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Sportsmen for Fish and Wildlife, and the Wild Sheep Foundation*

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

ALLIANCE FOR THE WILD
ROCKIES, *et al.*,
Plaintiffs,

v.

§
§
§ CV 11-70-M-DWM
§ CV 11-71-M-DWM
§
§

KEN SALAZAR, *et al.*
Defendants,

and

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,
Defendants-Intervenor-Applicants.

CENTER FOR BIOLOGICAL
DIVERSITY, *et al.*,
Plaintiffs,

v.

KEN SALAZAR, *et al.*
Defendants,

and

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,
Defendants-Intervenor-Applicants.

**MEMORANDUM
SUPPORTING WILDLIFE
CONSERVATION GROUPS'
MOTION FOR
STAY PENDING APPEAL**

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”) seek a stay of all proceedings in this matter pending their appeal from the Court’s June 1, 2011 Order (Doc. No. 38) denying their motion to intervene.

I. INTRODUCTION

This motion addresses the Order (Doc. No. 38) filed and entered on June 1, 2011 denying the Wildlife Conservation Groups’ motion to intervene. The nature of this case and the procedural background are set forth in the Order.

The Wildlife Conservation Groups intend to appeal the Court’s denial of intervention to the 9th Circuit. This case should be stayed while that appeal is pending because the Wildlife Conservation Groups will be denied any meaningful participation in the case, and therefore any ability to defend their legally-protectable interests, in the absence of a stay.

II. LEGAL STANDARDS

An order denying intervention as of right constitutes “an appealable ‘final decision’ within the meaning of 28 U.S.C. § 1291,” *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997), and a district

court retains inherent power during the pendency of an appeal to preserve the status quo to ensure the effectiveness of the eventual judgment. *See Natural Res. Def. Council, Inc. v. Southwest Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001); *Tribal Village of Akuton v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988). Under these circumstances, the rules provide that a party must ordinarily move the district court for a stay of the judgment or order involved before the stay issue may be raised on appeal. Fed. R. App. P. 8(a)(1)(A); *see generally*, Wright, Miller & Kane; 11 Fed. Prac. & Proceed. Civ. 2d §2904 (2008).

In evaluating a motion for stay pending appeal, district courts should 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); *Ctr. for Int’l Env’tl Law v. Office of the U.S. Trade Rep.*, 240 F. Supp. 2d 21, 22 (D.D.C. 2003). While the applicant’s burden is substantial, courts give unique weight to the irreparable injury element, even where success on appeal is deemed questionable, where “[f]ailure to grant...a stay...would make [the] right to appeal of little value.” *Quad/Graphics*, 875 F. Supp. at 560.

III. ARGUMENT

In the absence of a stay pending appeal, the Wildlife Conservation Groups will be denied a meaningful opportunity to participate in the case at the district court level. They will also be prevented from pursuing an appeal if the district court's decision ends up being adverse to their interests.

Under the terms of the scheduling order issued by the Court, the parties' cross-motions for summary judgment, which are expected to result in a final decision on the issues, will be fully briefed by June 28, 2011. The Wildlife Conservation Groups will be unable to respond to the parties' arguments or otherwise participate in the district court proceedings absent some form of a stay or modification of the current scheduling order.

Likewise, depending on how the Court ultimately rules on the substantive issues, the Wildlife Conservation Groups' appeal of the Order denying intervention may be rendered moot absent a stay of the lower court proceedings. Some courts have granted such a stay, even after finding it unlikely an appeal would succeed, upon determining that the "appeal would effectively be rendered moot in the absence of a stay," that a stay would delay resolution of but not otherwise harm the interests of other parties, and that a stay would not disserve the public interest. *EEOC v. Quad/Graphics, Inc.*, 875 F. Supp. 558, 560 (E.D. Wis. 1995).

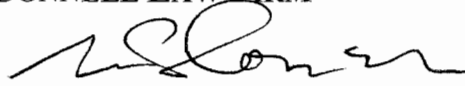
Any opposition to a stay pending appeal will likely assert that delay in ruling on plaintiffs' claims here will result in irreparable harm to the northern Rocky Mountain wolf populations due to the upcoming 2011 wolf season. This argument, however, ignores the reality that this Court previously permitted the harvesting of wolves in 2009, and the wolf populations did not suffer "irreparable harm" as a result.

IV. CONCLUSION

For the foregoing reasons, the Court should stay all further proceedings in this matter pending resolution of the Wildlife Conservation Groups' appeal.

DATED this 21st day of June, 2011.

CONNELL LAW FIRM



Mark S. Connell

Attorney for Defendants-Intervenor-Applicants 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

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(A) and (E), I hereby certify that this Memorandum in Support of the Wildlife Conservation Groups' Motion for a Stay Pending Appeal is printed with a proportionately-spaced Times New Roman text with a typeface of 14 points, is double spaced, and the word count of the brief is calculated by Microsoft Word to be 762 words.

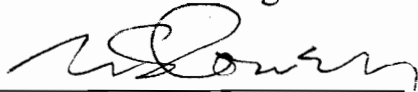
DATED this 21st day of June 2011.



Mark S. Connell

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2011, I filed the foregoing document with the clerk of the U.S. District Court for the District of Montana which will send a Notice of Electronic Filing to all counsel of record.



Mark S. Connell