IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

MCALLEN GRACE BRETHREN CHURCH, et al.,	§	
	§	
Plaintiffs,	§	Case No. 7:07-cv-60
	§	
v.	§	
	§	
SALLY JEWELL, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR,	§	
	§	
Defendant.	§	

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Defendant Secretary of the United States Department of the Interior, Sally Jewell[1] (in her official capacity), by and through undersigned counsel, hereby opposes Plaintiffs' Motion for a Preliminary Injunction ("Pls' Motion") (Doc. No. 57). As demonstrated below, Plaintiffs are not entitled to the extraordinary remedy of a preliminary injunction. First, the Court lacks jurisdiction to enter the relief requested. *See* Defendants' Motion to Dismiss ("Def's Motion to Dismiss") (Doc. No. 56). Second, even assuming that the Court has jurisdiction, Plaintiffs' request must nevertheless be denied because they have not satisfied the prerequisites for obtaining a preliminary injunction. Each of these issues is discussed in more detail below.

[1] Ken Salazar, former Secretary of the Interior, has been replaced by Sally Jewell, the current Secretary of the Interior. Ms. Jewell is, therefore, automatically substituted for Mr. Salazar pursuant to Fed. R. Civ. P. 25(d)(1).

INTRODUCTION

The Court lacks jurisdiction to entertain Plaintiffs' preliminary injunction request. This case has always been a challenge to Defendant's denial of Plaintiff Robert Soto's petition for the return of his eagle feathers. Defendant, rather than requesting a remand and prolonging this litigation, decided to return Soto's feathers. In addition to returning the feathers, Defendant made the following clear: "We have no intention of returning the feathers only to pursue some action against [Plaintiff] Soto. Once the feathers are returned to [Plaintiff] Soto, he is authorized to possess these particular eagle feathers." Doc. No. 57-7, Exhibit G to Pls' Motion. Further, upon the return of his feathers, Defendant provided Soto a property receipt stating that the feathers "are hereby returned to Robert Soto for his personal use and possession." *See* Exhibit 1, Declaration of Nicholas Chavez, Special Agent in Charge, ("Chavez Decl.") Exhibit A. As a result of the foregoing, this case is moot.

Plaintiffs' claims concerning Plaintiffs other than Soto are also moot and the Court lacks jurisdiction for the reasons set forth in Defendant's motion to dismiss. Doc. No. 56. However, even assuming that those claims were not moot, Plaintiffs have failed to satisfy their burden of demonstrating that they are entitled to a preliminary injunction, particularly not a highly-disfavored mandatory injunction that goes beyond simply maintaining the status quo. In support of their request, Plaintiffs attempt to extend the Fifth Circuit's ruling in this case beyond its terms; that is, Plaintiffs characterize the decision as a ruling in favor of all of the Plaintiffs in this case. The Fifth Circuit's opinion was not a final ruling on the merits. The Court merely held that the record that was before it was insufficient to satisfy the government's burden under the Religious Freedom Restoration Act (RFRA) at the summary judgment stage. Importantly, in

making this holding, the Fifth Circuit focused on Soto's particular circumstances and the return of his feathers. The Court offered no opinion about the other Plaintiffs. This is for good reason: the other Plaintiffs lacked a concrete injury upon which to base a RFRA analysis. Further, unlike Soto, not all of the other Plaintiffs are members of the Lipan Apache Tribe. As a result, Plaintiffs' attempt to argue that that the Fifth Circuit's ruling demonstrates that Plaintiffs other than Soto are likely to succeed on the merits in this case is unavailing.

In addition, the facts of this case undermine Plaintiffs' claim of irreparable harm. Although it is true that courts often find irreparable harm in cases involving RFRA, this case presents a unique set of facts that weigh against the issuance of a mandatory injunction. First, Defendant has no plans to investigate and bring an enforcement action against Plaintiffs. *See* Chavez Decl. at ¶6. Second, courts typically do not enjoin the enforcement of federal criminal laws as courts have held that the threat of a federal prosecution is not irreparable harm. Third, Plaintiffs' long delay in seeking preliminary injunctive relief undermines their claim of irreparable harm.

Finally, Plaintiffs' interest in avoiding the possibility of some criminal investigation and prosecution is outweighed by the government's interest in maintaining the discretion to enforce federal criminal statutes. Any such enforcement action would be in full compliance with existing case law, including satisfying the burden of proof set forth in the Fifth Circuit's decision in this case. For these reasons and all the reasons discussed below and in Defendant's motion to dismiss, Plaintiffs have fallen short of satisfying the prerequisites for obtaining the extraordinary remedy of a preliminary injunction and their request should be denied.

LEGAL AND PROCEDURAL BACKGROUND

As this case has been pending for more than eight years, the Court is familiar with the legal framework and procedural background in this action and they need not be repeated in this opposition.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Natural Res. Def. Council v. Winter*, 129 S. Ct. 365, 376 (2008). "The decision to grant a preliminary injunction is to be treated as the exception rather than the rule." *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 129 S. Ct. at 374. The plaintiff must satisfy all four requirements. *Id*. at 375-76; *Nichols v. Alcatel USA*, 532 F.3d 364, 372 (5th Cir. 2008). Further, mandatory preliminary relief that goes beyond simply maintaining the status quo is particularly disfavored and should not be issued unless the facts and law clearly favor the moving party. *See Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp*., 441 F.2d 560, 561-62 (5th Cir. 1971) (per curiam); *Miami Beach Federal Savings & Loan Ass'n v. Callander*, 256 F.2d 410, 415 (5th Cir. 1958).

ARGUMENT

Plaintiffs' request for a preliminary injunction should be denied. Because the Court lacks jurisdiction over Plaintiffs' claims, it need go no further in denying their request. In their motion, Plaintiffs ask this Court to enjoin Defendant's enforcement of two criminal statutes: the

Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act ("Eagle Act"). This is a request for a highly-disfavored "mandatory" injunction because it goes beyond merely maintaining the status quo. Thus, assuming for the sake of argument that the Court considers the merits of Plaintiffs' request, it should be denied because they have not satisfied the standard preliminary injunction requirements and they have certainly not met the even higher standard for the issuance of mandatory injunction by showing that the facts and the law *clearly* favor them.

I. PLAINTIFFS HAVE NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS.

Plaintiffs are not entitled to a preliminary injunction because they cannot meet their burden of showing that they are likely to succeed on the merits of their claims.

A. Plaintiffs' claims fail due to the Court's lack of jurisdiction.

Plaintiffs have no likelihood of success on the merits of their claims because this case is moot. *See* Def's Motion to Dismiss, Doc. No. 56. In short, Defendant's denial of Soto's petition for the return of his feathers was the concrete and particularized injury that allowed Plaintiffs to invoke this Court's jurisdiction. As discussed in more detail below, Soto is no longer suffering that injury -- his feathers have been returned and he is permitted to possess and use the feathers. As the Supreme Court has explained, "when the challenged conduct ceases," it is no longer possible for the court to grant any effectual relief and "any opinion as to the legality of the action would be advisory." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000); *accord Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 413-14 (5th Cir. 1999).

Soto's eagle feathers were returned in the interest of justice after carefully considering the Fifth Circuit's decision to reverse the lower court's grant of summary judgment and remand the case for further findings, and the record in this case. As the Court is aware, Defendant

originally planned to request a remand so that the Department could reconsider its decision to deny Soto's petition for remission of his feathers in light of the Fifth Circuit's decision. *See* Doc. No. 55. However, Defendant determined that a remand would unnecessarily delay a resolution of this case. *Id*. Hence, Defendant decided to return Soto's eagle feathers. *Id.* This is exactly the relief Soto requested in his petition for remission and in Plaintiffs' complaint. *See* Amended Complaint, Doc. No. 28, at p. 42. After Defendant decided to forgo a remand and immediately return Soto's feathers, there was no longer a live case or controversy regarding Soto's petition and the return of his eagle feathers. Because this case is moot, the Court lacks jurisdiction to grant any relief and it need not consider Plaintiffs' request for a preliminary injunction.

Assuming that Plaintiffs other than Soto have claims that are not moot, the Court lacks jurisdiction to grant the instant request. *See* Doc. No. 56. Plaintiffs either lack standing to assert a claim or their claims are not ripe for adjudication. *See Id*.[2] Because the Court lacks jurisdiction over Plaintiffs' request for a preliminary injunction, they cannot succeed on the merits.

B. If the Court reaches the merits of their claims, Plaintiffs have not shown a likelihood of success.

Assuming the Court maintains jurisdiction over this matter, Plaintiffs cannot show that they are likely to succeed on the merits of their claims. The Fifth Circuit's opinion in this case focused on whether the seizure of Soto's feathers and the denial of his petition requesting the return of the feathers violated RFRA. In particular, the Court relied on the fact that Soto was a member of the Lipan Apache Tribe. *See McAllen Grace*, 764 F.3d at 477 (holding that the

[2] Defendant incorporates by reference the previously filed motion to dismiss along with any reply in support thereof. Defendant reserves to the right to raise additional jurisdictional defenses. *See Menchaca v. Chrysler Credit. Corp*., 613 F.2d 507, 511 (5th Cir. 1980) (noting that "a factual attack under Rule 12(b)(1) may occur at any stage of the proceedings, and plaintiff bears the burden of proof that jurisdiction does in fact exist") (citations omitted).

Department should strive to avoid "harming the rights of someone like Soto, a sincere adherent who is a member of a tribe that is not federally recognized"). Indeed, Judge Jones made the following clarification in her concurring opinion:

> Soto is . . . a member and participant in the Lipan Apache Tribe, which, although not federally recognized, has long historical roots in Texas. The panel opinion discusses – and is so limited by – Soto's RFRA claim based on his and his tribe's status. No more should be read into the RFRA protection intended by this decision.

Id. at 480.

Not all Plaintiffs in this case are members of the Lipan Apache Tribe. In fact, four out of the five Plaintiffs other than Soto who provided declarations in support of Plaintiffs' motion are not members of the Lipan Apache Tribe. *See* Declarations of Michael Russell (not a member of the Lipan Apache Tribe), Carrie Felps (not a member of the Lipan Apache Tribe), John W. Clark (not a member of the Lipan Apache Tribe), and Edith Clark (not a member of the Lipan Apache Tribe). Consequently, to the extent Plaintiffs other than Soto who are not members of the Lipan Apache Tribe rely on the Fifth Circuit's decision to argue they are likely to succeed on the merits of their claim, their reliance is misplaced.

Plaintiffs mischaracterize the Fifth Circuit's holding in an effort to show that they are likely to succeed on the merits of their claims. First, Plaintiffs' assert that "the Fifth Circuit recently held that punishing *Plaintiffs* for engaging in their religious worship would, based on the current factual record, violate [RFRA]." Pls' Motion at 1 (emphasis added). Similarly, Plaintiffs contend that they are likely to succeed on the merits of their claims because "the Fifth Circuit has already held that, on the current record, the Department has not carried its burden of satisfying strict scrutiny." *Id*. at 30. This is not what the Fifth Circuit held. The Fifth Circuit held that the summary judgment record was insufficient to support the Department of the Interior's position as

it related to *Soto* as a member of the Lipan Apache Tribe. "No more should be read into the RFRA protection intended by the [Fifth Circuit's] decision." 764 F.3d at 480.

Plaintiffs' arguments concerning the likelihood of Plaintiffs other than Soto succeeding on the merits of their claims are speculative. In their motion, Plaintiffs discuss the various elements of a RFRA claim: assuming that a person's religious beliefs are substantially burdened, the government must act in furtherance of a compelling interest; and, that compelling interest must be furthered in the least restrictive means. Pls' Motion at 29-42. As an initial matter, the Fifth Circuit made clear that, even with regard to Soto, it is possible for the government to satisfy its burden under RFRA with the correct evidence. It follows that the government could certainly carry its burden when it comes to Plaintiffs other than Soto.

The exact evidence that would be required to satisfy the government's burden would depend on the circumstances of each case. A factual record has yet to be developed in support of an action against Plaintiffs other than Soto. *See* Chavez Decl. at ¶ 6 ("Whether any person or Plaintiff in this case (other than Soto) may possess eagle or migratory bird feathers will be determined on a case-by-case basis"). Thus, Plaintiffs are incorrect when they contend "the government has offered only two reasons why Plaintiffs should be subject to punishment for their religious use of eagle feathers." Pls' Motion at 35. The government has offered no reasons for subjecting Plaintiffs to punishment because no such action has been initiated against them, nor has any application or petition been denied (other than Soto's petition). Plaintiffs' reliance on the threat of some future action is insufficient to establish standing and it is equally inadequate to serve as a basis to argue that the Department will violate RFRA if it takes some hypothetical action in the future. Assuming hypothetically that some enforcement action is taken, the

Department's action will be in compliance with controlling statutory and case law, including RFRA and cases interpreting it. *See* Chavez Decl. at ¶ 6; *see also F.C.C. v. Schreiber*, 381 U.S. 279, 296 (1965) (noting that agencies are entitled to a presumption that they will act in accordance with the law); *Postal Service v. Gregory*, 534 U.S. 1, 10 (2001) (actions of government agencies are entitled to a presumption of regularity).

C. Plaintiffs' cannot succeed on their Equal Protection and Establishment Clause claims.

Plaintiffs mistakenly contend that the Defendant's eagle feather regulations violate the Establishment Clause and the Equal Protection Clause of the Constitution. Pls' Motion at 42-44. These claims fail because, assuming that they are set forth in Plaintiffs' complaint, they were abandoned. Simply because Plaintiffs prevailed in obtaining a remand of their case to this Court, does not mean that Plaintiffs are permitted to revive abandoned arguments. *See, e.g., Eason v. Thaler*, 73 F.3d 1322, 1329 (5th Cir.1996) ("[Plaintiff] included an allegation . . . in his original complaint; he did not, however, raise this issue in his original appeal to this Court. We hold that the district court exceeded the scope of the remand in addressing this abandoned issue."). Accordingly, having abandoned their Establishment Clause and Equal Protection claims earlier in this case, the claims are not properly before this Court and they cannot form the basis of a request for injunctive relief.

Even if Plaintiffs' claims were not abandoned, they would nevertheless fail because Defendant is not making a distinction based on religion as Plaintiffs contend. Instead, the distinction is based on the unique political relationship between the government and Indian tribes. In *Morton v. Mancari*, 417 U.S. 535, 537-39 (1974), the Supreme Court rejected an equal protection attack on a provision of the 1934 Indian Reorganization Act that gave Native

Americans preference for employment in the Bureau of Indian Affairs. The Court began by noting that Congress has "plenary power" to legislate concerning the tribes. *Morton*, 417 U.S. at 551-52. The Court found that, as a consequence of the forcible seizure of Indian lands by the United States, "the United States assumed the duty of furnishing ... protection [to the Native Americans], and with it the authority to do all that was required to perform that obligation." *Id*. at 552 (quoting *Bd. of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943)). Pursuant to this obligation to the tribes, Congress was empowered to "single out for special treatment a constituency of tribal Indians." *Id*. "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Id*. at 554. Thus, the preference was "political rather than racial, in nature." *Id*. at 553 n. 24. Here, the government's interest in fostering the culture of Indian tribes is based on its political relationship with tribes; it is not based on a racial, ethnic, or religious preference. As a result, Plaintiffs have no likelihood of success on their Establishment Clause and Equal Protection claims.

II. PLAINTIFFS HAVE FAILED TO DEMONSTRATE IRREPARABLE HARM.

The facts of this case weigh against a finding of irreparable harm. In their motion, Plaintiffs rely on the fact that courts generally find that irreparable harm is present in RFRA cases. Pls' Motion at 45-46. For example, the Fifth Circuit has held that the loss of First Amendment freedoms, even for a short period of time, typically constitutes irreparable harm. *See Opulant Life Church v. City of Holly Springs, Miss.*, 697 F3d 279, 295 (5th Cir. 2012). That said, a finding of irreparable harm is not automatic. The Court must consider each element of the preliminary injunction requirements based on the facts presented. *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987) (holding "the fundamental principle that an

injunction is an equitable remedy that does not issue as of course" and that a court must balance the competing interest and available legal remedies "in each case"). Here, the unique circumstances presented weigh against a finding of irreparable harm. In particular, Defendant has no current plans to start an investigation or bring an enforcement action against Plaintiffs. In addition, the fact that Plaintiffs are seeking to enjoin the enforcement of a federal criminal statute based on speculative and unripe claims weighs against the Court finding irreparable harm. Finally, Plaintiffs' long delay in seeking preliminary injunctive relief undermines their irreparable harm claim.

A. The threat of a future criminal prosecution as presented in this case does not constitute irreparable harm.

Plaintiffs' fear of prosecution is not irreparable harm. In particular, Plaintiffs complain that "due to the threat of civil and criminal penalties" Plaintiffs would suffer harm that warrants the issuance of a preliminary injunction. Pls' Motion at 45-46. The facts and case law do not support Plaintiffs' contention. As an initial matter, Defendant has no plans to "investigate or initiate an enforcement action against Plaintiffs." Chavez Decl. at ¶ 6. But even if that were not the case, courts have held that a plaintiff's fear of future prosecution is not irreparable harm. For example, in *Younger v. Harris*, 401 U.S. 37, 46 (1971), the Supreme Court refused to grant an injunction on the basis of a feared state prosecution, holding that "[c]ertain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable.'" 401 U.S. 37, 46 (1971); *see also Ali v. United States*, No. 12–CV–0816A SC, 2012 WL 4103867 (W.D.N.Y. Sept.14, 2012) (Curtin J.) (noting that federal courts have applied the abstention doctrine articulated in *Younger*

when asked to enjoin enforcement of federal criminal proceedings). In a more similar context, the Court of Appeals for the District of Columbia found the following:

> In no case that we have been able to discover has a federal court enjoined a federal prosecutor's investigation or presentment of an indictment. Of course, a federal prosecutor typically brings cases only in federal court, thereby affording defendants, after indictment, a federal forum in which to assert their defenses—including those based on the Constitution. Because these defendants are already guaranteed access to a federal court, it is not surprising that subjects of federal investigation have never gained injunctive relief against federal prosecutors.

Deaver v. Seymour, 822 F.2d 66, 72 (D.C.Cir.1987). Thus, despite Plaintiffs' claims to the contrary, a fear of a federal enforcement action does not constitute irreparable harm in this case.

B. Plaintiffs' delay in seeking a preliminary injunction undermines their claim of irreparable harm.

Plaintiffs' delay in seeking injunctive relief undermines their claim of irreparable injury. Courts have held that the timing of a plaintiff's request for injunctive relief may be considered as a factor in weighing the merits of the request. Specifically, "[a]s a general proposition, delay in seeking preliminary relief cuts against finding irreparable injury." *Kansas Health Care Ass'n, Inc. v. Kansas Dept. of Social and Rehabilitation Services*, 31 F.3d 1536, 1543-44 (10th Cir. 1994) (citation omitted); *see also GTE Corp. v. Williams*, 731 F.2d 676, 679 (10th Cir. 1984) (same); *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (preliminary injunction should not issue where plaintiffs had delayed seeking injunctive relief).

Here, Plaintiffs' decision to wait almost eight years after the initiation of this lawsuit to file a request for a preliminary injunction undermines their claimed need for emergency injunctive relief. Indeed, all Plaintiffs in this case have been subject to the existing regulatory scheme since at least 1999. *See McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 470 (5th Cir. 2014) (discussing 50 C.F.R. § 22.22). As a result, the argument that an emergency

situation exists that requires immediate injunctive relief strains credulity. *See Majorica, S.A. v. R.H. Macy & Co.*, 762 F.2d 7, 8 (2d Cir. 1985) (lack of diligence, standing alone, may preclude the granting of preliminary injunctive relief). At a minimum, Plaintiffs' long delay in seeking emergency injunctive relief undermines their claim of irreparable harm.

III. PLAINTIFFS HAVE NOT SHOWN THAT THE PUBLIC INTEREST AND EQUITIES TIP IN THEIR FAVOR.

The public interest and equities weigh against the issuance of a preliminary injunction in this case. The public has a strong interest in the government's continued management of our natural wildlife resources. Here, "[a]lthough [the United States Fish and Wildlife Service] has no plans to investigate or initiate an enforcement action against Plaintiffs, it must maintain the discretion to respond to complaints alleging there are violations of Federal law that are enforced by [the Fish and Wildlife Service]." Chavez Decl. at ¶ 6. There is undoubtedly a public interest in the United States' ability to enforce the federal criminal statutes enacted by Congress. *See U.S. v. Gillock*, 445 U.S. 360, 373 (1980) (recognizing the enforcement of federal criminal statutes as an important federal interest). This is particularly true when it comes to statutes protecting natural resources. *See Downstate Stone Co. v. U.S.*, 651 F.2d 1234, 1242 (7th Cir. 1981) (in denying a preliminary injunction, "stressing the importance of the government's and the public's interest in managing scarce natural resources"). Additionally, courts presume that the government will act in accordance with the law. *See F.C.C. v. Schreiber*, 381 U.S. at 296; *Postal Service v. Gregory*, 534 U.S. at 10. Hence, the Fifth Circuit has held that courts should not issue a preliminary injunction that restrains an agency's ability to enforce the law based on a hypothetical future enforcement action. *See Miami Beach Federal Sav. and Loan Ass'n v. Callander*, 256 F.2d 410, 415 (5th Cir. 1958) (holding that courts should not issue a preliminary

injunction that restrains "an agency of the United States Government from exercising its statutory functions" based on allegations that the agency will act improperly). In this case, an order limiting the discretion of law enforcement to enforce federal criminal wildlife statutes -- where there are no current plans for such an enforcement action against Plaintiffs -- would disserve the public interest and contravene Fifth Circuit case law by unnecessarily impeding the ability to investigate the illegal killing of, and commerce in, eagles. For these reasons, the public interest and balance of equities weigh against the issuance of a preliminary injunction.

CONCLUSION

For all the foregoing reasons, the Court should deny Plaintiffs' request for a preliminary injunction.

Respectfully Submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served on all counsel of record via the Court's Electronic Case Filing System.

s/ Jimmy A. Rodriguez
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