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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

DEFENDERS OF WILDLIFE, et al.,

Plaintiffs,

v.

KEN SALAZAR, et. al.,

Defendants.

GREATER YELLOWSTONE COALITION,

Plaintiff,

v.

KEN SALAZAR, et al.,

Defendants.

Case. No. 09-77-M-DWM
Case. No. 09-82-M-DWM
(consolidated cases)

WESTERN WATERSHEDS PROJECTS' RESPONSE OPPOSING MOTION FOR INDICATIVE RULING

INTRODUCTION

Pursuant to the Court's March 21, 2011 Order, Dkt. 193, Western Watersheds Project hereby objects to and opposes the Motion for Indicative Ruling filed jointly by several plaintiffs and defendants (collectively the "Settling Parties") who attempt to settle the present case and a related case (No. cv-08-14-M-DWM). Dkt. 187.

The Settling Parties seek to strip Western Watersheds Project ("WWP") and other non-settling plaintiffs of the legal ruling already rendered in their favor by this Court, without intervening or overriding legal authority, without all parties agreeing to the proposed settlement, and without ensuring adequate protection for wolves. The Court already held it improper for the United States Fish and Wildlife Service ("Service") to base its Northern Rocky Mountain ("NRM") wolves delisting decision on politics. Defenders of Wildlife v. Salazar, 729 F. Supp. 2d 1207, 1228 (D. Mont. 2010)("Even if the Service's solution is pragmatic, or even practical, it is at its heart a political solution that does not comply with the ESA.") Yet the Settling Parties now seek the Court's blessing for the politically motivated decision to be reinstated, and they provide no basis for the ruling they seek and settlement they propose, other than altered political postures.

Because the Settling Parties cannot justify their Rule 60(b) request for the Court to vacate[1] the remedy previously obtained, and cannot justify the settlement they seek to enter if the Court grants their requested ruling, the Court should deny the Motion for an Indicative Ruling. Alternatively, if the Court is not yet prepared to deny the Motion and concludes it presents a "substantial issue," then the Court should indicate only that it will entertain the motion, and set the matter for further briefing and a hearing. Rule 62.1 Fed. R. Civ. P. and Advisory Committee notes ("the district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted"); Dkt. 193 at 3.

STANDARD OF REVIEW

I. Rule 62.1 of the Federal Rules of Civil Procedure

The Settling Parties set forth the appropriate standard of review for Rule 62.1 in their Memorandum. Dkt. 189-2 at 8-9. WWP would only note again that if the Court is not yet prepared to deny the Motion pursuant to

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[1] Although the Settling Parties in some places style their request as a "stay" of the remedial aspects of the Order, they also clearly indicate they are requesting a "partial vacatur." See Dkt. 189-2 at 8 ("This motion requests that the Court partially vacate its order so as to effectuate the Settling Parties' agreement and thus help resolve this case in a prompt and fair manner."); Dkt. 189-2 at 6 (asking whether the Court would "partially stay the remedial aspects of its Judgment"). It is unclear whether the Settling Parties request one or the other, or both. References to "stay" or to "vacatur" herein are used interchangeably to refer to whatever relief the Settling Parties are seeking.

Rule 62.1(2), further argument based upon the Court's statement that the Motion raises a "substantial issue" would be appropriate pursuant to 62.1(3).

II. Rule 60(b) of the Federal Rules of Civil Procedure

Any motion for relief from judgment under either Rule 60(b)(5) or (6) must be made within a "reasonable time." Fed. R. Civ. P. 60(c). In determining what is a "reasonable time," courts consider "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to the other parties." Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981).

A. Standards for Rule 60(b)(5) Motions

Rule 60(b)(5) provides a court may relieve a party from a final judgment when "the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." To be eligible for relief from a judgment pursuant to Fed. R. Civ. P. 60(b)(5), a movant must demonstrate "a significant change in either factual conditions or in the law." Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 368 (1992); see also Agostini v. Felton, 521 U.S. 203, 216 (1997)("Obviously, if neither the law … nor the facts have changed, there would be no need to decide the propriety of a Rule 60(b)(5) motion").

B. Standards for Rule 60(b)(6) Motions

Rule 60(b)(6) provides a court may relieve a party from a final judgment for "any other reason that justifies relief." While the Settling Parties attempt to lower the bar for obtaining vacatur under Rule 60(b)(6), Dkt. 189-2 at 11, the U.S. Supreme Court applies an "extraordinary circumstance" standard of review to assess whether a district court appropriately determined whether relief is justified under Rule 60(b). See e.g., Gonzalez v. Crosby, 545 U.S. 524, 535, 125 S.Ct. 2641, 2649-50 (2005), citing Ackermann v. United States, 340 U.S. 193, 199, 71 S.Ct. 209, 95 L.Ed. 207 (1950). The Ninth Circuit frequently applies the same standard. See e.g. Staich v. California Department of Corrections, 2010 WL 3988839 *1 (9th Cir. 2010)(holding district court did not abuse discretion by rejecting motion based on lack of demonstrated "extraordinary circumstances" warranting relief from judgment); The Hermetic Order of the Golden Dawn, Inc. v. Griffin, 2010 WL 4034282 *1 (9th Cir.); Keeling v. Sheet Metal Workers International Association, Local Union 162, 937 F.2d 408, 410 (9th Cir. 1991); United States v. Sparks, 685 F.2d 1128, 1129 (9th Cir. 1982).

Further, it is well-settled that extraordinary circumstances warranting vacatur "do not include the mere fact that the settlement agreement provides

for vacatur." United States Bancorp Mortgage Company v. Bonner Mall Partnership, 513 U.S. 18, 29, 115 S.Ct. 386, 130 L.Ed. 2d 233 (1994). Accordingly, courts deny Rule 60(b)(6) motions where the parties have reached a settlement agreement conditioned on the vacatur of a prior final judgment order. See e.g. Neumann v. Prudential Insurance Company of America, 398 F.Supp.2d 489, 491 (E.D.Va. 2005); Bailey v. Blue Cross/Blue Shield, 878 F.Supp. 54, 55 (E.D.Va. 1995).[2]

III. Standards for Acceptable Settlement Agreements

Although the Settling Parties constructed their request to the Court so as to avoid seeking direct approval of the proposed Settlement, the standards for approving or denying a settlement apply, because the Settling Parties' sole reason for requesting the indicative ruling and remedial vacatur is to enable them to enter the Settlement agreement, which is contingent upon obtaining the requested relief from this Court. See Dkt. 188-1 at 4-5; 189-2 at 5, 20 ("In order for the agreement to become effective, the Settling Parties respectfully request that this Court stay its remedy order for wolves in Idaho and Montana, and return these wolves to a delisted status pending further rulemaking by FWS on the wolves in the NRM Region").

[2] Whether the Settling Parties seek a "stay" or a "vacatur" (see *supra*, FN1), the standards articulated in these cases apply, as the effect of the relief requested would be to eliminate parts of the prior Order and render the original relief ineffective.

It is well established that parties may not "agree to take action that conflicts with or violates the statute upon which the complaint is based." Local Number 93, International Association of Firefighters, AFL-CIO C.L.C v. City of Cleveland, 478 U.S. 501, 526 (1986); see also System Federation No. 91, Railway Employees' Department v. Wright, 364 U.S. 642 (1961)(setting aside consent decree where it was found to violate the statute under which the relief was granted). A settlement cannot be allowed to go into effect if it either violates the law, or prejudices another party. Id.

A district court reviews a settlement agreement to ensure that it is "fair, adequate, and reasonable" and "is not illegal, a product of collusion, or against the public interest." U.S. v. North Carolina, 180 F.3d 574, 581 (4th Cir. 1999), quoting U.S. v. Colorado, 937 F.2d 505, 509 (10th Cir. 1991); see also Conservation Law Foundation v. Franklin, 989 F.2d 54, 58 (1st Cir. 1993).

In Local No. 93, the U.S. Supreme Court stated the following:

> It has never been supposed that one party – whether an original party, a party that was joined later, or an intervenor – could preclude other parties from settling their own disputes and thereby withdrawing from litigation . . . . Of course, parties who choose to resolve the litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the

> valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor.

478 U.S. at 528-29. This analysis indicates that while some parties can choose to settle and withdraw from litigation, it cannot be done in such a way as to affect the positions or claims of other parties.

ARGUMENT

A. Vacatur is not justified based on 60(b)(5)

As an initial matter, WWP agrees with and adopts and incorporates herein by reference the arguments set forth by fellow non-settling Plaintiffs Alliance for the Wild Rockies and Friends of the Clearwater (collectively "AWR") that the Motion for Indicative Ruling and underlying 60(b) request is not timely.[3] Dkt. 194 at 5-8.

Not only is the request untimely, prejudicing WWP and others by seeking to annul the relief requested and obtained in Defenders and to dismiss the related case addressing the 10(j) regulations at this late juncture, but it is not justified under Rule 60(b)(5) because the Settling Parties have not pointed to *any* new law or facts that would provide a basis to alter the Court's prior ruling. Rufo, 502 U.S. at 368; see also Agostini, 521 U.S. at 216. No intervening legal decision or change in governing statutes has

[3] The untimely nature of the motion applies equally to WWP's argument that vacatur is not justified based on Rule 60(b)(6).

occurred; no new signs of wolf recovery have occurred[4]; and there is no other evidence of significant change in law or fact.

Accordingly, the Court should deny the Settling Parties' request to partially vacate the Defenders' order under Rule 60(b)(5).

B. Vacatur is not justified based on Rule 60(b)(6)

Nor is the motion justified or timely under Rule 60(b)(6). Under either standard of review – extraordinary circumstances, or the "equitable balancing test" urged by the Settling Parties (Dkt. 289-1 at 11-13) – the requested stay or vacatur is not justified. Although the Court has *authority* to grant a partial vacatur, as emphasized by Settling Plaintiffs' case citations, this does not equate with finding "equity" in doing so here. Dkt. 189-2 at 12. The Settling Parties cite to cases in which the parties "agreed to vacatur in settlement" or where parties jointly request vacatur in order to facilitate settlement, Dkt. 189-2 at 12-13, but they do not point to precedent for stay or vacatur where not all parties join in the request or the settlement.

The Settling Parties' attempts to strip WWP of the appropriate and legally supported remedy granted by the Court would produce an inequitable

[4] In fact, the NRM wolf population has apparently decreased by 5% - the first decrease since they were reintroduced 15 years ago. Bozeman Daily Chronicle, "Wolf population dips in Northern Rockies", March 11, 2011, available at http://www.bozemandailychronicle.com/news/article_563661d8-4c01-11e0-98a5-001cc4c002e0.html (last accessed March 22, 2011).

result by removing hard-fought and legally defensible protections for the NRM wolves. The Settling Parties attempt to downplay the effect of the requested vacatur on the other parties and on the wolves left without ESA protections, by urging the Court did not have to vacate the illegal final delisting rule in its 2010 Order. Dkt. 189-2 at 21. However, the Administrative Procedure Act (APA) clearly demands that courts "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. Sec. 706(2)(A)(emphasis supplied).

Secondly, the Court already assessed not only the legality of the Service's delisting decision, but the appropriate remedy, and correctly determined that setting aside the rule so that wolves would remain protected under the ESA was proper. Defenders, 729 F.Supp.2d at 1228. The Court considered and rejected arguments that a remand without vacatur was appropriate, and that vacatur was unnecessary because the only difference between state and federal management is wolf hunts, and Montana argued such hunts did not impact the population. Id. The Court rejected these arguments, stating they "misse[d] the mark," because "if the Rule is invalid, the harm occurs from wolves being taken contrary to the terms of the ESA."

Id. The statement remains true, and nothing has changed since that decision, other than the political positions of the plaintiffs seeking to settle.

The political theater the Settling Parties ask the Court to engage in is exemplified by the fact the Settlement itself is conditioned upon potential political outcomes – it becomes null and void if Congress removes ESA protections for some or all wolves in the NRM region. Dkt. 188-1 at 9. The political assessments of some of the parties does not provide a justifiable basis to vacate the remedy already granted and allow the Service to operate in violation of law. Defenders, 729 F. Supp. 2d at 1228.

Nor is there justification for the Service to act illegally even in the interim until it can publish a new delisting rule for a yet-to-be-designated Distinct Population Segment (DPS) of NRM wolves. Dkt. 188-1 at 5-6. For one thing, there is no guarantee any future delisting rule will comport with the APA and ESA without public challenge to ensure that it does, as evidenced by the case at hand. Notwithstanding the fact the Service could again publish an unlawful rule, despite the Service's best intentions and efforts, the settling plaintiffs would give up their right to challenge any new delisting rule for five years – during which time untold numbers of wolves could be unnecessarily and unlawfully killed. Dkt. 188-1 at10 ("Settling Plaintiffs agree that they will not . . . file a lawsuit, raise claims against, or

otherwise challenge in court before March 31, 2016 any final delisting or reclassification rule . . .”). Yet the Settlement is predicated on a future delisting rule, (and plaintiffs’ agreement not to challenge such rule, regardless of its legality or illegality, or its impact on wolves), and will become null and void if the order requested of the Court does not remain in place for the full span of time during which the Service will attempt to develop a lawful delisting rule to include wolves in Wyoming. Dkt. 188-1 at 5-6, 9.

However, the Service is free *right now* to amend the unlawful M-Opinion it relied upon for the vacated delisting rule, to seek an acceptable management plan from the State of Wyoming[5], and to attempt to legally designate and delist a DPS of NRM wolves. See Dkt. 188-1 at 5-6; Dkt. 189-2 at 4, 7; Defenders, 729 F. Supp. 2d 1207 (ruling M-Opinion was not a reasonable interpretation of the term “significant portion of its range” and thus could not form basis of delisting rule for NRM wolves DPS in only a portion of its range). The Service does not need the Settlement or need to be granted leave to act unlawfully and allow wolves to be killed in order to take those actions pursuant to law, and the remedy now in place does not in any

[5] Wyoming is also free to develop a Service-approved plan now. Wyoming does not need this settlement or a vacatur of the Court’s remedy in order to achieve an acceptable plan. See Dkt. 189-2 at 20.

way limit the Service's ability to comply with the law or seek a future lawful delisting rule.

C. Vacatur would result in an unlawful settlement agreement and prejudice to non-settling plaintiffs

As noted *supra*, the Settling Parties seek the Court's order indicating it would stay or vacate portions of its remedy order so that they can finalize their proposed Settlement agreement. The Settlement does not have the consent of all parties, but would impact the non-settling parties' positions and claims, something that is not allowable. See Local No. 93, 478 U.S. at 528-29. Instead of leaving in place this Court's remedy, which ensures wolves and Plaintiffs' interests would be protected until such time as the Service can ensure delisting is proper – legally and factually – the Settling Parties would have the Court eliminate critical remedial provisions against some plaintiffs' will, and thus render what was a favorable outcome, meaningless. To exercise their rights to settle and withdraw from litigation, the Settling Parties must craft a settlement that does not adversely impact other parties' positions in the litigation – the current proposed settlement does not accomplish that.

The Settlement that would go into effect if the Court indicates it would grant the 60(b) request would also be against the public interest. North Carolina, 180 F.3d at 581, quoting Colorado, 937 F.2d at 509; see also

Franklin, 989 F.2d 5at 58. Contrary to the Settling Parties' assertions, granting the Motion and allowing the Settlement to go forward would not accomplish the "laudable" goal of finality through settlement, because not all parties have agreed to the settlement and thus not all plaintiffs would agree to dismiss the 10(j) case, nor would all intervenors necessarily agree to dismiss their appeals of the delisting case. Dkt. 189-2 at 25-28. In fact, the Motion and Settlement are likely to create more confusion and potentially further litigation due to the non-agreement of the parties and the prejudice of some parties' positions on other parties' positions. This is particularly true given the Settlement offers little assurance for wolves, and does not appear to bind the Service to much, if anything, beyond what is already required of it under the ESA.

Not only would the Settlement inappropriately affect non-settling plaintiffs' – WWP's – positions and interests and the public interest, it would also be unlawful in that it would allow the Service to violate the APA and ESA, as the Court already concluded. Defenders, 729 F.Supp.2d at 1228 (determining Rule was unlawful and should be vacated so wolves would not be killed contrary to ESA); Local No. 93, 478 U.S. at 528-29 (settlement cannot be approved if it would violate the law giving rise to complaint); see also System Federation, 364 U.S. 642. Because the Rule 60(b) motion

would clear the way for this unlawful settlement, the motion should be denied so that an unlawful settlement does not go into effect.

CONCLUSION

For all the reasons set forth above, Western Watersheds Project respectfully requests the Court deny the pending Motion for an Indicative Ruling. Alternatively, if the Court is inclined to consider the Motion because it presents a substantial issue requiring further argument and consideration, WWP respectfully requests that the Court indicate simply that it will entertain the Motion, and set a schedule for further briefing and another hearing to fully consider the underlying motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b).

Respectfully submitted this 22nd day of March, 2011.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(A), the attached brief is proportionately spaced, and has a typeface of 14 points. Pursuant to the Court's March 21 Order, the attached brief is no longer than 15 pages, excluding caption and certificate of compliance.

DATED this 22nd day of March, 2011.

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