

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY;
NATURAL RESOURCES DEFENSE COUNCIL;
and GREENPEACE, INC.,

No. C 08-1339 CW

Plaintiffs,

ORDER TENTATIVELY
GRANTING DEFENDERS
OF WILDLIFE'S MOTION
FOR LEAVE TO
INTERVENE

v.

DIRK KEMPTHORNE, United States
Secretary of the Interior; and UNITED
STATES FISH AND WILDLIFE SERVICE,

Defendants.

Defenders of Wildlife (DOW) moves for leave to intervene in these proceedings. No party has filed a response to DOW's motion. The matter was taken under submission on the papers. Having considered all of the papers filed by DOW, the Court tentatively grants the motion.

BACKGROUND

Plaintiffs filed this action on March 10, 2008, charging Defendants with failing to comply with the Endangered Species Act's (ESA) deadline to issue a determination on whether the polar bear should be listed as a threatened species. On April 2, 2008,

1 Plaintiffs moved for summary judgment. Defendants opposed this
2 motion, conceding that they had failed to meet the deadline but
3 arguing that the relief Plaintiffs sought was unjustified.

4 On April 28, 2008, the Court granted Plaintiffs' motion and
5 ordered Defendants to publish their listing determination by May
6 15, 2008. Defendants complied with this order and published a
7 final rule designating the polar bear as threatened. In addition,
8 Defendants promulgated a special rule under section 4(d) of the
9 ESA, which permits the Fish and Wildlife Service to specify
10 prohibitions and authorizations that are tailored to the specific
11 conservation needs of a particular species. The special rule here
12 allows certain activities that might otherwise be prohibited under
13 the ESA or its associated regulations.

14 On May 16, 2008, Plaintiffs filed an amended complaint adding
15 two claims. The first new claim charged Defendants with violating
16 the Administrative Procedures Act (APA) by promulgating the section
17 4(d) rule without first publishing a notice of proposed rule-making
18 and giving interested persons an opportunity to comment. The
19 second new claim charged Defendants with violating the National
20 Environmental Policy Act (NEPA) by promulgating the section 4(d)
21 rule without first conducting an environmental impact statement or
22 an environmental assessment.

23 On July 16, 2008, Plaintiffs filed a second amended complaint
24 adding four new claims. All four claims are brought pursuant to
25 the APA and are based on Defendants' alleged failure to comply with
26 either the ESA or the Marine Mammals Protection Act (MMPA). The
27 first challenges the decision to classify the polar bear under the
28 ESA as a threatened, rather than an endangered, species. The

1 second challenges the substance of the section 4(d) rule as
2 contrary to the ESA. The third charges Defendants with violating
3 the ESA by failing to designate critical habitat for the polar
4 bear. The fourth alleges that Defendants violated the MMPA by
5 failing to publish a list of guidelines for safely deterring polar
6 bears through the use of non-lethal methods.

7 DOW is a non-profit organization dedicated to the protection
8 of native wild animals and plants in their natural communities. It
9 has more than 500,000 members. It seeks to intervene in this
10 action for a single purpose: to challenge the substance of
11 Defendants' section 4(d) rule as contrary to the ESA.

12 DISCUSSION

13 To intervene as a matter of right under Rule 24(a)(2) of the
14 Federal Rules of Procedure, an applicant must claim an interest the
15 protection of which may, as a practical matter, be impaired or
16 impeded if the lawsuit proceeds without the applicant. Forest
17 Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1493 (9th
18 Cir. 1995). The Ninth Circuit applies a four-part test to motions
19 under Rule 24(a)(2):

20 (1) the motion must be timely; (2) the applicant must
21 claim a "significantly protectable" interest relating to
22 the property or transaction which is the subject of the
23 action; (3) the applicant must be so situated that the
24 disposition of the action may as a practical matter
impair or impede its ability to protect that interest;
and (4) the applicant's interest must be inadequately
protected by the parties to the action.

Id. (quoting Sierra Club v. EPA, 995 F.2d 1478, 1481 (9th Cir.
1993)).

26 The Ninth Circuit interprets Rule 24(a)(2) broadly in favor of
27 intervention. Id. In evaluating a motion to intervene under Rule
28

1 24(a)(2), a district court is required "to take all well-pleaded,
2 nonconclusory allegations in the motion . . . as true absent sham,
3 frivolity or other objections." Sw. Ctr. for Biological Diversity
4 v. Berg, 268 F.3d 810, 820 (9th Cir. 2001).

5 Alternatively, a court may, in its discretion, permit
6 intervention under Rule 24(b)(1)(B) by anyone who "has a claim or
7 defense that shares with the main action a common question of law
8 or fact." In exercising its discretion, a court should "consider
9 whether the intervention will unduly delay or prejudice the
10 adjudication of the original parties' rights." Fed. R. Civ. P.
11 24(b)(3).

12 DOW has satisfied the first three factors of the four-factor
13 test for intervention as a matter of right. Its members have an
14 interest in the continued existence of the polar bear in its
15 natural habitat. Because the activities currently permitted by the
16 section 4(d) rule allegedly jeopardize the polar bear's continued
17 existence by destroying its habitat, and because this action
18 challenges the validity of that rule, the disposition of this
19 action in Defendants' favor could jeopardize DOW's interest. In
20 addition, DOW moved for leave to intervene shortly after Plaintiffs
21 filed their second amended complaint, which asserted a substantive
22 challenge to the section 4(d) rule for the first time, and thus its
23 motion is timely.

24 However, DOW cannot satisfy the fourth factor of the Ninth
25 Circuit's test. In determining whether existing parties represent
26 a proposed intervenor's interests, the court should consider "(1)
27 whether the interest of a present party is such that it will
28 undoubtedly make all the intervenor's arguments; (2) whether the

1 present party is capable and willing to make such arguments; and
2 (3) whether the would-be intervenor would offer any necessary
3 elements to the proceedings that other parties would neglect." Nw.
4 Forest Resources Council v. Glickman, 82 F.3d 825, 838 (9th Cir.
5 1996). "Under well-settled precedent in this circuit, '[w]here an
6 applicant for intervention and an existing party have the same
7 ultimate objective, a presumption of adequacy of representation
8 arises.'" League of United Latin Am. Citizens v. Wilson, 131 F.3d
9 1297, 1305 (9th Cir. 1997) (quoting Nw. Forest Resource Council, 82
10 F.3d at 838) (alteration in original; additional internal quotation
11 marks omitted). The proposed intervenor has the burden of showing
12 that Plaintiffs will not adequately represent its interests, though
13 that burden is "minimal." Sagebrush Rebellion, Inc. v. Watt, 713
14 F.2d 525, 528 (9th Cir. 1983).

15 DOW seeks to intervene to challenge the substance of the
16 section 4(d) rule -- a claim that has already been asserted by the
17 three Plaintiffs, Center for Biological Diversity, Natural
18 Resources Defense Counsel and Greenpeace. Although DOW asserts
19 that its interest in this case is more "narrow and focused" than
20 Plaintiffs' because it would be asserting only one of the six
21 remaining claims, it has not suggested that its interest in
22 challenging the rule differs from Plaintiffs' in any way or that it
23 is likely to raise any unique arguments. Nor has it demonstrated
24 that its fundamental interest in this action -- the survival and
25 health of the polar bear -- differs in any material respect from
26 Plaintiffs'.

27 The cases DOW cites in which the interests of a proposed
28 intervenor were found not to be adequately represented by the

1 existing parties differ from this one. In Home Builders
2 Association of Northern California v. United States Fish & Wildlife
3 Service, 2006 WL 1030179 (E.D. Cal.), for instance, a property
4 owner was allowed to intervene notwithstanding the fact that the
5 action was brought by a homebuilders' association whose broad
6 objective was aligned with his, because his interest in the fate of
7 his particular land led him to have "a more specific goal" in the
8 litigation. Id. at *5. Here, in contrast, DOW shares the same
9 goal as Plaintiffs in challenging the substance of the section 4(d)
10 rule. Similarly, in National Resources Defense Council v. Costle,
11 561 F.2d 904 (D.C. Cir. 1977), a number of environmental advocacy
12 groups challenged the Environmental Protection Agency's failure to
13 discharge its statutory duty to regulate the release of pollutants
14 into the waterways. The court held that certain industry groups
15 could intervene to ensure their participation in the implementation
16 of a settlement agreement between the original parties that
17 obligated the EPA to initiate rule-making proceedings on an
18 industry-by-industry basis. In finding that the groups had met
19 their burden of demonstrating that their interests were not
20 sufficiently represented by other industry intervenors, the court
21 stated that, although the new industry groups might share an
22 "overall point of view" with the others, the particular industries
23 represented by the new groups were not represented by existing
24 parties. Id. at 913. Here, in contrast, DOW has not shown that
25 the interests or motivations of Plaintiffs' constituencies diverge
26 in any respect from those of its own.

27 DOW has not cited any case in which an advocacy group with
28 interests that are indistinguishable from those of existing parties

1 has been permitted to intervene as a matter of right. And while
2 DOW correctly notes that Plaintiffs' challenge to the substance of
3 the 4(d) rule is only one of their six claims, this fact does not
4 render Plaintiffs' interest in that claim "limited" in any relevant
5 sense of the word. DOW has provided no support for its suggestion
6 that Plaintiffs lack sufficient resources or motivation to litigate
7 this claim vigorously and competently. Nor has it shown that it
8 possesses unique information or knowledge relevant to challenging
9 the section 4(d) rule. Cf. LG Elecs. Inc. v. O-Lity Computer Inc.,
10 211 F.R.D. 360, 365 (N.D. Cal. 2002) ("Quanta may not have the same
11 knowledge that Apple has about the design of the Apple products,
12 and thus may not be able to adequately represent Apple's interests
13 in this litigation.").

14 Although DOW's burden in demonstrating that its interests will
15 not be adequately represented is "minimal," it is not non-existent.
16 DOW has not met that burden, even under the liberal standards for
17 intervention as a matter of right.

18 With respect to permissive intervention, the Court is not
19 persuaded that the current Plaintiffs will not adequately represent
20 DOW's interests. The Court is concerned about delaying proceedings
21 with multiple, repetitive briefs and disputes over argument time.
22 However, the Court will grant permissive intervention if the
23 existing Plaintiffs agree, and if all Plaintiffs agree to file a
24 joint brief, not exceeding the page limits already set by the
25 Court, in support of their motion for summary judgment and any
26 other motions. DOW must also reach an agreement with the other
27 Plaintiffs concerning the division of oral argument between them at
28 the summary judgment hearing and further proceedings.

CONCLUSION

For the foregoing reasons, DOW's motion for leave to intervene (Docket No. 128) is TENTATIVELY GRANTED. If DOW is able to satisfy the conditions for permissive intervention described above, it must file a notice of such with the Court. The Court will then finally grant the motion. DOW's notice must be filed within ten days of the date of this order.

IT IS SO ORDERED.

Dated: 10/2/08



CLAUDIA WILKEN
United States District Judge