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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
Prescott Division

CENTER FOR BIOLOGICAL
DIVERSITY,

Plaintiff,

v.

U.S. BUREAU OF LAND
MANAGEMENT; BOB ABBEY, Director
of U.S. BLM; JAMES KENNA, BLM
Arizona State Director; KEN SALAZAR,
Secretary of Interior, and U.S. FISH AND
WILDLIFE SERVICE,

Defendants,

and

The National Rifle Association,

Intervenor-Defendant.

Case No. 3:09-cv-08011-PCT-GMS

**REVISED JOINT CASE
MANAGEMENT REPORT**

Pursuant to this Court's June 2, 2009 Order and November 3, 2009 Order Setting a Scheduling Conference and Fed. R. Civ. P. 16 and 26(f), Defendants U.S. Bureau of Land Management ("BLM"); Bob Abbey, Director of BLM; James Kenna, BLM Arizona State Director; Ken Salazar, Secretary of the Interior; and U.S. Fish and Wildlife Service ("FWS"); (collectively, "Defendants"), Plaintiff Center for Biological Diversity ("CBD"), and Intervenor The National Rifle Association ("Intervenor") hereby submit this Joint Case Management Report. On August 24, 2009 and January 22, 2010, the parties conferred in order to facilitate planning and resolution of certain issues. A statement of the case and the issues discussed during the conferences are set forth below per the instructions in Section (5) of the Court's May 1, 2009 Order issued in the related case, *The Wilderness Society v. U.S. Bureau of Land Management*, Case No. 3:09-cv-08010-PGR (D. Ariz.).

Concurrently with the filing of this report, the parties are jointly filing a motion to continue the February 8, 2010 Case Management Conference to allow the parties to engage in settlement discussions. Settlement discussions are in the initial stages, and the parties are seeking a continuance of approximately 30 days to allow the parties to determine whether further discussions will be productive. Accordingly, the dates suggested in this report are tentative. If settlement discussions are productive, the parties intend to seek a further extension of the schedule.

A. Statement of the Case

1. Plaintiff's Claims

In this case, Plaintiff challenges the issuance by BLM of three resource management plans ("RMP") for the Grand Canyon-Parashant and Vermillion Cliffs National Monuments ("the Monuments") and the lands managed by the Arizona Strip Field Office ("ASFO"). In its First Amended Complaint, Plaintiff alleges that BLM and FWS have failed to comply with the National Environmental Policy Act, 42 U.S.C. § 3421 *et seq.* ("NEPA"), the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.* ("FLPMA"), and the Endangered Species Act, 16 U.S.C. § 1536(a)(2) ("ESA") by refusing to incorporate actions necessary to protect public lands and endangered and threatened species from adverse

1 impacts of excessive off-road vehicle (“ORV”) use, livestock grazing, and the use of lead
2 ammunition in their land and wildlife management planning for Monuments and other federal
3 lands administered by the ASFO.

4 Plaintiff alleges that BLM’s issuance of the RMPs was arbitrary, capricious, or
5 otherwise not in accordance with the law and therefore in violation of the Administrative
6 Procedure Act (“Act”), 5 U.S.C. § 706(2) and that BLM’s and FWS’s issuance of the RMPs
7 and Biological Opinion (“BiOp”) were arbitrary, capricious, and unlawful and therefore a
8 violation of the ESA. Plaintiff alleges five distinct claims: (1) violation of FLPMA and
9 related regulations and executive orders, and violation of the proclamations establishing the
10 Monuments, see Proclamation 7265, Establishment of the Grand Canyon-Parashant National
11 Monument, 65 Fed. Reg. 2825 (Jan. 11, 2000) & Proclamation 7374, Vermillion Cliffs
12 National Monument, 65 Fed. Reg. 69227 (Nov. 9, 2000) (collectively “Monument
13 Proclamations”) by adopting RMPs that fail to inventory species data, allow off-road vehicle
14 use, and allow grazing to the detriment of natural resources; (2) violation of NEPA and its
15 implementing regulations by failing to adequately analyze environmental impacts or consider
16 a range of alternatives in the environmental impact statement (“EIS”) for the RMPs;
17 (3) violation by BLM and FWS of Section 7(a)(2) of the ESA by failing to ensure against
18 jeopardy and destruction or adverse modification of critical habitat for listed species within
19 the Monuments and ASFO; (4) violation by BLM and FWS of Sections 7(a)(1), 7(a)(2), and
20 7(b)(4) of the ESA by failing to ensure against jeopardy of the California Condor, and
21 (5) violation by FWS of the ESA, 16 U.S.C. § 1536(a)(2), by issuing an unlawful biological
22 opinion. Plaintiff requests an order from the Court declaring that the RMPs are in violation
23 of the Monument Proclamations, NEPA, and FLPMA, that FWS’s biological opinion is
24 unlawful, and that BLM’s implementation of the RMPs violates the ESA; ordering that the
25 RMPs be set aside and that the biological opinion be set aside; enjoining BLM from allowing
26 motorized and mechanized vehicles on tracks, trails, or primitive roads in the Monuments,
27 awarding Plaintiff its attorneys’ fees and costs, and awarding other relief as the Court deems
28 just and proper.

2. Defendants' Defenses

Defendants deny that BLM's issuance of the RMPs was arbitrary, capricious, or otherwise not in accordance with the law. The RMPs were the product of a lengthy planning process that fully complied with the Monument Proclamations, FLPMA, NEPA, and applicable regulations and executive orders. Defendants deny that the RMPs improperly inventory species data, allow off-road vehicle use, or allow grazing to the detriment of natural resources. In the EIS, BLM appropriately analyzed the potential impacts of the RMPs, including the potential impact of motorized and mechanized vehicles in the Monuments, and considered an appropriate range of alternatives. Defendants deny that FWS and BLM did not comply with the ESA and deny that the biological opinion issued by FWS is unlawful. Defendants deny the allegations in Plaintiff's First Amended Complaint and request that judgment be entered for the Defendants, that Defendants be awarded their costs, and that the Court order any other relief that it deems just and proper.

3. Intervenor's Defenses on Behalf of Defendants

In addition to the defenses raised above by Defendants, Intervenor contends that, even if Plaintiff's First Amended Complaint is correct in alleging Defendants failed to consider the alleged impact lead-based ammunition use by hunters has on the nonessential and experimental population of California condors at issue (which Plaintiff alleges violates the ESA and APA), such failure amounts to a harmless error.

B. Jurisdictional Basis of the Case

Jurisdiction in this case is based upon 28 U.S.C. §§ 1331 (federal question), 1346 (United States as defendant), 2201 (declaratory judgment), 2202 (injunctive relief), 16 U.S.C. § 1540(g) (ESA), and 5 U.S.C. §§ 701-06 (APA). Defendants reserve the right to argue that the Court lacks jurisdiction over some or all of the claims in this case.

C. Factual and Legal Issues In Dispute

Defendants and Plaintiff anticipate that the case will be resolved through summary judgment based primarily on the administrative record submitted by the Defendants. 5 U.S.C. § 706 (stating that a reviewing court "shall review the whole record or those parts of

1 it cited by a party . . .”); see also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S.
2 402, 420 (1971). The legal issues in dispute are set forth in Section A above. Intervenor
3 agrees with the foregoing, except that Intervenor contends Plaintiff’s allegations relating to
4 California condors may be properly disposed of via a motion for partial judgment on the
5 pleadings pursuant to Federal Rule of Civil Procedure 12(c).

6 **D. Parties Which Have Not Been Served**

7 There are no parties who have not been served or who have not yet entered an
8 appearance.

9 **E. Parties Not Subject to the Court’s Jurisdiction**

10 All parties are subject to the Court’s jurisdiction.

11 **F. Discovery**

12 The parties anticipate that this case will be decided on summary judgment based
13 primarily on the administrative record submitted by the Defendants. Therefore, no discovery
14 has yet been conducted. Defendants maintain that extra-record discovery is generally
15 inappropriate in APA cases because the case should be decided based upon the administrative
16 record prepared by the agencies. See Florida Power & Light Co. v. Lorion, 470 U.S. 729,
17 743-44 (1985) (“The task of the reviewing court is to apply the appropriate APA standard
18 of review, 5 U.S.C. § 706(2), to the agency decision based on the record the agency presents
19 to the reviewing court.”). Nevertheless, the parties reserve the right to conduct discovery for
20 any appropriate reason should the need arise during the litigation.

21 **G. Agreements Relating to Discovery**

22 The parties have not entered into any agreements to conduct discovery because the
23 parties do not currently have a need to conduct discovery.

24 **H. Issues to be Resolved Through Dispositive Motions**

25 The parties anticipate that the merits issues in this case will be resolved through
26 dispositive summary judgment motions. The parties anticipate that there may be motions by
27 Plaintiff challenging the scope of the administrative record. As indicated in the proposed
28 briefing schedule below, the parties would like the Court to resolve any issues relating to the

administrative record before proceeding to summary judgment briefing and resolution of the case on the merits.

I. Consent to Magistrate

The parties do not consent to have the case heard by a U.S. Magistrate Judge or to have the case referred for alternative dispute resolution.

J. Related Cases

The Wilderness Society v. U.S. Bureau of Land Management, Case No. 3:09-cv-08010-PGR (D. Ariz.) is a related case and is pending before this Court. There are no other related cases pending in federal, state, or municipal court.

K. Proposed Deadlines and Briefing Schedule

The parties agree that the case is likely to be resolved on summary judgment following Defendants' submission of the administrative record and resolution of any issues relating to the administrative record. Given that the administrative record in this case is expected to exceed 50,000 pages, the parties also agree, subject to the approval of the Court, that the Defendants may file the administrative record in electronic form on CD-ROMs or DVDs. As indicated above, the parties are currently engaged in settlement discussions, and if those settlement discussions are productive, the parties may seek an extension of the dates below. Assuming that settlement discussions are not productive, the parties' proposed schedule for all deadlines prior to summary judgment briefing is set forth below:

Defendants file administrative record in electronic form:	March 24, 2010
Plaintiff files any motion to amend pleadings:	March 24, 2010
Parties file any motions to join additional parties:	March 24, 2010
Plaintiff and Intervenor file any motion challenging the administrative record:	April 7, 2010
Defendants file response to any administrative record motions:	May 5, 2010
Plaintiff and Intervenor file replies in support of any administrative record motions:	May 19, 2010

1 If no motions are filed regarding the adequacy of the administrative record, then one
2 of the alternative schedules for summary judgment briefing set forth below shall apply. If,
3 however, a motion regarding the administrative record is filed, the briefing schedule chosen
4 by the Court will be stayed pending a Court order resolving the administrative record issues.
5 Within one week of the Court's order, the parties will jointly propose new dates for the
6 Court's approval, which will follow the briefing approach chosen by the Court in the absence
7 of a record motion.

8 With respect to summary judgment, the parties disagree as to whether there is a need
9 for Defendants' to file a cross motion in this case. Additionally, because the merits of all five
10 claims in this case will be resolved through summary judgment briefing, the parties agree,
11 subject to the approval of the Court, to an extension of the page limits required by L.R. Civ.
12 7.2(e). The parties disagree, however, on the appropriate lengths of the parties respective
13 briefs. Finally, the parties disagree as to whether Intervenor should be afforded the
14 opportunity to file a separate Rule 12(c) Motion prior to summary judgment briefing.
15 Accordingly, the separate proposals of Defendants, Plaintiff, and Intervenor regarding
16 briefing schedule and brief length are set forth below:

17 **Defendants' Proposal:** Defendants propose that each side be allowed one opening
18 brief and one reply brief and that the parties be given an equal number of briefing pages.
19 Pursuant to Fed. R. Civ. P. 56 and L.R. Civ. 56.1, Defendants are entitled to file a motion for
20 summary judgment on any legal theory they deem appropriate. Plaintiff's proposal would
21 prevent Defendants from filing a motion for summary judgment. Further, as is often done
22 in cases of this type, Defendants propose staggered summary judgment briefing, whereby
23 Plaintiff would file an initial summary judgment brief, Defendants would subsequently file
24 an opening brief, and each side would be entitled to one reply. Such a briefing schedule
25 reduces the burden on the Court because it results in the submission of six briefs (including
26 Intervenor's briefs) rather than nine and streamlines the presentation of arguments. Finally,
27 Defendants respectfully suggest that allowing Plaintiff more pages of briefing than
28

1 Defendants is fundamentally unfair and request that each side be afforded the same number
2 of pages.

3 With respect to Intervenor's suggestion that it brief certain issues as a motion for
4 judgment on the pleadings under Rule 12(c) prior to summary judgment briefing, Defendants
5 suggest that it would better serve judicial economy to file such a motion as a summary
6 judgment motion at the same time as Defendants file their summary judgment brief.
7 Accordingly, Defendants' proposed schedule and page limits are set forth below:

8 Plaintiff files motion for summary judgment (30 pages): April 28, 2010

9 Defendants and Intervenor file cross motions for summary
10 judgment and oppositions to Plaintiff's motion (30 pages): June 9, 2010

11 Plaintiff files replies in support of summary judgment
and oppositions to Defendants' and Intervenor's motions

12 (20 pages): July 14, 2010

13 Defendants and Intervenor file replies in support of summary
14 judgment (20 pages): August 4, 2010

15 **Plaintiff's Proposal:** Plaintiff believes that there is no need for Defendants or
16 Intervenor to file cross-motions for summary judgment in this case. The parties expect that
17 all of Plaintiff's claims will be resolved on summary judgment based on the administrative
18 record. Plaintiff bears the burden of showing that BLM's actions violated the APA and that
19 BLM's and FWS's actions violated the ESA and will move for summary judgment on all five
20 claims in its Complaint. Because this is an APA and ESA case based on a review of the
21 record and there are no cross-claims, any cross-motion by Defendants and/or Intervenor will
22 be limited to the exact same claims for which Plaintiff will move for summary judgment and
23 the exact same record. Therefore, Plaintiff believes that this case can most efficiently and
24 fairly be disposed of through a single round of summary judgment briefing, and propose the
25 following schedule:

26 Plaintiff's Motion for Summary Judgment
(40 pages): April 28, 2010

27 Defendants' and Intervenor's Oppositions to
28 Plaintiff's Motion for Summary Judgment
(40 pages): June 9, 2010

1 Plaintiff's Replies in Support of Summary Judgment
2 (20 pages):

July 14, 2010

3 To the extent this Court feels that Defendants and Intervenor are entitled to cross-
4 motions, however, Plaintiff asks that the Court set one dispositive motion deadline of April
5 28, 2010 for all parties, followed by one deadline for oppositions and one deadline for
6 replies, as is commonly done in civil litigation, and adhere to the same dates and page limits
7 set forth above. Although this is not Plaintiff's preferred approach because it results in nine
8 briefs rather than five, it is far more equitable than Defendants' or Intervenor's proposed
9 staggered schedules, which unfairly limit Plaintiffs' ability to respond to Defendants' and
10 Intervenor's arguments and allow Defendants and Intervenor to have the last word despite
11 the fact that Plaintiff bears the burden of proof.

12 With respect to Intervenor's desire to file a Rule 12(c) motion before summary
13 judgment motions are filed, Plaintiff joins Defendants in their suggestion that such a motion
14 should be brought concurrent with all other dispositive motions. This Court has not yet made
15 a determination regarding the scope of Intervenor's involvement in this case. Plaintiff
16 believes that this involvement should be limited to the remedy phase only, but to the extent
17 that this Court allows a broader scope of involvement by Intervenor, judicial economy would
18 be best served by not needlessly expanding this litigation to include repetitive dispositive
19 motions.

20 Because Plaintiff will move for summary judgment on five complex claims that
21 involve four different federal statutes and two separate Presidential Proclamations, Plaintiff
22 requests page extensions of 40 pages for Motions and Oppositions and 20 pages for Replies.

23 **Intervenor's Proposal:** Intervenor proposes a modified version of the schedule
24 proposed above by Defendants. Specifically, Intervenor believes that judicial economy will
25 be best served by allowing Intervenor to file a motion for partial judgment on the pleadings¹
26 prior to summary judgment briefing. If Intervenor's motion for partial judgment on the

27 ¹ Intervenor is not requesting an exception regarding the page limit put forth in LRCiv 7.2(e)
28 to the extent the Court permits Intervenor to file a motion for partial judgment on the
pleadings.

pleadings is completely successful, and is ruled on before the initial summary judgment briefing is due, not only will that ruling remove one issue from those that will be decided on summary judgment (thus saving the Court and the parties substantial work), it should allow Intervenor to exit the case without having to participate in the summary judgment phase, simplifying summary judgment proceedings for all involved.

Additionally, Intervenor proposes that, as to summary judgment briefing, to avoid duplication of argument (a result that will waste the time of both the parties and the Court), Intervenor's briefing deadlines be set two weeks behind Defendants, which should allow Intervenor to limit its briefing to matters supplemental to Defendants' briefing.²

Intervenor files motion for judgment on the pleadings: February 22, 2010

Plaintiff files opposition/Defendants file responsive briefing: March 15, 2010

Intervenor files reply in support of motion for judgment on the pleadings: March 22, 2010

Plaintiff files motion for summary judgment (30 pages): April 28, 2010

Defendants file cross motion for summary judgment and opposition to Plaintiff's motion (30 pages): June 9, 2010

Intervenor files cross motion for summary judgment and opposition to Plaintiff's motion (30 pages): June 23, 2010

Plaintiff files reply in support of summary judgment and oppositions to Defendants' and Intervenor's motions (20 pages): July 28, 2010

Defendants files reply in support of summary judgment (20 pages): August 18, 2010

Intervenor files reply in support of summary judgment (20 pages): September 1, 2010

L. Trial Date

As this case is governed by the APA and the ESA, the parties do not expect that there will be a trial.

M. Jury Trial

² Intervenor's proposed dates will all shift four weeks into the future if the Scheduling Conference in this matter is moved from February 8, 2010 to March 10, 2010.

1 The parties do not request a jury trial.

2 **N. Potential for Settlement**

3 The parties have initiated settlement discussions and those discussions are in their
4 initial stages.

5 **O. Proposed Dates for Class Certification.**

6 Not applicable.

7 **P. Unusual, Difficult or Complex Problems**

8 The parties do not believe that it is necessary to place this case on a complex track.

9 **Q. Other Matters**

10 As this Court is aware, this case and *The Wilderness Society v. U.S. Bureau of Land*
11 *Management*, Case No. 3:09-cv-08010-PGR (D. Ariz.), are both pending before this Court
12 and the Court has decided to set a case management conference in both of these cases for the
13 same date and time. The parties in both cases believe that it would be in the interest of
14 judicial economy to consolidate these matters into a single case with the parties filing
15 separate briefs so that briefing in both cases would proceed on the same schedule.

16 Another issue that should be addressed is whether Intervenor's participation in the
17 case will be limited to the remedial phase, as indicated in the Court's January 13, 2010 Order
18 (Docket No. 58). Intervenor intends to submit briefing on this issue prior to the Scheduling
19 Conference, but Plaintiff believes that the issue was adequately addressed during briefing of
20 the motion to intervene. One other issue to be addressed is whether Intervenor will be
21 permitted to conduct discovery. See January 13, 2010 Order at 9. At this time, Intervenor
22 only seeks to retain the right to perform discovery, as Plaintiff and Defendants have.

23 By agreement of the parties, Defendants respectfully submit this Joint Case
24 Management Report on behalf of all parties in the case.

25 Respectively submitted this 25th day of January, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2010, a copy of the foregoing Revised Joint Case Management Report was filed electronically. Notice of this filing will be sent via the Court's electronic case filing (ECF) system to all counsel of record, listed below:

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