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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, v. RYAN ZINKE, et al., Defendants,	)	No. 3:17-cv-00091-JWS **DEFENDANT-INTERVENORS PACIFIC LEGAL FOUNDATION, ET AL.'S REPLY MEMORANDUM IN SUPPORT OF RENEWED MOTION TO DISMISS**

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

Constitution

Statute

Other Authorities

INTRODUCTION

The dispositive issue before the Court is whether Public Law No. 115–20 effected a valid cancellation of the Interior Department's Refuges Rule. Plaintiff Center for Biological Diversity (CBD) effectively admits just this. CBD concedes: (1) that Congress, having delegated to Interior regulatory authority over Alaska's refuges, may modify that delegation; (2) that Public Law No. 115–20 was properly enacted pursuant to the constitutional requirements of bicameralism and presentment; and (3) that through Public Law No. 115–20, the Refuges Rule is no longer in effect. On these bases alone, this Court should dismiss CBD's lawsuit with prejudice.

CBD tries to avoid these inconvenient—though admitted—facts and raises a host of unsupported, and unsupportable, theories. First, CBD claims that to enact a law that limits delegated authority, Congress—in addition to satisfying bicameralism and presentment—must expressly identify and alter the language of earlier "delegating statutes" (*i.e.*, the statutes through which Congress first delegated authority to Interior). This extra step in the law-making process is a CBD invention. It is found nowhere in the Constitution, which requires *only* bicameralism and presentment to enact a valid law.

Second, CBD argues that Public Law No. 115–20 creates uncertainty about Interior's remaining regulatory authority, and that therefore, Congress' delegation to Interior lacks an "intelligible principle." This argument fails for two, independent reasons: (1) there is simply no confusion about Interior's authority, as shown by CBD's own detailed description of the agency's existing power; and (2) the lack of an intelligible principle would render the *delegation* unconstitutional—not the limitation on that delegation.

In addition to these constitutional arguments, CBD claims that Congress did not pass Public Law No. 115–20 in accordance with the Congressional Review Act (CRA), and that therefore, the Court has jurisdiction over its third claim for relief. In fact, as PLF previously explained, Congress disapproved of the Refuges Rule under the precise terms of the CRA, which sets out the internal rules by which Congress considers agency rules. And under the Constitution's Rules Clause, this Court lacks jurisdiction to consider the application of Congress' internal rules.

None of CBD's arguments withstand scrutiny, and the Court should therefore dismiss with prejudice CBD's First Amended Complaint.

ARGUMENT

I. CBD'S AMENDED COMPLAINT CANNOT STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED BECAUSE CONGRESS' ACTIONS ARE CONSTITUTIONAL

A. CBD's attempt to add an additional requirement to the Constitution's law-making procedures is baseless

There is no dispute that Interior's authority here is based entirely on a congressional delegation. Resp. (Dkt. No. 119) at 3–4, 10. Nor is there any dispute that Public Law No. 115–20, by disapproving the Refuges Rule, restricted "one particular exercise" of Interior's delegated authority. *Id*. at 14; *see also id*. at 8 (There is "no ambiguity that the Refuges Rule is no longer in effect."). CBD admits that both Public Law No. 115–20 and the CRA met the Constitution's bicameralism and presentment requirements (*id*. at 9); therefore, Public Law No. 115–20 and CRA are both validly enacted laws. *See INS v. Chadha*, 462 U.S. 919 (1983). This should be the end of the matter.

But CBD argues that an additional step is required. It contends that a joint resolution disapproving an agency rule *must also* explicitly amend any existing statutes concerning the agency's delegated power. *See* Resp. at 27 (Congress "cannot simply 'disapprove' one exercise of an agency's rulemaking authority without passing legislation—[1] consistent with the requirements of bicameralism and presentment—[*and 2*] *that specifically amends the underlying statutory authority*." (emphasis added)); *see also id*. at 1, 9–10, 12, 14–19, 27. Thus, CBD argues that Public Law No. 115–20 must be struck down because it does not expressly amend the delegating statutes, but instead leaves these statutes fully intact. Resp. at 10–22. CBD's argument finds no support in the Constitution (or anywhere else).

To begin with, the "failure" of Public Law No. 115–20 to identify, or alter the language of, the delegating statutes has no bearing on the question whether it properly limited Interior's delegated authority. In *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992), for example, the Supreme Court reversed the Ninth Circuit's order striking down a statute that amended the scope of the executive's authority over spotted-owl habitat. *Id.* at 436. The Ninth Circuit had concluded that Congress could not direct a particular decision in a case, "without repealing or amending the law underlying the litigation." *Id*. According to the Ninth Circuit, the statute had not, "by its plain language," repealed or amended underlying environmental laws. *Id*. A unanimous Supreme Court reversed, holding that while the language of the original statutes remained unchanged, the new law effectively modified those statutes. *Id*. at 440. The Ninth Circuit has since applied this rule. *See*

All. for the Wild Rockies v. Salazar, 672 F.3d 1170 (9th Cir. 2012) (rejecting challenge to a law that ordered Interior to reissue a rule that was previously struck down for violating the Endangered Species Act (ESA), even though the law did not expressly amend the ESA).[1]

Similarly, in *Friends of Animals v. Jewell*, 824 F.3d 1033 (D.C. Cir. 2016), the Fish and Wildlife Service listed three antelope species as endangered under the ESA, but the Service also exempted owners of captive-bred antelope species from the ESA's restrictions. *Id.* at 1035–36. After this exemption rule was invalidated in court, President Obama signed into law the Consolidated Appropriations Act, part of which (Section 127) required Interior to reissue the rule. *Id.* at 1036. Friends of Animals challenged the law on separation-of-powers grounds and argued that Section 127 made "no change, not even the most minor addition or subtraction, to the ESA[,]" and further, that the relevant provisions of the ESA "remain[ed] exactly as they were before Section 127 was enacted." *Id.* at 1045. As the D.C. Circuit court stated, these contentions were "meritless, for Section 127 obviously change[d] the reach" of the ESA. *Id.*

Here, in the same way, Public Law No. 115–20 obviously limits the reach of the statutes that originally delegated authority to Interior.[2] The lack of express amendatory language in Public Law No. 115–20 has no bearing on the analysis.[3]

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[1] CBD claims that the CRA's application "notwithstanding any other provision of law," 5 U.S.C. § 806(a), does not trump the "specific" grants of authority in the delegating acts. Resp. at 14–15. But courts have long held that such language does effect an amendment of existing law. *See, e.g.*, *All. for the Wild Rockies*, 672 F.3d at 1174 ("This court has held that, when Congress so directs an agency action, with similar language, Congress has amended the law.").

[2] CBD's reliance on *Branch v. Smith*, 538 U.S. 254 (2003), and *Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368 (Fed. Cir. 2002), is misplaced. Resp. at 13. These cases stand for the proposition that implied repeals may be approved when "'two statues are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.'" *Id.* (quoting *Branch*, 538 U.S. at 273). Here, Public Law No. 115–20 cannot be reconciled with the statutes that granted Interior the authority to issue the Refuges Rule. Accordingly, Public Law No. 115–20 effectively repealed that statutory authority.

[3] CBD attempts to distinguish *All. for the Wild Rockies* and *Friends of Animals* on two grounds: (1) the separation-of-powers dispute was between Congress and the Judiciary, not between

The Constitution requires Congress to pass a law through bicameralism and presentment—and that is all. As CBD admits, Public Law No. 115–20 and the CRA met those requirements.[4] CBD's contention that more is required runs counter to the Constitution's plain text.

B. CBD's non-delegation argument is without merit

CBD argues that by precluding Interior from adopting a rule substantially similar to the Refuges Rule, Public Law No. 115–20 and the CRA leave Interior unsure about its remaining authority and, therefore, fail to provide Interior with an "intelligible principle" to guide its delegated power. Resp. at 23–28. This argument fails for two reasons: (1) there is no confusion about the scope of Interior's delegated authority; and (2) if the Court finds a constitutional problem

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Congress and the Executive; and (2) Congress ordered Interior to issue a rule, rather than (as here) effecting the disapproval of a rule. Resp. at 12. In fact, while these cases considered whether Congress could amend statutes that were subject to pending litigation, they also upheld Congress' ability to amend the scope of the Executive's delegated authority without expressly amending the underlying statutes. Second, the difference between a law that reissues a rule and one that disapproves a rule has no *constitutional* significance. The only relevant question is Congress' authority to alter the power it delegates to the executive branch. On that issue, the opinions in *All. for the Wild Rockies* and *Friends of Animals* are directly on point. CBD cannot point to any contrary authority.

[4] CBD elsewhere states that Congress "must 'abide by its delegation of authority until that delegation is legislatively altered or revoked.'" Resp. at 18 (quoting *Chadha*, 462 U.S. at 954–55 (emphasis supplied by CBD)). That is correct, but by passing Public Law No. 115–20 through bicameralism and presentment, Congress *did legislatively* alter its delegation to Interior.

CBD also takes a PLF statement out of context. *See* Resp. at 18. In its brief, PLF explained that agencies created by Congress have no inherent constitutional authority, and that therefore, the separation-of-powers doctrine does not constrain Congress' power to alter the delegated authority it has granted to those agencies. Of course, Congress must enact legislation through the bicameralism and presentment process, but there is no separation-of-powers doctrine that limits Congress' *substantive* power to control delegated authority. PLF Mem. in Supp. of Renewed Mtn. to Dismiss (PLF Mem.) (Dkt. No. 114) at 2.

with the scope of delegation, then the Court must strike down Interior's delegated authority, not the statutes that refine and narrow that authority.

1. Interior's delegated authority remains clear and understandable

The CRA's ban on issuing substantially similar rules has not caused any confusion.[5] CBD itself exhaustively described what the Refuges Rule restricted, what it did not restrict, and in what locations the Rule did and did not apply. Resp. at 6–8, 13–14. And as the Government advised the Court, Interior "knows precisely what not to do going forward." Fed. Defendants' Mem. in Supp. of Renewed Mtn. to Dismiss (Dkt. No. 108) at 19.

The CRA's legislative history explains the scope and effect of joint resolutions that become law, and it provides additional clarity to guide future agency decision-making. 142 Cong. Rec. S3683, S3686 (daily ed. Apr. 18, 1996) (joint statement for the record of co-sponsors Sens. Nickles, Reid, and Stevens).[6] This joint statement explains that, when a rule is disapproved, an agency should look to the underlying law that authorized the rule:

> If the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion to issue a substantially different rule. If the law that authorized the disapproved rule did not mandate the promulgation of any rule, the issuing agency may exercise its discretion not to issue any new rule. Depending on the law that authorized the rule, an issuing agency may have both options. But if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule.

Id.

The legislative history of Public Law No. 115–20 resolves any lingering confusion about Interior's remaining authority (which is precisely how the CRA was intended to work). *See* 142 Cong. Rec. at S3686 ("The authors [of the CRA] intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the

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[5] Even if CBD were correct that the "substantially the same form" language in the CRA violated the non-delegation doctrine, *see* Resp. at 26, the proper remedy would not be to invalidate the entire CRA, which includes a severability clause, 5 U.S.C. § 806(b).

[6] The same statement was submitted by Representative Hyde for the House sponsors of the CRA. 142 Cong. Rec. E571-01, E577 (Congressional Record – Extension of Remarks Apr. 19, 1996).

agency's options or lack thereof after enactment of a joint resolution of disapproval."). CBD claims that the legislative history on the joint resolution provides no guidance on how to manage the National Wildlife Refuge System after passage of the joint resolution. Resp. at 24 n.9. That is simply not true.

Consistent with the CRA's authors' intent, the floor debate provides insight into the rules Interior is prohibited from adopting in the future. 163 Cong. Rec. H1259-07 (daily ed. Feb. 16, 2017). During consideration of the joint resolution to overturn the Refuges Rule, Representative Bishop of Utah explained the reasoning for passing the joint resolution: the Refuges Rule was "an illegal rule" because the Statehood Act "granted Alaska full authority to manage fish and game on all lands in the State of Alaska, including all Federal lands." 163 Cong. Rec. at H1260. "The Alaska National Interest Lands Conservation Act in 1980 further, in fact, verified what the Statehood Act did: protecting the right of the State to manage fish and game." *Id.* The floor debate in the Senate reflected a similar purpose for adopting the joint resolution. 163 Cong. Rec. S1864-05, S1864 (daily ed. Mar. 21, 2017).

Therefore, the effect of Public Law No. 115–20 is clear, and Interior has guidance about what rules it can and cannot adopt in the future. And because Interior has several options for achieving the management goals set out in the delegating statutes (*see* PLF Mem. at 4 n.2), it can promulgate a new regulation that is substantially different from the Refuges Rule.

Finally, even if one was to accept CBD's claim that the Refuges Rule were the only means to achieve the goals in the underlying statutes (or relevant provisions thereof), Interior's authority remains clear: Public Law No. 115–20 would, on this assumption, "prohibit the reissuance of any rule." 142 Cong. Rec. at S3686.[7]

[7] CBD raises the specter of future litigation concerning the scope of Interior's delegated authority. *See, e.g.*, Resp. at 14. But this Court may address only actual cases or controversies, U.S. Const. art. III, § 2, cl. 1, not hypothetical issues. CBD's vague assertions of future, conjectural litigation cannot create a non-delegation problem where one does not exist—as CBD appears to recognize. *See* Resp. at 23 (noting that the Refuges Rule "'withdraws from agencies a range of substantive authority that cannot be determined without *subsequent* litigation.'" (emphasis added; citation omitted)).

2. Any lack of an intelligible principle invalidates Interior's (delegated) authority—not the law limiting that delegation

The Supreme Court's prevailing standard for a constitutional delegation is whether Congress has provided an "intelligible principle" to guide the agency's exercise of delegated power. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). *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). As Justice Thomas more recently explained, the underlying constitutional problem is whether Congress has improperly given too broad or amorphous a power to a regulatory agency such that it has effectively delegated Congress' legislative power. *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1241–45 (2015) (Thomas, J., concurring in judgment). Thus, the constitutional issue is whether Congress has delegated too much (policy-making) discretion to an agency. If it has, the remedy is to strike down the delegation, rather than to enlarge it as CBD seeks here. No excessive delegation can be cured by striking down the limits on that delegation.

CBD appears to confuse the non-delegation doctrine, which is about Congress' giving too much power to agencies, with the Due Process Clause's void for vagueness doctrine, which protects individuals against laws so vague they fail to provide notice of what is required of them. *See United States v. Williams*, 553 U.S. 285, 304 (2008). If CBD means to argue the latter, that argument fails as a matter of law because Interior has no due process rights to assert against Congress' diminution of its power. *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)). Public Law No. 115–20 is not a penal statute; it doesn't regulate anyone. And Interior has no right to regulatory power, free of the limits Congress wishes to impose. *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).[8] The Property

[8] Cases that CBD relies on show merely that Congress cannot (in CBD's words) "giv[e] itself some *new* power at the expense of the Executive Branch." Resp. at 16 n.4 (emphasis added) (citing *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Chadha*, 462 U.S. at 952–55; *Morrison v. Olson*, 487 U.S. 654, 694

Clause gives Congress, not Interior, plenary authority to decide how federal lands are regulated. *See Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976).

C. The Take Care Clause does not apply here

CBD claims that Public Law No. 115–20 and the CRA prevent the President from taking care that the delegating statutes are faithfully executed. Resp. at 19–22. But of course, Public Law No. 115–20 and the CRA are themselves laws that the President must take care to execute faithfully. The Court should reject CBD's suggestion that the Executive must faithfully execute only *some* laws.[9]

II. THIS COURT LACKS SUBJECT-MATTER JURISDICTION OVER CBD'S THIRD CLAIM FOR RELIEF

As PLF previously explained, the CRA established Congress' internal rules for disapproving agency regulation, and the Rules Clause of the Constitution precludes this Court from second-guessing the application of those rules. PLF Mem. at 6–9. Further, the CRA itself bars litigants from challenging congressional action taken pursuant to the CRA, and therefore, the Court lacks jurisdiction over CBD's third claim for relief. *Id*. CBD claims that the CRA does not control here because, it says, Public Law No. 115–20 was enacted outside of the CRA. Resp. at 28–38. Although CBD is wrong about that, *see* PLF Mem. at 6–10, it is also precisely the type of question that the CRA bars this Court from considering.

(1988)). Here, Congress exercised no new power. Congress merely passed a law reducing authority it previously delegated—a power quintessentially reserved to Congress.

[9] Thus, contrary to CBD's claim (Resp. at 20), PLF correctly stated that the Take Care Clause limits the executive's lawmaking functions to recommending and vetoing legislation. PLF Mem. at 4.

The CRA's operative provisions at issue here merely set forth Congress' internal rules for its legislative action relating to new agency rules. *See* 5 U.S.C. § 802(g)(1) (The procedures established by the CRA are "an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such [they are] deemed a part of the rules of each House, respectively.").[10] And because the Constitution gives to each house the exclusive authority to "determine the Rules of its Proceedings[,]" U.S. Const. art. I, § 5, cl. 2, courts may not second-guess how congressional rules operate (unless they violate some other express provision of the Constitution or a fundamental right[11]). *United States v. Ballin*, 144 U.S. 1, 5 (1892), *cited favorably in N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2574 (2014); *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."). Therefore, while this Court would have jurisdiction to rule on the lawfulness of certain agency action under the CRA, *see* PLF Mem. at 6–10, the Court has no jurisdiction to rule on Congress' application of the CRA to its internal rules and procedures that precede a final vote on a resolution of disapproval.

[10] The CRA has some substantive provisions, namely, restrictions on when a rule can go into effect and a restriction on promulgation of substantial similar rules, but none of those provisions are challenged in CBD's third claim for relief.

[11] CBD cites only the Take Care Clause as grounds for invalidating Congress' internal rules. Am. Comp. (Dkt. No. 104) ¶ 90. This claim fails. The Executive has no obligation to execute Congress' internal rules. And, as discussed above, a law passed pursuant to the CRA is itself a law that the President must faithfully execute. Either way, the Take Care Clause does not apply here.

CONCLUSION

CBD's First Amended Complaint fails to state a claim upon which relief may be granted. In addition, this Court lacks jurisdiction over CBD's third claim for relief. CBD's Response fails to save these deficiencies, which are fatal.

PLF therefore asks the Court to dismiss, with prejudice, CBD's First Amended Complaint.

* * *

DATED: December 22, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2017, a copy of the foregoing document was served electronically through the Court's ECF system on all counsel of record.

s/ Oliver J. Dunford
OLIVER J. DUNFORD