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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, v. RYAN ZINKE, in his official capacity as Secretary of the Interior; and U.S. DEPARTMENT OF THE INTERIOR, Defendants, STATE OF ALASKA, Applicant Defendant-Intervenor.	)	Case No. 3:17-cv-00091-JWS **STATE OF ALASKA'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM AND LACK OF SUBJECT MATTER JURISDICTION (Fed. R. Civ. P. 12)**

INTRODUCTION

The State of Alaska ("State" or "Alaska") joins in the motion to dismiss filed by the Applicant Defendant-Intervenors Pacific Legal Foundation ("PLF"), Alaska Outdoor Council, Big Game Forever, Kurt Whitehead, and Joe Letarte (collectively "PLF").[1] The State seeks dismissal of the complaint[2] filed by the Center for Biological Diversity ("CBD") for all of the reasons stated in PLF's motion and supporting documents.[3] To avoid duplicative and unnecessary briefing, the State incorporates by reference PLF's memorandum of points and authorities in support of its motion to dismiss, and supplements that memorandum as follows.

BACKGROUND

Understanding that the Court may accept the complaint's factual allegations as true when considering these motions to dismiss,[4] it is nevertheless worth noting that Alaska strongly disagrees with CBD's mischaracterizations of the factual record. CBD's statements are merely meant to disparage the State's record of managing wildlife — both predator and prey — since Alaska became a state in 1959. In light of CBD's allegations, the State believes further explanation regarding its management authority and the legal mandates under which it exercises that management authority is warranted.

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1 Dkt. 27 &28.

2 Complaint, Dkt. 1.

3 Dkt. 27 &28.

4 *See Schueneman v. Arena Pharmaceuticals, Inc.*, 840 F.3d 698, 704–05 (9th Cir. 2016).

Alaska has the authority to manage and protect wildlife within its borders, including on federal lands, except to the extent expressly preempted by Congress when acting under Constitutional grants of authority to the federal agencies.[5] In August 2016, the U.S. Fish and Wildlife Service ("FWS") finalized regulations prohibiting various predator hunting practices on national wildlife refuges in Alaska ("FWS Rule").[6] The FWS Rule provided that predator control, as broadly defined by FWS in a manner inconsistent with the generally accepted meaning of the phrase, was prohibited on Alaska wildlife refuges "unless it [wa]s determined necessary to meet refuge purposes, [wa]s consistent with Federal laws and policy, and [wa]s based on sound science in response to a conservation concern."[7] The FWS Rule broadly described "predator control" as any management activity favoring some species to the detriment of others, and included a prohibition on "particularly effective public harvest methods and means."

Alaska and several conservation organizations sued to challenge the FWS Rule (and the similar National Park Service rule applicable to national preserves) in three cases that have been consolidated.[8] Collectively, the plaintiffs in the consolidated cases claim

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5 *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976); *Geer v. Connecticut*, 161 U.S. 519, 528 (1896), *overruled on other grounds by Hughes*, 441 U.S. at 322; 43 C.F.R. § 24.3(a).

6 *See* "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska," 81 Fed. Reg. 52,247 (August 5, 2016).

7 50 C.F.R. § 36.32(b).

8 *State of Alaska v. Zinke* (3:17-cv-00013-JWS), *Safari Club Int'l v. Zinke* (3:17-cv-00014-JWS) *and Alaska Professional Hunters Ass'n v. U.S. Dep't of the Interior* (3:17-cv-00026-JWS).

that the FWS Rule exceeded authority granted to the Department of the Interior by Congress. In conjunction with its legal challenge, Alaska also supported use of the CRA to revoke the FWS Rule.[9]

The State's motives for challenging the FWS Rule cannot be denied. The desire for self-management of natural resources, including management of Alaska's wildlife resources, was a driving force behind Alaska statehood; fish and wildlife are the property of the State held in trust for the benefit of all residents.[10] Ownership of the resources passed to Alaska upon statehood under the Alaska Statehood Act.[11] General management authority over fish and wildlife within Alaska passed from the federal government to Alaska shortly after Alaska's adoption of a comprehensive fish and game code.[12]

The Alaska Constitution requires the State to manage these resources for the maximum benefit and use for all Alaskans.[13] Under Alaska's Constitution, wildlife is reserved to the people for common use,[14] and must be "utilized, developed, and

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9 *See State of Alaska v. Zinke*, et. al. No. 3:17-cv-00013-JWS*; see also* Declaration of Bruce Dale, ¶ 10.

10 *See, e.g., Pullen v. Ulmer*, 923 P.2d 54, 57 n. 5 (Alaska 1996); *Metlakatla IndianCommunity v. Egan*, 369 U.S. 45, 47, 82 S.Ct. 552, 555 (1962).

11 Pub. L. No. 85-508, (1958), 72 Stat. 339.

12 *See* Executive Order No. 10857, 25 Fed. Reg. 33 (Dec 29, 1959) (transferring management of fish and wildlife resources to the State of Alaska effective January 1, 1960); s*ee also Metlakatla Indian Community*, *supra*, 369 U.S. at 47 n.2, 82 S.Ct. at 555.

13 Alaska Const. Art. VIII, §§ 1-2.

14 Alaska Const. Art. VIII, § 3.

maintained on the sustained yield principle, subject to preferences among beneficial uses."[15]

Under Alaska law, responsibility for wildlife management in Alaska is constitutionally vested in the Alaska legislature,[16] but regulatory authority has been statutorily delegated to the Alaska Board of Game,[17] and administrative authority to the Commissioner of the Alaska Department of Fish and Game.[18] Subject to a subsistence priority,[19] the Board of Game uses its authority to manage wildlife, including the authority to regulate taking of wildlife resources. Under this authority, the Board of Game has adopted comprehensive wildlife regulations.[20]

The FWS Rule unlawfully restricts the State's management authority by prohibiting certain methods and means for taking predators on National Wildlife Refuges within Alaska. The FWS Rule used the term "predator control," but such term is misleading and inaccurate because allowing a hunter to take a predator is not predator control. In fact, predator control is only allowed by the Alaska Department of Fish and Game or its contractors as part of an intensive management program authorized by the Board of Game.[21] The FWS Rule, on the other hand, would have affected hunters' ability

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15 Alaska Const. Art. VIII, § 4.

16 Alaska Const. Art. VIII, § 2.

17 AS 16.05.221; AS 16.05.241; AS 16.05.255; AS 16.05.258.

18 AS 16.05.010; AS 16.05.020; AS 16.05.050; AS 16.05.060; AS 16.05.241.

19 AS 16.05.258.

20 AS 16.05.255; 5 AAC 84; 5 AAC 85; 5 AAC 92.

21 AS 116.05.255(e)-(g) and (k).

to utilize methods and means authorized by the Board of Game. Hunting under regulations adopted by the Board of Game is permitted in a manner that meets the State's constitutional mandates.[22] No conservation concerns result from Alaska's wildlife management or Alaska's regulations allowing subsistence and general hunting in Alaska.[23]

House Joint Resolution ("HJR") 69 was introduced by Representative Don Young to revoke the FWS Rule under the authority of the CRA. After passing the House on February 16, 2017 and Senate on March 21, 2017, it was signed by the President on April 2, 2017 and became Pub. L. 115-20. The FWS Rule is revoked and shall be treated as if it had never taken effect.[24] The CRA prohibits adoption of any regulations substantially the same as the FWS Rule.[25]

ARGUMENT

CBD's complaint raises two counts. The first count is a constitutional challenge, alleging that the CRA's prohibition on future rulemaking "in substantially the same form" as the nullified regulation unconstitutionally infringes on the executive branch in violation of the separation of powers. The second count is a statutory challenge, alleging

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22 Alaska Constitution, Art. VIII.

23 The complaint also refers to regulations adopted by the National Park Service, which are the subject of separate litigation. Those regulations will not be addressed here because they were not revoked under the CRA. The presence of the National Park Service regulations in the complaint is not relevant to the revocation of the FWS Rule under the CRA, but does indicate Congressional intent opposing the federal rules.

24 5 U.S.C. § 801(d).

25 5 U.S.C. § 801(B)(2).

that the CRA does not permit congressional disapproval of hunting regulations—which fall within the exception to the CRA's effective date provision—during a new session of Congress.

As relief, the complaint requests that the Court (1) declare that the CRA's prohibition on future rulemaking "in substantially the same form" as the FWS Rule violates the separation of powers, (2) declare that the agency's reliance on the joint resolution to nullify the FWS Rule and refuse to promulgate similar rules is beyond its authority in violation of the Administrative Procedure Act, and (3) declare the FWS Rule reinstated.

I. CBD's constitutional challenge is not ripe for judicial review.

CBD's constitutional claim does not challenge the basic CRA process for invalidating a new regulation. Instead, it focuses on the CRA's prohibition on future rulemaking "in substantially the same form" as a disapproved regulation. Plaintiff argues that "[b]y nullifying the [FWS] Rule, and prohibiting any future substantially similar rules . . . without amending any of Interior's existing rulemaking authorities, Congress expanded its own power at the expense of the executive branch."[26] It asserts that "[t]he CRA's prohibition on future rulemaking 'in substantially the same form' as the [FWS] Rule . . . unconstitutionally infringes on the powers of the executive branch in violation of the separation of powers."[27]

Plaintiff's claim is not ripe, and the Court cannot grant the remedy it seeks. Before

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[26] Complaint ¶ 4.

[27] Complaint ¶ 44.

a court may exercise its jurisdiction, the Constitution mandates the existence of a "case or controversy."[28] This requires the existence of issues that are "definite and concrete, not hypothetical or abstract."[29] "Where a dispute hangs on 'future contingencies that may or may not occur,' it may be too 'impermissibly speculative' to present a justiciable controversy."[30]

Because the Court cannot grant the relief CBD seeks, its claims are not ripe for judicial review. The Court has no authority to order the Department of the Interior to pursue rulemaking similar to the FWS Rule. The only agency actions that courts can compel are "discrete" agency actions that the agency is legally required to take.[31] Therefore, even in situations where the agency is required to promulgate a rule, the Court's authority is limited to compelling the agency to act.[32] It "has no power to specify what the action must be."[33]

The CRA's severability clause precludes CBD's remedy. [34] Pursuant to that severability clause, a decision by the Court to invalidate the prohibition on future

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28 *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000).

29 *Id.*

30 *In re Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009) *(*internal citation omitted) (quoting *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572) (9th Cir. 1996) and *Portland Police Ass'n v. City of Portland*, 658 F.2d 1272, 1273 (9th Cir. 1981).

31 *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

32 *Id.* at 65.

33 *Id.*

34 *See* 5 U.S.C. § 806(b) ("If any provision of this chapter or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this chapter, shall not be affected thereby.").

rulemaking would not invalidate the entire statute. So even if CBD is correct that the prohibition on future rulemaking is unconstitutional, that would not entitle it to reinstatement of the nullified FWS Rule—it would only entitle CBD to a declaration that future rulemaking similar to the nullified rule is not prohibited. The Court has no authority to order the Department of the Interior to promulgate a rule that is substantially similar to the FWS Rule. And only if the Department of the Interior decides to take such action would CBD's claim be ripe. CBD's claim is too hypothetical and abstract to satisfy the ripeness doctrine.

II. The CRA precludes judicial review of Congress' action.

Section 805 of the CRA provides that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review."[35] Many federal court decisions have rejected CRA-related claims under § 805. For example, the D.C. District Court rejected a claim that an agency rule was invalid because it had not been submitted to Congress as mandated by the CRA, and the D.C. Circuit affirmed.[36] In an apparent

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35 5 U.S.C. § 805.

36 *Montanans for Multiple Use v. Barbouletos*, 542 F. Supp. 2d 9, 20 (D.D.C. 2008), *aff'd*, 568 F.3d 225 (D.C. Cir. 2009); *see also Texas Sav. & Comty. Bankers Ass'n v. Fed. Housing Fin. Bd.*, 1998 WL 842181 (W.D. Tex. June 25, 1998) (rejecting claim that an agency's failure to submit new rules to Congress violated the CRA because "the language could not be plainer" that "the statute provides for no judicial review of any 'determination, finding, action, or omission under this chapter'"); *United States v. American Elect. Power Serv.*, 218 F.Supp.2d 931 (S.D. Ohio 2002) (holding that "the language of § 805 is plain" and that an agency's failure to submit a rule to Congress is not judicially reviewable); *In re Operation of the Missouri River System Litigation*, 363 F.Supp.2d 1145, 1173 (D. Minn. 2004) (holding that section 805 precluded judicial review of an agency's decision that the designation of certain critical habitat was not a "major rule"), *vacated in part on other grounds*, 421 F.3d 618 (8th Cir. 2005); *Via*

minority position, one federal district court reviewed a claim based on asserted agency noncompliance with the CRA, reasoning that rejecting such claims would allow agencies to "evade the strictures of the CRA by simply not reporting new rules."[37] But even that minority reasoning would still bar a claim — like the claim here — that is based on alleged noncompliance with the CRA by *Congress*. The court found that Congress "intended to preclude judicial review of Congress' own determinations, findings, actions, or omissions made under the CRA."[38]

To decide Plaintiff's statutory claim would require the Court to review Congress's determination that it could use the CRA process to repeal the FWS Rule, but such judicial review of this determination is precluded under § 805. The CRA alters Congress's internal procedural rules for consideration of a certain type of legislation. Here, Congress chose to consider and pass Pub. L. 115-20 for the FWS Rule under those altered procedures. CBD argues that Congress interpreted and applied the CRA wrong and should not have used these altered procedures. But under the political question doctrine, courts generally do not scrutinize a legislature's choice of (or compliance with) its own

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Christi Reg'l Med. Ctr. 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."); *Forsyth Mem'l Hosp. v. Seblius*, 667 F. Supp. 2d 143, 150 (D.D.C. 2009) (rejecting under § 805 plaintiffs' argument that regulation was invalid because agency failed to comply with the CRA); *see also* Congressional Research Service, *The Congressional Review Act: Frequently Asked Questions* at 18 (November 17, 2016) (available at https://fas.org/sgp/crs/misc/R43992.pdf).

[37] *United States v. S. Indiana Gas & Elec. Co.*, 2002 WL 31427523, at *5 (S.D. Ind. Oct. 24, 2002).

[38] *Id*.

internal rules and procedures.[39] Indeed, when the CRA was being enacted, the sponsors stated that § 805 "was drafted in recognition of the constitutional right of each House of Congress to 'determine the Rules of its Proceedings,' U.S. Const., art. I, § 5, cl. 2, which includes being the final arbiter of compliance with such Rules."[40]

CONCLUSION

If the Court construes CBD's constitutional claim expansively, as a challenge to the entire CRA process, then CBD's complaint should be dismissed for all of the reasons stated in PLF's motion to dismiss and its supporting documents. If the Court construes CBD's challenge as written, then CBD's constitutional claim is limited to challenging the prohibition on future rulemaking. For the reasons stated above, the Court lacks the authority to grant the remedy CBD seeks, and CBD's claims are not ripe for review.

For all of the reasons stated in PLF's motion to dismiss and its supporting documents, as well as the additional reasons provided above, the Court lacks jurisdiction to consider CBD's statutory claim and CBD has failed to state a claim for which relief can be granted. The entire complaint should be dismissed.

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[39] *See Koohi v. U.S.*, 976 F.2d 1328 (9th Cir. 2013) ("The political question doctrine serves to prevent the federal courts from intruding unduly on certain policy choices and value judgments that are constitutionally committed to Congress or the executive branch.").

[40] 142 Cong. Rec. S3683-01, 1996 WL 185536 (statement of Sen. Nickles).

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CERTIFICATE OF SERVICE

I certify that on May 31, 2017 the foregoing was served electronically on all parties via CM/ECF.

/s/ Cheryl R. Brooking

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