Yesterday, Alliance for the Wild Rockies, Friends of the Clearwater and WildEarth Guardians filed a compliant in the federal district court of Montana challenging the wolf delisting rider. You can check out a press release from WildEarth Guardians here. My previous posts describe the wolf delisting rider and the past litigation on the wolf delisting.

Why yesterday? Well, on May 5, the Department of Interior published the delisting rule in accordance with the rider.

The complaint asserts that the rider directed the judiciary to reach a particular outcome in a pending case without amending existing law, in violation of the separation of powers doctrine. The environmental plaintiffs rely on *United States v. Klein* for that assertion. They distinguish a more recent case, *Robertson v. Seattle Audubon Society*, by claiming that, under Robertson, such a rider is constitutional only if Congress amended existing law (here, the Endangered Species Act.) Because the rider ostensibly did not modify the ESA, it fails under *Robertson* and *Klein*.

For those not versed in esoteric Supreme Court legal history, *Klein* is an interesting Civil War-era case. Mr. Klein was the administrator of the estate of one V.F. Wilson, who had assisted the Confederacy during the war. In 1863, President Lincoln pardoned all who had participated in the rebellion, conditional on the taking of an oath of allegiance. The pardon restored certain property rights to those former rebels. Mr. Wilson took the oath and Mr. Klein sought restoration of cotton proceeds from the sale of Mr. Wilson's cotton by the U.S. Treasury. Unfortunately for Mr. Wilson's estate, in 1870 Congress passed a law precluding use of the pardon as a basis for claiming such sale proceeds. The Supreme Court held, in 1871, that "Congress has inadvertently passed the limit which separates the legislative from the judicial power."

More recently, the Supreme Court upheld the Northwest Timber Compromise against a *Klein* challenge in *Robertson*. The Northwest Timber Compromise was the Congressional response to the spotted owl controversy. The legal controversy was mainly over language in the statute that basically decided, by Congressional fiat, that various environmental statutes had been met:

> [T]he Congress hereby determines and directs that management of areas . . . on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society

> et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR.

Justice Thomas, writing for a unanimous Court in the 1992 *Robertson* opinion, determined that this statutory language modified existing law, by replacing legal standards underlying the original challenges. According to the Court, the statute did not direct any court to a specific decision, because the court was still free to apply facts to the new standards. Therefore, the Northwest Timber Compromise was constitutional under *Klein*.

The environmental plaintiffs challenging the wolf delisting rider, then, fairly construe *Robertson* as test of whether Congress constitutionally amended existing law or unconstitutionally directed the judiciary to a specific construction of law and a decision in a pending case. Not surprisingly, their complaint spends a lot of energy on legislative history and post-enactment statements by members of Congress to demonstrate that Congress never contemplated amending the Endangered Species Act.

The plaintiffs face (at least) two hurdles in their litigation to strike the wolf delisting rider. The first is what I will call the "notwithstanding clause" problem. Here is the relevant language from the rider:

> [T]he 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.

There is no explicit repeal or amendment of existing law, because the rider, as the plaintiffs point out, fails to identify the ESA. But courts have allowed Congress to effect a repeal by using a "general repealing clause." Such a clause uses language like "notwithstanding any other Federal law." The Eleventh Circuit relied on such a clause to uphold a section in an omnibus budget bill in *Miccosukee Tribe v. U.S. Army Corps*. That section ordered the Army Corps to build a mile-long bridge to improve water flow in the Everglades even though the specific construction alternative at issue had been previously challenged in federal court.

A court could conceivably interpret the rider language in a similar manner, finding that the "without regard" language makes it a general repealing clause. Arguably, the rider places the delisting rule outside the reach of the Endangered Species Act without

unconstitutionally directing a specific court decision.

The second hurdle is the jurisdiction stripping language in the rider:

> Such reissuance (including this section) shall not be subject to judicial review . . . .

Here, Congress went one step further than the language seen in *Robertson* and *Miccosukee Tribe*, by explicitly stripping all judicial review of the reissued wolf delisting rule (and the rider itself). The environmental plaintiffs do not address this issue at all in their complaint, but I imagine that the federal defendants will raise it eventually. I will be interested to see how this argument plays out. Congressional power over court jurisdiction is a difficult area of law. (One might call it a "morass," although I am not sure my former Fed Courts professor would agree.) I will point out that appellate jurisdiction was a live issue in *Klein*. There, the statute stripped appellate jurisdiction of the Supreme Court over such pardon cases. The Supreme Court rejected such jurisdiction stripping language as outside of Congress' control over the appellate power.