

03-8058

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WYOMING OUTDOOR COUNCIL, et al.,

Appellants/Intervenor-Defendants

vs.

STATE OF WYOMING,

Appellee/Plaintiff.

BRIEF OF THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF APPELLEE'S MOTION TO DISMISS

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Pursuant to 28 U.S.C. 517 and Fed. R. App. P. 29, the United States submits this brief as amicus curiae.

INTEREST OF THE UNITED STATES

In State of Wyoming v. United States Department of Agriculture, 277 F. Supp. 2d 1197 (D. Wyo. 2003), the district court held that the United States Forest Service (“USFS”) violated the National Environmental Policy Act (“NEPA”) and Wilderness Act in the process of promulgating its Roadless Area Conservation Rule (“Roadless Rule” or “Rule”). This Rule was promulgated by the USFS under its discretionary authority. After fully considering a variety of factors, the Government decided not to appeal. Private, non-profit organizations that intervened in the district court as defendants nevertheless appealed the district court decision to this Court. Plaintiffs moved to dismiss the intervenors’ appeal for lack of standing to pursue the appeal. We agree that the appeal should be dismissed for lack of standing.

The standing question posed here is of substantial concern to the United States. When the Executive, upon due deliberation in its decision-making processes, determines to end litigation over a discretionary regulatory policy, a private party does not have standing to use the judiciary to override that

legal/policy determination. Obviously, different issues may arise if the Government does not have discretion and the particular regulatory action at stake is compelled by the Constitution or a statute. But that is not the situation now before this Court. Based on Supreme Court authority, the United States contends that the intervenors lack standing to appeal.¹

STATEMENT OF THE ISSUE

1. Whether the private intervenors lack standing to pursue their own appeal where the Government has decided not to appeal an adverse district court judgment that invalidates a discretionary regulation?
2. Whether this Court lacks jurisdiction under 28 U.S.C. 1291 because the intervenors are not “aggrieved” by the district court’s order.

STATEMENT OF FACTS

1. Statutory and Regulatory Background. On January 5, 2001, the United States Forest Service, a component of the United States Department of

¹ The United States advanced a similar argument in an amicus brief filed on September 26, 2003 in Association of American Physicians and Surgeons v. Food and Drug Administration (D.C. Cir. Case Nos. 02-5407 & 03-5005). In that case, oral argument is scheduled to take place on January 22, 2004.

Agriculture, issued the Roadless Rule, 66 Fed. Reg. 3,244 (Jan. 12, 2001). The purpose of the Roadless Rule, a rule of nationwide applicability, is “to establish prohibitions on road construction, road reconstruction, and timber harvesting in inventoried roadless areas on National Forest System lands.” Id. USFS issued the Roadless Rule pursuant to its authority under 16 U.S.C. 472, 529, 551, 1608, 1613, 23 U.S.C. 201, 205. See 66 Fed. Reg. at 3,272 see also id. at 3,252.

2. District Court Proceedings. On May 18, 2001, the State of Wyoming filed a complaint in the United States District Court for the District of Wyoming alleging that, in the course of promulgating the Roadless Rule, USFS violated a host of federal laws, including NEPA and the Wilderness Act. Over the objections of the plaintiff, the district court subsequently permitted Wyoming Outdoor Council, et al. to intervene as of right. Following briefing on the merits, the district court issued a decision on July 14, 2003, finding that the Roadless Rule violates NEPA and the Wilderness Act and permanently enjoining the rule.

3. The Intervenors and This Appeal. On July 15, 2003, the intervenors filed a notice of appeal. Intervenors are national and local private, non-profit environmental organizations with members located within Wyoming and across the nation.

After conducting the established process for determining whether or not to

pursue further litigation, the Executive determined not to appeal. By motion dated September 26, 2003, the plaintiff moved to dismiss intervenors' appeal, arguing that intervenors lack standing to pursue an appeal in the absence of the federal government and that the case is moot.

SUMMARY OF ARGUMENT

1.a. The Government decided not to appeal, and the intervenors lack independent standing to seek review of the district court's decision striking down the Roadless Rule, a discretionary rule that USFS was under no legal obligation to promulgate.

In Diamond v. Charles, 476 U.S. 54 (1986), the Supreme Court rejected a private intervenor's standing to appeal a district court decision striking down a state statute after the State declined to appeal. Only the State itself, the Court held, had the necessary direct stake in retention of the legal code it had created.

The analogy between Diamond and this case is precise. Where a federal regulation is not compelled by the Constitution or a statute and where the Government has decided not to appeal, an intervenor cannot assert the necessary direct stake in defending the regulation to appeal a district court decision invalidating the regulation. USFS was not legally compelled to promulgate the Roadless Rule, or to retain it. In these circumstances, the intervenors cannot

demonstrate an injury sufficient to establish Article III standing to pursue further litigation when the Executive has determined on behalf of the United States not to do so.

1.b. With the exception of decisions by the Ninth Circuit that fail to apply the reasoning of Diamond, intervenors can point to no appellate decisions recognizing a private intervenor's standing to appeal a district court decision invalidating a federal regulation when the Executive has elected not to appeal and the particular regulation was not compelled by the Constitution or a statute. Outside the Ninth Circuit, the court of appeals cases in which private intervenors have been permitted to appeal independently involve intervenors who sought to pursue a claim that they could have vindicated through an action under the Administrative Procedure Act or a provision of state law.

2. For much the same reason, intervenors' appeal falls outside the scope of this Court's jurisdiction under 28 U.S.C. 1291. Although the district court's decision enjoining the Roadless Rule is final, Section 1291 permits an appeal only by a party who is "aggrieved" by such a final decision. See Forney v. Apfel, 524 U.S. 266 (1998). An intervenor cannot be aggrieved by a decision in an action brought under a statute that gives him no right to the outcome he seeks through the appeal. Because the intervenors have no claim under the APA that USFS was

required to promulgate the Roadless Rule, the intervenors are not aggrieved by the district court's decision in this APA suit.

ARGUMENT

I. IN LIGHT OF THE GOVERNMENT'S DECISION NOT TO APPEAL, THE INTERVENORS LACK STANDING TO SEEK REVIEW OF THE DISTRICT COURT'S DECISION INVALIDATING THE ROADLESS RULE.

Whether and under what circumstances intervenors can appeal a district court decision invalidating a federal regulation is an issue controlled by the Supreme Court's decision in Diamond v. Charles. There the Court addressed what constitutes sufficient Article III injury where a private party seeks to pursue an appeal of a decision invalidating a law that the government itself did not appeal. Diamond dictates that a private party cannot demonstrate legally cognizable injury when it seeks to defend on appeal a federal regulation that is not compelled by the Constitution or a statute.

Although Diamond concerned a state statute and not a federal regulation, its reasoning is applicable here. In both contexts, private parties do not share the Government's role and thus cannot share its direct stake in defending discretionary decisions regarding the on-going execution of the law. For this reason, even if

they can show harm as a result of a district court decision, that harm is not legally cognizable and the intervenors do not have standing to appeal after the Executive decides not to continue this litigation. This conclusion follows from the reasoning of Diamond.

A. The Reasoning of Diamond v. Charles Dictates That The Intervenors Lack Standing.

In Diamond v. Charles, several doctors filed a Section 1983 action against the State of Illinois, challenging the constitutionality of a state statute criminalizing certain abortion services that they provided. Dr. Diamond intervened to defend the statute, asserting an interest “based upon his personal status as a doctor, a father, and a protector of the unborn.” 476 U.S. at 66. After the Seventh Circuit affirmed an injunction against enforcement of several sections of the statute, the State of Illinois elected not to seek Supreme Court review. Diamond sought review, but the Supreme Court dismissed his appeal for lack of standing.

The threshold inquiry undertaken by the Court was whether Diamond could seek further review in the absence of the State. Diamond held that “an intervenor’s right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the

requirements of Art. III.”² Diamond, 476 U.S. at 68. Accord Arizonans for Official English v. Arizona, 520 U.S. 43, 64-65 (1997). More specifically, Diamond further concluded that “[b]ecause the State alone is entitled to create a legal code, only the State has the kind of ‘direct stake’ identified in *Sierra Club v. Morton*, 405 U.S. at 740 . . . in defending the standards embodied in that code.” Diamond, 476 U.S. at 65.

Diamond thus holds that an intervenor cannot appeal a district court decision invalidating a state statute where the State does not appeal because the exclusiveness of the State's lawmaking role renders any private person's interest in retaining a given law insufficient to satisfy Article III standing requirements. As the Supreme Court stated, “the power to create and enforce a legal code . . . is one of the quintessential functions of a [sovereign].” Id. at 65 (citing Snapp v. Puerto Rico ex rel. Barez, 458 U.S. 592, 601 (1982)). To put it another way, “[t]he very

² The judicial power extends to cases and controversies. U.S. CONST., art. III, § 2. “Standing to sue or defend is an aspect of the case-or-controversy requirement.” Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997). The criteria used by the Supreme Court to determine whether a party has standing were articulated in Defenders of Wildlife v. Lujan, 504 U.S. 555 (1992). The three-part test established by the Court is: (1) did the plaintiff suffer legally cognizable injury in fact; (2) is there a causal connection between the injury and the conduct complained of; and (3) is it likely that the injury will be redressed by a favorable decision. 504 U.S. at 560-61. Accord Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180-81 (2000); Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-03 (1998).

meaning of sovereignty is that the decree of the sovereign makes law.” American Banana Co. v. American Fruit Co., 213 U.S. 347, 358 (1909). Private persons should not be permitted to use the judiciary to interfere with this core function of the United States or the States.

The parallel between Diamond and this case is direct. The Roadless Rule is not compelled by the Constitution or by any applicable statute.³ Absent such a mandate, USFS was just as free to decide what regulations would be issued and remain in force as Illinois was to decide what statutes it would “create and retain.” Diamond, 476 U.S. at 65. Indeed, as the Sixth Circuit recognized in Associated Builders & Contractors v. Perry, 16 F.3d 688 (6th Cir. 1994), Diamond dictates that private intervenors cannot maintain litigation originally brought against a government defendant that elects not to appeal in order to compel the government to retain legal requirements in accord with the intervenor's interests.

Diamond's teaching -- that intervenors lack standing to appeal when the Government has decided to end litigation affecting enforcement of a law – also

³ USFS was under no obligation to promulgate the Roadless Rule. The Rule was promulgated pursuant to the Property Clause of the Constitution, U.S. CONST., art. IV, § 3, cl. 2, and statutes including the Organic Act, Multiple Use-Sustained Yield Act, and National Forest Management Act. These authorities provide the USFS with wide discretion to manage the national forests and do not require the USFS to promulgate particular rules of nationwide application determining the use of particular lands in individual forests.

rests on substantial separation of powers principles. The decision whether to appeal a judgment that enjoins enforcement of a regulation is a fundamental aspect of the Executive Branch's authority under the Constitution to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3, cl. 4. Allowing private parties to proceed independently with an appeal would thus inject the courts into a decision-making process entrusted to the Executive. Because a government decision not to appeal amounts, in both contexts, to a decision not to continue litigation for the Government, allowing a private party to proceed independently with the litigation would inject the courts into a function reserved for the Executive Branch and tread upon the Executive's authority to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3, cl. 4.

Consistent with Article II, Congress has directed the Attorney General to supervise litigation in which the United States or federal agencies are parties. 28 U.S.C. 516, 519. Exercising that authority, the Attorney General has delegated to the Solicitor General the function of "[d]etermining whether, and to what extent, appeals will be taken by the Government to all appellate courts." 28 C.F.R. 0.20(b). In this manner, Congress has centralized decision-making authority within the Government regarding the taking of appeals by vesting that authority in a single official -- the Attorney General (and, by delegation, the Solicitor General).

Federal Election Comm'n v. NRA Political Victory Fund, 513 U.S. 88, 96 (1994).

The Solicitor General's determinations regarding whether to pursue further litigation for the United States are highly discretionary decisions involving a variety of legal and policy judgments that are not susceptible to judicial review.

Congress's centralized decision-making scheme and the Executive's authority to take care that the laws be faithfully executed would be impaired if private intervenors could thwart the Executive's decisions by continuing litigation that it has decided should end.

B. The Majority of Court Of Appeals Decisions Are Consistent With The Conclusion That These Intervenors Lack Standing.

Three Circuits have dismissed appeals by private intervenors who sought to press forward with litigation to defend a challenged provision of law after the government defendant decided not to appeal. With the exception of several decisions by the Ninth Circuit, there are no cases finding standing for an intervenor in circumstances even remotely analogous to the present matter. That is, leaving aside the Ninth Circuit, which has failed to follow a key portion of the Supreme Court's reasoning in Diamond, no court has permitted such an intervenor to appeal, in the absence of an appeal by the Government, to defend a challenged law where it had no legal basis for an independent action to seek the same judicial relief it

sought through the appeal.

In Associated Builders & Contractors v. Perry, 16 F.3d 688 (6th Cir. 1994), the Sixth Circuit held that an intervenor was unable to appeal a district court order instructing the State of Michigan to refrain from enforcing a state law where the State itself elected not to appeal. The court of appeals concluded that “the state cannot be compelled by a citizen to exercise its sovereign powers.” Id. at 693.

The First Circuit and the Seventh Circuit have likewise rejected standing for private intervenors seeking to pursue appeals in the absence of the original government defendant. See Sea Shore Corp. v. Sullivan, 158 F.3d 51 (1st Cir. 1998) (beer wholesalers lacked standing to appeal invalidation of mandatory liquor price-posting laws where State had not appealed because any injury to them was speculative and would be redressed only if the State chose to enforce the challenged law); Kendall-Jackson Winery, Ltd. v. Branson, 212 F.3d 995 (7th Cir. 2000) (intervenors who could not have independently sued for relief they sought lacked standing to appeal injunction running against a state government defendant that elected not to appeal).

The intervenors here may contend that National Wildlife Federation v. Lujan, 928 F.2d 453 (D.C. Cir. 1991) supports their standing to appeal but that case is readily distinguishable. There, the D.C. Circuit held that an intervenor

could move forward with appeal of a district court order invalidating federal regulations promulgated pursuant to the Surface Mining Control and Reclamation Act (“SMCRA”) that the Department of the Interior elected not to appeal. The regulations at issue in *National Wildlife Federation* are compelled by SMCRA, see *id.* at 455 (citing 30 U.S.C. 1266(a)), in contrast to the Roadless Rule, which is not compelled by the Constitution or a statute.

The Ninth Circuit alone has issued a series of decisions that are not consistent with the reasoning of *Diamond*. See *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991); *Didrickson v. Department of Interior*, 982 F.2d 1332 (9th Cir. 1992); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002); *California Dep't of Soc. Servs. v. Thompson*, 321 F.3d 835 (9th Cir. 2003). It is clear that the Ninth Circuit holds the position that an intervenor has standing to appeal a decision invalidating a federal regulation or other federal government action whether or not the intervenor argues that the action is compelled by the Constitution or a statute. See *California Dep't of Soc. Servs.*, 321 F.3d at 845 (“while it appears that [the intervenor] could have filed an independent lawsuit challenging the Secretary's interpretation of [the governing statute], this suit can continue even if [she] could not have brought an independent lawsuit”); *Kootenai Tribe of Idaho*, 313 F.3d at

1108 (allowing appeal by intervenors despite acknowledgment that they had no “significant protectable interest” under the statute at issue).

These Ninth Circuit decisions ignore Diamond's teaching that private intervenors lack a sufficient interest in the retention of a law adopted through an exercise of governmental discretion, and that they therefore lack standing to appeal a decision invalidating such a law when the government defendant decides to forgo further judicial review. In such circumstances, the particular attributes of a private intervenor are necessarily insufficient to satisfy the injury prong of the test for Article III standing. Under Diamond, only the Government itself has the direct stake necessary for standing to appeal when the issue is retention of a legal requirement adopted and enforced in an exercise of the Government's discretion.

* * *

We ask the Court to note that the position we take here is a narrow one, no broader than demanded by the facts of this case (i.e., the Government elects not to appeal an adverse decision enjoining a regulation that is not compelled by the Constitution or a statute). In other circumstances, a private intervenor may have Article III standing to continue the litigation on its own. Where, however, as here, intervenors seek to defend a regulation that is not compelled by the Constitution or by a statute, they lack standing to appeal independently. As explained above, this

conclusion follows directly from the reasoning of Diamond and separation of powers principles.

II. THIS COURT LACKS JURISDICTION UNDER 28 U.S.C. 1291 TO ENTERTAIN THE INTERVENORS' APPEAL BECAUSE THEY ARE NOT AGGRIEVED BY THE DISTRICT COURT'S DECISION.

The intervenors' inability to argue that they have any independently enforceable statutory or constitutional right to the result they seek through this appeal precludes the appeal not only because it deprives the intervenors of Article III standing, but also because it prevents the intervenors from being "aggrieved" by the district court's decision.

The intervenors invoke this Court's jurisdiction pursuant to 28 U.S.C. 1291. Section 1291 grants the "courts of appeals . . . jurisdiction of appeals from all final decisions of the district courts." In Forney v. Apfel, 524 U.S. 266 (1998), the Supreme Court made clear that this jurisdictional grant requires not only that the order appealed from be final, but also that the appeal be brought by a party "aggrieved" by that order.

Forney concerned court of appeals jurisdiction over an appeal by a Social Security disability claimant. The district court had determined that the agency's denial of benefits was unsupported by the administrative record and had remanded

the matter to the agency for further proceedings. The Supreme Court had little trouble concluding that such a remand order was final for purposes of section 1291, as the same question had been before the Court in an earlier case where the Government had appealed. 524 U.S. at 269-70 (citing Sullivan v. Finkelstein, 496 U.S. 617 (1990)). The Court went on, however, to consider whether the claimant in Forney was “aggrieved” by a decision in which the district court agreed with her that the administrative determination lacked support in the record, but remanded the matter to the agency for further consideration (instead of reversing the agency and directing it to award disability benefits). The Supreme Court concluded that the claimant was, indeed, aggrieved, and the court of appeals therefore did have jurisdiction, because the district court’s order gave the claimant only part of the relief she had requested. 524 U.S. at 271 (characterizing the remand as “half a loaf” from the claimant’s perspective).

Here, there is no question that the district court’s decision permanently enjoining the Roadless Rule is final. The intervenors cannot, however, be aggrieved by the outcome of a suit brought under a statute that could not have afforded the intervenors the relief they now seek.

The plaintiffs brought this suit under the APA, claiming that USFS’s promulgation of the Roadless Rule was arbitrary and capricious and exceeded the

agency's statutory authority. As we discussed in Part I, the agency was not required to promulgate the rule by the Constitution or by statute.

As the Court observed in Forney, “congressional statutes governing appealability normally proceed by defining ‘classes’ of cases where appeals will (or will not) lie.” 524 U.S. at 273. There is no indication that Congress intended to permit an appeal in circumstances like those presented here. Where an intervenor seeks to obtain through an appeal a result he could not have obtained through an independent suit under the statute affording the cause of action in the litigation -- or, indeed, under any other statute -- Section 1291 does not permit an appeal.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed because the intervenors lack standing to appeal and because this Court lacks statutory jurisdiction.

Respectfully submitted,

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NOVEMBER 2003

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion was served on November 12, 2003, by first class mail on the following counsel for parties:

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