IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

ALLIANCE FOR THE WILD ROCKIES, et al. Plaintiff, vs. KEN SALAZAR, et al., Defendants.	CV 11-70-M-DWM CV 11-71-M-DWM ORDER
CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, vs. KEN SALAZAR, et al., Defendants.	

The Rocky Mountain Elk Foundation, Inc., Arizona Sportsmen for Wildlife, Big Game Forever, LLC, Idaho Sportsmen for Fish and Wildlife, Montana

Sportsmen for Fish and Wildlife, the Mule Deer Foundation, Sportsmen for Fish and Wildlife, and the Wild Sheep Foundation (collectively "Wildlife Conservation Groups") move for a stay of proceedings in this case pending their appeal from the Court's June 1, 2011 order (dkt. # 38) denying their motion to intervene. The motion is denied.

In evaluating a motion for stay pending appeal, district courts consider (1) the applicant's likelihood of succeeding on appeal; (2) whether the applicant will be irreparably harmed if a stay is not granted; (3) whether the issuance of a stay would cause substantial injury to other parties interested in the lawsuit; and (4) where the public interests lie. EEOC v. Quad/Graphics, Inc., 875 F. Supp. 558, 559 (E.D. Wash. 1995). Here, circumstances do not weigh in favor of staying the litigation. Indeed the converse is true.

Wildlife Conservation Groups will not likely succeed on appeal. When an applicant for intervention seeks the same result as one of the present parties, a presumption of adequate representation arises. Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003). The "presumption of adequacy is 'nowhere more applicable than in a case where the Department of Justice deploys its formidable resources to defend the constitutionality of a congressional enactment.'" Freedom from Religion Found., Inc. v. Geithner, — F.3d —, 2011 WL 1746137 at *2 (9th Cir. May 9, 2011).

Federal Defendants and Wildlife Conservation Groups each seek to successfully defend the constitutionality of Section 1713. At the time of their application, no showing was made that Federal Defendants would neglect a necessary element in defending the congressional action regarding wolves.

After Federal Defendants filed their opening brief, Wildlife Conservation Groups identified litigation strategies and arguments not used by Federal Defendants. If allowed to intervene, Wildlife Conservation Groups would argue:

> (1) when a statute is fairly subject to differing interpretations as to its constitutionality, a Court must choose the constitutional interpretation;
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> (2) a law that is constitutional on its face does not become unconstitutional if drafted or adopted for allegedly unconstitutionally based motives;
>
> (3) legislation does not become unconstitutional simply because it renders a pending appeal moot; and
>
> (4) Plaintiffs lack and should not be allowed to assert third-party prudential standing.

Wildlife Conservation Groups believe the failure to make the arguments proves that Federal Defendants do not adequately represent their interests. The argument is not well taken. Furthermore, unlike the Congress, a court is not a forum for political lobbying.

First, Federal Defendants have argued that a statute subject to differing interpretations as to its constitutionality should be construed so as to be constitutional

if possible. Dkt. 66 at 11 n.6. Wildlife Conservation Groups' assertion that the argument was not advanced is incorrect.

Second, Federal Defendants have not neglected the argument that a law that is constitutional on its face does not become unconstitutional if drafted or adopted for alleged unconstitutionally based motives. Federal Defendants object to the use of legislative history and references to comments made by the sponsors of Section 1713. Dkt. 57 at 17–19; Dkt. 66 at 6–9. Federal Defendants' argument that the statements are irrelevant is based on the position Wildlife Conservation Groups claim was neglected.

The third argument Wildlife Conservation Groups seek to make is premised on a misunderstanding of Plaintiffs' challenge. Plaintiffs have not argued that legislation is unconstitutional merely because it renders a pending appeal moot. Accordingly, Wildlife Conservation Groups' argument is misplaced.

Finally, Wildlife Conservation Groups complain that Federal Defendants have not challenged Plaintiffs' standing. Inadequate representation is not established by identifying one or more arguments that Defendants did not make. Federal Defendants' differing litigation strategies do not undermine the adequacy of their representation. See Arakaki, 324 F.3d at 1086.

Wildlife Conservation Groups did not establish a right to intervene at the time

of their application. And there is nothing that persuades me otherwise now. Even if the Ninth Circuit judges the adequacy of representation by comparing Federal Defendants' brief with Wildlife Conservation Groups' proposed brief, success on appeal is unlikely. Federal Defendants have made arguments Wildlife Conservation Groups seek to advance, and differing manners of presenting arguments do not mean there is inadequate representation.

The remaining factors to consider when evaluating a motion to stay do not weigh in favor of staying the litigation. A court should consider whether the party seeking a stay will be irreparably harmed absent a stay. Considering that their interests are adequately represented by Federal Defendants, Wildlife Conservation Groups do not risk irreparable harm if no stay is issued. Furthermore, the public, the states as well as the Congress have a legitimate expectation of dispatch in addressing the issue raised here.

In their analysis of the third factor, Wildlife Conservation Groups do not identify the correct standard of injury. The third factor asks whether a stay would cause substantial injury to other parties interested in the lawsuit. Wildlife Conservation Groups state that Plaintiffs cannot establish irreparable harm. Irreparable harm is difficult to establish, but the court looks only to whether there is risk of substantial injury. Plaintiffs argue they risk substantial injury because the

challenged section means all wolves are not protected by the Endangered Species Act in the DPS at issue. Wolves in Oregon have been killed under state management, and this fall wolf hunts are planned in Montana and Idaho. Dkt. 26-12 at ¶ 17. Plaintiffs' interests are likely to be injured if this Court delays the litigation.

Turning to the last factor, the public interest weighs in favor of the speedy and inexpensive resolution of every action and proceeding. A stay unnecessarily prolongs resolution of the legal question in this action. Wildlife Conservation Groups do not argue that a stay is in the public interest. In my view further delay in this litigation is contrary to the public interest.

All the factors weigh in favor of denying the motion for a stay. Wildlife Conservation Groups are not likely to succeed on their appeal, and they have not demonstrated risk of irreparable harm. Furthermore, staying litigation is not in the public's interest, and Plaintiffs' interests risk potential injury if the Court delays. Therefore,

IT IS HEREBY ORDERED that the motion (dkt. # 63) is DENIED.

Dated this 1st day of July, 2011.

12:17 pm

Donald W. Molloy, District Judge
United States District Court