

**United States District Court
for the District of Columbia**

PUBLIC EMPLOYEES FOR)	
ENVIRONMENTAL RESPONSIBILITY,)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:10-cv-0127 (ESH)
)	
U.S. Department of the Interior, et al.,)	
)	
Defendants.)	
)	
)	
)	

PLAINTIFF’S RESPONSE IN OPPOSITION TO THE MOTION OF SAFARI CLUB INTERNATIONAL AND NATIONAL RIFLE ASSOCIATION FOR LEAVE TO PARTICIPATE AS INTERVENORS

Plaintiff Public Employees for Environmental Responsibility (“PEER”) hereby files its response in opposition to the Motion of the Safari Club International (“Safari Club”) and the National Rifle Association of America (“NRA”) for Leave to Intervene.

BACKGROUND

On November 29, 2010, PEER filed its First Amended and Supplemental Complaint (“Complaint”) with the Court. In Count I of Plaintiff’s Complaint, PEER claimed that Defendants’ denial of its petition to adopt hunting regulations for Mojave National Preserve (“Mojave Preserve”) consistent with the Mojave Preserve General Management Plan (“GMP”) and Environmental Impact Statement (“EIS”), the Desert Tortoise Recovery Plan, and the Biological Opinion (“BiOP”) for the GMP was arbitrary, capricious, and an abuse of discretion in violation of the Administrative Procedure Act (“APA”). Compl., at 18. In Count II, PEER claimed that Defendants’ denial of PEER’s petition to adopt hunting regulations for the Mojave Preserve was a violation of National Environmental Policy Act (“NEPA”) because Defendants failed to prepare a supplement to the 2001 EIS on the GMP when the GMP’s commitment to the

adoption of hunting regulations was abandoned in connection with the denial of PEER's petition. Id. at 19.

Safari Club and NRA (collectively "Movants" or "Proposed Intervenor") move for the Court's leave to participate as defendant-intervenor in this action pursuant to Rules 24(a)(2) and 24(b) of the Federal Rules of Civil Procedure. Motion, at 1. They state, in relevant part, as follows:

Safari Club and NRA have made a timely request to intervene and have demonstrated significant interest in this case, due to their use and enjoyment of hunting and sustainable use conservation opportunities in [the Mojave Preserve], their longstanding involvement in National Park Service wildlife issues as they relate to hunting and sustainable use conservation, and their observations and knowledge of hunting and wildlife conservation in the Mojave National Preserve. These interests would be harmed if PEER succeeds in its efforts to reverse the NPS's decision to reject a rulemaking petition that would ban and/or limit hunting on the MNP. Safari Club and NRA's interests would not be adequately represented by the existing parties to this litigation.

Id. at 23. PEER contends that the Movants are not entitled to intervene as of right under Rule 24(a)(2), nor should they be granted leave for permissive intervention under Rule 24(b), for the reasons stated below. Safari Club has previously been granted amicus status, limited to filing a brief in response to Plaintiff five days after Defendants' brief is due, limited to 15 pages and limited to points not covered by Defendants. Minute Order of October 27, 2010. PEER contends that any possible interest Safari Club may have in addressing the issues in this case will be fully served by its existing amicus status. PEER has no objection to the NRA joining in Safari Club's amicus brief.

ARGUMENT

A. Safari Club and NRA are not Entitled to Intervene as of Right under Federal Rule 24(a).

With regard to Count I, the Court should deny the Movants' motion to intervene as a matter of right under of the Federal Rules of Civil Procedure as their interests in this action are adequately represented by Defendants. With regard to Count II, intervention of right should be

denied because Movants have not demonstrated the requisite interest or impairment of that interest. Rule 24(a)(2) of the Federal Rules of Civil Procedure governs intervention as a matter of right and provides that:

On timely motion the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). Consistent with this language, the D.C. Circuit has determined that intervention as of right under Rule 24(a) depends upon the movant's ability to meet all of five conditions: (1) timeliness; (2) interest; (3) impairment of interest; (4) adequacy of representation; and (5) standing. Wildearth Guardians v. Salazar, 2010 U.S. Dist. Lexis 128203, at *15-17 (D.D.C. Dec. 6, 2010).

With regard to Count I, without admitting that Movants meet the requirements of standing, timeliness, interest, or impairment of that interest, Safari Club and NRA have not shown that their interests in this action will not be adequately represented by the Federal Defendants. The fundamental issue before the Court in Count I is whether or not Defendants' denial of PEER's petition should be set aside. In accordance with the APA and relevant case law, that determination will be made solely based upon an evaluation of the agency decision and whether the agency's decision is properly supported by its administrative record. The issues which the Proposed Intervenors seek to address are not based on the agency decision or the administrative record and are therefore irrelevant to the disposition of this case. The Movants' desire to raise irrelevant issues that will not be raised by the Defendants cannot support a claim that that the Proposed Intervenors are not adequately represented by the Defendants.

Proposed Intervenors seek to assert that Defendants have no authority to promulgate hunting regulations (Motion at 4-7, 8), a position which Defendants did not take in their denial of Plaintiff's petition. In fact, Defendants' denial of PEER's petition specifically found that NPS

did have the authority to promulgate special hunting regulations for the Mojave Preserve, but that they were purportedly not warranted at this time. Since the question here is whether the agency's decision is arbitrary and capricious based on its own record and the reasons the agency itself gave justifying that decision, the argument which Movants seek to present has no bearing on this case.

Proposed Intervenors also seek intervention as a means to assert their view that hunting in Mojave preserve is not having a detrimental effect on desert tortoises and in fact benefits wildlife on the Mojave Preserve. Motion at 5. Movants' views concerning the effects of hunting on the Mojave Preserve are irrelevant to the issue presented in this case as to whether the decision that Defendants made, for the reasons stated by Defendants in their denial of PEER's petition, and based on Defendants' administrative record, is arbitrary and capricious or an abuse of discretion.

Movants claim that they should be allowed intervention because if Defendants adopted regulations to limit hunting, they might file suit to challenge that action, and efficiency dictates allowing them to make those arguments here. Motion at 13. This is in effect an admission that the issues Movants seek to address and the arguments they seek to make are not relevant to this lawsuit, but to another potential suit they might file to challenge a potential decision by NPS, contrary to the decision now under review, to limit hunting.

Moreover, Defendants' only interest in this lawsuit is to uphold the *status quo* which is the absence of NPS special hunting regulations, which favors the interests of the Movants. There is no evidence of any disagreement of any sort between the Movants and Defendants which would justify intervention. "Nor is there any showing of conflict of interest or collusion between plaintiffs and the federal defendants which might indicate that the federal defendants are not fully willing to vigorously support the regulations in question." Humane Soc. of United States v. Clark, 109 F.R.D. 518, 521 (D.D.C. 1985).

Therefore, because Defendants' interests and the Movants' interests with regard to Count I are aligned in this case, and the positions which the Movants seek to present which might differ from the Defendants' are not properly raised in this case, the positions of the Safari Club and NRA are adequately represented and they are not entitled to intervene as of right under Rule 24(a)(2).

With regard to Count II, Movants have not proffered any reason why they have an interest which will be impaired with regard to PEER's claim that a supplemental EIS on the Mojave Preserve GMP was required when Defendants' determined to deny PEER's petition and abandon their stated intention in the GMP to adopt special hunting regulations. There is no reason to believe that the preparation of a supplemental EIS to comply with NEPA will harm Movants' interests. Therefore, intervention as of right should also be denied with respect to Count II.

B. The Safari Club and NRA Should not be Granted Permissive Intervention

The Court should deny the Movants' permissive intervention motion because the issues which they seek to address as intervenors are collateral to the issues before the Court, and would cause undue delay and prejudice the adjudication of PEER's action. Rule 24(b) of the Federal Rules of Civil Procedure states that: "On timely motion, the court may permit anyone to intervene who ... has a claim or defense that shares with the main action a common question of law or fact." Fed. Civ. P. 24(b). However, the court "must also consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Nat'l Ass'n of Home Builders v. Evans, 2002 U.S. Dist. LEXIS 25521, at *9 (D.D.C. Mar. 25, 2002). Courts have denied Rule 24(b) motions on grounds that the applicant's issue was collateral to the issue currently before the Court, even when the applicant had established "an independent jurisdictional basis, submitted a timely motion, and advanced a claim or defense that

shares a common question with the main action.” Id. at *17-18 (quoting Equal Employment Opportunity Comm’n v. National Children’s Ctr., Inc., 146 F.3d 1042, 1046 (D.C. Cir. 1998)).

Movants claim that the defenses to PEER’s action which they wish to raise share “common factual and legal bases with PEER’s claims.” Motion, at 21. This is not the case. Distinct from PEER’s challenge to the denial of its petition as arbitrary and capricious based on the reasoning of the denial decision and the administrative record, Movants seek to contend that “hunting is mandatory” on the Mojave Preserve, that hunting is governed by state and not NPS regulations, and that NPS must coordinate with the state fish and game agency on hunting closures. Id. As explained above, none of these contentions were relied upon by NPS as grounds for the denial of PEER’s petition, and in fact NPS affirmatively stated that it had the authority to promulgate the special hunting regulations sought by PEER, but that they were found to be not warranted at the present time. The issues which Movants seek to raise are collateral to the issues before the Court on Count I and do not share common factual and legal bases.

Moreover, none of the issues which Movants assert they wish to raise even purport to address Count II of PEER’s complaint, which seeks to enforce compliance with NEPA by requiring a supplemental EIS on the Mojave Preserve GMP. Thus, there are no common questions of law or fact with regard to Count II.

Safari Club and NRA’s motion for permissive intervention should be denied as the defenses they wish to raise do not share a common question of law or fact with the main action, and thus their intervention will only serve to unduly delay and prejudice the adjudication of Plaintiff’s action before the Court.

D. If Safari Club and NRA are Granted Leave to Intervene, Their Participation in This Action Should Be Made Conditional.

Even if it is determined that Movants are entitled to intervention by virtue of Rule 24(a) or (b), the Court may in its discretion impose conditions or restrictions on Movants' level of participation in the action. Wildearth Guardians, 2010 U.S. Dist. LEXIS 128203, at *19. The Court's authority in this regard emanates from its "inherent power to manage the litigation before it, as well as a necessary instrument in accommodating the two conflicting goals of intervention: *i.e.*, 'to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending.'" Id. at *19-20.

Taking into account that "the primary limitation on the district court's discretion is that any conditions imposed should be designed to ensure the fair, efficacious, and prompt resolution of the litigation," D.C. circuit courts have, in the past, imposed conditions on intervenors such as: (1) barring intervenors from injecting collateral issues into the litigation; (2) requiring intervenors to consult with one another prior to filing papers with the Court and restricting their presentations to non-cumulative arguments; and (3) in filing for a motion for summary judgment, requiring intervenors to file a joint statement of facts with references to the administrative record. Id. at *42-46.

Should the Court grant the Movants leave to intervene, Plaintiffs respectfully request that the Court order Safari Club and NRA to jointly file all submissions to the Court, consult with Defendants and restrict their presentations to non-cumulative arguments, and limit their issues and arguments to Defendants' decision to deny Plaintiff's petition based solely on the content of NPS's decision denying PEER's petition and the administrative record.

