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Foundation, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Center for Biological Diversity; Sierra
Club; and Grand Canyon Wildlands
Council,

Plaintiffs,

v.

United States Forest Service,

Defendant,

and

National Shooting Sports Foundation,

Applicant for
Intervention

No. CV-12-8176-PCT-SMM

**NATIONAL SHOOTING SPORTS
FOUNDATION, INC.'S MOTION FOR
LEAVE TO INTERVENE**

(Expedited Ruling Requested)

National Shooting Sports Foundation, Inc. ("NSSF"), a Connecticut corporation, moves the Court for leave to intervene as a defendant in this case pursuant to Rule 24 of the Federal Rules of Civil Procedure. As set forth below, NSSF is entitled to intervene of right under Rule 24(a)(2) because NSSF has protectable interests that directly relate to Plaintiffs' claims and will be impaired by the declaratory and injunctive relief sought by

1 Plaintiffs, and because the Defendant, the United States Forest Service (“Forest Service”)
 2 may not adequately protect NSSF’s members’ economic, recreational and legal interests.
 3 Alternatively, NSSF’s defenses to Plaintiffs’ claims raise common questions of fact or law
 4 with the main action against the Forest Service, entitling NSSF to intervene permissively
 5 under Rule 24(b).

6 This motion is supported by the declaration of Lawrence Keane, Senior Vice
 7 President, Assistant Secretary and General Counsel of NSSF, filed herewith. NSSF also
 8 has lodged its proposed answer concurrently with this motion, as required by Rule 24(c).

9 **I. SUMMARY OF MATERIAL FACTS.**

10 **A. Overview of NSSF’s Interests.**

11 As set forth in Mr. Keane’s declaration, NSSF is the trade association for the
 12 firearms and ammunition industry, and its members will be directly and adversely
 13 impacted by the outcome of this litigation. NSSF has more than 8,000 members including
 14 federally-licensed firearms manufacturers, distributors, and retailers; companies
 15 manufacturing, distributing, and selling shooting and hunting-related goods and services;
 16 sportsmen’s organizations; public and private shooting ranges; gun clubs; publishers; and
 17 individual recreational target shooters and hunters.¹ Formed in 1961, NSSF promotes,
 18 protects and preserves hunting and shooting sports, and supports America’s traditional
 19 hunting heritage and firearms freedoms.²

20 NSSF’s members manufacture, distribute, sell and use traditional ammunition
 21 made with lead components.³ Approximately 95% of the domestically manufactured
 22 ammunition is traditional ammunition made with lead bullets or shot, and NSSF members

23 ¹ Declaration of Lawrence Keane in Support of National Shooting Sports Foundation,
 24 Inc.’s Motion for Leave to Intervene (“Keane Decl.”) at ¶ 5.

25 ² *Id.*

26 ³ Keane Decl. at ¶ 7 (the components of ammunition typically include a primer, propellant, the projectile - shot or bullet, and the casing).

1 manufacture over 90% of domestically manufactured traditional ammunition.⁴ NSSF's
 2 members, and the ammunition and firearms industry as a whole, provide approximately
 3 210,000 jobs in the U.S., and have an overall annual economic impact of almost
 4 \$32 billion.⁵ More than 50 million hunters and target shooters in America purchase and
 5 use traditional ammunition containing lead components.⁶

6 **B. Plaintiffs' Complaint and the Impact of the Requested Relief.**

7 In the Complaint, Plaintiffs assert that the use of traditional lead ammunition for
 8 hunting must be regulated as the disposal of a hazardous waste under the Resource
 9 Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901 *et seq.* RCRA, which was
 10 enacted in 1976, gives the EPA the authority to control hazardous waste from "cradle-to-
 11 grave," including the generation, transportation, treatment, storage, and disposal of such
 12 waste.⁷

13 Plaintiffs assert a single RCRA claim. They contend that the Forest Service has
 14 contributed and is contributing to the disposal of hazardous waste that may present an
 15 imminent and substantial endangerment in violation of RCRA.⁸ Specifically, Plaintiffs
 16 assert that the Forest Service has and will continue to violate RCRA by (1) failing to use
 17 its authority over the management of National Forest System land to halt the "disposal" of
 18 lead in the form of spent ammunition; and (2) issuing Special Use permits to hunting
 19 guides and outfitters that fail to prohibit the use of lead ammunition.⁹ While Plaintiffs'
 20 claim in this case is limited to the Kaibab National Forest, a finding by this Court that lead

21 _____
 22 ⁴ *Id.*

23 ⁵ Keane Decl. at ¶ 6.

24 ⁶ *Id.*

25 ⁷ *See, e.g.,* 42 U.S.C. §§ 6921-6939b; *Chemical Waste Management, Inc. v. Hunt,*
 26 *Governor Of Alabama, et al.,* 504 U.S. 334, 337 n.1 (1992).

⁸ Complaint at ¶ 47.

⁹ Complaint at ¶¶ 34, 45-46.

1 ammunition, lawfully discharged but not retrieved or recovered, violates RCRA will be
2 far reaching and extend to any land on which hunting and related recreational activities
3 take place, regardless of its ownership, as Plaintiffs undoubtedly intend.

4 Reductions, or worse, a prohibition on the use of traditional ammunition for
5 hunting on even just National Forest System land would injure NSSF's members.
6 Domestic ammunition manufacturers cannot, except at great cost, re-design their products,
7 retool or repurchase new manufacturing equipment, or significantly change their
8 manufacturing processes.¹⁰ Ammunition is produced in high speed and high volume
9 automated processes using expensive, close-tolerance, and purpose-built machinery, all
10 based on decades of manufacturing experience.¹¹ In other words, it is not possible to
11 simply replace lead with an alternative raw material in existing ammunition
12 manufacturing processes. Before such a major shift in an everyday consumer product can
13 occur, the efficacy, consumer acceptance and environmental, health, and safety impacts of
14 substitutes would have to be evaluated in order to determine if a switch to alternative
15 ammunition is even feasible.¹²

16 In today's fragile economy, the economic interests of a \$32 billion industry
17 providing more than 200,000 jobs cannot be overstated. Domestic ammunition
18 manufacturers operate in a very competitive economic environment, with very low profit
19 margins.¹³ First, adequate alternatives for traditional ammunition that can be mass-
20 produced have to be found, and then the industry needs to find the massive capital
21 infusion to pay to reinvent itself.¹⁴ Second, the cost to the consumer must be considered.

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23 ¹⁰ Keane Decl. at ¶ 9.

24 ¹¹ *Id.*

25 ¹² *Id.*

26 ¹³ Keane Decl. at ¶ 10.

¹⁴ *Id.*

Based on NSSF research, it is estimated that banning traditional ammunition will increase the cost of ammunition, on average, up to 190%.¹⁵ NSSF members (which include sports shooters and hunters), firearms dealers, shooting ranges, Federal and State law enforcement agencies, and the U.S. military, will pay far more for ammunition if the use of lead components were restricted as a result of Plaintiffs' claim.¹⁶ These increased costs will in turn cause reduced sales and the loss of related jobs, as well as a reduction in hunting and related recreational activities.¹⁷ Higher prices for ammunition will also cause a reduction in the collection of the Federal Firearms and Ammunition and Excise Tax ("FAET") (11% on taxable ammunition sales), which is a primary source of wildlife conservation funding in the U.S. All of the FAET revenues go to the U.S. Fish and Wildlife Service, which then distributes the funds to the States for wildlife and sport fish restoration.¹⁸

II. NSSF MEETS THE STANDARD FOR INTERVENTION OF RIGHT UNDER RULE 24(A)(2).

NSSF is entitled to intervene as of right in this matter pursuant to Rule 24(a)(2) because NSSF satisfies the traditional four-part test for intervention under controlling law: (1) this motion is timely; (2) NSSF and its members have significant, protectable interests relating to the use of lead ammunition for hunting and related recreational activities within the Kaibab National Forest as well as on other land, which is the subject of this action; (3) NSSF and its members are situated so that the disposition of this action may, as a practical matter, impair or impede their ability to protect those interests; and (4) NSSF's economic, recreation and legal interests may not be adequately represented by the Forest

¹⁵ Keane Decl. at ¶ 11.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

1 Service, which, as a federal agency, has different interests and cannot be expected to
2 defend the private rights and interests of NSSF and its members.¹⁹

3 Rule 24(a)(2) requires a court, upon timely motion, to permit intervention of right
4 by anyone who “claims an interest relating to the property or transaction that is the subject
5 of the action, and is so situated that disposing of the action may as a practical matter
6 impair or impede the movant’s ability to protect its interest, unless existing parties
7 adequately represent that interest.”²⁰ In evaluating intervention under Rule 24(a)(2),
8 courts normally follow “practical and equitable considerations” and construe the rule
9 “broadly in favor of proposed intervenors.”²¹ “[A] liberal policy in favor of intervention
10 services both efficient resolution of issues and broadened access to courts.”²² As further
11 described by the Ninth Circuit, “the interest test is primarily a practical guide to disposing
12 of lawsuit by involving as many apparently concerned persons as is compatible with
13 efficiency and due process.”²³

14 Rule 24(a)(2) does not require a specific legal or equitable interest to support
15 intervention. “Rather, it is generally enough that the interest is protectable under some
16 law, and that there is a relationship between the legally protected interest and the claims at
17 issue.”²⁴ A prospective intervenor “has a sufficient interest for intervention purposes if it
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20 ¹⁹ See, e.g., *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (en
21 banc) (discussing intervention under Rule 24(a)(2) in the context of claims brought under
22 NEPA); *Sw. Ctr. for Bio. Diversity v. Berg*, 268 F.3d 810, 817-18 (9th Cir. 2001).

23 ²⁰ Fed. R. Civ. P. 24(a)(2); see also *Wilderness Soc.*, 630 F.3d at 1178-1179.

24 ²¹ *Wilderness Soc.*, 630 F.3d at 1179 (citing *United States v. City of Los Angeles*, 288 F.3d
25 391, 397 (9th Cir. 2002)).

26 ²² *Id.*

²³ *Id.* (quoting *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980); see also
Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967)).

²⁴ *Wilderness Soc.*, 630 F.3d at 1179 (quoting *Sierra Club v. EPA*, 995 F.2d 1478, 1484
(9th Cir. 1993)).

1 will suffer a practical impairment of its interests as a result of the pending litigation.”²⁵ In
 2 reviewing this motion, this Court should accept as true the well-pleaded, non-conclusory
 3 allegations and evidence, including the facts set forth in Mr. Keane’s declaration filed in
 4 support of this motion.²⁶ As shown below, NSSF meets all of the requirements for
 5 intervention of right under Rule 24(a)(2).

6 **A. NSSF’s Motion Is Timely.**

7 This motion satisfies the timeliness element for intervention. In determining
 8 whether a motion to intervene is timely, this Court should evaluate three factors: (1) the
 9 stage of the proceeding in which the applicant seeks to intervene; (2) the prejudice to
 10 other parties; and (3) the reason for and length of any delay.²⁷ Here, Plaintiffs filed their
 11 complaint on September 9, 2012 (Dkt. #1). The Forest Service filed a motion to dismiss
 12 on December 14, 2012 (Dkt. #46). On January 14, 2013, Plaintiffs requested to extend the
 13 deadline to respond until February 5, 2013 (Dkt. #46). The Court granted Plaintiffs’
 14 request on January 16, 2013 (Dkt. #53). Additionally, on November 6, 2012, the State of
 15 Arizona moved to intervene for the limited purpose of filing its own motion to dismiss
 16 (Dkt. #21-22). On November 21, 2012 the National Rifle Association of America and
 17 Safari Club International also filed for intervention (Dkt. #28-37). Although both motions
 18 have been briefed, there have been no rulings from the Court on these procedural matters,
 19 nor have there been any substantive proceedings to date. Therefore, NSSF’s intervention
 20 will not prejudice any party to the case.

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 22
 23 ²⁵ *Id.* (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)).

24 ²⁶ *Sw. Ctr.*, 268 F.3d at 819-20.

25 ²⁷ *See, e.g., Idaho Farm Bureau Fed. v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995);
 26 *United States ex rel. McGough v. Covington Technologies Company*, 967 F.2d 1391, 1394 (9th Cir. 1992).

B. NSSF Has a Protectable Interest in Plaintiffs' Claims for Relief.

Under Rule 24(a)(2), NSSF has a protectable interest in the subject matter of the RCRA claim alleged in the Complaint because the object of Plaintiffs' claim is the product NSSF's members manufacture, distribute, sell and use. When a third-party challenges an agency final action or other regulatory policy, the members of the regulated industry that are directly affected by that government action have a significant, protectable interest that supports intervention.²⁸ In addition, NSSF has a direct interest in the economic vitality and legal rights of its members, which include the leading domestic manufacturers of the traditional ammunition that is the subject of Plaintiffs' RCRA claim, as well as thousands of distributors, firearms retailers, shooting ranges, sportsman's organizations (including hunters and target shooters) that distribute, sell and use that ammunition and are members of NSSF.²⁹

NSSF's members benefit from the agency's current regulations that do not prohibit the use of traditional ammunition for hunting on National Forest System land. The regulation of the use of lead ammunition as the "disposal" of a "hazardous waste" under RCRA would require manufacturers to re-design their processes and facilities so that a different product could be manufactured, a complex process that would come only at great cost, if feasible at all.³⁰ Increased manufacturing costs will have a trickle-down impact,

²⁸ See *Fund for Animals v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (holding that Foundation's members interest in hunting and conservation of wild sheep species sufficient to warrant intervention in ESA suit against FWS to list the species); *NRDC v. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983) (holding that pesticide manufacturers subject to regulation under challenge had a legally protected interest); see also, e.g., *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (holding that companies that produce military munitions and operate military firing ranges had standing to challenge EPA's Military Munitions Rule); *Conservation Law Found. of New England v. Mosbacher*, 966 F.2d 39, 41-44 (1st Cir. 1992) (holding that commercial fishermen impacted by regulatory plan to address overfishing had a recognizable interest in the timetable for implementing that plan).

²⁹ Keane Decl. at ¶5.

³⁰ Keane Decl. at ¶¶ 9-10.

causing the price of lead ammunition to the consumer to increase by an estimated 190 percent.³¹ In this way, further regulation of traditional ammunition would create uncertainty in the marketplace, with effects (including shortages, price increases, and reduced FAET revenues used for wildlife conservation) that would cascade through the supply chain, significantly impacting NSSF members who distribute, sell, and use ammunition for hunting and other recreational purposes.³² Thus, by seeking an order that the Forest Service regulate or ban lead ammunition for hunting on National Forest System land because it constitutes the “disposal” of a “hazardous waste,” the relief sought clearly relates to NSSF’s members protectable interests in the manufacture, distribution, sale and use of traditional lead ammunition.

C. NSSF’s Interests Will Be Impaired by Resolution of the RCRA Claims in NSSF’s Absence.

The third element in the four-part test, impairment, “follows from the factors” related to NSSF’s protectable interest.³³ For that reason, a prospective intervenor “has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation.”³⁴ As discussed, NSSF’s members manufacture, distribute, sell and use traditional lead ammunition. Any restriction in the use of traditional ammunition because its use constitutes the “disposal” of a “hazardous waste” under RCRA will have an immediate and chilling impact on the use of traditional lead ammunition. Where the proceeding has the potential to subject the movant to governmental regulation or significantly change how the movant does business, the

³¹ Keane Decl. at ¶ 11.

³² *Id.*

³³ *See Sierra Club*, 995 F.2d at 1486, *abrogated on other grounds by Wilderness Soc.*, 630 F.3d at 1177-78.

³⁴ *Wilderness Soc.*, 630 F.3d at 1178 (quoting *Lockyer*, 450 F.3d at 441).

1 movant has a protectable interest that will be impaired or impeded by the relief sought.³⁵
 2 That is clearly the case here with respect to Plaintiffs' claim and its potential to impair the
 3 interests of NSSF and its members.

4 **D. NSSF's Interests May Not Be Adequately Represented by the Current**
 5 **Parties to This Case.**

6 NSSF's burden in showing inadequate representation is minimal; it is sufficient to
 7 show that representation "may be inadequate."³⁶ In determining whether the interests of
 8 NSSF and its members will be adequately represented, this Court should consider
 9 "whether the interest of a present party is such that it will undoubtedly make all the
 10 intervenor's arguments; whether the present party is capable and willing to make such
 11 arguments; and whether the intervenor would offer any necessary elements to the
 12 proceedings that other parties would neglect."³⁷ In assessing adequacy of representation,
 13 this Court should focus on the subject of the action, not the particular issues before it at
 14 the time of this motion.³⁸

15 In this case, it is readily apparent that the Forest Service may not adequately
 16 represent all of the economic, recreation and legal interests of NSSF and its members.
 17 The Forest Service may defend its current regulation of hunting on National Forest
 18 System land, but it is not in a position to assert arguments relating to NSSF's rights or to
 19 address the impairment of NSSF's interests. For example, the agency is not in position to
 20 defend against the relief sought by Plaintiffs by addressing the injuries and damages that

21 ³⁵ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992); *Fund for*
 22 *Animals*, 322 F.3d at 735; *Military Toxics Project v. EPA*, 146 F.3d at 948, 954 (D.C. Cir.
 1998).

23 ³⁶ E.g., *Trbovich v. United Mine Workers*, 404 U.S. 528, 538, n. 10 (1972)).

24 ³⁷ *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1498-99 (9th Cir.
 1995) (citing *California v. Tahoe Reg. Planning Agency*, 792 F.2d 775, 778 (9th Cir.
 1986)), *abrogated on other grounds by Wilderness Soc.*, 630 F.3d at 1177-80.

25 ³⁸ *Sw. Ctr.*, 268 F.3d at 823 (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528
 26 (9th Cir. 1983)).

1 NSSF's members will suffer in the event that the Forest Service is directed to treat
 2 hunting with lead ammunition as the "disposal" of a "hazardous waste" under RCRA.
 3 "Inadequate representation is most likely to be found when the applicant assert[s] a
 4 personal interest that does not belong to the general public."³⁹

5 Under these circumstances, it is well-established that the interests of the federal
 6 agencies involved and NSSF may diverge because:

7 [w]e have here ... the familiar situation in which the
 8 governmental agency is seeking to protect not only the interest
 9 of the public but also the private interest of the ...
 [intervenors], a task which is on its face impossible.⁴⁰

10 It also follows that NSSF will provide a unique perspective not otherwise represented by
 11 the Forest Service. As a federal agency, the Forest Service simply does not have interests
 12 that are analogous to the private interests of NSSF's members, nor does the Forest Service
 13 share their business objectives. Therefore, NSSF, if allowed to intervene, will provide a
 14 unique perspective not otherwise offered, defended or represented by the Forest Service, a
 15 federal agency whose policies and litigation positions are necessarily different from those
 16 of a private litigant.

17 **III. IN THE ALTERNATIVE, NSSF SHOULD BE ALLOWED PERMISSIVE**
 18 **INTERVENTION.**

19 In the alternative, NSSF should be granted permissive intervention under Rule
 20 24(b). Rule 24(b) allows permissive intervention when an applicant "has a claim or
 21 defense that shares with the main action a common question of law or fact."⁴¹ Permissive
 22

23 ³⁹ *Forest Conservation Council*, 66 F. 3d at 1499 (citing 3B MOORE'S FEDERAL
 24 PRACTICE, ¶ 24.07[4] at 24-78 (2d ed. 1995); CHARLES WRIGHT, ARTHUR R. MILLER &
 MARY K. KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 1909 at 317, 346 (2d ed.
 1986)).

25 ⁴⁰ *National Farm Lines v. ICC*, 564 F.2d 381, 384 (10th Cir. 1977).

26 ⁴¹ Fed. R. Civ. P. 24(b)(1)(B).

1 intervention lies within the discretion of the Court and “in exercising its discretion, the
 2 court must consider whether the intervention will unduly delay or prejudice the
 3 adjudication of the original parties’ rights.”⁴²

4 Under Rule 24(b), NSSF need only demonstrate that its claim or defense and the
 5 main action have a question of law or a fact in common.⁴³ Under this relaxed standard,
 6 NSSF has an interest in the underlying subject matter of this case, i.e., the use of
 7 traditional lead ammunition for hunting within the National Forests. As demonstrated by
 8 its proposed answer, NSSF asserts that Plaintiffs’ RCRA claims are unsupported and
 9 contrary to law. On this issue, NSSF’s defenses to Plaintiffs’ claims have both questions
 10 of law and fact in common with the main action. Because NSSF’s intervention will not
 11 unduly delay the adjudication of the rights of the original parties, NSSF should be allowed
 12 to intervene permissively if the Court finds that NSSF cannot intervene as of right under
 13 Rule 24(a).

14 **IV. CONCLUSION.**

15 For the reasons set forth above, NSSF requests that the Court issue an order
 16 granting NSSF leave to intervene as a defendant at the Court’s earliest convenience.

17 RESPECTFULLY SUBMITTED this 22nd day of January, 2013.

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 19 FENNEMORE CRAIG, P.C.

20
 21 By s/ Norman D. James
 22 Norman D. James
 23 Jay L. Shapiro
 Attorneys for National Shooting Sports
 Foundation, Inc.

24 ⁴² Fed. R. Civ. P. 24(b)(3).

25 ⁴³ See Fed. R. Civ. P. 24(b); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1109
 26 (9th Cir. 2002) (granting permissive intervention in challenge to Forest Service rule under
 NEPA), *abrogated on other grounds by Wilderness Soc.*, 630 F.3d at 1177-78.

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2013, I electronically transmitted the foregoing NATIONAL SHOOTING SPORTS FOUNDATION, INC.'S MOTION FOR LEAVE TO INTERVENE to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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ORDER

Based on the motion of the National Shooting Sports Foundation, Inc. (“NSSF”),
and good cause appearing therefore,

IT IS HEREBY ORDERED granting NSSF motion for leave to intervene as
defendants in this case.

1 IT IS FURTHER ORDERED that the Clerk shall file NSSF's proposed form of
2 Answer, which was lodged with the Court on January 21, 2013.

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