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IN THE UNITED STATES DISTRICT COURT

FOR THE 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, and

THE NATIONAL RIFLE ASSOCIATION,

Defendant-Intervenor.

CASE NO. 3:09-cv-08011-PCT-PGR

REPLY IN SUPPORT OF BRIEF REGARDING THE SCOPE OF THE NATIONAL RIFLE ASSOCIATION'S INTERVENTION

Judge Paul G. Rosenblatt, presiding

Scheduling Conf. Date: May 18, 2010
Time: 10:00 a.m.
Courtroom No.: 601

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I. INTRODUCTION

Defendant-Intervenor the National Rifle Association of America ("NRA") hereby files this Reply (the "Reply") in support of NRA's Brief Regarding the Scope of the National Rifle Association's Intervention ("NRA's Brief") and in opposition to Plaintiff (Center for Biological Diversity, "CBD")'s Response to the National Rifle Association's Brief Regarding the Scope of Intervention (the "Response").

II. ARGUMENT

A. NRA's Brief Is Plainly Not an Attempt at a Motion for Reconsideration

The Response states "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) . . . ." (Response at 2, section "A"). The forgoing is correct per the Order of January 13, 2010. (Docket Document 58). CBD is incorrect, however, in arguing that "NRA now moves for the Court to Amend its order and grant permissive intervention under FRCP 24(b)[, and that NRA's Brief is a] thinly-veiled motion for reconsideration." (Response at 2, section "A").

First, contrary to what CBD states, NRA is not "moving for the Court to amend" anything. That statement misrepresents the terms of NRA's Brief, which is not a motion, nor does it purport itself to be. (*See* NRA's Brief).

Second, the court did not rule on the permissive intervention argument raised in NRA's Motion to Intervene (see Docket Document 58). Thus, the issue is still "open." *See Montesano v. Xerox Corp.*, 256 F.3d 86, 89 (2nd Cir. 2001) (remanding a particular claim "[b]ecause there [wa]s no sign in [the district court's] written opinion or elsewhere in the record that the district court addressed [a particular party's] retaliation claim, . . . constrain[ing the reviewing court] to infer that th[e] claim escaped adjudication"). So if the Court were inclined to grant permissive intervention to NRA, that would not require an amendment of the Order of January 13, 2010.

Third, because the Court has not ruled on the issue of permissive intervention, there is nothing to reconsider. Therefore, NRA's Brief cannot be construed as a motion for

reconsideration. A motion to reconsider would be a challenge to the Order of January 13, 2010. Obviously, NRA does not challenge the Court's ruling (i.e., the Order of January 13, 2010) that NRA has established a right to intervene in this case.

CBD was aware of NRA's intent to file a brief regarding the scope of NRA's intervention since at least January 25, 2010 (see Joint Case Management Report, Docket Document 61), but never filed any objection thereto. Accordingly, CBD's supposition that NRA's Brief is a "thinly-veiled motion for reconsideration" is unfounded and should be ignored.

B. *Koontenai* Is Not Only Applicable to Parties With Goals Similar to CBD

CBD admits "that the court in *Koontenai* supported full intervention under FRCP 24(b)" in a matter where the potential intervenors "were concerned that the federal defendants would not sufficiently defend a suit brought over a federal action." (Response at 3, section "B"). CBD *cannot dispute* that NRA is concerned that the federal defendants will not sufficiently defend against CBD's suit, which was, in fact, brought over a federal action. The potential intervenors in *Kootenai* were in a position very similar to NRA's position in the instant case. Yet CBD argues that *Kootenai* does not apply here. Specifically, CBD states "[u]ltimately, the *Koontenai* court was ruling on an intervention request by parties *seeking to bring an appeal* (that would not otherwise be brought) in defense of a federal action *that acted to protect the environment.*" (*Id.*) (italics added).

This statement shows just two distinctions between CBD's view of the situation in *Kootenai* and the instant matter, and seems to expose a position that NRA has lesser rights than an "environmental" group would.

First, the proposed intervenors in *Kootenai* sought to bring an appeal "in defense of a federal action." Here, NRA intends to bring affirmative defenses "in defense of a federal action." Though a distinction in form, the purpose of intervention in both scenarios was to defend a federal action, meaning *Kootenai* cannot be distinguished on this issue.

Second, the proposed intervenors in *Kootenai* acted "in defense of a federal action that acted to protect the environment." (*Id.*). NRA, on the other hand, is attempting to act "in defense of a federal action that acted to protect" hunters' rights under federal law. The distinction CBD is attempting to distinguish *Kootenai* on appears to be that, in CBD's view, NRA is not acting to protect the environment. As CBD's analysis of *Kootenai* is unfairly biased, NRA requests this Court disregard that analysis in its entirety.

Finally, CBD contends NRA is currently "under . . . the general rule in the Ninth Circuit that the federal government is the only proper defendant in a NEPA compliance case . . . ." (*Id.*) (citation omitted). Even assuming arguendo there is such a general rule for NEPA cases, NRA has not intervened on any NEPA claims. NRA intervened on CBD's Fourth and Fifth Claims for Relief, which are pled as Endangered Species Act claims. (First Amended Complaint, Docket Document 21, at 33-34, ¶¶ 97-100).[1] Thus, the supposed general rule is not applicable.[2]

C. Section "C" of the Response Is Unpersuasive and Confused

Section C of the Response is titled "Whether this Case Presents an Issue of First Impression Is Irrelevant." (Response at 6, section "C"). CBD fails to cite any authority for this proposition, and does not even address the case law cited by NRA that indicates the direct opposite of CBD's statement is true (i.e., *Yniguez v. Arizona*, 939 F.2d 727, 737 (9th Cir. 1991)). Failing to cite authority to rebut the authority cited by NRA is sufficient grounds in and of itself for this Court to disregard CBD's arguments in section "C" of the Response.

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[1] The Fifth Claim for Relief is also pled as an Administrative Procedure Act claim.

[2] CBD also argues in section B of the Response that NRA cannot "secure a declaratory relief judgment" unless an agency takes "action based on an interpretation of that rule that the NRA found unacceptable." (Response at 6, section "B"). As the federal defendants' failure to plead affirmative defenses based on 50 C.F.R. § 17.84(j)(2)(i) is an "action based on an interpretation of that rule that the NRA f[inds] unacceptable[,]" NRA *currently* has a ripe declaratory relief claim.

Additionally, section "C" states that "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 . . .[.]'" (*Id.*, citing NRA's Brief at 4, omission in Response). NRA admits it does not understand what CBD is attempting to argue here; the two sentences at issue are a non-sequitur. Reading the above-quoted language literally, CBD states that NRA has a theory "that this case is one of first impression" "because no case has cited the special rule for the experimental population of condors."

NRA does not know how to respond to this supposition other than to note that an issue is "one of first impression" in a district court if there are no "Supreme Court, circuit or district court decisions that have specifically addressed the issue before the court." *See In re 6783 E. Saoring Way Scottsdale, Az,* 109 F. Supp. 2d 1162, 1163 (D. Az. 2000).

Section "C" also argues that "extra-record evidence will have to be introduced in this case" to prove that "lead ammunition is part and parcel of hunting . . ." (Response at 6, citing NRA's Brief at 4, omission in Response). Again, what CBD is attempting to argue is just not clear. That is, lead ammunition is obviously "part and parcel" of hunting; CBD itself admits as much in its First Amended Complaint, where CBD states the following.

> Hunting is allowed in most of the Arizona Strip . . . . No restrictions are imposed on the use of lead ammunition by either BLM or AZDFG. Since Condors have been released in Arizona their leading cause of death has been lead poisoning . . . . [t]here is scientific consensus that hunter-shot lead ammunition is the primary, if not the sole, source of lead that is poisoning California condors . . . . Alternative non-lead ammunition is readily available in almost all calibers used by hunters . . . .

(First Amended Complaint at 19, ¶¶ 48-49, paragraph numbers omitted).

Though it is unclear what CBD is trying to argue in section "C," NRA contends the section is nothing more than a scare tactic to overstate the impact of NRA being allowed to intervene prior to the remedial phase of this action. Because section "C" is unsupported, unclear, and unconvincing, the Court should not consider it.

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III. CONCLUSION

Based on the foregoing, NRA requests the Court allow NRA to participate prior to the remedial phase in this action.

Dated: May 14, 2010

MICHEL & ASSOCIATES, P.C.

/s/ C.D. Michel
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2010, I electronically transmitted the document Reply in Support of Brief Regarding the Scope of the National Rifle Association's Intervention for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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