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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; RON WENKER, Acting Director of U.S. Bureau of Land Management; JAMES KENNA, BLM Arizona State Director; KEN SALAZAR, Secretary of Interior, and U.S. FISH AND WILDLIFE SERVICE, Defendants, NATIONAL RIFLE ASSOCIATION, Defendant-Intervenor.	Case No. CV 09-8011-PGR **PLAINTIFF'S RESPONSE TO THE NATIONAL RIFLE ASSOCIATION'S BRIEF REGARDING THE SCOPE OF INTERVENTION** Scheduling Conf.: May 18, 2010 Time: 10:00 PM Court: Courtroom 601 Judge: Hon. Paul G Rosenblatt

INTRODUCTION

Plaintiff Center for Biological Diversity ("Center") files this brief in response to the "Brief Regarding the Scope of the National Rifle Association's Intervention" filed on April 28, 2010, by the National Rifle Association ("NRA").

Although the Court had indicated its intent to address the issue of the scope of the NRA's intervention at the upcoming Scheduling Conference, and no further briefing was ordered on this issue, the NRA has submitted a brief in anticipation of the conference. Plaintiff therefore submits this brief in response. For the following reasons, participation by the NRA should be limited to the remedy phase of this litigation.

ARGUMENT

A. NRA's "Brief" is an Improper Motion for Reconsideration and should be Denied

At the outset, the NRA's brief argues, in effect if not explicitly, for reconsideration of the Court's Order dated January 13, 2010, granting intervention as of right to the NRA under FRCP 24(a). Although the NRA sought to intervene under both FRCP 24(a) and FRCP 24(b), and the Court clearly granted intervention as of right under FRCP 24(a), the NRA now moves for the Court to amend its order and grant permissive intervention under FRCP 24(b). The NRA's thinly-veiled motion for reconsideration of this issue is not timely, as it has been filed well beyond the 14 days from the Order as required by Local Rule 7.2(g). It further violates Local Rule 7.2(g) as it largely repeats arguments previously made in the Motion to Intervene (including those related to the affirmative defenses of harmless error and that related to 50 C.F.R. Part 17.24(j)(2)(i)), and should therefore be denied.

B. The NRA's Intervention Should be Limited to the Remedy Phase

The NRA seeks to change the basis of its intervention from FRCP 24(a) to FRCP 24(b) so as to get out from under the general rule in the Ninth Circuit that the federal government is the only proper defendant in a NEPA compliance case, and therefore intervention in such cases be limited to the remedial phase. *See Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1114 (9th Cir. 2000).

The NRA cites to *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002), for support, arguing that the case presents a similar scenario to the NRA's. The NRA's reasoning is misplaced, however. The court in *Kootenai* allowed permissive intervention by environmental groups concerned that the federal defendants would not sufficiently defend a suit brought over a federal action (in this case, the Clinton-era "roadless rule" prohibiting road-building and other activities on certain portions of federal land). *Id*. at 1104. The procedural posture of the case was unusual: the action at issue was the "cessation of road development and repair in certain areas of our national forests,…undertaken for the primary purpose of conservation, and the resulting benefit of the environment." *Id*. at 1124. The plaintiffs sought to have the rule rescinded as a violation of NEPA (and thus have road-building recommence), while the intervenors sought to maintain the rule (and thus preserve the status quo and not build more roads). The court specifically cited to the "magnitude" of the case and the fact that the new administration was declining to fully defend the rule as bases for granting permissive intervention. *Id*. at 1111.

While it is true that the court in *Kootenai* supported full intervention under FRCP 24(b), the case is more properly viewed as an exception to the "general rule" limiting defendants in NEPA compliance actions to the

federal government, based on the its unusual procedural posture and the nature of the potential harm that would result if intervention were not granted. Ultimately, the *Kootenai* court was ruling on an intervention request by parties seeking to bring an appeal (that would otherwise not be brought) in defense of a federal action that acted to protect the environment. The government's failure to appeal, combined with a denial of intervention, would have resulted in an injunction being issued that would upset the status quo and greatly impact the environment by opening up vast tracks of federal land to road-building.

In this case, the status quo will not be disrupted by any ruling on the merits, nor will there be any impact on the environment if intervention is limited to the remedy phase. If Plaintiff is successful on its fourth and fifth claims for relief, the management plan regarding lead ammunition on federal land will be remanded back to the federal agencies for further consideration, but the status quo—that lead ammunition is allowed to be used—will not be changed. Plaintiffs are not seeking injunctive relief on current management practices for these claims. *See* First Amended Complaint (Doc 21), pp 34-36. Only after future affirmative actions by the federal agencies, after full public review and participation by interested parties, would any change in management occur.

The NRA's interests are more than adequately protected by being limited to the remedy phase, as the NRA will be allowed full participation in the only possible portion of this case that could affect its interests: the remote possibility that some sort of injunctive relief would be sought by Plaintiff (despite specific foreswearing of that remedy by Plaintiff) or that the Court would be somehow *sua sponte* issue injunctive relief. *See* Reply in Support of Motion for Leave to Intervene of National Rifle Association

(Doc 49) at 5-6.

The NRA also argues that judicial economy would be best served by allowing its full participation before the remedy phase. Rather than aiding judicial economy, though, this would clearly and unnecessarily extend the litigation and burden all parties and the Court with additional briefing. This is best demonstrated by the briefing schedule proposed by the NRA, which would add an entire round of briefing to resolve issues of liability that could and should be resolved concurrently with the other liability issues that will be raised in summary judgment. The NRA's arguments that an extra round of briefing would somehow result in *less* briefing overall is simply unavailing.

The NRA's proposed Motion for Partial Judgment on the Pleadings, attached as Exhibit A to the NRA's brief, does not lend any additional support for their argument concerning judicial economy. Despite the NRA's desire to make this case into a precedent-setting case regarding the special rule for the Arizona-based condor population (50 C.F.R. Part 17.84(j)(2)(i)), Plaintiff's claims regarding lead ammunition are still just claims against two federal agencies over their compliance with Section 7 of the ESA. Plaintiff's case will be limited to an administrative record that will be composed almost entirely of agency-created reports and plans. The federal agencies are the best, and the only appropriate, parties to defend their interpretation of and reliance on their own documents and the actions they took or did not take as a result.

Any debate that the NRA wants to have regarding the special rule, including the legislative history of the rule, any political promises made when the rule was enacted, and most importantly, how the rule should govern future agency decision-making, is best brought up in the context of a

subsequent administrative process before the relevant agencies. If that process does not result in decisions acceptable to the NRA, they are free to challenge them in court. At that point, the issues will have been well debated by the public and the agencies and the administrative record will fully reflect the body of knowledge on the subject—neither of which is the case in this litigation.

For similar reasons, the NRA's belief that it will be forced to file a declaratory relief action is unconvincing. Before securing a declaratory judgment regarding the interpretation of the special rule, an agency would have to take an action based on an interpretation of that rule that the NRA found unacceptable. An action for declaratory judgment before such agency action would not be ripe.

C. Whether this Case Presents an Issue of First Impression is Irrelevant

The NRA argues that because no case has cited the special rule for the experimental population of condors that this case is one of first impression. The NRA's theory rests on the proposition that "the use of lead ammunition is part and parcel of hunting…" (NRA Brief p. 4). This statement is not supported in the NRA's brief, and for good reason: such a statement directly contradicts the evidence that will be contained in the administrative record in this case. In order for the NRA to prove this claim—on which its entire theory rests—extra-record evidence will have to be introduced in this case. This is exactly why the NRA's involvement should be limited to the remedy phase only: the matters at issue in this case do not include the question of whether lead ammunition is part and parcel of hunting, or whether restricting the use of lead ammunition necessarily restricts hunting in general. This is partly because these matters have already been addressed in management

documents that will make up part of the administrative record (indicating consensus on the question within the agencies themselves), but more importantly, this is because this suit will not restrict the use of lead ammunition or hunting in the Arizona Strip in any way. Furthermore, the fact that the NRA has already prepared briefing on this topic (NRA Brief, p. 5) is not relevant either in determining whether this case will have precedent-setting impact or in determining the scope of the NRA's involvement.

CONCLUSION

For the above reasons, the NRA's Brief seeking reconsideration of this Court's January 13, 2010, Order granting intervention by the NRA should be denied. The NRA's participation should be limited to the remedy phase and conditioned upon limits that will serve judicial economy.

DATED: May 12, 2010

_*/s/ Adam Keats*___________

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2010, I electronically transmitted the document **PLAINTIFF'S RESPONSE TO THE NATIONAL RIFLE ASSOCIATION'S BRIEF REGARDING THE SCOPE OF INTERVENTION** to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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