see *supra* note 114 and accompanying text.

153. See, e.g., Block, *supra* note 18, at 11000-01 (highlighting that Reissuance is unclear in how it amends ESA).
Second, the statute in *Robertson II* amended the underlying environmental law consistent with the spirit of conservation by creating additional environmental regulations. Section 1713 in *Wild Rockies II*, however, exempts the directive from any environmental oversight by explicitly barring any other law from interfering with the directive’s execution—a move sharply at odds with the ESA’s protectionist purpose. Moreover, the Ninth Circuit’s strained attempt to find a saving interpretation, which it justified using language as vague as “without regard to [other law or judicial review],” may contradict the reasoning in *Robertson II*, which noted the constitutionality of an amendment does not depend on empty phrases such as “determine and direct.” The length to which the Ninth Circuit went to find a saving interpretation of the Reissuance may therefore be a step further than the Supreme Court envisioned in *Robertson I*. As the district court implied in *Wild Rockies I*, it is not the holding in *Robertson II*, but rather the Ninth Circuit’s interpretation of that holding that proves to be so problematic.

The Ninth Circuit’s failure to distinguish the Reissuance from the intervening legislation in *Stop H-3* and *Consejo* further exemplifies its overly deferential review. Unlike the vague appropriations rider in *Wild Rockies II*, the statute in *Stop H-3* identified the

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155. See *Department of Defense and Full-Year Continuing Appropriations Act of 2011*, Pub. L. No. 112-10, § 1713, 125 Stat. 86 (Apr. 15, 2011) (exempting gray wolf delisting from compliance with any other law). For a brief discussion of the Reissuance’s effect on other law, see *supra* notes 99-102 and accompanying text. For a statement of ESA’s purpose, see *supra* note 47 and accompanying text.

156. See *Wild Rockies II*, 672 F.3d 1170, 1171, 1174-75 (9th Cir. 2012) (interpreting Reissuance’s vague language as exempting it from other environmental regulations and judicial review). For a brief synopsis of the Supreme Court’s discussion of the utility of phrases such as “determine and direct” in *Robertson II*, see *supra* note 121 and accompanying text. The holding in *Wild Rockies II*“turned [the standard] 180 degrees, so that the courts are no longer using ‘empty phrases’ to invalidate a statute, but instead use them to declare a statute constitutional.” *Block v. Stewart*, 800 F. Supp. 118 at 11000.

157. See *Wild Rockies I*, 800 F. Supp. 2d at 1126 (suggesting Ninth Circuit is overly deferential in wake of *Robertson II*). 11000.

158. See id. (noting, in dicta, court would invalidate Reissuance as unconstitutional if not for Supreme Court’s *Robertson II* decision). The court noted Ninth Circuit precedent requires the court to impose a saving interpretation if Congress uses “nonspecific magic words.” Id. For a review of the district court’s analysis, see *supra* notes 38-40 and accompanying text.

159. See *Wild Rockies II*, 672 F.3d at 1174-75 (analogizing *Wild Rockies II* to earlier cases).
specific law it purported to amend. The court in Stop H-3 also focused solely on the legislation’s ends and never addressed the means used, while the plaintiffs in Wild Rockies II did question the use of an appropriations rider to amend law. Further, both Stop H-3 and Consejo concerned one-time construction projects that did not pose the broad implications that may result from delisting a species from the ESA. Most importantly, the Ninth Circuit afforded virtually no significance to the fact that, unlike the laws in Robertson I, Stop H-3, and Consejo, the Reissuance in Wild Rockies II directed enforcement of the same law that a federal district court had already vacated as illegal and inconsistent with the ESA. While the Reissuance purportedly solved this inconsistency issue by amending the ESA, such an action was unprecedented and warranted a more thorough explanation.

B. The Ninth Circuit Got it Right the First Time

The Ninth Circuit may have been correct in Robertson I that upholding legislation that has a suspicious impact on pending litigation is irreconcilable with Klein. Klein emphasized the separation of powers doctrine depends on scrutiny of congressional means. Yet, the Court’s decision in Robertson II abandoned the approach in Klein by shifting focus away from the means Congress used to the ends Congress could have achieved by directly modifying the law. Further, like the intervening legislation that the

160. See id. (noting Reissuance’s impact). For an overview of the Ninth Circuit’s precedent set in Stop H-3, see supra notes 124-127 and accompanying text.
161. See Wild Rockies II, 672 F.3d at 1174 (paying no mind to concerns about using appropriations provisions to delist a species); see also Shepley, Rutan & Ebersole, supra note 9, at 448 (exploring implications of shifting focus from means used to amend law to ends). For a synopsis of the Ninth Circuit’s inattention to the means used to amend legislation in Stop H-3, see supra note 127 and accompanying text.
162. See Reply Brief for Plaintiffs-Appellants, supra note 150, at *12-13 (arguing Wild Rockies II is distinguishable from earlier cases).
163. For a thorough history of the Reissuance and its enforcement of the previously vacated 2008 Final Rule, see supra notes 90-101 and accompanying text.
164. See Barringer & Broder, supra note 11 (highlighting Reissuance’s uniqueness). For further discussion of the Ninth Circuit’s swift review of the Reissuance’s legality, see supra notes 133-146 and accompanying text.
165. See Robertson I, 914 F.2d 1311, 1316 (9th Cir. 1990) (vacating intervening legislation as unconstitutional under Klein); see also Ronner, supra note 39, at 1054-55 (suggesting holding in Robertson II was inconsistent with Klein).
166. See, e.g., Wild Rockies I, 800 F. Supp. 2d 1123, 1129 (D. Mont. 2011) (criticizing abandonment of rigid separation of powers analysis). For a further discussion of Klein, see supra notes 105-111 and accompanying text.
167. See Robertson II, 503 U.S. 429, 438-40 (1992) (distinguishing Klein); see also Ronner, supra note 39, at 1053-55 (criticizing Robertson II as internally inconsistent regarding analyzing congressional means used to enact legislation).
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The Supreme Court vacated in Klein, the provisions in Robertson II and Wild Rockies II clearly targeted specific controversies, yet courts upheld those provisions as compelling changes in law rather than findings of fact. 168

C. An Amorphous Distinction, an Uncertain Result

The Ninth Circuit and Supreme Court’s irreconcilable holdings in Robertson I and Robertson II illustrate that the characterization of intervening legislation as affecting fact findings or underlying law is largely arbitrary. 169 The distinction as to “what counts as a relevant fact in a given case will depend on what is determined to be the relevant rule, which in turn depends on the characterization of the facts.” 170 Confusion under this system prevents courts from utilizing a principled method to distinguish proper congressional directives from the improper, thereby encouraging courts to defer to the legislature or to decide cases based on their own political views. 171 The Ninth Circuit appears to have taken the former approach. 172

The confusion surrounding this amorphous distinction between law and fact is compounded by the use of empty phrases such as “without regard to any other provision of statute or regulation” in Wild Rockies II because these phrases provide little guidance as to how the law has changed. 173 The Ninth Circuit found the Reissuance was perfectly clear: it directed the partial delisting take place within a specific time and without interference. 174 The court, how-

168. See United States v. Klein, 80 U.S. 128, 128-29 (1871) (noting intervening legislation’s impermissible targeting of specific controversy). For a discussion of possible motives to affect the outcome of a pending case, see supra notes 99-101 and accompanying text.


170. Id. at 940 (criticizing distinction between amending law and directing fact finding as improper basis for distinguishing types of legislation).

171. See id. at 941 (noting implications of perpetuating vague separation of powers standards).

172. For a discussion of the Ninth Circuit’s approach to separation of powers issues in the wake of Robertson II, see supra notes 102-132 and accompanying text.

173. See Block, supra note 18, at 11002 (explaining textual ambiguity and lack of legislative history make 2011 Reissuance unclear). This lack of clarity, in combination with the removal of judicial review, may suggest Congress intended to direct the outcome in pending cases regarding the NRM gray wolf and never intended to create new legal circumstances. Id.

174. Wild Rockies II, 672 F.3d 1170, 1175 (9th Cir. 2012) (dispelling appellant’s contention that provision was unclear).
ever, dismissed concerns about potential ambiguity too quickly.\textsuperscript{175} The forced delisting could have a variety of implications, ranging from stripping the non-Wyoming NRM gray wolf population or even the entire NRM population of ESA protections to establishing the future permissibility of sub-taxonomies and partial delistings under the ESA.\textsuperscript{176} The ESA presumably governs the wolf delisting, but how the Reissuance leaves the ESA is unclear.\textsuperscript{177} The only clear implications from Section 1718 are the mooring of pending litigation and the removal of the federal judiciary’s authority to review the issue, both of which warrant concern.\textsuperscript{178}

\section*{VI. Impact}

\subsection*{A. The NRM Gray Wolves}

Since the Ninth Circuit approved the Reissuance of the 2009 Final Rule in March 2012, Montana and Idaho have each focused their state’s management efforts on decreasing the wolf population by lengthening hunting seasons and increasing wolf hunting quotas.\textsuperscript{179} As a result, hunters and trappers in the two states killed more than 360 wolves during the 2011-2012 hunting season and more than 460 wolves during the 2012-2013 season.\textsuperscript{180} The drastic

\begin{itemize}
\item\textsuperscript{175} See, e.g., Sher & Hunting, supra note 9, at 477-80 (noting amendments by implication are traditionally disfavored). The inevitable lack of careful consideration involved in passing “eleventh-hour” exemptions that amend law by implication can lead to unforeseen interpretations of the exemptions. \textit{Id}. For a suggestion of the possible impact of ignoring clarity issues, see \textit{infra} notes 194-197 and accompanying text.
\item\textsuperscript{176} See \textit{Wild Rockies II}, 672 F.3d at 1175 (suggesting Reissuance’s implications are clear). Unlike the intervening legislation in \textit{Robertson II}, the provision in \textit{Wild Rockies II} did not specifically indicate that certain new circumstances now satisfied existing standards. \textit{See id.} For a review of the legislation in \textit{Robertson II}, see \textit{supra} notes 112-117 and accompanying text.
\item\textsuperscript{177} See Block, \textit{supra} note 18, at 11002-03 (highlighting gap left by court in \textit{Wild Rockies II}). A species as controversial as the NRM gray wolf is likely to retain some ESA protections, but the extent of those protections after \textit{Wild Rockies II} is unclear. \textit{Id}. at 11002. Some courts may interpret the Reissuance’s scope particularly narrowly given that appropriations measures can be interpreted as in force only during the fiscal year of the appropriation. \textit{See George Cameron Coggins & Robert L. Glickman, Powers of Courts Over Public Lands and Resources}, 1 PUB. NAT. RESOURCES L. § 3:24 (2nd ed.) (last updated Feb. 2013) (suggesting Congress should clarify measure’s effect).
\item\textsuperscript{178} See Block, \textit{supra} note 18, at 11002-03 (discussing Reissuance’s susceptibility to several possible interpretations).
\item\textsuperscript{179} See David Lawlor, \textit{A Friend of the Wolf for Decades}, \textit{EARTHJUSTICE}, http://earthjustice.org/features/campaigns/a-friend-of-wolves-for-decades (last visited April 4, 2013) (recounting state wolf management efforts since Reissuance went into effect).
\item\textsuperscript{180} \textit{Id.} (noting threat to wolf population); Matthew Brown, \textit{Hunters, Trappers Kill 245 Wolves in Idaho So Far This Season}, KBOI2 (Feb. 28, 2013), http://www.
\end{itemize}
decline in the wolf population will likely affect the ecological stability of the region, thereby extending the Reissuance’s reach far beyond just the NRM gray wolf.181

Furthermore, on September 1, 2012, the FWS lifted ESA protections in Wyoming following revisions to the state’s management plans.182 The move turned management over to the state despite earlier concerns that Wyoming’s wolf management plan was inadequate and overly hostile.183 The current Wyoming plan authorizes unlimited, shoot-on-sight hunting of wolves in 85% of the state.184

The FWS Director applauded the Wyoming delisting as a victory for the ESA, but conservationists fear removing wolves’ federal protection threatens to undo decades of recovery work.185 In the first two and a half months of the hunting season, hunters killed approximately 20% of Wyoming’s wolves, including the “most famous wolf in the world,”186 a female alpha wolf who scientists tracked and researched since her birth in 2006.186 In November of 2012,
several conservation organizations, including many of the plaintiffs in *Wild Rockies II*, filed suit against the FWS for the Wyoming delisting.\textsuperscript{187} Since the decision in *Wild Rockies II*, hunters in Idaho, Montana, and Wyoming have trapped or shot at least 850 NRM gray wolves, leaving the gray wolf population now dwindling at around 1,700, which may already be too low to maintain a stable population.\textsuperscript{188}

B. Shooting Holes in the ESA Behind Closed Doors

After the decision in *Wild Rockies II* allowing Congress to use an obscure appropriations provision to delist the NRM gray wolf, other politically unpopular species may share a similar fate.\textsuperscript{189} A dialogue among legislators and the public about ESA delisting is crucial, especially when delisting concerns a species whose protections are as controversial as the wolf's.\textsuperscript{190} Bypassing this necessary dialogue by delisting a species behind closed doors is certainly the path of least resistance; Congress, however, has a duty to participate in this debate and should not shirk its responsibility under political pressure.\textsuperscript{191}

The Ninth Circuit’s holding in *Wild Rockies II* is particularly troubling in light of the ESA’s requirement that decisions to delist a


\textsuperscript{188} See Zuckerman, supra note 185 (disputing claims that NRM wolf population is stable or recovered). See also Peter Firmin, Move to Extend Wolf Protections in State, SF GATE (Jan. 13, 2013), http://www.sfgate.com/science/article/Move-to-extend-wolf-protections-in-state-4191107.php (noting response from neighbor states concerned for their wolf populations). For further discussion of the population required to ensure the gray wolf’s recovery, see supra note 70 and accompanying text.

\textsuperscript{189} See Block, supra note 18, at 11003 (reasoning that bypassing proscribed ESA delisting process robs species of traditional ESA safeguards).

\textsuperscript{190} For a discussion of public opinion of wolves, see supra notes 72-73 and accompanying text.

\textsuperscript{191} See *Wild Rockies I*, 800 F. Supp. 2d 1123, 1131 (D. Mont. 2011) (suggesting Congress avoided addressing difficult issue head on). The district court explained, “The political process requires Congress to take stances on issues . . . nonspecific magic words should not sweep aside constitutional concerns.” Id. For discussion of the political pressure on Congress to remove the gray wolf’s federal protections, see supra notes 75, 96 and accompanying text.
species be based only on the best scientific evidence available. 192 Evidence concerning the wolf’s recovery remains highly contested: the FWS declared a full recovery of the population, but other scientists are critical of the Agency’s recovery goals and lack of scientific transparency. 193 Amending the ESA in an appropriations policy rider “circumvent[s]” the traditional lawmakers process, discouraging full debate about the competing values at issue, thus resulting in uninformed and misguided decisionmaking [sic]. 194

Further, backdoor exemptions such as Section 1713 in *Wild Rockies II* undermine the ESA’s intended effect, which is to afford broad, comprehensive protections to vulnerable species. 195 Hiding these exemptions in long, politically charged appropriations bills allows Congress to circumvent the ESA’s requirements while preventing the public from “recognizing that the measure represented a severe compromise of the values of the Endangered Species Act.” 196 Following *Wild Rockies II*, Congress can easily and deceptively create exemptions and amendments to environmental statutes, even when the effect is contradictory to the underlying law’s intent, so long as it uses the right set of ambiguous, magic words. 197

The Ninth Circuit’s affirmation of *Robertson II* and its progeny is problematic for its effects outside of the ESA as well. 198 Appropriations policy riders that circumvent the proper legislative process

192. For a discussion of the ESA delisting process, see supra notes 48-52 and accompanying text.

193. For a discussion of the contested evidence surrounding the NRM gray wolf’s recovery, see supra note 70 and accompanying text.

194. Sher & Hunting, supra note 9, at 452 (criticizing congressional use of appropriations bills to create exemptions).

195. For an overview of the ESA’s purpose, see supra note 45 and accompanying text.

196. Sher & Hunting, supra note 9, at 444 (discussing ESA’s erosion since courts have become more accepting of exemptions from environmental regulations). For a discussion of the backdrop in which Congress passed the Reissuance, see supra note 31 and accompanying text.

197. See, e.g., Block, supra note 18, at 11008 (warning Ninth Circuit’s decision allows Congress to impermissibly bypass prescribed legislative processes). For a discussion of the failed efforts to delist the NRM gray wolf before the decision in *Wild Rockies II* enabled Congress to use a backdoor strategy, see supra notes 76-93 and accompanying text. For a synopsis of the ESA provisions implicated in the delisting efforts, see supra notes 48-52 and accompanying text.

198. See George Cameron Coggin & Robert L. Glickman, *Statutes, 1 Pub. Nat. Resources L. § 1:24* (2nd ed.) (last updated Feb. 2013) (mentioning other areas where Congress exercised “bad habit” by using appropriations bills to amend law). For further discussion of unfavorable effects of the Ninth Circuit’s approval of the use of appropriations bills to enact policy changes, see supra notes 169-178 and accompanying text.
evade public will because appropriations bills are not subject to public comment or the congressional scrutiny required to pass substantive legislation.\textsuperscript{199} Using a combination of nonspecific magic words in these obscure amending provisions shoots holes in the underlying substantive law being amended and provides little insight into the scope of the amending provision’s impact.\textsuperscript{200} The result is that the public, and even the legislature creating the exemption, are left in the dark.\textsuperscript{201}

C. Encroachment on the Judiciary

Ironically, the judiciary’s overly deferential review of these backdoor amendments paves the way for further congressional encroachment on the federal courts.\textsuperscript{202} Manning the boundaries between congressional directives that change the law and those that direct the outcome of pending litigation is imperative to maintain a balance of power.\textsuperscript{203} Yet \textit{Wild Rockies II} solidifies the Ninth Circuit’s deference to congressional directives as compelling changes in law rather than fact, thereby allowing Congress to take matters into its own hands by excluding judicial review and preventing public participation in the legislative process.\textsuperscript{204}

This chipping away of the separation of powers doctrine warrants harsher scrutiny.\textsuperscript{205} Barring judicial review and giving Congress free reign to direct the outcome of pending litigation erodes the public’s confidence in the federal government and infringes on the public’s right to address environmental and other issues in

\textsuperscript{199} See Sher & Hunting, supra note 9, at 478 (criticizing Congress’ burying of exemptions in appropriations measures). For discussion of the 2011 Appropriations Act, see supra note 94 and accompanying text.

\textsuperscript{200} For an example of the deterioration of regulatory schemes through the use of exemptions enacted in appropriations measures, see supra notes 173-178 and accompanying text.

\textsuperscript{201} For a further explanation of the amorphous and uncertain effects of discrete policy exemptions, see supra notes 169-178 and accompanying text.

\textsuperscript{202} For an elaboration on how the judiciary’s deferential stance enables further encroachment, see supra notes 38-39 and accompanying text.

\textsuperscript{203} For further discussion of the importance of scrutinizing the means Congress uses to enact legislation, see supra notes 120-127, 161, 166 and accompanying text.

\textsuperscript{204} For further discussion of the uncertainty left in the wake of Robertson II, see supra notes 169-171 and accompanying text.

\textsuperscript{205} For a review of the problematic implications of the Ninth Circuit’s holding in \textit{Wild Rockies II}, see supra notes 179-201 and accompanying text. For a recommendation that courts scrutinize amendments by implication, see supra note 117 and accompanying text.
The Ninth Circuit’s permissive approach to these directives tips the balance in favor of the legislature and discards the spirit of *Klein*. Such an approach not only endangers the NRM gray wolf, but also threatens the delicate balance of power that protects the people from the federal government, and the federal government from itself.

*Emily A. Cathcart*

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206. See Sher & Hunting, *supra* note 9, at 482 (noting broad implications of eroding separation of powers doctrine).

207. See United States v. Klein, 80 U.S. 128, 147 (1871) (highlighting separation of powers doctrine’s importance). In *Klein*, the Supreme Court noted, “It is of vital importance that [the legislative and the judicial] powers be kept distinct.” *Id.* For a discussion of the Ninth Circuit’s deferential review of the legislation in *Wild Rockies II*, see *supra* notes 150-164 and accompanying text.

208. For further discussion of the importance of separation of powers, see *supra* notes 102-103 and accompanying text.

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