

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,

v.

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

ORDER DENYING
INTERVENORS' MOTIONS
FOR LEAVE TO FILE
MOTIONS FOR
RECONSIDERATION

Defendants.

Intervenors Alaska Oil and Gas Association (AOGA) and Arctic
Slope Regional Corporation (ASRC) each move separately for leave to
file a motion for reconsideration of the Court's order granting in
part their motions for leave to intervene. They object to four
aspects of the order: 1) the Court's decision not to permit them to
defend the portions of the Fish and Wildlife Service's section 4(d)
rule that (a) exempt greenhouse gas emissions from section 7 of the
Endangered Species Act (ESA); and (b) exempt all activities outside
of Alaska from the ESA's take prohibitions; 2) the Court's decision
that they are not entitled to intervene as a matter of right in

1 connection with the merits phase of Plaintiffs' stand-alone
2 Administrative Procedure Act (APA) claim; 3) the Court's failure to
3 discuss explicitly whether it would permit them to intervene in
4 connection with those issues and claims where it denied leave to
5 intervene as a matter of right; 4) the Court's decision to impose
6 what they consider to be unreasonable limitations on the length of
7 their summary judgment briefs.

8 Civil Local Rule 7-9(a) provides, "No party may notice a
9 motion for reconsideration without first obtaining leave of Court
10 to file the motion." A motion for leave to file a motion for
11 reconsideration may only be granted if the moving party shows:

12 (1) That at the time of the motion for leave, a material
13 difference in fact or law exists from that which was
14 presented to the Court before entry of the interlocutory
15 order for which reconsideration is sought. The party
16 also must show that in the exercise of reasonable
17 diligence the party applying for reconsideration did not
18 know such fact or law at the time of the interlocutory
19 order; or

20 (2) The emergence of new material facts or change of law
21 occurring after the time of such order; or

22 (3) A manifest failure by the Court to consider material
23 facts or dispositive legal arguments which were presented
24 to the Court before such interlocutory order.

25 Civ. L.R. 7-9(b). Intervenors rely on the first and third bases
26 for permitting a motion for reconsideration.

27 In ruling on the motions for leave to intervene, the Court
28 found that AOGA and ASRC have a "significantly protectable
interest" in ensuring that the section 4(d) rule survives judicial
review because their activities in Alaska bring them into
occasional contact with polar bears. According to Intervenors,
that contact may result in the incidental take of polar bears,

1 which would not be permitted in the absence of the rule. To the
2 extent Intervenorors have an interest in the protections afforded by
3 the rule to activities outside of Alaska or to the emission of
4 greenhouse gases, their interest cannot be differentiated from that
5 of any number of entities in the United States. The Court
6 discussed and considered the involvement of AOGA's and ASRC's
7 involvement in oil and gas activity in ruling on the motion for
8 leave to intervene, and there is no basis under Local Rule
9 7-9(b)(1) or (3) to permit a motion for reconsideration.

10 There is similarly no basis under the local rule to permit a
11 motion for reconsideration of the Court's decision not to allow
12 AOGA or ASRC to intervene in connection with the merits phase of
13 Plaintiffs' stand-alone APA claim, which simply challenges
14 Defendants' failure to provide notice and accept comments prior to
15 promulgating the section 4(d) rule. Contrary to Intervenorors'
16 assertion, the Court's decision does not conflict with controlling
17 Ninth Circuit authority. The only such authority argued by
18 Intervenorors is Idaho Farm Bureau Federation v. Babbitt, 58 F.3d
19 1392 (9th Cir. 1995). That case, which was considered and cited in
20 the Court's order, involved an APA claim that challenged both the
21 procedure and the substance of an agency rule. In finding that two
22 environmental groups could intervene as defendants in the action as
23 a matter of right, the Ninth Circuit noted that the groups "were
24 not seeking intervention in a case challenging only agency
25 procedure." Id. at 1398 n.3. Rather, the action challenged "both
26 the substantive listing rule and the procedures [the Fish and
27 Wildlife Service] followed." Id. Thus, as it explicitly stated,
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1 the court left open the question of whether intervention may be had
2 as a matter of right in an APA action challenging only an agency's
3 compliance with procedural requirements. Id.

4 Idaho Farm Bureau therefore stands only for the proposition
5 that, when an action challenges both substantive and procedural
6 aspects of a rule, as does the present case, a party with a
7 demonstrable interest in the validity of the rule may intervene as
8 a defendant in the action. Consistent with Idaho Farm Bureau, AOGA
9 and ASRC have been granted leave to intervene in this action.

10 Idaho Farm Bureau does not, however, address whether the
11 intervenors have a right to defend every aspect of an APA challenge
12 to an agency rule, without regard to whether the challenge is
13 procedural or substantive in nature. As discussed in the Court's
14 earlier order, Ninth Circuit case law relating to procedural
15 challenges under the National Environmental Policy Act suggests
16 that there is no third-party right to intervene as a defendant in
17 the merits phase of a purely procedural challenge under the APA.
18 See, e.g., Wetlands Action Network v. Babbitt, 222 F.3d 1105, 1113-
19 14 (9th Cir. 2000). Idaho Farm Bureau itself left open the
20 possibility that no such right to intervene exists. In addition,
21 the Ninth Circuit has approved of decisions allowing an intervenor
22 to participate in some claims but not others. See Forest
23 Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1495-96
24 (9th Cir. 1995) While Intervenor may disagree with the Court's
25 interpretation of Ninth Circuit precedent, this does not provide a
26 basis for permitting them to file a motion for reconsideration.

27 Concerning permissive intervention, the Court stated in its
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1 order that it had the discretion to permit intervention, even where
2 intervention may not be had as a matter of right, by anyone who has
3 a claim or defense that shares with the main action a common
4 question of law or fact. Intervenor correctly note, however, that
5 the Court did not explicitly decline to exercise its discretion to
6 permit them to intervene in connection with those claims and issues
7 in which the Court found that they lacked a significantly
8 protectable interest. The Court now clarifies that it will not
9 permit intervention in those areas. There is no reason to believe
10 that Defendants will not fully defend their decision or thoroughly
11 address the issues relating to greenhouse gas emissions and
12 activities outside of Alaska. Accordingly, permissive intervention
13 is not warranted.

14 As for the limitations on the length of Intervenor's briefs,
15 although Intervenor believe they are unfair, the Court considered
16 the complexity of the issues before making its decision. Because
17 Intervenor will file their briefs after Plaintiffs and Defendants
18 have completed the first round of briefing on the cross-motions for
19 summary judgment, and because Intervenor are not permitted to
20 repeat the arguments made by other parties, the page limits should
21 be adequate. If, after Defendants have filed their brief in
22 opposition to Plaintiffs' motion for summary judgment and in
23 support of their cross-motion for summary judgment, Intervenor
24 believe they will require additional pages, they may file an
25 administrative motion pursuant to the Local Rules seeking such
26 relief.

27 For the foregoing reasons, Intervenor's motions for leave to
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1 file motions for reconsideration (Docket Nos. 140 and 145) are
2 DENIED.

3 IT IS SO ORDERED.

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5 Dated: 10/2/08



CLAUDIA WILKEN
United States District Judge

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