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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CENTER FOR BIOLOGICAL DIVERSITY *et al.* and ALLIANCE FOR THE WILD ROCKIES *et al.* Plaintiffs	)	CV 11-70-M-DWM CV 11-71-M-DWM
v.	)	SAFARI CLUB INTERNATIONAL AND NATIONAL RIFLE ASSOCIATION OF AMERICA'S MOTION FOR LEAVE TO FILE A MOTION TO ALTER OR AMEND JUDGEMENT OF DENIAL OF INTERVENTION
KEN SALAZAR, *et al.* Defendants	)	
and	)	
SAFARI CLUB INTERNATIONAL and THE NATIONAL RIFLE ASSOCIATION OF AMERICA Defendant-Intervenor-Applicants	)	

Safari Club International and the National Rifle Association of America ("Safari Club and NRA") respectfully move this Court for leave to file a motion for reconsideration of the Court's denial of Safari Club and NRA's motion to intervene. Safari Club and NRA bring this motion pursuant to Montana L.R. 7.3. On June 1, 2011, this Court denied Safari Club and NRA's intervention as of right, on the presumption that Defendants Ken Salazar *et al.* ("Federal Defendants") would adequately represent Safari Club and NRA's interests in defending the constitutionality of Section 1713 of H.R. 1473, the Department of Defense and Full-Year Continuing Appropriations Act of 2011. P.L. 112-10 § 1713, 125 Stat. 38 (April 15, 2011) ("Section 1713"). After reviewing the Federal Defendants' brief, Safari Club and NRA need no longer ***predict*** that Federal Defendants will not adequately represent their interests. Federal Defendants' brief is concrete evidence of the ***fact*** of the inadequacy of representation. On this basis, Safari Club and NRA ask the Court to reconsider its denial of Safari Club and NRA's right to intervene in this action. Federal Defendants have informed Safari Club and NRA that they take no position on this motion. Plaintiffs Center for Biological Diversity *et al.* oppose this motion. Plaintiffs Alliance for the Wild Rockies *et al.* did not respond to Safari Club and NRA's inquiry in time to include in the filing of this motion.

I. Background Facts

On May 5, 2011, two sets of Plaintiffs filed lawsuits to challenge the Constitutionality of Section 1713. Section 1713 directed the U.S. Fish and Wildlife Service ("Service") to reissue an April 2, 2009 federal regulation that delisted the wolves of Montana, Idaho and portions of Utah, Oregon and Washington State. On May 20, 2011, Safari Club and NRA filed timely motions to participate in the two cases as intervenors as of right, (and alternatively by permission, or as amici). Dkt. No. 12 in 9:11-cv-0070-DWM and Dkt. No. 14 in 9:11-cv-00071-DWM. Federal Defendants took "no position" on the motions to intervene and made no affirmative statement that they were capable of or were willing to represent Safari Club and NRA's interests in this litigation. On June 1, 2011, the Court denied Safari Club and NRA's motions to intervene.

Plaintiffs filed their motions for summary judgment on May 31, 2011. On June 14, 2011 Federal Defendants filed their brief in Opposition to Plaintiffs' Motions for Summary Judgment.[1] In that brief, Federal Defendants failed to make four essential arguments in defense of the constitutionality of Section 1713: 1) When given a choice between constitutional and unconstitutional interpretations of a law, a Court must chose the constitutional interpretation; 2) a law, constitutional on its face, does not become unconstitutional if drafted or adopted for

[1] Federal Defendants resubmitted their brief on June 16, 2011, to remedy a compliance issue.

unconstitutionally based motives; 3) legislation does not become unconstitutional simply because it moots a pending appeal; and 4) Plaintiffs lack prudential standing because they cannot assert harm from interference with pending litigation, since Plaintiffs did not cause the litigation to be pending at the time Section 1713 was adopted and Plaintiffs cannot assert third-party prudential standing, derivative of the interests of those who may suffer a loss of the ability to pursue their appeals in the underlying wolf delisting litigation, because the appellants are capable of asserting their own interests.

These are arguments that Safari Club and NRA would have made in defense of the law's constitutionality and will make, if they are given the chance to participate in this litigation. A copy of Safari Club and NRA's [Proposed] Brief in Opposition to Plaintiffs' Motions for Summary Judgment is attached to this motion as Exhibit "A."

II. Relevant Law

Local Rule 7.3 requires a litigant to seek leave of the court to file a motion for reconsideration of any interlocutory order. L.R. 7.3(a). A denial of intervention, although immediately appealable, is such an interlocutory order. Grounds for seeking leave under L.R. 7.3(a) include the emergence of new material facts that present themselves after entry of the order that the litigant wishes to be reconsidered. L.R. 7.3(b)(2).

Federal Rule of Civil Procedure 24 specifies the requirements for intervention as of right. If intervention is sought in a timely manner, the court must permit anyone to intervene who:

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). In *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003), cited by this Court in its June 1, 2011 Order denying intervention, the Ninth Circuit noted the presumption that a governmental party will adequately represent the interests of its constituency. *Id.* at 1086. To overcome that presumption, the intervenor applicant must demonstrate a "very compelling showing to the contrary." *Id.*

The questions the court must answer when determining adequacy of representation are: (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect. *Id.*

III. Argument

In the instant matter, as evidenced by their brief, Federal Defendants have demonstrated that they have not made all of Safari Club and NRA's arguments and that they are neither capable nor willing to make all of Safari Club and NRA's arguments. Safari Club and NRA's attached [Proposed] brief offers this Court evidence of the necessary arguments that Safari Club and NRA intend to present, that other parties have neglected. Safari Club and NRA have made a "very compelling showing" that the Federal Defendants do not represent Safari Club and NRA's interests by showing the Federal Defendants failed to make an affirmative statement of their willingness to represent Safari Club and NRA's interests ***and*** submitted a brief that omits arguments that Safari Club and NRA consider important to the defense of Section 1713's constitutionality.

The evidence in this case contrasts the scenario in *Arakaki*, *supra*, where the Ninth Circuit denied intervention in the absence of the requisite "very compelling showing." In that case, the state government defendants had expressly stated to the Court that it would "make all arguments necessary to defend the benefits to native Hawaiians." *Id.* at 1087.

In contrast to *Arakaki*, and in greater resemblance to the case at bar, an Arizona federal district court in the case of *WildEarth Guardians v. Salazar*, 2009 WL 1798611 (D.Ariz. 2009), granted intervention as of right to Gunnison County,

finding that the Secretary of the Interior could not adequately represent the interests of the county in a case in which the county sought to defend the Secretary's decision not to list the Gunnison prairie dog as endangered or threatened. The court took particular note of the fact that the "the Secretary takes no position on the motion and fails to assert that it would adequately represent Gunnison County's interest." *Id.* at *2.

In the instant matter, the Federal Defendant's failure to state its willingness and capability to represent Safari Club and NRA's interests, together with the fact that Federal Defendant's brief fails to make several arguments that Safari Club and NRA deem important and would raise in defense of the constitutionality of Section 1713, provide the very compelling showing necessary to override the presumption that Federal Defendants will adequately represent Safari Club and NRA's interests. Safari Club and NRA respectfully request that this Court grant them leave to file a motion for reconsideration of the denial of their intervention.

DATED this 20th day of June 2011.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the motion complies with the page limits of Local Rule 7.3. This motion, excluding caption and certificates of service and compliance, contains seven pages.

Robert T. Cameron

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2011, I filed the foregoing document with the Clerk of the Court and sent a copy via U.S. Mail, First Class, postage pre-paid to counsel of record in this action.

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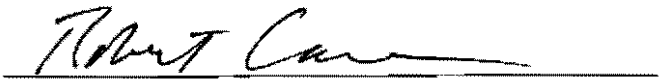

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