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IN THE U.S. DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, et al. Defendants.	Case No. 05-03508-EDL Consolidated with
THE WILDERNESS SOCIETY, et al., Plaintiffs, v. UNITED STATES FOREST SERVICE, et al., Defendants	Case No. 05-04038-EDL **DEFENDANTS' MOTION FOR INDICATIVE RULING ON RULE 60(b) MOTION TO MODIFY INJUNCTION OR FOR STAY PENDING APPEAL**

NOTICE OF MOTION AND MOTION FOR INDICATIVE RULING ON RULE 60(b) MOTION TO MODIFY INJUNCTION OR FOR STAY PENDING APPEAL

PLEASE TAKE NOTICE that Defendants hereby move the Court for an indicative ruling under Fed. R. Civ. P. Rule 60(b) or for a stay pending appeal in the above consolidated cases. Hearing on this motion is scheduled for September 30 at 9:00 in Courtroom E, 15th Floor, before the Honorable Elizabeth D. Laporte.

Defendants have conferred with counsel for the parties and are informed as follows. The plaintiff States and the plaintiff environmental groups, the Wilderness Society *et al.*, take no position on the motion at this time and will take a position in a timely response to Defendants' motion. Defendant-Intervenors, California Association of 4 Wheel Drive Clubs, *et al.*, support this motion. Defendant-Intervenor Silver Creek Timber Co., supports Defendants' motion to modify the Court's injunction to eliminate the Forest Service's obligation to follow the 2001 Roadless Rule or alternatively to stay that injunction pending appeal. Silver Creek Timber Company takes no position on the Defendants' alternate stay requests.

I. INTRODUCTION

As a result of the injunctive relief issued in this case and that recently issued by the United States District Court for the District of Wyoming in Wyoming v. U.S. Dep't of Agric., --- F. Supp. 2d. ---, No 07-cv-17-B, 2008 WL 3397503 (D. Wyo. Aug. 12, 2008), the United States Forest Service is confronted with injunctions simultaneously *requiring it to follow* and *prohibiting it from following* the 2001 Roadless Rule, leaving the agency with the Hobbesian choice of which injunction to violate.

As set forth below, the Forest Service asks that this Court to modify its injunction to eliminate the obligation that the agency comply with a now invalid regulation and eliminate the spectre of contempt that now haunts the agency. Because this case is currently on appeal, Defendants' request is made in the context of the "indicative ruling" procedure required by the Ninth Circuit.

In the alternative, Defendants request that the Court stay its injunction pending resolution

of the pending appeal of this Court's decision. At the minimum this Court could reduce the scope of the conflict by staying application of its injunction outside the boundaries of the Plaintiff States, or by staying its application within the boundaries of the State of Wyoming.

In light of the substantial burden placed on the Forest Service by these conflicting injunctions, Defendants are contemporaneously asking the Wyoming District Court to reconsider its injunctive relief, limit its injunction to the State of Wyoming, or alternatively to stay its injunction. See Exhibit 1 (Federal Defendants' Motion for Reconsideration and Motion for Stay).

II. BACKGROUND

On May 13, 2005, the United States Department of Agriculture issued the State Petitions for Inventoried Roadless Area Management Rule ("State Petitions Rule"). 70 Fed Reg. 25,654 (May 13, 2005). The State Petitions Rule established a petitioning process under which State Governors could petition to establish or adjust the management requirements set forth in the applicable forest plans for some or all of the inventoried roadless areas of the National Forests within their State. Id.

The State Petitions Rule was challenged in consolidated cases before this Court. California ex rel. Lockyer v. U.S. Dep't of Agric., No. C05-3508 EDL and Wilderness Soc'y v. U.S. Forest Serv., No. C05-04038 EDL. On September 20, 2006, this Court declared the State Petitions Rule invalid finding violations of the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"). California ex rel. Lockyer v. U.S. Dep't of Agric., 459 F.Supp. 2d 874, 919 (N.D. Cal. 2006). As to remedy this Court ordered that the State Petitions Rule "is set aside" and the "rule previously in effect," the 2001 Roadless Rule, is "reinstated." Dkt. No. 235 at 2. This Court further enjoined the Forest Service from "taking any further action contrary to the Roadless Rule without first remedying the legal violation identified in the Court's opinion of September 20, 2006." Id. The United States has appealed from this Court's decision. That appeal is fully briefed and set for argument on October 20, 2008, before the Ninth Circuit.

In response, the State of Wyoming renewed its challenge to the 2001 Roadless Rule in the United States District Court for the District of Wyoming. On August 12, 2008, the Wyoming District Court found the 2001 Roadless Rule violated NEPA and the Wilderness Act. 2008 WL 3397503, at *37. As to remedy, the District Court ordered the rule "permanently enjoined." Id. This is the second time the Wyoming District Court has invalidated and enjoined the Roadless Rule. The Wyoming Court's prior decision, Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197 (D. Wyo. 2003), was dismissed as moot and vacated on appeal as result of the issuance of the State Petitions Rule. Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207 (10th Cir. 2005).

As a result of the injunctions issued by this Court and the Wyoming District Court, the Forest Service is simultaneously required to follow the 2001 Roadless Rule and prohibited from following the 2001 Roadless Rule.

III. ARGUMENT

A. This Court Should Provide an Indicative Ruling that it Would Grant a Rule 60(b) Motion to Modify its Injunction to Remove the Requirement that the Forest Service Follow the 2001 Roadless Rule.

1. The Indicative Ruling Process and Rule 60(b) Provide the Appropriate Means for Seeking Relief from the Court's Injunctive Order.

Rule 60(b)(5) of the Federal Rules of Civil Procedure provides that "[o]n motion and just terms, the court may relieve a party . . . from a final judgment [or] order . . . [when] applying it prospectively is no longer equitable." There is no single set of circumstances or "talismanic" standard governing when modification of an injunction under Rule 60(b) is appropriate. Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 381 (1992). Indeed, the Supreme Court has directed district courts to "exercise flexibility in considering" such motions, and noted that modification of an injunction may be warranted by "either a significant change in either factual conditions or in law," including "when changed factual conditions make compliance with the decree substantially more onerous," when the injunction "proves to be unworkable because of unforeseen obstacles," when enforcement "would be detrimental to the public interest," when "one or more of the obligations places upon the parties has become impermissible under federal

law," or when "statutory or decisional law has changed to make legal what the degree was designed to prevent." Id. at 384, 388. The Ninth Circuit provides that under the flexible standard of Rule 60(b), courts are to "take all the circumstances into account in determining whether to modify or vacate a prior injunction or consent decrees." Bellevue Manor Associates v. United States, 165 F.3d 1249, 1256 (9th Cir. 1999).

The party seeking modification of an injunction bears the "initial burden" of showing a "significant change in either factual conditions or in law.'" Orantes-Hernandez v. Gonzales, 504 F. Supp. 2d 825, 830 (C.D. Cal. 2007) (quoting Rufo,502 U.S. at 384). "If the moving party meets this burden, 'the court should consider whether the proposed modification is suitably tailored to the changed circumstance.'" Id. (quoting Rufo at 383).

While Rule 60(b)(5) provides the appropriate means for addressing Defendants' request that this Court's injunction be modified, the process is complicated by the fact that this case is currently on appeal. Generally, the filing of an appeal divests the district court of jurisdiction over an action, "including divesting a district court of the power to grant a Rule 60(b) motion." 12 Moore's Federal Practice Civil § 60.67 (3d ed. 2008).

To address this situation, the Ninth Circuit has outlined a process whereby the party seeking Rule 60(b) relief must first seek an indication from the district court as to whether it would "entertain" such a motion. Davis v. Yageo Corp., 481 F.3d 661, 685 (9th Cir. 2007). Upon receipt of such an indication from the district court, the party may seek a limited remand from the Ninth Circuit so that the district court will have jurisdiction to grant the Rule 60(b) motion. Crateo, Inc. v. Intermark, Inc., 536 F.2d 862, 869 (9th Cir. 1976).

Thus, pursuant to this indicative ruling process, Defendants now respectfully seek an indication from this Court as to whether it would entertain a Rule 60(b)(5) motion to modify its final injunction of February 2007 [Dkt. No. 238] to remove the obligation that the Forest Service follow the 2001 Roadless Rule.

2. This Court Should Amend its Injunction is Light of the Fact that the 2001 Roadless Rule has been Invalidated.

As a remedy for its finding that the State Petitions Rule was promulgated in violation of NEPA and the ESA, this Court ordered that the State Petitions Rule "is set aside" and the 2001 Roadless Rule is "reinstated." Dkt. 235 at 2. This Court further enjoined the Forest Service from "taking any further action contrary to the Roadless Rule without first remedying the legal violation identified in the Court's opinion of September 20, 2006." Id.

In reinstating the 2001 Roadless Rule, this Court did not –nor could it have, as the Rule was not at issue– pass on the legality of the 2001 Rule. Rather, the Court reinstated the 2001 Roadless Rule based on its conclusion that "the proper course" was to follow the Ninth Circuit's direction in Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005), that the "effect of invalidating an agency rule it to reinstate the rule previously in force."

The remedy recommended in Paulsen necessarily rests on the assumption that the "rule previously in force," was legally promulgated. Nothing in Paulsen suggests it would be appropriate for a court to direct compliance with a prior regulation where that regulation has been held invalid. In fact, this commonsense proposition is illustrated by Paulsen itself. There, the Court of Appeals, after finding the 1997 regulation at issue was invalid, did not reinstate the prior rule, because the prior rule had been judged invalid in separate litigation, but instead directed the agency to follow a subsequent rule. 413 F.3d at 1008 ("Because the rule previously in force, the 1995 regulation, erroneously interpreted 18 U.S.C. § 3621(e)(2)(B), the applicable rule is the final rule that was effectuated on December 22, 2000.") (citations omitted).

Here, the Wyoming district court, in a review of the merits of the 2001 Roadless Rule, has determined that the rule was promulgated in violation of NEPA and the Wilderness Act. As a consequence, the presumption upon which remedy in Paulsen rests –that the prior rule is valid– is no longer applicable. This Court's injunction now effectively obligates the Forest Service to comply with a regulation that this Court has not reviewed, and which a coordinate court has found invalid. This significant change in decisional law justifies modification of this Court's

injunction to remove the requirement that the Forest Service follow the 2001 Roadless Rule.

3. This Court Should Amend its Order as Matter of Judicial Comity and Orderly Administration of Justice.

In addition to being necessitated by the change is decisional law discussed above, this Court should as matter of comity exercise is equitable authority under Rule 60(b)(5) to relieve the Forest Service from the untenable position of having to comply with two irreconcilable injunctions. As the Fourth Circuit observed, in relieving the Department of Labor from incompatible district court injunctions, the imposition of conflicting injunctions on a federal agency does "a grave disservice to the public interest in the orderly administration of justice. Prudence requires that whenever possible, coordinate courts should avoid issuing conflicting orders." Feller v. Brock, 802 F.2d 722, 727-28 (4th Cir. 1986). See also Bergh v. Washington, 535 F.2d 505, 507 (9th Cir. 1976) ("[W]hen an injunction sought in one federal proceeding would interfere with another federal proceeding, considerations of comity require more than the usual measure of restraint.").

The litigation surrounding the regulations governing snowmobile use at Yellowstone National Park provides an instructive template. In that litigation, snowmobile interests and the State of Wyoming brought suit in Wyoming District Court challenging the National Park Service's ("NPS") 2001 Snowcoach Rule. Int'l Snowmobile Mfr. Ass'n ("ISMA") v. Norton, 304 F. Supp. 2d 1278 (D. Wyo. 2004). That challenge was stayed based on the NPS's agreement to prepare a supplemental EIS. Id. at 1284. In 2003, the NPS issued a new regulation ("2003 Rule") which was immediately challenged by environmental groups in the district court for the District of Columbia. Fund for Animals v. Norton, 294 F. Supp. 2d 92 (D.D.C. 2003). Based on its conclusion that the 2003 Rule violated NEPA and the Administrative Procedure Act, the D.C. District Court vacated the 2003 Rule and ordered the 2001 Snowcoach Rule into effect. Id. at 115. The State of Wyoming and the snowmobile groups then reopened their litigation against the 2001 Snowcoach Rule, and Wyoming District Court enjoined the NPS from enforcing the rule. ISMA, 304 F. Supp. 2d at 1285. On the NPS's motion for relief from the conflicting

injunctions, the D.C. District Court found that "[i]n effect, defendants are required by this Court's Order to implement a rule that another court has mandated cannot be enforced. . . . Accordingly, the most prudent course of action, and the action most likely to lend some clarity to increasingly unclear agency proceedings, it to relieve Federal Defendants from an obligation to enforce the 2001 Rule." Fund for Animals v. Norton,323 F. Supp.2 d 7, 10 (D.D.C. 2004).

As was the case in Fund for Animals, this Court issued a remedial injunction requiring the agency to follow a presumptively valid prior regulation. And, as was the case in Fund for Animals, this Court's remedial injunction is now in conflict with another district court's determination that the prior regulation is invalid. Defendants respectfully submit that the "most prudent course of action" is for this Court to relieve the agency from its obligation to follow the invalid rule.

In sum, for the reasons outlined above, Defendants respectfully request that the Court should provide an indicative ruling, pursuant to the Ninth Circuit's direction in Crateo, Inc. v. Intermark, Inc., that it will entertain a Rule 60(b) motion to modify its injunction to remove the directives that the 2001 Rule is "reinstated" and that the Forest Service is enjoined from "taking any further action contrary to the Roadless Rule." Such a modification would be consistent with Court's apparent intention of restoring the status quo prior the State Petitions Rule, which was only regulation under review by this Court.

B. In the Alternative, the Court Should Stay its Injunction Requiring Adherence to the 2001 Roadless Rule Pending Resolution of the Rule's Legality.

Under Rule 62(c) of the Federal Rules of Civil Procedure and Rule 8(A)(1) of the Federal Rules of Appellate Procedure this Court retains the jurisdiction to stay its injunctive relief in whole or in part during the pendency of Defendants' appeal. As set forth below, Defendants respectfully submit that a stay is appropriate to at least temporarily ameliorate the conflict between the injunctions issued by this Court and by the Wyoming District Court.

In this case the balance of equities supports a stay of this Court's injunctive order in its entirety pending resolution of this case on appeal. First, a stay will obviate the risk that the

Forest Service currently faces of being accused of violating one or the other of the two injunctions. Second, as noted above, there is a strong public interest in the avoidance of conflicting injunctions. Feller v. Brock, 802 at 727. Finally, the Plaintiffs will suffer little prejudice from a stay: given the discretionary nature of most Forest Service management activities, the time it takes to plan and authorize such activities, and the protections provided by individual forest plans, there is little likelihood that an activity harmful to Plaintiffs will be authorized in an inventoried roadless area during the pendency of Defendants' appeal.

While Defendants believe a stay of this Court's injunction as a whole is appropriate, Defendants request in the alternative that the Court stay its injunction outside of the plaintiff States (California, New Mexico, Oregon and Washington). Finally, at the minimum, the Court could help obviate the conflict faced by Defendants by excising the State of Wyoming from its injunction.

IV. CONCLUSION

For the reasons stated herein, the Court should indicate, pursuant to the Ninth Circuit's direction in Crateo, Inc. v. Intermark, Inc. that it will entertain a Rule 60(b)(5) motion to amend its injunction to relieve the Forest Service of the obligation to follow the 2001 Roadless Rule.

In the alternative, this Court should stay its injunction, either in whole or in part, pending resolution of Defendants' appeal.

Respectfully Submitted,

Dated: August 20, 2008

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