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National Rifle Association

10
11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE DISTRICT OF ARIZONA**
13 **PRESCOTT DIVISION**

14 CENTER FOR BIOLOGICAL
DIVERSITY

15 Plaintiff,

16 v.

17 U.S. BUREAU OF LAND
18 MANAGEMENT; RON WENKER,
Acting Director of U.S. Bureau of Land
19 Management; JAMES KENNA, BLM
Arizona State Director; KEN
20 SALAZAR, Secretary of Interior, and
U.S. FISH AND WILDLIFE SERVICE,

21 Defendants, and

22 NATIONAL RIFLE ASSOCIATION,
23 Proposed Defendant-Intervenor.

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

**NOTICE OF MOTION AND MOTION
FOR LEAVE TO INTERVENE,
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF,
DECLARATIONS IN SUPPORT
THEREOF**

ORAL ARGUMENT REQUESTED

24
25 TO THE COURT, THE PARTIES, AND ALL COUNSEL OF RECORD:

26 PLEASE TAKE NOTICE that on November 3, 2009, at 9:00 a.m., or as soon
27 thereafter as the matter may be heard, in Courtroom 601 in the Sandra Day O'Connor
28 Courthouse at 401 W. Washington Street, Phoenix, Arizona, before the Honorable Paul G.

1 Rosenblatt, Proposed Defendant-Intervenor National Rifle Association (“NRA”) will, and
2 hereby does, move this Court for an Order granting it leave to intervene as a defendant in
3 the above-titled action, under Federal Rules of Civil Procedure (“FRCP”) Rule 24(a), or
4 alternatively with permission of this Court under FRCP Rule 24(b).

5 Oral Argument is requested pursuant to LRCiv 7.2(f), as this case is one of broad
6 public importance wherein the parties currently joined are not poised or to likely to
7 advocate solely for the interests underlying NRA’s proposed intervention. Oral argument
8 will assist the Court in obtaining a better view of the issues relevant to NRA’s proposed
9 intervention, and will give the Court an opportunity to make inquiries as to any issues it
10 deems relevant but that were not briefed by the parties. Such opportunity is especially
11 appropriate here because NRA’s alternative request for permissive intervention hinges on
12 judicial discretion, which, by its discretionary nature, tends to raise a broader scope of
13 issues than can be fully addressed in concise briefing.

14 The Motion of NRA is and will be based on this Notice of Motion and Motion, the
15 Memorandum of Points and Authorities, Declaration(s) and exhibits attached therewith,
16 the [Proposed] Answer in Intervention to Plaintiff’s First Amended Complaint, all
17 pleadings and papers filed in this Action, and any and all arguments and evidence
18 presented by counsel at the requested hearing.

19 Respectfully submitted this 14th day of October, 2009.

20

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MICHEL & ASSOCIATES, P.C.

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/s/ David T. Hardy
David T. Hardy, Affiliate Counsel to Michel &
Associates, P.C., Attorneys for Proposed
Defendant-Intervenor National Rifle Association

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1 **MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE**

2 **I. INTRODUCTION**

3 NRA respectfully requests this Court grant NRA leave to intervene on behalf of
 4 Defendants U.S. Bureau of Land Management (“BLM”), U.S. Fish and Wildlife Service
 5 (“FWS”), and the related parties sued in their official capacities (collectively
 6 “Defendants”). As explained below, NRA satisfies the requirements for intervention as of
 7 right under FRCP Rule 24(a), as well as the requirements for permissive intervention
 8 under FRCP Rule 24(b). Accordingly, NRA seeks leave to intervene as to the factual and
 9 legal allegations implicating hunting (especially as to the Fourth and Fifth Claims for
 10 Relief) made in Plaintiff Center for Biological Diversity’s (“CBD”) First Amended
 11 Complaint (the “Complaint”).

12 **II. PROCEDURAL HISTORY**

13 Relevant to NRA’s proposed intervention, the Complaint seeks to have BLM’s
 14 implementation of certain Resource Management Plans and FWS’ issuance of a related
 15 Biological Opinion declared to be in violation of the Endangered Species Act (“ESA”).
 16 (*See* Complaint, Docket No. 21, at pp. 35-36, ¶¶ (4)-(5)). CBD seeks such declaratory
 17 relief based on the aforementioned agencies’ allegedly insufficient consideration of how
 18 lead ammunition (i.e., ammunition incorporating a lead projectile) use impacts California
 19 condors in the Arizona Strip District (“ASD”). (*See id.* at pp. 33-34, ¶¶ 97-100).¹

20 The alleged ESA violations arise from the supposition that California condors in
 21 Arizona, part of an experimental and nonessential population (see 16 U.S.C. Section
 22

23 ¹ The ASD comprises vast amounts of BLM and National Parks Service-managed
 24 land in Arizona, including Grand Canyon-Parashant National Monument and Vermillion
 25 Cliffs National Monument. *See generally* <http://www.blm.gov/az/otherNLCS-map.htm>,
 26 http://www.blm.gov/az/st/en/fo/grand_canyon-parashant.html,
 27 http://www.blm.gov/az/en/fo/arizona_strip_field.html, and
 28 <http://www.blm.gov/pgdata/etc/medialib/blm/az/images/parashant.Par.15818.File.dat/parashantmap.pdf>. As a point of clarification, the Arizona Strip includes all of the ASD except Grand Canyon-Parashant National Monument and the land in the ASD that is directly south of that monument. *See id.*

1 1539(j) and 50 C.F.R. Part 17.84(j)), are scavenging hunter-shot game, and as a result are
 2 being poisoned by lead shot or bullets present in the carrion. (*See* Complaint at p. 21, ¶
 3 49). NRA contends CBD’s supposition is based on faulty scientific analyses. NRA
 4 further contends this exact supposition was *raised, addressed, and dismissed* over ten
 5 years ago when California condors were introduced to Arizona. *See generally* Fish and
 6 Wildlife Service, 61 Fed. Reg. 54,044 (Oct. 16, 1996).

7 NRA’s proposed intervention is based largely on the fact that the relief CBD seeks
 8 conflicts with federal law. If the relief sought is granted, it will significantly and
 9 unnecessarily burden the longstanding tradition of hunting in northwestern Arizona. NRA
 10 has both a current interest in and a decades long record of opposing unjustified
 11 impingements on hunting in both nationally and specifically in Arizona. (*See* Declaration
 12 of Chris Cox at p. 1, ¶ 4); *see also infra* note 5 and the cases cited therein.

13 **III. FACTUAL BACKGROUND**

14 **A. General Background Regarding NRA and Its Advocacy Activities**

15 NRA is a tax-exempt corporation under 26 U.S.C. Section 501(c)(4), incorporated
 16 in New York in 1871. (*Id.* at ¶ 2). NRA’s principal offices are in Fairfax, Virginia.
 17 NRA’s membership includes approximately four million individuals, with nearly 100,000
 18 members in Arizona alone. (*Id.*). One of NRA’s primary purposes is “to promote and
 19 defend hunting as a shooting sport and as a viable and necessary method of fostering the
 20 propagation, growth and conservation, and wise use of our renewable wildlife resources.”
 21 (*Id.* at ¶ 3). NRA has represented the interests of hunters in Arizona and other states by
 22 sponsoring pro-hunting legislation and referenda, as well as challenging unreasonable
 23 anti-hunting laws and regulations. (*See id.* at pp. 1-2, ¶¶ 4-8).

24 NRA is especially knowledgeable regarding one subject implicitly raised by CBD’s
 25 lawsuit: the deficiencies in the scientific analyses supporting the theory that California
 26 condors are being poisoned as a result of ingesting hunter-shot lead. As recently as
 27 August 6, 2009, scientific experts, researchers, and attorneys working with NRA
 28 submitted evidence to and testified before the California Fish and Game Commission

1 (“Commission”) rebuffing the scientific explanation supposedly demonstrating a link
 2 between lead ammunition used in hunting and California condor mortalities. (*See*
 3 Declaration of C.D. Michel at p. 2, ¶ 3).

4 Based in large part on NRA’s efforts, the Commission voted against adopting
 5 regulations expanding current bans on lead ammunition use in California, reasoning the
 6 reports submitted by the experts and attorneys working with NRA demonstrated the
 7 scientific analysis supposedly showing a link between lead ammunition and condor
 8 mortalities was faulty. (*Id.* at p. 3, ¶ 7).

9 **B. Hunting in the ASD**

10 From 2003 to 2008, at least 1,245 permits were issued to hunt big game in the
 11 Arizona Strip, resulting in 727 big game animals being obtained.² Hunting permits are
 12 issued in Arizona to hunters who participate in a draw.³ There were at least 39,940 draw
 13 applications submitted between 2003 and 2008 by individuals who desired but did not
 14 receive permits. *See* note three herein. Many of the people who seek these tags, as well as
 15 the guides who assist them in filling the tags, are NRA members. (*See* Declarations of Dr.
 16 Todd Geiler at p. 1, ¶¶ 2-3; Don Martin at p. 1, ¶¶ 2-3; and David Nystrom at p. 1, ¶¶ 2-3).

17 Lead ammunition is traditionally used for hunting because, as to that particular use,
 18 hunters generally consider it to be abundant, economical, and ballistically proven when
 19 compared to non-lead ammunition. (*See* Geiler Decl. at pp. 1-2, ¶ 5; Martin Decl. at pp. 1,
 20 ¶ 5). Moreover, it is, at best, extremely difficult to procure non-lead ammunition (i.e.,
 21 ammunition that uses a non-lead projectile) in Arizona in calibers for hunting small game
 22

23 ² *See* http://www.azgfd.gov/pdfs/h_f/hunting/Hunt_AZ_2009.pdf (listing statistics
 24 for permit applicants, permits issued, and number of animals obtained (for big and small
 25 game) between 2003 to 2007 in Arizona Strip (Units 13-A and 13-B); *accord*
 26 http://www.azgfd.gov/pdfs/h_f/hunting/Hunt_AZ_2009.pdf (as to the years 2004 through
 2008). Since 2003, thousands of small game animals were obtained from the Arizona
 Strip and surrounding areas. *Id.*

27 ³ *See* http://www.azgfd.gov/h_f/hunting.shtml (“The draw is a lottery-style process
 28 for allocating the limited number of Arizona big game and other limited species hunt
 permit-tags to applicants.”).

1 and turkey, both of which are often hunted the Arizona Strip. (*See* Declaration of Eric
2 Soderblom at p. 1, ¶ 5-7); *see also supra* website pages cited at note 2.

3 IV. ARGUMENT

4 A. **NRA Is Entitled to Intervene as a Matter of Right**

5 NRA is entitled to intervene as a matter of right. FRCP Rule 24(a) provides that:

6 [u]pon timely application anyone shall be permitted to intervene in an action
7 . . . when the applicant claims an interest relating to the property or
8 transaction which is the subject of the action and the applicant is so situated
9 that the disposition of the action may as a practical matter impair or impede
the applicant's ability to protect that interest, unless the applicant's interest
is adequately represented by existing parties.

10 The Ninth Circuit Court of Appeals "construe[s] Rule 24(a) liberally in favor of
11 potential intervenors." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th
12 Cir. 2006); *see Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995)
13 (Rule 24 "is construed broadly in favor of...applicants"). The Ninth Circuit has held:

14 [a] liberal policy in favor of intervention serves both efficient resolution of
15 issues and broadened access to the courts. By allowing parties with a
16 *practical* interest in the outcome of a particular case to intervene, [courts]
17 often prevent or simplify future litigation involving related issues; at the
same time, [they] allow an additional interested party to express its views
before the court.

18 *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002).

19 The Ninth Circuit has established a four prong test to determine whether
20 intervention as a matter of right is warranted:

21 (1) the motion must be timely; (2) the applicant must claim a "significantly
22 protectable" interest relating to the property or transaction which is the
23 subject of the action; (3) the applicant must be so situated that the
24 disposition of the action may as a practical matter impair or impede its
ability to protect that interest; and (4) the applicant's interest must be
inadequately represented by the parties to the action.

25 *California ex rel. Lockyer*, 450 F.3d at 440 (quoting *Sierra Club v. EPA*, 995 F.2d 1478,
26 1481 (9th Cir. 1993)). Because NRA meets the requirements of each prong of the test,
27 intervention should be granted as a matter of right.

1 **1. NRA’s Motion to Intervene Is Timely**

2 “Courts weigh three factors in determining whether a motion to intervene is timely:
3 (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice
4 to other parties; and (3) the reason for and length of the delay.” *United States v. Alisal*
5 *Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004).

6 **a. The Proceedings Have Not Progressed Substantially**

7 The parties have yet to appear at a Case Management Conference, and this Court
8 has not yet issued any substantive orders or rulings. These facts weigh in favor of a
9 finding this Motion is timely. *See* 7C Charles Allen Wright, Arthur Miller, & Mary R.
10 Kane, *Fed. Practice & Procedure* § 1916 & n.13 (2d ed. 1986) (noting that an application
11 for intervention made before parties have joined issue in the pleadings is “clearly timely”).
12 Furthermore, the administrative record, which is at the center of this dispute, has not yet
13 been filed with the Court.

14 **b. NRA’s Intervention Would Not Prejudice the Parties**

15 Because this litigation has not even reached a hearing to set trial dates or discovery
16 deadlines, intervention will not prejudice any party. *See Idaho Farm Bureau Fed’n*, 58
17 F.3d at 1397 (holding a district court did not abuse its discretion in concluding an
18 intervenor’s application was timely because the application “was filed at a very early
19 stage, before any hearings or rulings on substantive matters”).

20 **c. There Was No Unreasonable Delay in Bringing this Motion**

21 CBD amended its Complaint to add the Fourth and Fifth Claims for Relief on
22 March 25, 2009. (Complaint). As NRA did not receive notice of CBD’s intent to file (or
23 amend) suit, NRA did not have notice of the Action until after it was amended. (*See*
24 Michel Decl. at p. 4, ¶ 8). Within months of the Action being amended, NRA: became
25 aware of the Action, evaluated the various complex issues it raises, internally determined
26 that it would file this Motion, and had counsel prepare this Motion. (*Id.*). In light of the
27 highly technical area of law at issue, and further considering NRA was not directly
28 apprised of the filing or amending of the Complaint, there was no delay sufficient to weigh

1 against intervention. Thus, as to all three factors at issue, NRA's Motion is timely.

2 **2. NRA Has a Significantly Protectable Interest in This Litigation**

3 "An applicant has a 'significantly protectable interest' in an action if (1) it asserts
4 an interest that is protected under some law, and (2) there is a 'relationship' between its
5 legally protected interest and the plaintiff's claims." *Donnelly v. Glickman*, 159 F.3d 405,
6 409 (9th Cir. 1998) (quoting *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th
7 Cir. 1996)). NRA satisfies these requirements.

8 **a. NRA Asserts an Interest in Hunting that Is Protected by Law**

9 A proposed intervenor need not establish any "specific legal or equitable interest"
10 to satisfy Rule 24(a). *City of Los Angeles*, 288 F.3d at 398 (citations omitted). Instead,
11 courts "make a practical, threshold inquiry" into an applicant's interest, bearing in mind
12 that the interest test "is primarily a practical guide to disposing of lawsuits by involving as
13 many apparently concerned persons as is compatible with efficiency and due process." *Id.*
14 (citations omitted).

15 NRA's nationwide advocacy for hunters' rights establishes its "interest" in this
16 litigation. As indicated at Section III(A) herein, one of NRA's key functions is to preserve
17 the tradition of hunting, protecting it from unreasonable and unnecessary restrictions. (*See*
18 *Cox Decl.* at p. 1, ¶ 4). Hunting permits for the Arizona Strip are sought by literally
19 thousands of hunters yearly. (*See supra* Section III(B)). Based on the large number of
20 hunters applying for permits to hunt in the Arizona Strip, many of whom are NRA
21 members, it is clear hunting in the ASD is immensely popular and a legitimate⁴ interest
22 NRA has the right to protect. (*See Geiler Decl.* at p. 1, ¶¶ 2-3; *Nystrom Decl.* at p. 1, ¶¶
23

24 _____
25 ⁴ There is no doubt hunting is recognized as an important interest in Arizona.
26 Arizona offers 18 different types of hunting licenses. Arizona Revised Statutes ["A.R.S."] §17-333(A)(1)-(18). Furthermore, it is illegal in Arizona to "intentionally interfere with,
27 prevent or disrupt the lawful taking of wildlife." A.R.S. §17-316. Also, "it is a class 3
28 misdemeanor for a person to enter or remain on a designated hunting area on any public or
private lands ... with the intent to interfere with, prevent or disrupt the lawful taking of
wildlife." *Id.*

1 2-3). NRA members and other hunters who hold current permits may have a vested right
2 to hunt in the ASD. NRA intends to protect such rights.

3 Furthermore, NRA has a long history of advocacy related to protecting and
4 preserving the rights of hunters to continue to enjoy areas that have traditionally been open
5 to hunting. (*See Cox Decl.* at pp. 1-2, ¶¶ 5, 7). NRA has an established record of
6 advocating against restrictions on hunting based on scientifically unsupported claims of
7 alleged environmental harm. (*See id.* at ¶¶ 5, 8). In fact, during the last thirty-five years,
8 NRA has intervened in multiple lawsuits potentially affecting the interests of hunters.⁵

9 There will likely be a direct impact on hunting (e.g., an injunction banning hunting
10 in the ASD with lead ammunition) if no party rebuts CBD's unfounded claim that the
11 "[e]vidence is overwhelming and there is scientific consensus that hunter-shot lead is the
12 primary, if not the sole, source of lead that is poisoning California condors." (Complaint
13 at p. 21, ¶ 49). Because it appears that one goal of CBD's lawsuit is to eliminate the use
14 of lead ammunition in the ASD (e.g., a restriction on hunting), and because NRA has an
15 interest in preventing such restrictions (as part of NRA's interest in protecting hunting),
16 NRA possesses the type of interest that is plainly sufficient under Rule 24(a).

17 **b. There Is a Relationship Between NRA's Legally Protected**
18 **Interest and CBD's ESA-Based Claims**

19 To satisfy the second element of the "significant protectable interest" test, an
20 applicant must show "a 'relationship' between its legally protected interest and the
21 plaintiff's claims." *Donnelly*, 159 F.3d at 409. "The relationship requirement is met if the
22 resolution of the plaintiff's claims actually will affect the applicant." *City of Los Angeles*,
23 288 F.3d at 398 (quotation marks and citation omitted). This rule is not to be applied

24 ⁵ *See Fund for Animals v. Frizzell*, 530 F.2d 982 (D.C. Cir. 1975) (regarding the
25 setting of certain hunting seasons by FWS); *Defenders of Wildlife v. Hall*, 565 F. Supp 2d
26 1160 (D. Mt. 2008) (regarding the removal of the northern Rocky Mountain gray wolf
27 from protected status under ESA); *Wilderness Watch v. U.S. Fish & Wildlife Serv.*, 07-
28 1185-PHX-MHM, 2008 U.S. Dist. LEXIS 70548 (D. Az. Sept. 8, 2008) (regarding certain
agency actions related to the creation of watering tanks to provide supplemental water to
wildlife). For the avoidance of doubt, the three cases cited above are not cited as
authoritative, but rather as factual evidence that NRA intervened each of the listed actions.

1 rigidly: “a party has a sufficient interest for intervention purposes if it will suffer a
2 practical impairment of its interests as a result of the pending litigation.” *California ex*
3 *rel. Lockyer*, 450 F.3d at 441.

4 CBD’s claims regarding the California condor can be summarized succinctly: CBD
5 contends BLM and FWS took certain administrative actions without properly and fully
6 considering the alleged link between the use of lead ammunition for hunting in the ASD
7 and certain California condor mortalities. (*See Generally* Complaint). Therefore, this
8 Action, whether resolved by court order or settlement, has a reasonable chance of resulting
9 in a lead ammunition ban or similar use restriction regarding hunting in the ASD.

10 It is not unreasonable to presume that if the Action is successful as to CBD’s
11 condor-related claims, hunting will be at least restricted (e.g., a ban of lead ammunition),
12 if not fully curtailed, in the ASD. The potential for such a result is not based in wild
13 speculation: a temporary hunting ban was effectively created (with an exception for
14 certain “steel shot zones”) by an injunctive relief order issued in *Nat’l Wildlife Federation*
15 *v. Hodel*, Case No. S-85-0837 EJM, 1985 U.S. Dist. LEXIS 20891 (E.D. Cal. Aug. 26,
16 1985), an ESA case somewhat similar to this action.⁶ Because a ban or similar result
17 would “practically impair” the interests in hunting asserted by NRA, there is a direct
18 relationship between NRA’s interest and CBD’s claims.

19 **3. The Relief CBD Seeks May Impair NRA’s Interest in the Protection of**
20 **the Established Tradition of Hunting in the Arizona Strip**

21 Under the third prong of the Rule 24(a) intervention inquiry, a party must
22 demonstrate the litigation “may as a practical matter impair or impede” its ability to
23 protect its interests. Fed. R. Civ. P 24(a)(2); *see Calif. ex rel. Lockyer*, 450 F.3d at 440.

24 ⁶ In *Hodel*, an environmental group alleged FWS violated ESA and other statutes
25 when, in the course of taking certain agency actions related to the regulation of hunting,
26 FWS failed to consider the effect of hunters’ lead ammunition use on bald eagles. *Id.* at
27 *17-18. *Hodel* is not being cited as persuasive or mandatory authority. Rather, it is raised
28 as evidence of the fact that the court in *Hodel* issued an order, based in part on FWS’
noncompliance with ESA, that *prohibited* FWS “authorizing, purporting to authorize or
allowing any and all hunting of migratory birds for the 1985-1986 hunting season in the
disputed areas” unless mandatory lead ammunition bans were put into place. *Id.*

1 When analyzing this issue, courts are guided by the Advisory Committee Notes for the
 2 1966 Amendments to Rule 24(a), which explain: “[i]f an absentee would be substantially
 3 affected in a practical sense by the determination made in an action, he should, as a
 4 general rule, be entitled to intervene.” *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d
 5 810, 822 (9th Cir. 2001) (relying on abovementioned Advisory Committee Notes).

6 Here, CBD attempts to challenge BLM’s adoption of particular Resource
 7 Management Plans and FWS’ issuance of a Biological Opinion. CBD seeks declaratory
 8 relief holding the aforementioned agency actions violated ESA by failing to consider the
 9 contention that hunters’ use of lead ammunition can put California condors in jeopardy.
 10 (See Complaint at pp. 2-3, ¶¶ 3-4; pp. 35-36, ¶¶ 4-5). Further, CBD seeks judicial review
 11 under 16 U.S.C. Section 1540(g), which authorizes the injunction of an activity, even if
 12 such activity is conducted by the Federal Government. (Complaint at p. 33, ¶ 97);⁷ see 16
 13 U.S.C. Section 1540(g)(1)(a). Thus, it is plainly possible that this Court could issue an
 14 order restricting or banning hunting similar to what occurred in *Hodel*.

15 If CBD obtains injunctive relief that effectively enjoins or limits the use of lead
 16 ammunition for hunting in the ASD, or if CBD obtains a settlement wherein FWS/BLM
 17 agree to some level of restriction on lead ammunition use, it will substantially affect the
 18 interests of NRA members and other hunters who enjoy hunting in the ASD. Such an
 19 injunction or settlement would deprive ASD hunters of the ammunition they consider to be
 20 abundant, economical, and ballistically proven. (See Geiler Decl. at p. 1, ¶ 5; Martin Decl.
 21 at pp. 1-2, ¶ 5). And to the extent non-lead ammunition is not generally available in the
 22 calibers used for hunting small game and turkey (both of which are popular game in the
 23 ASD, see Section III(B) herein), a judicially imposed or settlement-based lead ammunition
 24 ban would preclude the hunting of such animals in the ASD by hunters who cannot afford
 25 or locate non-lead ammunition.

26 There is a strong possibility NRA’s attempts to protect an interest in hunting in the

27
 28 ⁷ Injunctive relief could also be granted pursuant to CBD’s prayer for “such other
 and further relief as the court [sic] deems just and proper.” (*Id.* at p. 36, ¶ 10).

1 ASD will be impaired and impeded by the resolution (be it by judicial determination or
2 settlement) of this Action. Thus, NRA meets the requirements of the third prong.

3 **4. NRA's Interests Are Not Adequately Represented by Defendants**

4 Rule 24(a)'s final prong requires an applicant for intervention as a matter of right
5 "must be inadequately represented by the parties to the action." *California ex rel. Lockyer*,
6 450 F.3d at 440. This requirement "is satisfied if the applicant shows that representation of
7 his interest 'may be' inadequate; and the burden of making that showing should be treated
8 as minimal." *Trbovich v. UMW*, 404 U.S. 528, 538 n.10 (1972) (citation omitted); *see*
9 *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995)
10 (citing *Trbovich*).

11 **a. No Presumption or Assumption of Adequacy Arises Herein**

12 There are certain scenarios wherein a presumption or assumption of adequacy of
13 representation may arise: 1) a presumption of adequacy arises when "an applicant for
14 intervention and an existing party have the same ultimate objective[,]" and 2) an
15 assumption of adequacy may arise when the proposed intervenor and a governmental
16 entity are "on the same side." *Id.* (citation omitted).

17 The presumption does not arise herein because NRA and Defendants have different
18 objectives. NRA's main objective in intervening is obtaining a ruling that the alleged
19 failure to consider the potential impact of lead ammunition use on condors is irrelevant or
20 harmless error because, among other reasons, that potential impact was expressly
21 considered and accepted as condition of the introduction of condors into Arizona. (*See*
22 [Proposed] Answer at p. 18, ¶ 16); 61 Fed. Reg. at 54,050-55. As Defendants' have not
23 raised this issue, and further considering that Defendants' likely objective herein is to have
24 this Action voluntarily terminated or adjudicated (on any grounds) in Defendants' favor, it
25 appears Defendants and NRA do not share the same ultimate objective, and this
26 presumption does not arise.

27 Though an assumption may arise when, as here, a government entity is "on the
28 same side" as a proposed intervenor, that assumption *does not* arise when that entity is

1 “required to represent a broader view than the more narrow, parochial interests” of a
 2 proposed intervenor. *Forest Conservation Council*, 66 F.3d at 1499.⁸ Defendants are
 3 charged with representing the general public, which includes a broad spectrum of land
 4 users, including non-hunters, some of whom may advocate restricting or eliminating the
 5 use of lead ammunition in the ASD. NRA, in contrast, represents a narrower and more
 6 focused interest herein: maintaining the status quo for hunting in the ASD. Accordingly,
 7 this assumption does not arise.

8 **b. All Relevant Factors Indicate NRA’s Interest Is Not Represented
 by Defendants**

9 To determine whether an applicant’s interest is adequately represented by
 10 the existing parties, courts in the Ninth Circuit consider:

11 (1) whether the interest of a present party is such that it will undoubtedly
 12 make all of a proposed intervenor’s arguments; (2) whether the present party
 13 is capable and willing to make such arguments; and (3) whether a proposed
 intervenor would offer any necessary elements to the proceedings that other
 parties would neglect.

14 *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). “The most important factor in
 15 determining the adequacy of representation is how the interest [of the proposed intervenor]
 16 compares with the interests of existing parties.” *Id.* (citation omitted).⁹

17 **i. The Interest of Defendants Is Not Such That They Will
 Undoubtedly Make All of NRA’s Arguments**

18 NRA is inadequately represented in this Action unless existing parties “*will*
 19 *undoubtedly make all*” NRA’s arguments. *Arakaki*, 324 F.3d at 1086 (italics added).
 20 NRA intends to argue, among other things, that at the time of the relevant agency actions,
 21 the best scientific evidence available *did not* establish a nexus between California condor

23 ⁸ See also *Johnson v. S.F. Unified Sch. Dist.*, 500 F.2d 349, 354 (9th Cir. 1974)
 24 (determining that school district did not adequately represent the particular views of
 25 parents of children of Chinese ancestry when, inter alia, district was charged with
 26 representing all parents in the school district); cf. *Prete v. Bradbury*, 438 F.3d 949, 956
 27 (9th Cir. 2006) (noting that presumption of adequacy of representation is overcome when
 applicant for intervention demonstrates it “might bring a perspective materially different
 from that of the present parties” (citing *Sagebrush Rebellion*, 713 F.2d at 528)).

28 ⁹ Though this comparison is not one of the three enumerated factors, it appears
 to be a restatement of the first factor.

1 illness and hunters' use of lead ammunition in the ASD. If necessary, NRA is prepared to
2 disprove CBD's assertion that "the evidence is overwhelming and there is scientific
3 consensus that hunter-shot lead ammunition is the primary, if not the sole, source of lead
4 that is poisoning California condors." (Complaint at p. 21, ¶ 49).

5 In contrast, Defendants likely will not challenge CBD's proffered evidence
6 and basic underlying theory that hunter-shot lead projectiles pose a particular threat to
7 condors. FWS has apparently accepted as truth that certain condors have died from lead
8 poisoning resulting from the ingestion of lead present in hunter-shot carrion. *See* 61 Fed.
9 Reg. at 54,055. Indeed, prior to the introduction of California condors into Arizona in
10 1996, FWS stated it *expected* some of the introduced condors would die as a result of
11 ingesting lead present in hunter-shot carrion. *Id.* FWS also stated, however, that the loss
12 "would presumably be more than compensated by natural and captive reproduction." *Id.*

13 Furthermore, Defendants apparently agree with CBD's assertion that lead
14 poisoning has been the leading cause of death for condors released in Arizona.¹⁰ NRA,
15 however, is currently in the process of obtaining and reviewing *all* California condor
16 necropsies and the relevant administrative records, and thus far has found evidence that
17 suggests, in fact, that lead poisoning *may not* be the leading cause of death of condors
18 released in Arizona. (*See* Michel Decl. at p. 3, ¶¶ 5-6). Accordingly, NRA plans to argue
19 that the administrative record and the relevant scientific data do not support CBD's
20 assertion regarding the prevalence of lead-related condor mortalities, an assertion that will
21 likely be at the heart of many of CBD's arguments throughout this litigation.

22 Based on Defendants taking the position that lead poisoning is the leading cause of
23 death in Arizona-released condors, and further based on Defendants' apparent adoption of
24 the contention that there is a relevant link between lead ammunition use and condor
25

26 ¹⁰ (*See* Defendants' Answer, Docket No. 31, p. 8, ¶ 49, wherein Defendants admit
27 Plaintiff's allegations that: "[s]ince condors have been released in Arizona their leading
28 cause of death has been lead poisoning, with at least 12 to 14 condors dying of lead
poisoning in Arizona").

1 mortality, it is doubtful Defendants will make NRA's arguments that run contrary thereto.

2 **ii. Defendants' interests are not such that they are "capable**
and willing" to make all NRA's arguments

3 When evaluating whether a present party to litigation will represent the interests of
 4 a proposed intervenor, a court must determine if the present party is capable and willing to
 5 make the same arguments as the proposed intervenor. *Arakaki*, 324 F.3d at 1086. Because
 6 Defendants' responsibilities are to a broad class of divergent interests (see Section
 7 IV(A)(4)(a) herein), it is unlikely they are "capable and willing" to make the narrow and
 8 insular arguments NRA will make to maintain the status quo for hunting in the ASD.
 9 Thus, this factor weighs in favor of finding Defendants' representation will be deficient as
 10 to NRA's interest.

11 **iii. NRA will offer necessary elements to the proceedings that**
Defendants may neglect

12 NRA has expertise in the subject matter of this lawsuit as to the California condor.
 13 The experts, consultants, and attorneys working with NRA have compiled and analyzed
 14 relevant scientific data and related material to effectively rebut the scientific deficiencies
 15 that underlay the contested conclusion that condors are dying from the ingestion of hunter-
 16 shot lead. (*See* Michel Decl. at p. 3, ¶¶ 5-7). NRA is unaware of Defendants having this
 17 particular expertise. Thus, NRA contends Defendants may not be able to defend against
 18 CBD's hunting-related allegations as comprehensively and zealously as could NRA.

19 In summary, NRA's interests, defenses, and background are not in accord with
 20 Defendants'. Because it is clear Defendants will likely not represent NRA's interests, this
 21 prong, like all of the other three prongs regarding intervention as of right, has been met.
 22 Therefore, NRA meets the requirements for intervention as of right, and requests the Court
 23 grant this Motion.

24 **B. NRA MEETS REQUIREMENTS FOR PERMISSIVE INTERVENTION**
UNDER RULE 24(b)

25 If this Court finds NRA cannot intervene in this case as a matter of right, NRA
 26 requests that the Court grant it permissive intervention under Rule 24(b). That rule states:

27 Upon timely application anyone may be permitted to intervene in an action .
 28 . . . when an applicant's claim or defense and the main action have a question
 of law or fact in common. . . . In exercising its discretion the court shall

1 consider whether the intervention will unduly delay or prejudice the
2 adjudication of the rights of the original parties.

3 FRCP 24(b). Like intervention of right, permissive intervention is to be granted
4 liberally. *See* 7C Wright, Miller, & Kane, § 1904.

5 NRA meets all of the prerequisites for permissive intervention. As expressed
6 throughout this Memorandum, NRA seeks to protect hunting as it exists today in the ASD.
7 NRA's defenses arise directly in response to the allegations in CBD's Complaint. As a
8 result of that fact, NRA's defenses implicitly share substantial questions of law and fact
9 with the issues raised by the Action. And as discussed at Section IV(A)(1) herein, this
10 Motion is timely and will not prejudice the rights of the existing parties.

11 Moreover, by allowing NRA to intervene, the Court will have a single party that
12 will advocate for the rights of tens of thousands of hunters that would otherwise not have
13 their interests represented in this Action. That is, because of the potential impact on
14 hunters and the complexity of the issues involved, there are sufficient grounds upon which
15 NRA should be allowed to intervene. *See The Humane Society of the U.S. v. Clark*, 109
16 F.R.D. 518, 521 (D.D.C. 1985). In *Clark*, a hunting advocacy organization (WLFA) was
17 granted permission to intervene in an action wherein the plaintiff filed suit against federal
18 agencies for alleged violations of various federal statutes in connection with the
19 management of National Wildlife Refuges. *Id.* at 519. In allowing WLFA to intervene,
20 the court reasoned that including WLFA to directly represent the interests of hunters in a
21 matter of such scope and complexity was appropriate. *Id.* at 521

22 Because NRA's interests are not represented by existing parties, its participation
23 will contribute to an equitable resolution of this case and "contribute to a full development
24 of the underlying issues in the suit." *Or. Env't'l Council v. Or. Dep't of Env't'l Quality*,
25 775 F. Supp. 353, 359 (D. Or. 1991). Accordingly, even if this Court denies NRA
26 intervention as a matter of right, there is ample basis for the Court to permit NRA's
27 intervention in this Action. *See Calif. ex rel. State Lands Comm'n v. United States*, 805
28 F.2d 857, 860, 865-66 (9th Cir. 1986) (upholding grant of permissive intervention to

1 conservation groups allowing intervenors to join United States in defending a quiet title
2 lawsuit brought by the State of California).

3 **V. CONCLUSION**

4 For the foregoing reasons, NRA satisfies the requirements for intervention as of
5 right as well as permissive intervention. NRA's Motion is timely and supports the
6 interests that NRA and its members have in maintaining the status quo for hunting in the
7 ASD. As Defendants' goal is likely to defeat CBD's claims *regardless* of the grounds
8 upon which such defeat occurs (and not to address the impact those claims may have on
9 hunters in the ASD), and because Defendants are bound to consider multiple competing
10 interests (whereas NRA has but one interest to protect), NRA's presence in this Action is
11 appropriate.

12 In light of the foregoing, NRA respectfully requests this Court grant NRA's Motion
13 to Intervene as of Right. Alternatively, NRA requests it be granted permissive
14 intervention.

15 Respectfully submitted this 14th day of October, 2009.

16 MICHEL & ASSOCIATES, P.C.

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/s/ David T. Hardy
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2009, I electronically transmitted the document Notice of Motion and Motion for Leave to Intervene, Memorandum of Points and Authorities in Support Thereof, Declarations in Support Thereof 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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