JAMES S. BURLING, Alaska Bar No. 8411102
E-mail: jsb@pacificlegal.org
OLIVER J. DUNFORD*, Ohio Bar No. 0073933
E-mail: ojd@pacificlegal.org
JEFFREY W. McCOY*, Colo. Bar No. 43562
E-mail: jwm@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

JONATHAN WOOD*, Cal. Bar No. 285229
E-mail: jw@pacificlegal.org
TODD F. GAZIANO*, Tex. Bar No. 07742200
E-mail: tfg@pacificlegal.org
Pacific Legal Foundation
3033 Wilson Blvd., Suite 700
Arlington, Virginia 22201
Telephone: (202) 888-6881

ZACHARIA OLSON*, D.C. Bar No. 1025677
E-mail: zolson@dc.bhb.com
Birch, Horton, Bittner & Cherot, P.C.
1156 15th Street, NW, Suite 1020
Washington, D.C. 20005
Telephone: (202) 659-5800

**Pro Hac Vice*

Attorneys for Defendant-Intervenors

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, v.	)	No. 3:17-cv-00091-JWS
	)	**DEFENDANT-INTERVENORS PACIFIC LEGAL FOUNDATION, ET AL.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RENEWED MOTION TO DISMISS**

RYAN ZINKE, et al.,	)	**(FRCP 12(b)(1) and FRCP 12(b)(6))**
	)	
Defendants,	)	
	)	
PACIFIC LEGAL FOUNDATION; ALASKA OUTDOOR COUNCIL; BIG GAME FOREVER; KURT WHITEHEAD; and JOE LETARTE,	)	
	)	
Defendant-Intervenors,	)	
	)	
STATE OF ALASKA,	)	
	)	
Defendant-Intervenor,	)	
	)	
SAFARI CLUB INTERNATION, *et al.*,	)	
	)	
Defendant-Intervenors.	)	
_____	)	

Table of Contents

Table of Authorities

Cases

United States Constitution

Statutes

Other Authorities

Introduction

Pursuant to this Court's September 17, 2017 Order, Pacific Legal Foundation, Alaska Outdoor Council, Big Game Forever, Kurt Whitehead, and Joe Letarte (collectively "PLF Intervenors") submit this brief in support of their renewed Motion to Dismiss Center for Biological Diversity's (CBD) amended complaint. PLF Intervenors incorporate by reference all arguments made by U.S. Department of Interior and Secretary of Interior Ryan Zinke (collectively "Interior") in their memorandum in support of the Renewed Motion to Dismiss.[1]

Argument

I. CBD's first claim for relief fails to state a claim on which relief can be granted because Congress has the constitutional authority to withdraw delegated authority from an agency

CBD claims that Congress and the President violated the separation of powers by enacting a law through procedures established by the Congressional Review Act (CRA). That law, Public Law No. 115–20, disapproved a rule adopted by Interior (the Refuges Rule) and withdrew a small amount of rulemaking authority previously delegated to Interior (i.e., the authority to reissue a rule substantially similar to the one that was disapproved). *See* Amended Compl. Dkt. 104 (Compl.) ¶¶ 52–53, 55. That claim fundamentally misunderstands both the separation of powers and the legislative process established by the Constitution.

To enact a law under the Constitution, both Houses of Congress must pass a bill or resolution and the President must sign it (or both Houses may override his veto). *See I.N.S. v. Chadha*, 462 U.S. 919, 946–48 (1983). Public Law No. 115–20 was passed by a majority of both Houses of Congress, thus satisfying the Constitution's bicameralism requirement. Compl. ¶ 41; U.S. Const. art. I, §§ 1, 7. The President then signed the resolution, satisfying the Constitution's presentment requirement. Compl. ¶ 41; U.S. Const. art. I, § 7. CBD's complaint concedes Congress and the President complied with the Constitution's requirements to enact Public Law No. 115–20. *See* Compl. ¶ 41. Thus, it has failed to state a separation of powers claim.

[1] PLF Intervenors were the first to appear in this lawsuit defending the law in question, and they submitted a proposed Motion to Dismiss at that time. (Dkt. Nos. 19–20, 27–28). Interior largely adopted PLF Intervenors' arguments in its Motion to Dismiss. In accordance with this Court's Order (Dkt. 106), PLF Intervenors have striven to avoid repeating those arguments here.

Nonetheless, CBD insists that Congress and the President violated the separation of powers because Public Law No. 115–20 impinges upon Interior's "rulemaking authorities" that were "executed via the Refuges Rule." Compl. ¶¶ 53, 55. But because federal agencies, including Interior, have no independent constitutional authority on which Congress and the President could encroach, CBD's allegations do not state a separation of powers claim.

The Constitution vests *Congress* with the power to manage Alaskan wildlife refuges—and all other federal lands—not Interior. U.S. Const. art. IV, § 3, cl. 2; *see Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976) ("[D]eterminations under the Property Clause are entrusted primarily to the judgment of Congress."); *United States v. City & County of San Francisco*, 310 U.S. 16, 29 (1940) ("The power over the public land thus entrusted to Congress is without limitations."). Congress has delegated some of this authority, subject to limits it has imposed, to Interior. 16 U.S.C. §§ 668dd–668ee. But Congress does not violate the separation of powers by amending a Property Clause delegation to reclaim its constitutional authority any more than the President does in firing or giving an order to an executive official to whom he previously delegated discretionary authority. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496–97 (2010) ("[T]he President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch." (internal quotations omitted)).

Like all agencies created by Congress, Interior has no inherent constitutional authority at all. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–26 (2000). Therefore, any limits Congress places on delegations to agencies raise no separation of powers concerns. *Cf. Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196–97 (2012) (separation of powers forbids Congress' infringing a power the Constitution gives exclusively to the President). On the contrary, Congress would violate the separation of powers if it failed to impose significant limits on authority delegated to agencies. *See Mistretta v. United States*, 488 U.S. 361, 371–73 (1989); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). Thus, the separation of powers places no constraint on Congress' power to amend prior delegations to agencies.

CBD shrewdly does not contest Congress and the President's authority to withdraw delegated authority from executive agencies. Instead, it asserts the Constitution requires Congress to use some "magic words" or to formally amend the text or structure of a preexisting law before

reclaiming its constitutional authority from executive agencies. Compl. ¶¶ 53–55. Not so. To be sure, Congress may significantly amend a preexisting statute to change an agency's authority. But it may also amend a delegation by disallowing a particular application of an existing authority. *See All. for the Wild Rockies v. Salazar*, 672 F.3d 1170, 1174 (9th Cir. 2012); *see also Friends of Animals v. Jewell*, 824 F.3d 1033, 1045 (D.C. Cir. 2016).

The theory CBD presents in this case is indistinguishable from *Friends of Animals*. In that case, an environmental group challenged a law requiring the Fish and Wildlife Service to reissue a particular regulation previously struck down under the Endangered Species Act. *See id*. at 1036. The group argued that this law violated the separation of powers by dictating that an agency must issue a particular rule, and by exempting it from judicial challenge under the Endangered Species Act. *Id*. at 1042–45. The D.C. Circuit easily rejected the argument, noting that the law satisfied bicameralism and presentment and was thus a valid exercise of Congress' power to legislate. *See id*. at 1043, 1045.

"Seeking to avoid this conclusion," the group argued that the new law was nonetheless unconstitutional because it "makes no change, not even the most minor addition or subtraction, to the [preexisting] ESA," under which the rule had previously been adopted. *Id*. at 1045. This is precisely the theory CBD asserts in its constitutional claim. *See* Compl. ¶¶ 53–55. As the D.C. Circuit held in *Friends of Animals*, that theory is "meritless." 824 F.3d at 1045. Congress may limit an agency's power broadly or narrowly, including by requiring or forbidding an agency to adopt a particular regulation. If enacted pursuant to the Constitution's bicameralism and presentment requirements, such laws "easily pass[] muster under established law." *Id*.

The Ninth Circuit has also held that Congress has the constitutional authority to amend the law by requiring or disallowing a particular regulation. *See All. for the Wild Rockies*, 672 F.3d at 1174. "[W]hen Congress so directs an agency action . . . Congress has amended the law." *Id*.; *see also Consejo de Desarrollo Economico de Mexicali v. United States*, 482 F.3d 1157, 1169 (9th Cir. 2007) (upholding a statute that exempted a single project from several environmental laws without formally amending those laws). Just as Congress may amend an agency's delegation by passing a narrow law that requires it to adopt a particular regulation or exempting a particular project from environmental review, it may amend a delegation by passing a law disapproving a particular rule and forbidding any substantially similar rule.

CBD's passing references to the Take Care Clause fail to save its argument that Public Law No. 115–20 is unconstitutional. Compl. ¶¶ 45, 49. The allegation, added in CBD's amended complaint, argues that Congress cannot pass a law directing Interior to act inconsistently with a previously enacted law. *Id.* This argument suffers from the same flaws as the rest of the allegations in CBD's first claim for relief. Public Law No. 115–20, passed through bicameralism and presentment, is a constitutionally enacted law that necessarily amends the previous statutes.[2] *All. for the Wild Rockies*, 672 F.3d at 1174. The Take Care Clause requires the President and Interior to faithfully execute Public Law No. 115–20 and respect its amendment of Interior's rulemaking authority.

CBD's theory of the Take Care Clause turns the constitutional provision on its head. Rather than restricting Congress' legislative authority within its enumerated powers, the Clause protects the separation of powers by limiting *executive* authority. Indeed, as the Supreme Court has stated:

> the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).[3]

---

[2] CBD may believe that the Refuges rule is the only means by which Interior may achieve the management goals stated in "ANILCA, the Administration Act, the Improvement Act and other authorities." Compl. ¶ 60. However, there are many different ways to manage the refuges in order to conserve fish and wildlife populations and habitats in their natural diversity. *See* Decl. of Ryan Benson in Supp. of Big Game Forever's Motion to Intervene, Dkt. 22, ¶ 8. Even if the Refuges Rule were the only way to implement that authority, Public Law No. 115–20 would nonetheless control (and effectively fully repeal the authority).

[3] Interior argues that the Take Care Clause applies only to the President. Mem. of P. & A. in Supp. of Federal Defendants' Renewed Motion to Dismiss, Dkt. 108, at 16–17. But this is of no moment because the obligation extends to the President's oversight of the agencies within the Executive Branch. The Department of Interior exercises executive authority under the supervision of the President, and, thus, it too must take care that the laws it implements are faithfully executed.

CBD's allegations show that Congress and the President acted within their constitutional authority in enacting Public Law No. 115–20 to disapprove the Refuges Rule and restrict the Department of Interior's delegated authority. Therefore, CBD has failed to state a separation of powers claim.

II. CBD's second claim for relief fails to state a claim because the CRA complies with all relevant constitutional requirements

CBD's second claim for relief is largely redundant of its first, and should be dismissed for the same reasons. The only distinction is that CBD's first claim is directed at Public Law No. 115–20, while its second claim is directed at the CRA itself. Compl. ¶¶ 71–74. The CRA is merely "an exercise of the rulemaking power of the Senate and House of Representatives." 5 U.S.C. § 802(g)(1); *see also* U.S. Const. art. I, § 5, cl. 2 (authorizing each house of Congress to "determine the Rules of its Proceedings"). And pursuant to it, Congress and the President constitutionally withdrew delegated authority from Interior, which now must faithfully execute Public Law No. 115–20. *See supra* Part I. The only authority withdrawn from Interior is the authority to circumvent Congress' and the President's statute by enforcing or reissuing the disapproved rule or a substantially similar rule on the same subject.

The only unique aspects of CBD's second claim are the arguments that the CRA's anti-circumvention provision is unconstitutionally vague and lacks an intelligible principle. Compl. ¶ 72; 5 U.S.C. § 801(b)(1) (barring the adoption of rules substantially similar to a rule disapproved by Congress and the President under the CRA). These allegations, too, fail to state a claim upon which relief may be granted. The Fifth Amendment's Due Process Clause forbids the enforcement by the government of laws against individuals so vague they fail to provide a person of ordinary intelligence fair notice of what is prohibited, or are so standardless that it authorizes or encourages seriously discriminatory enforcement. *United States v. Williams*, 553 U.S. 285, 304 (2008). But CBD's allegations present no due process concerns because the CRA's anti-circumvention provision does not regulate individuals; it merely constrains Interior's rulemaking authority. *See United States v. Batchelder*, 442 U.S. 114, 123 (1979) (Vagueness doctrine is based on "fundamental tenet of due process" that no one "may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." (internal quotations omitted)). Regardless, because the language is definitive and clear enough to guide Interior's future rulemaking, the "substantially the same form" language is not vague. 142 Cong. Rec. S3683, S3686 (daily ed.

Apr. 18, 1996) (joint statement for the record by Senators Nickles, Reid, and Stevens describing effect of enactment of a joint resolution of disapproval).

Perhaps for rhetorical flourish, CBD references the nondelegation doctrine's "intelligible principle" test in its vagueness argument. Compl. ¶ 72 ("By usurping authority from the Executive Branch in such a vague way and lacking any intelligible principle . . . ."). If, by this fleeting reference, CBD means to argue that Congress and the President violate the nondelegation doctrine, it is mistaken. That doctrine forbids Congress from delegating too much power to agencies; it places no limit on Congress' ability to restrict agency power. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).[4] The Constitution vests the legislative power with Congress, which does not violate the separation of powers, or any other constitutional principle, when it restricts the executive's rulemaking authority. Ironically, if CBD were correct that there is no intelligible principle to guide Interior's rulemaking authority, the remedy for that constitutional violation would be to strike down the rulemaking authority entirely. *Panama Ref. Co.*, 293 U.S. at 430. A violation of the nondelegation doctrine would be exacerbated, not cured, by untethering Interior's rulemaking authority from the new limits Congress has imposed (as CBD is seeking). Accordingly, this Court should dismiss CBD's second claim for relief.

III. This Court lacks subject-matter jurisdiction over CBD's third claim for relief because the CRA prevents litigants from challenging Congress' and OMB's actions under the Act

In its third claim for relief, CBD asserts that Congress misapplied its internal rules in disapproving the Refuges Rule under the Congressional Review Act. Compl. ¶¶ 86–88. This Court lacks subject-matter jurisdiction over the claim for two reasons.

First, the Rules Clause of the Constitution forbids courts from second-guessing Congress' application of its internal rules unless those rules violate some independent constitutional

[4] The intelligible principle test allows Congress to delegate lawmaking power to agencies and fails to adequately safeguard the separation of powers. *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1240–55 (2015) (Thomas, J., concurring). But whatever the status of the original grant of power to Interior at issue here, and it is far more limited than other courts have sanctioned, the nondelegation concern is lessened when Congress, by law, further limits the delegation of rulemaking authority in some meaningful way.

constraint. *Mester Mfg. Co. v. I.N.S.*, 879 F.2d 561, 571 (9th Cir. 1989) ("In the absence of express constitutional direction, we defer to the reasonable procedures Congress has ordained for its internal business."). CBD only cites one constitutional provision, the Take Care Clause, in its third claim for relief and it is directed towards Interior's decision making. Furthermore, as demonstrated above, CBD's Take Care Clause arguments are without merit. Therefore, Congress' application of its internal rules in enacting Public Law No. 115–20 is not subject to judicial review.

Second, the Congressional Review Act itself prevents litigants from challenging congressional action taken pursuant to the Act. It provides that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. § 805. Section 805 bars challenges to congressional determinations and actions taken pursuant to the Act. *See, e.g.*, *United States v. S. Ind. Gas & Elec. Co.*, No. IP99-1692-C-M/S, 2002 WL 31427523, at *6 (S.D. Ind. Oct. 24, 2002); Paul J. Larkin, Jr., *Judicial Review Under the Congressional Review Act*, Heritage Found. Legal Mem. No. 202 (Mar. 9, 2017) ("Larkin, *Judicial Review*");[5] *see also* Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, forthcoming, Harvard Journal of Law and Public Policy (2017).[6]

The legislative history confirms that Congress intended to prevent second-guessing of its actions under the Congressional Review Act. 142 Cong. Rec. at S3686 (joint statement for the record by Senators Nickles, Reid, and Stevens); 142 Cong. Rec. E571, E577 (Extensions of Remarks Apr. 19, 1996) (statement of Rep. Hyde). Congress chose language to ensure that litigants could not flyspeck the process of adopting a resolution of disapproval. Larkin, *Judicial Review*, *supra* at 3 ("Accordingly, Section 805 would appear to reach every decision or step . . . that could be associated with the CRA."). Specifically, Congress ensured that no court could "review whether Congress complied with the congressional review procedures in this chapter." 142 Cong. Rec. at S3686. The legislative history also explains that the same limitation on judicial review applies to the Office of Management and Budget's actions under the Congressional Review Act. *Id.* This limitation is consistent with other parts of the Administrative Procedure Act. Larkin, *Judicial*

---

[5] *Available at* http://www.heritage.org/the-constitution/report/judicial-review-under-the-congressional-review-act.

[6] Draft manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007843.

Review, *supra* at 4 (explaining how actions by Congress and the President are excluded from judicial review under the Administrative Procedure Act).[7]

Although Congress' and OMB's actions under the Congressional Review Act are not subject to judicial review, courts do have jurisdiction to determine the legal effect of an agency's failure to submit a rule and to determine whether a subsequently adopted rule is substantially similar to a rule that was previously disapproved. *See* 142 Cong. Rec. at S3686 ("The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect.").

Few courts have interpreted the Congressional Review Act's judicial-review provision. They are split over the question whether courts may review an agency's failure to comply with the CRA. *Compare Southern Ind. Gas*, 2002 WL 31427523, at *6 (Section 805 only precludes challenges to congressional action taken under the Congressional Review Act), *and United States v. Reece*, 956 F. Supp. 2d 736, 743 (W.D. La. 2013) (holding that Section 805 does not preclude a criminal defendant from seeking to dismiss an indictment for the Drug Enforcement Agency's alleged failure to comply with the Congressional Review Act), *with Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009) (holding Section 805 "denies courts the power to void rules on the basis of agency noncompliance with the Act") *and Via Christi Reg'l Med. Ctr., Inc. v. Leavitt*, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007) ("The Congressional Review Act specifically precludes judicial review of an agency's compliance with its terms."). In other instances, courts have interpreted the provisions of the Congressional Review Act when an agency has used the Act's requirements as a defense to the agency's actions, notwithstanding Section 805's bar on judicial review. *Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368, 1370 (Fed. Cir. 2002), *amended on reh'g in part*, 65 F. App'x 717 (Fed. Cir. 2003); *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004). No court, however, has ever allowed judicial review of Congress' application of its own procedures, which all concede is at the core of what the Congressional Review Act precludes.

While this Court should properly interpret Section 805 to dismiss CBD's claims, this Court does not need to address whether it bars different types of claims against agency action not raised

[7] Indeed, the Congressional Review Act is codified as chapter 8 of the Administrative Procedure Act to ensure that it is read consistently with the rest of the Administrative Procedure Act. 142 Cong. Rec. at S3683 (The CRA "adds a new chapter" to the APA).

in this case. Section 805 clearly applies to Congress' actions in this case. In passing the resolution of disapproval, Congress made a "determination" or "finding" that the Refuges Rule was eligible for review and disapproval under the terms of the Congressional Review Act. Section 805 precludes CBD from second-guessing that finding. Accordingly, this Court should dismiss CBD's third claim for lack of subject-matter jurisdiction.

IV. This Court should dismiss CBD's third claim for relief because Interior submitted the Refuges Rule to Congress pursuant to Section 801 of the Congressional Review Act

Even if this Court had jurisdiction over CBD's third claim for relief, CBD would still fail to state a claim on which relief can be granted. Its argument relies on the intersection of several technical provisions of the Act, almost all of which it misreads, which boils down to an assertion that the Act should not have been read to allow expedited procedures to disapprove the Refuges Rule during the current session of Congress, even if the Act could have applied in the previous session of Congress.

CBD's claims that Public Law No. 115–20 was untimely as a result of Section 808 of the Congressional Review Act. Section 808 allows (1) any rule an agency determines for "good cause" to go into effect immediately (which mirrors an exception in the APA to notice and comment procedures) and (2) "any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping" to take effect "at such time as the Federal agency promulgating the rule determines." 5 U.S.C. § 808. However, this provision doesn't alter the requirement in section 801 that agencies submit rules or Congress' opportunity to review them; it only allows certain rules to go into effect sooner than they otherwise could. *See* 5 U.S.C. § 801(a)(1)(A) ("Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing . . . ."). Even assuming the Refuges Rule were eligible to go into effect prior to submission to Congress (if the agency had so specified, which it did not), section 801(a)(1)(A) still mandates that the federal agency promulgating it "shall" submit it to each House of Congress and GAO for review.

The submission of the rule pursuant to subsection 801(a)(1)(A) triggers Congress' extra period of expedited review in a new session. *See* 5 U.S.C. § 802(e)(2) (providing an extra period of review for rules submitted during the period referred to in section 801(d)(1)); 5 U.S.C. § 801(d)(1) (referring to rules submitted in accordance with subsection 801(a)(1)(A)). CBD reads

"submitted in accordance with subsection [801]" to apply only if that submission was necessary *for a rule to go into effect*. But nothing in the text of section 801 supports this interpretation. In fact, the text leads to the opposite conclusion. Congress anticipated that it might pass resolutions of disapproval for rules that are already in effect, stating that "[a] rule shall not take effect (*or continue*), if the Congress enacts a joint resolution of disapproval." 5 U.S.C. § 801(b)(1) (emphasis added).

CBD's reading of the Congressional Review Act would have bizarre implications that Congress could not have intended. It would convert a minor exception in 808 for when hunting, fishing, and camping rules may go into effect into an exception negating the mandate requiring them to be sent to Congress. It would also allow rules of that type to be disapproved in the first session in which they are received by Congress (if sent up "voluntarily") but not in the follow-on session if they were submitted on the last day of the preceding session. If Congress had wanted to exempt such rules from review entirely (or from the subsequent expedited review periods), there would be much more straightforward ways to write that. If there were any ambiguity in the Congressional Review Act that would permit CBD's interpretation, and there is not, such ambiguity should be resolved in favor of applying the same periods of additional expedited review to hunting, fishing, and camping rules (once submitted) as to any other covered rule under the Congressional Review Act.

Regardless, an in-depth analysis of the Congressional Review Act's provisions is not required to determine the merits of CBD's third claim for relief. The Congressional Record demonstrates that the Refuges Rule was required to be—and was—submitted under section 801. According to the November 14, 2016 House of Representative Congressional Record, Interior sent a letter "transmitting the Department's final rule—Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska . . . *pursuant to 5 U.S.C. 801(a)(1)(A)* . . . ." 162 Cong. Rec. H6160, H6169 (daily ed. Nov. 14, 2016) (emphasis added); *see also* 163 Cong. Rec. S6339, S6346 (daily ed. Nov. 15, 2016). Even if that submission were voluntary, it was still submitted in accordance with section 801. Thus, under the Congressional Review Act, Congress had an additional period of expedited review of the Refuges Rule in the new session of Congress this year. Accordingly, CBD's third claim for relief is without merit and should be dismissed.

DATED: October 27, 2017.

Respectfully submitted,

JAMES S. BURLING
OLIVER J. DUNFORD
JEFFREY W. McCOY
JONATHAN WOOD
TODD F. GAZIANO
ZACHARIA OLSON

s/ Jeffrey W. McCoy
JEFFREY W. MCCOY

Attorneys for Defendant-Intervenors

Certificate of Service

I hereby certify that on October 27, 2017, a copy of the foregoing document was served electronically through the Court's ECF system on all counsel of record.

s/ Jeffrey W. McCoy
JEFFREY W. McOY