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9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF ARIZONA**

12 Center for Biological Diversity; Sierra
Club; and Grand Canyon Wildlands
13 Council,

14 Plaintiffs,

15 v.

16 United States Forest Service,

17 Defendant,

18 and

19 National Shooting Sports Foundation,

20 Applicant for
21 Intervention

No. CV-12-8176-PCT-SMM

**NATIONAL SHOOTING SPORTS
FOUNDATION, INC.'S REPLY
MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO INTERVENE**

(Expedited Ruling Requested)

22 Plaintiffs oppose the January 22, 2013 Motion to Intervene of National Shooting
23 Sports Foundation, Inc. (“NSSF”) by contending that NSSF has no significantly
24 protectable interest at stake that would be impaired if this action is disposed of without
25 NSSF and that the United States Forest Service (the “Forest Service”) will adequately
26 represent the interests of NSSF and its members. Both these arguments fail. As set forth

1 in both NSSF's Motion to Intervene (Doc. 54) and the Declaration of Lawrence Keane
2 (Doc. 55), NSSF meets the standard for intervention as of right under Rule 24(a)(2).
3 Alternatively, NSSF should be granted permissive intervention under Rule 24(b).

4 **I. NSSF MEETS THE STANDARD FOR INTERVENTION AS OF RIGHT**
5 **UNDER RULE 24(A)(2).**

6 **A. Plaintiffs Mischaracterize the Nature of NSSF's Interest in This Case.**

7 Plaintiffs argue that NSSF "exaggerates the potential effects of the relief Plaintiffs'
8 [sic] seek."¹ Plaintiffs would have this Court believe that NSSF is unreasonably seeking
9 to intervene to avert Forest Service regulation of a single, faraway forest in which neither
10 NSSF nor its members have any protectable interest. In that situation, Plaintiffs argue,
11 NSSF lacks any significantly protectable interest in this lawsuit and the allegations made
12 in the Keane Declaration can be disregarded.²

13 Plaintiffs' own behavior relating to the filing of this lawsuit indicates that this
14 lawsuit is far more than an isolated attempt at saving an experimental, reintroduced
15 wildlife population in a particular National Forest.³ In a September 5, 2012 press release
16 heralding the filing of this lawsuit, a CBD representative said that "[t]he Forest Service
17 has a duty to prevent the buildup of toxic materials and the needless lead poisoning of
18

19 ¹ See Plaintiffs' Response in Opposition to NSSF's Motion to Intervene (Doc. 66)
20 ("Response") at 6.

21 ² See *id.* at 7-8.

22 ³ The population of California condors found in northern Arizona was reintroduced as an
23 nonessential experimental population. See *Establishment of a Nonessential Experimental*
24 *Population of California Condors in Northern Arizona; Final Rule*, 61 Fed.Reg. 54044
25 (Oct. 16, 1996). In this rulemaking, the Fish and Wildlife Service stated that "[c]urrent
26 and future land, water, or air uses" in the area, including "sport hunting," "should not be
restricted due to the designation of the nonessential experiment population." *Id.* at 54050.
Notably, the agency specifically acknowledged the possibility of condor deaths from lead
poisoning, explaining that it "does not intend to request modifications or restrictions to
current hunting regulations anywhere in the vicinity of the Vermilion Cliffs release site or
in the experimental population area." *Id.* at 54055.

1 wildlife in *our national forests*.”⁴ A Sierra Club representative described this lawsuit as a
2 “step” toward a broader transition away from traditional ammunition: “Because lead is so
3 dangerous ... it is imperative that we take this important step to transition ammunition to
4 less toxic alternatives.”⁵ She continued: “The Forest Service should require nonlead
5 ammunition for hunting *on public land* as an important step in limiting lead exposure for
6 condors and other wildlife.”⁶ Additionally, CBD maintains an entire web “campaign”
7 (“Get the Lead Out”) devoted to its ongoing assault on traditional ammunition made with
8 lead components.⁷ This lawsuit is mentioned on this web page as a part of this broader
9 effort.⁸

10 Although Plaintiffs oppose NSSF’s intervention on the ground that it has no
11 significantly protectable interest which would be impaired if this action is disposed of in
12 its absence, under Plaintiffs’ reasoning it is unclear when, if ever, in Plaintiffs’ campaign
13 against traditional ammunition the interests of NSSF and its members *would* be
14 sufficiently implicated. Clearly NSSF and its members in the ammunition manufacturing
15 industry cannot be expected to stand idly by at each “step” of Plaintiffs’ publicly heralded
16 campaign against their products simply because Plaintiffs argue that their protectable
17 interests are not sufficiently implicated by that particular “step.” Rather, NSSF and its
18 members ask to intervene to defend their interests before adjudication of this case sets a
19 precedent for future endangerment findings that further restrict the use of, and obviate

20 ⁴ See Press Release, Center for Biological Diversity, Suit Filed to Protect Wildlife From
21 Lead Poisoning in Arizona’s Kaibab National Forest (Sept. 5, 2012), *available at*
http://www.biologicaldiversity.org/news/press_releases/2012/lead-09-05-2012.html
(emphasis added).

22 ⁵ *Id.*

23 ⁶ *Id.* (emphasis added).

24 ⁷ See *Get the Lead Out*, Center for Biological Diversity,
http://www.biologicaldiversity.org/campaigns/get_the_lead_out/index.html (last visited
25 Feb. 13, 2013).

26 ⁸ See *id.*

1 demand for, their products. Particularly given that intervention as of right is “guided
2 primarily by practical and equitable considerations,”⁹ the Court should reject Plaintiffs’
3 attempt to silence industry opposition to their national campaign by characterizing the
4 interests at stake as far more limited than they actually are.

5 **B. NSSF Has a Protectable Interest in Plaintiffs’ Claims for Relief.**

6 Pursuant to Rule 24(a)(2), NSSF has a protectable interest in the subject matter of
7 the RCRA claim alleged in the Complaint because traditional ammunition, the vast
8 majority of which is manufactured by NSSF’s members,¹⁰ is the very object whose use the
9 Complaint seeks to compel the Forest Service to prohibit.¹¹

10 Contrary to Plaintiffs’ Response, *Fund for Animals v. Norton* is indistinguishable
11 and does not support a finding of no significant interest. In that case, where the plaintiff
12 sued to enjoin the Secretary of the Interior and the Fish and Wildlife Service from issuing
13 permits for the importation of hunted Mongolian sheep, the Mongolian government
14 sought to intervene on the side of the defendants.¹² Finding that the Mongolian
15 government had an interest relating to the property and transaction which was the subject
16 matter of the plaintiff’s claim for relief, the court permitted Mongolia’s intervention.¹³

17 Plaintiffs argue that the relevant “property” here is the Kaibab National Forest and
18 that the relevant “transaction” is “the Forest Service’s liability to abate a known
19 endangerment under RCRA.”¹⁴ This argument is plainly incompatible with *Fund for*

20 ⁹ *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998).

21 ¹⁰ See Keane Decl. at ¶ 7 (“Approximately 95% of the domestically manufactured
22 ammunition is traditional ammunition made with lead bullets or shot, and over 90% of
23 that domestically manufactured traditional ammunition is manufactured by NSSF
members.”).

24 ¹¹ See Complaint (Doc. 1) at ¶¶45-47.

25 ¹² See *Fund for Animals v. Norton*, 322 F.3d 728, 730-31 (D.C. Cir. 2003).

26 ¹³ See *id.* at 735-37 (holding that the other Rule 24(a)(2) factors were also met).

¹⁴ See Response at 7.

1 *Animals* itself, which reasoned that the relevant “property” in that case was Mongolia’s
2 sheep and that the relevant “transaction” was “the FWS’s decision to permit the
3 importation of those sheep from Mongolia.”¹⁵ Here, then, the relevant “property” is
4 ammunition manufactured, sold and/or used by NSSF’s members, and the relevant
5 “transaction” is the Forest Service’s decision to permit the use of that ammunition for
6 hunting wildlife in National Forests. Additionally, just as in *Fund for Animals*, the fact
7 that the applicant (here NSSF, in *Fund for Animals* the Mongolian government) would not
8 itself be personally subject to the regulation sought by the Complaint does not change the
9 analysis.¹⁶

10 NSSF also has a direct interest in the economic vitality and legal rights of its
11 membership, which includes the manufacturers of the bulk of the traditional ammunition
12 at issue in this case as well as thousands of distributors, firearms retailers, shooting
13 ranges, sportsman’s organizations and hunters who distribute, sell, and use that
14 ammunition.¹⁷ Plaintiffs cite *Trident Seafoods Corp. v. Bryson*, a district court case, for
15 the proposition that this “generalized” interest “is inadequate to support intervention at the
16 liability stage.”¹⁸ *Trident Seafoods* is easily distinguishable.

17 First, Plaintiffs cite that case as “finding proposed interveners’ interests insufficient
18 at [the] merits stage when based on maintaining market share.”¹⁹ NSSF’s interests in this
19 case do not relate to maintaining the market share of any particular member; rather, NSSF
20 represents practically the entire domestic ammunition industry, manufacturers, sellers,
21

22 ¹⁵ *Fund for Animals*, 322 F.3d at 735.

23 ¹⁶ *See id.* at 735; compare Response at 6.

24 ¹⁷ *See* Keane Decl. at ¶ 5.

25 ¹⁸ *See* Response at 7 (citing No. C12-134 MJP, 2012 WL 1884657, *3-4 (W.D. Wash.
26 May 23, 2012).

¹⁹ *See* Response at 7.

1 buyers and users, and seeks to protect the interests of that entire industry.²⁰

2 Second, this is not a case in which NSSF's interests are not implicated until the
3 remedy stage. Although NSSF has an interest in averting any remedy that would require
4 the Forest Service to prohibit or otherwise regulate the use of traditional ammunition in
5 the National Forests, its interest in avoiding an endangerment finding, which must be
6 proven as a part of Plaintiffs' prima facie case,²¹ is even more important. That is, NSSF
7 has a significant interest in preventing the creation of an endangerment precedent that
8 could be used in future RCRA citizen suits and, moreover, could alter Forest Service
9 policy on a national scale—the apparent goal of the lawsuit. NSSF plainly has an interest
10 in defending its members' products against a finding that the nature of those products
11 poses a legally actionable threat to wildlife.

12 **C. NSSF's Ability to Protect Its Interests Will Be Impaired by Resolution**
13 **of the RCRA Claim in NSSF's Absence.**

14 The impairment element “follows from the factors” related to NSSF's protectable
15 interest.²² Because NSSF has a protectable interest in the very subject matter of Plaintiffs'
16 suit (the use of traditional ammunition) and in the economic well-being of its members,
17 and because an endangerment finding would impair these interests, this element is
18 satisfied.²³

19 Plaintiffs argue that consideration of the aforementioned precedential value of an
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21 ²⁰ See Keane Decl. at ¶ 7.

22 ²¹ See 42 U.S.C. § 6972(a)(1)(B).

23 ²² *Sierra Club v. EPA*, 995 F.2d 1478, 1486 (9th Cir. 1993), *abrogated by Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173 (9th Cir. 2011) (abrogating with respect to a separate NEPA issue).

24 ²³ Plaintiffs argue that an endangerment finding would not impair any interest NSSF has
25 in the *Kaibab National Forest*. See Response at 9:9-12. However, as *Fund for Animals*
26 implies, the relevant interest is that which NSSF has in *traditional ammunition*, which is
the subject matter of Plaintiffs' Complaint. See *supra* § II(B).

1 endangerment finding in this case is not a sufficient basis for finding impairment, citing
2 *Dilks v. Aloha Airlines*.²⁴ *Dilks*, however, says absolutely nothing about the extent to
3 which “speculation” about the precedential value of the court’s holding in a particular
4 matter may suffice for impairment under Rule 24(a)(2).²⁵ In that case, the pilots’ union
5 sought to intervene as a defendant where an airline pilot sued his airline for wrongful
6 discharge.²⁶ The pilot’s complaint alleged that arbitrating his case as required under the
7 collective bargaining agreement would be futile because the union had breached its duty
8 to fairly represent him.²⁷ In seeking to intervene, the union urged “that it may have
9 potential liability for damages if it is found to have breached its obligation of fair
10 dealing.”²⁸ The court discounted this fear as “speculative” in light of the fact that the
11 plaintiff had pledged not to sue the union.²⁹ *Dilks* therefore held only that fear of being
12 sued for damages was too “speculative” to justify intervention where the plaintiff had
13 pledged not to sue.³⁰ Here, NSSF’s interests in its members’ products are such that they
14 may be impaired regardless of whether NSSF itself is actually sued or whether Plaintiffs
15 pledge not to sue it. Consequently, *Dilks* has no application to this case.

16 Plaintiffs deny that a finding of liability on the part of the Forest Service will have
17 an immediate and chilling impact by expressing disbelief at the allegations of NSSF’s
18 Senior Vice President, Assistant Secretary, and General Counsel Lawrence Keane.³¹ For
19 starters, Plaintiffs are not entitled to contest the factual validity of Mr. Keane’s

20 _____
21 ²⁴ See Response at 9 (citing 642 F.2d 1155, 1157 (9th Cir. 1981)).

22 ²⁵ See *Dilks*, 642 F.2d at 1155-57.

23 ²⁶ See *id.* at 1156.

24 ²⁷ *Id.*

25 ²⁸ *Id.* at 1157.

26 ²⁹ See *id.*

³⁰ See *id.*

³¹ See Response at 10.

1 Declaration.³² Furthermore, Plaintiffs’ assertion that the traditional ammunition
 2 manufacturing industry has “survived” a ban on the use of lead shot for waterfowl hunting
 3 is a red herring. The relevant inquiry is whether NSSF’s ability to protect its interests will
 4 be *impaired* or *impeded* by a resolution of Plaintiffs’ claims in NSSF’s absence, not
 5 whether the ammunition industry can “survive” an endangerment finding in this case.³³

6 **D. NSSF’s Interests May Not Be Adequately Represented by the Current**
 7 **Parties to This Case.**

8 In arguing that NSSF’s interests are adequately represented by the Forest Service,
 9 Plaintiffs’ Response relies on the notion that “[a] presumption of adequate representation
 10 exists when an applicant for intervention and an existing party have the same ultimate
 11 objective.”³⁴ However, this presumption does not apply where the existing party is
 12 “required to represent a broader view than the more narrow, parochial interests of” a
 13 proposed intervenor.³⁵ NSSF represents the interests of the firearms industry and
 14 individual hunters,³⁶ while the Forest Service is a federal agency charged with
 15 administering the National Forest System, which includes a much broader spectrum of
 16 interests than those of NSSF and its members. “Inadequate representation is most likely
 17 to be found when the applicant assert[s] a personal interest that does not belong to the
 18 general public.”³⁷ Because the interests of the Forest Service are necessarily much

19 ³² See *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819-20 (9th Cir. 2001)
 20 (“Courts are to take all well-pleaded, nonconclusory allegations in the motion to
 intervene, the proposed complaint or answer in intervention, and declarations supporting
 the motion as true absent sham, frivolity or other objections.”).

21 ³³ See FED. R. CIV. P. 24(a)(2).

22 ³⁴ See Response at 11 (citing *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th
 Cir. 1996)).

23 ³⁵ See *Forest Conserv. Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995),
 24 *abrogated by Wilderness Soc.*, 630 F.3d 1173 (abrogating with respect to a separate
 NEPA issue).

25 ³⁶ See Keane Decl. at ¶ 5.

26 ³⁷ *Forest Conserv. Council*, 66 F.3d at 1499 (citing 3B MOORE’S FEDERAL PRACTICE, ¶
 (footnote continued on next page)

1 broader than those of NSSF, no presumption of adequate representation applies. Even if
2 that presumption did apply, it would be overcome by the fact that NSSF's "ultimate
3 objective" is to protect its members' interests, which include makers, sellers and users of
4 traditional ammunition, from the threats identified by paragraphs 9 to 11 of the Keane
5 Declaration. The Forest Service certainly does not share that objective.³⁸

6 Plaintiffs argue that "with respect to liability for the one claim presented in this
7 case, the litigation positions of NSSF and the Forest Service are identical—both oppose a
8 finding of liability under RCRA."³⁹ First, NSSF notes that whether an applicant for
9 intervention and a defendant "both oppose a finding of liability" is *not* the relevant
10 standard. If it were, no applicant could ever successfully intervene on the side of a
11 defendant, since an applicant seeking to join a case on the side of the defendant
12 necessarily stands in opposition to "a finding of liability." Second, the mere fact that
13 "both entities occupy the same posture in the litigation" does not necessarily mean that
14 "the government's representation of the public interest ... [is] identical to the individual
15 parochial interest of a particular group."⁴⁰ Indeed, in their Response to the NRA's Motion

16 _____
17 (footnote continued from previous page)

18 24.07[4] at 24-78 (2d ed. 1995); CHARLES WRIGHT, ARTHUR R. MILLER & MARY K.
19 KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 1909 at 317, 346 (2d ed. 1986)).

20 ³⁸ Plaintiffs also argue in their Response that "it will be presumed that a state adequately
21 represents its citizens when the applicant shares the same interest." *See* Response at 11
22 (citing *California ex rel. Lockyer*, 450 F.3d 436, 443 (9th Cir. 2006)). NSSF is not sure
23 whether Plaintiffs here are referring to the presence of the State of Arizona as an
24 intervenor in this suit. To the extent that Plaintiffs here are arguing that the State of
25 Arizona will adequately represent NSSF's interests, NSSF notes that the State has moved
26 to intervene only for the limited purpose of filing a motion to dismiss. *See* State of
Arizona's Motion to Intervene for the Limited Purpose of Filing a Motion to Dismiss
(Doc. 21). Further, the State of Arizona does not share the same interests as the NSSF for
the same reason that the Forest Service does not share such interests.

³⁹ *See* Response at 12.

⁴⁰ *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011)
(citation omitted) (internal quotations omitted).

1 to Intervene, Plaintiffs themselves argue that “the [federal] government has consistently ...
2 for more than a decade” taken the position that traditional ammunition poses a threat to
3 condor survival.⁴¹ At this early stage it is not even clear that the Forest Service will
4 vigorously defend Plaintiffs’ claims if its pending Motion to Dismiss is denied. The
5 Forest Service thus may not adequately represent NSSF’s interest in protecting its
6 members in the ammunition industry from the very kind of threat posed by this case.

7 For these reasons, as well as those reasons set forth in NSSF’s Motion to Intervene,
8 NSSF has plainly met its minimal burden⁴² of showing that the Forest Service’s
9 representation of the varying interests of NSSF and its members “may be inadequate.”
10 Because the elements of Rule 24(a)(2) are met, intervention as of right should be granted.

11 **II. IN THE ALTERNATIVE, NSSF SHOULD BE ALLOWED PERMISSIVE**
12 **INTERVENTION.**

13 Plaintiffs’ Response does not dispute that NSSF’s defenses to its claims have
14 questions of law and fact in common with the main action. Instead Plaintiffs assert that
15 NSSF’s intervention would needlessly delay the proceedings.⁴³ On this point, Plaintiffs
16 cite *Tripp v. Executive Office of the President*, which is not factually analogous due to the
17 pendency of parallel lawsuits at different stages.⁴⁴ That court explained that “the
18 collateral issues and undue complications that would ensue from intervention ... would
19 unreasonably frustrate and prolong [this] case, to say nothing of how it would negatively
20 impact the court's ability to manage both of these cases.”⁴⁵ Here in contrast, Plaintiffs

21 ⁴¹ See Plaintiffs’ Response in Opposition to NRA’s Motion to Intervene (Doc. 47) at 8.

22 ⁴² See *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972) (“The
23 requirement of the Rule is satisfied if the applicant shows that representation of his
interest ‘may be’ inadequate; and the burden of making that showing should be treated as
minimal.”)

24 ⁴³ See Response at 15-16.

25 ⁴⁴ 194 F.R.D. 344 (D.D.C. 2000).

26 ⁴⁵ *Id.* at 348.

1 have failed to identify any way in which these proceedings would be delayed as a result of
2 NSSF's participation, particularly given this case's early stage. Accordingly, NSSF
3 should be granted permissive intervention if this Court denies intervention as of right.

4 **III. CONCLUSION AND RELIEF REQUESTED**

5 In light of the foregoing, NSSF respectfully requests that this Court grant its
6 Motion to Intervene as of right. Alternatively, NSSF requests it be granted permissive
7 intervention.

8 Plaintiffs' request that NSSF and the proposed NRA and SCI intervenors file joint
9 briefs should be denied because, unlike the intervenors in *Trident Seafoods*, NRA and SCI
10 seek to intervene on behalf of different interests than does NSSF and thus cannot be
11 presumed to present the same arguments as NSSF.⁴⁶ Plaintiffs have made no attempt to
12 show otherwise. In this regard, NSSF does not intend to simply repeat arguments made
13 by other defendants, as Plaintiffs' request presumes. Therefore, Plaintiffs' request should
14 be denied.

15 RESPECTFULLY SUBMITTED this 19th day of February, 2013.

16
17 FENNEMORE CRAIG, P.C.

18
19 By s/ Norman D. James
20 Norman D. James
21 Jay L. Shapiro
22 Attorneys for National Shooting Sports
23 Foundation, Inc.

24 ⁴⁶ See *Trident*, 2012 WL 1884657 (W.D. Wash. May 23, 2012) at *5 (both applicants
25 sought to intervene on behalf of the exact same interests; namely, those of rockfish
26 catchers). NRA and SCI seek to intervene on behalf of interests different than those of
NSSF's members. See NRA's Motion to Intervene (Doc. 28) at 8-11.

CERTIFICATE OF SERVICE

I hereby certify that on February 19th, 2013, I electronically transmitted the foregoing NATIONAL SHOOTING SPORTS FOUNDATION, INC.'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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