

United States District Court  
For the Northern District of California

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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.

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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  
25 impair or impede its ability to protect that interest;  
26 and (4) the applicant's interest must be inadequately  
27 protected by the parties to the action.

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

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

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.

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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