IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

SCHULTZ FAMILY FARMS LLC, et al,

Plaintiffs,

v.

JACKSON COUNTY,

Defendant.

Case No. 1:14-cv-01975

ORDER

CLARKE, Magistrate Judge.

This matter comes before the Court on a Motion to Intervene (#7) filed by Oshala Farm, Christopher Hardy, Our Family Farms Coalition (OFFC), and the Center For Food Safety (CFS), (collectively, "intervenors"). Intervenors seek intervention as of right under Federal Rules of Civil Procedure ("FRCP") Rule 24(a)(2), or alternatively, seek permissive intervention under FRCP Rule 24(b)(2). For the reasons discussed below, the motion is GRANTED, and the intervenors are hereby joined as defendants to this case.

DISCUSSION

Plaintiffs originally filed this action in the Circuit Court for the State of Oregon for the County of Jackson on November 18, 2014. On December 10, Defendant Jackson County

removed to federal court based on federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction under 28 U.S.C. § 1367(a). Plaintiffs' action challenges Proposed Jackson County Ordinance 635, which voters in Jackson County approved as ballot measure 15-119 on May 20, 2014, to ban the growing of genetically engineered plants in Jackson County. The ordinance is set to go into effect in June, 2015.

Plaintiffs Shultz Family Farms LLC, James Frink and Marilyn Frink, and Frink Family Trust are Oregon farmers who currently reside in Jackson County, Oregon. They have all previously grown and currently have planted crops of Roundup Ready® Alfalfa (RRA), which is grown from genetically engineered seeds. Plaintiffs claim that Ordinance 635 conflicts with Oregon's Right to Farm Act, ORS § 30.930-947, and that the ordinance will require plaintiffs to destroy valuable crops they have already planted, cultivated, and planned to sell, without just compensation, in violation of the Oregon and United States Constitution. Plaintiffs seek declaratory relief and to permanently enjoin enforcement of the ordinance. Alternatively, plaintiffs seek damages as compensation for the destruction of their property as a result of the ordinance.

Intervenors Christopher Hardy and Oshala Farms are also Oregon farmers who currently reside in Jackson County and grow traditional (non-genetically engineered crops). Intervenors OFFC and CFS are public interest groups who similarly represent local Oregon farmers, as well as other supporters of Ordinance 635. Intervenors claim that Ordinance 635 was passed in order to protect their farms and crops from transgenic contamination from crops of genetically engineered plants, which would make their traditional crops legally unsellable or unusable under federal patent law. Intervenors allege that their local customers will not purchase seeds or plants that have been contaminated with genetically engineered pollen because consumers do not want

to eat genetically engineered foods and crops. Additionally, intervenors claim that once transgenic contamination occurs, it becomes difficult if not impossible to contain it, thereby causing irreparable damage to their crops.

I. Intervention as of Right

FRCP Rule 24(a)(2) provides in relevant part that,

> On timely motion, the court must permit anyone to intervene who ... claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Rule 24 is to be liberally construed in favor of the party seeking intervention, Arakaki v. Cayetano, 324 F.3d 1078, 1083 (9th Cir. 2003), because "a liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." Wilderness Soc'y. v. U.S. Forest Service, 630 F.3d 1173, 1179 (9th Cir.2011); see also In re Estate of Ferdinand E. Marcos Human Rights Litigation, 536 F.3d 980, 985 (9th Cir.2008) ("the requirements for intervention are broadly interpreted in favor of intervention.").

When analyzing a motion to intervene as of right under FRCP Rule 24(a)(2), this Court applies a four-part test:

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Wilderness Soc'y, 630 F.3d at 1177. In applying this test, "courts are to take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true absent sham, frivolity or other

objections." Sw. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 820 (9th Cir. 2001). Because Plaintiffs do not contest the timeliness of the motion, the Court addresses only the remaining three factors.

A. Significantly Protectable Interests.

An applicant seeking intervention has a "significantly protectable interest" in an action if:

> (1) it asserts an interest that is protected under some law, and (2) there is a "relationship" between its legally protected interest and the plaintiff's claims. The relationship requirement is met if the resolution of the plaintiff's claims actually will affect the applicant. The "interest" test is not a clear-cut or bright-line rule, because no specific legal or equitable interest need be established. Instead, the "interest" test directs courts to make a practical, threshold inquiry, and is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.

In re Estate of Ferdinand E. Marcos Human Rights Litig., 536 F .3d 980, 984–85 (9th Cir. 2008) (citing Southern California Edison Co. v. Lynch, 307 F.3d 794, 803 (9th Cir. 2002).

Additionally, the Ninth Circuit has held that a public interest group may have a significantly protectable interest for purposes of intervention in an action challenging the legality of a measure it has supported, Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1397 (9th Cir.1995) (citing Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir.1983), but the group must have more than "an undifferentiated, generalized interest in the outcome of an ongoing action." S. California Edison Co. v. Lynch, 307 F.3d 794, 803 (9th Cir.) modified, 307 F.3d 943 (9th Cir. 2002) (quoting Public Serv. Co. of N.H. v. Patch, 136 F.3d 197, 205 (1st Cir.1998)). [1]

[1] Plaintiffs argue that the Supreme Court's recent decision in Hollingsworth v. Perry, 133 S. Ct. 2652, 2663 (2013) creates a standing requirement for third party intervenors. However, Hollingsworth merely held that intervenors must have independent standing to bring an appeal when the government defendant declines to do so; thus that decision "did not undercut prior authority indicating that intervenors do not need to establish independent standing at the district court level." Vivid Entertainment, LLC v. Fielding, 2013 WL 3989558, at *2 (C.D. Cal. 2013).

The intervenors assert they have a significantly protectable interest relating to the subject of this litigation because 1) Hardy and Oshala Farm are a Jackson County farmer and commercial farm who allege that their economic livelihoods have been threatened by the planting of genetically engineered crops near their farms, and 2) OFFC and CFS are public interest groups that vigorously supported the passage of the ordinance that plaintiffs challenge in this litigation, and they represent other local farms and farmers whose agricultural and economic interests are allegedly threatened in a similar manner.

Plaintiffs claim that the intervenors do not have a protectable interest at stake, but merely "broad policy concerns" that are not relevant to the narrow legal questions in this case. Plaintiffs claim the intervenors will only serve to complicate this litigation. The Court disagrees. Intervenors have alleged concrete agricultural and economic interests that will be just as impacted by this litigation as the interests claimed by the Plaintiffs in this case.

B. Disposition of the Action and Impairment of the Interest

If a proposed intervenor "would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." Sw. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 822 (9th Cir. 2001) (quoting FRCP Rule 24 Advisory Committee Notes). The court's analysis focuses on the "future effect pending litigation will have" on the interveners' interests. Parker v. Nelson, 160 F.R.D. 118, 122 (D.Neb.1994). Notably, "the question of impairment is not separate from the existence of an interest," Natural Resources Defense Council, Inc., v. U.S. Nuclear Regulatory Commission, 578 F.2d 1341, 1345 (10th Cir.1978), and "generally, after determining that the applicant has a protectable interest, courts have 'little difficulty concluding' that the disposition of the case may affect such interest."

Jackson v. Abercrombie, 282 F.R.D. 507, 517 (D.Haw.2012) (citing Lockyer v. United States, 450 F.3d 436, 442 (9th Cir.2006).

Having found that the intervenors have a significantly protectable interest in the practical protections offered by Ordinance 635, it naturally follows that the invalidation of Ordinance 635 would impair those interests. See Syngenta Seeds, Inc. v. Cnty. of Kauai, 2014 WL 1631830, at *5 (D. Haw. Apr. 23, 2014).

C. Adequacy of Representation by Jackson County

The Fourth prong of FRCP Rule 24, pertaining to the inadequacy of representation, is satisfied "if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." Trbovich v. United Mine Workers of Am., 404 U.S. 528. 540 n.10 (1972); see also Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir.2003).

Notwithstanding this generally permissive rule, a rebuttable presumption of adequate representation arises where an existing party and the applicant for intervention "share the same ultimate objective," Citizens for Balanced Use v. Montana Wilderness Ass'n, 647 F.3d 893, 898 (9th Cir.2011), or where the government is acting on behalf of a constituency that it represents." Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir.2003). Where a presumption of adequate representation arises, the applicant must make a "compelling showing" to the contrary. Citizens for Balanced Use, 647 F.3d at 898.

In evaluating the adequacy of representation, the Court examines three factors,

> (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervener's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 952 (9th Cir.2009). In analyzing these factors, the adequacy or inadequacy of representation is judged by analysis of the existing parties, not by the qualifications of counsel retained by the parties. See Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 529 (9th Cir.1983).

The Ninth Circuit has held the presumption of adequacy may be overcome where the intervenors have "more narrow, parochial interests" than the existing party, or where "the applicant asserts a personal interest that does not belong to the general public." Forest Conservation Council v. United States Forest Service, 66 F.3d 1489, 1499 (9th Cir.1995) (abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir.2011).

As discussed above, the intervenors allege a concrete economic interest that will be affected by the outcome of this litigation. While the County has an interest in defending the legality of the ordinance, the County also has a duty to all of its constituents, not merely those that supported passage of the ordinance. The County does not have a concrete economical interest in the outcome of the litigation. Therefore, here, the presumption of adequacy is overcome because the intervenors have a narrower interest than the County does, as well as a personal and economic interest that does not belong to the general public.

Liberally construing Rule 24(a), the Court finds that the intervenors have met the test for intervention as a matter of right.

II. Permissive Intervention

Permissive intervention under Fed.R.Civ.P. 24(b) requires only that an intervenor's claim or defense share a common question of law or fact with the main action and that the intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed.R.Civ.P.

24(b). See also Kootenai Tribe v. Veneman, 313 F.3d 1094, 1111 (9th Cir. 2002). If the common question of law or fact is shown, intervention is discretionary with the Court. Id. (noting permissive intervention was appropriate because "the presence of intervenors would assist the court in its orderly procedures leading to the resolution of this case, which impacted large and varied interests."). Id. at 1111.

The Court finds that even if the intervenors have not met the test for intervention as a matter of right, the intervenors' claims and defenses share a common question of law or fact with the main action, and the intervention will not unduly delay or prejudice the adjudication of the original parties' rights. The intervenors have agreed to the dates set by the Court at the Rule 16 Conference, and the Court finds no risk of other delay or prejudice to the parties. Therefore, even if the intervenors were not entitled to intervention as a matter of right, the Court would exercise its discretion and allow permissive intervention in this case.

ORDER

The Motion to Intervene (#7) is hereby GRANTED. Intervenor defendants shall file an Answer to Plaintiffs' Complaint no later than February 12, 2015.

IT IS SO ORDERED and DATED this 6 day of February, 2015.

MARK D. CLARKE
United States Magistrate Judge