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16
 17 IN THE UNITED STATES DISTRICT COURT
 18 FOR THE DISTRICT OF ARIZONA
 19 PRESCOTT DIVISION

20 Center for Biological Diversity, *et al.*,

21 Plaintiffs,

22 vs.

23 United States Forest Service,

24 Defendant, and

25 National Rifle Association of America
 and Safari Club International,

26 Proposed
 27 Defendant-Intervenor.

CASE NO. 3:12-cv-08176-PCT-SMM

NOTICE OF MOTION AND MOTION FOR
 LEAVE TO INTERVENE BY THE
 NATIONAL RIFLE ASSOCIATION OF
 AMERICA AND SAFARI CLUB
 INTERNATIONAL,
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT,
 DECLARATIONS IN SUPPORT

ORAL ARGUMENT REQUESTED

28 TO THE COURT, THE PARTIES, AND ALL COUNSEL OF RECORD:

1 Proposed Defendant-Intervenors National Rifle Association of America (“NRA”)
2 and Safari Club International (“SCI”) (collectively “NRA and SCI”) move for an order
3 granting leave to intervene in this action under 42 U.S.C. § 6972(b)(2)(E), and as of right
4 under Federal Rule of Civil Procedure 24(a); or permissively under Rule 24(b); or
5 alternatively as amici curiae. NRA and SCI request oral argument pursuant to L.R.Civ.
6 7.2(f), as this case is one of broad public importance. Plaintiff Center for Biological
7 Diversity, *et al.* (collectively the “CBD Plaintiffs”) intend to oppose NRA and SCI’s
8 intervention, while the Defendant United States Forest Service (the “Service”) takes no
9 position as to the proposed intervention.
10
11

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

13 **I. INTRODUCTION**

14
15 In this case, CBD Plaintiffs seek to force the Service to prohibit the use of lead
16 ammunition in the Kaibab National Forest (“Kaibab NF”). NRA and SCI have
17 members who have long hunted and plan to hunt in the Kaibab NF using lead
18 ammunition. The requested relief would harm NRA’s, SCI’s, and their members’
19 interests. The existing parties do not represent NRA and SCI’s interests. As explained
20 below, NRA and SCI meet the requirements for intervention under 42 U.S.C. §
21 6972(b)(2)(E) and intervention as of right under Rule 24(a), as well as the requirements
22 for permissive intervention under Rule 24(b). In the three years prior to the filing of the
23 complaint in 2012, NRA and SCI have sought and obtained permission to participate in
24 three lawsuits brought by CBD regarding lead-based ammunition (“lead ammunition”).¹
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28 ¹ Order Granting [NRA] Mot. Intervene Jan. 30, 2010 at 8-9 & Order Granting [SCI]
Motion for Amicus, *Ctr. for Biological Diversity v. Bureau of Land Mgmt. (CBD v.*

1 **II. PROCEDURAL HISTORY AND PREVIOUS RELATED CASE**

2 CBD Plaintiffs seek a ban of hunting with lead ammunition in the Kaibab NF,
 3 which is managed by the Service. Compl. ¶¶ 3, 47 (Dkt. 1). CBD Plaintiffs rely on the
 4 Resource Conservation and Recovery Act (“RCRA”) in requesting that the Court issue an
 5 order: (1) finding the “Service has contributed and is contributing to the past or present
 6 disposal of any solid or hazardous waste which may present an imminent and substantial
 7 endangerment,” and (2) enjoining the furtherance of the alleged endangerment, *i.e.*, the
 8 use of lead ammunition in the Kaibab NF. *Id.* ¶ 47. The alleged endangerment CBD
 9 Plaintiffs focus on is the supposed threat to California condors (“condors”). *Id.* ¶ 10.

12 This lawsuit is CBD’s second attempt at using condor protection as the putative
 13 basis for obtaining a ban on hunting with lead ammunition in northwestern Arizona.
 14 The 2009 action, *CBD v. BLM*, was very similar to this action: both are grounded in an
 15 allegation that a federal agency responsible for managing federal land in northwestern
 16 Arizona violated environmental laws by failing to take the actions CBD believes are
 17 necessary to protect condors. *Id.*; *see* First Am. Compl., *CBD v. BLM* (Dkt. 21).

19 NRA and SCI based their intervention in the present case in part on the fact that
 20 the relief CBD Plaintiffs seek here once again conflicts with federal law intended to
 21 protect hunting: 50 C.F.R. § 17.84(j)(2)(i). Granting this relief will significantly limit
 22 the types of ammunition hunters, including NRA and SCI members, can use to hunt in
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 27 *BLM*, Case No. 3:09-cv-08011-PGR (D. Ariz.) (Dkt. 58 & 73, respectively); Minute
 28 Order Granting [NRA and SCI’s] Mot. Intervene April 28, 2011, *Ctr. for Biological
 Diversity v. Jackson (CBD v. Jackson)*, Case No. 1:10-cv-02007-EGS (D.D.C.); Minute
 Order Granting [NRA and SCI’s] Mot. Intervene July 31, 2012, *Trumpeter Swan Society
 v. Env’tl. Protection Agency (TSS v. EPA)*, Case No. 1:12-cv-00929-EGS (D.D.C.).
 CBD was a co-plaintiff in *TSS v. EPA*.

1 this area. Such limitations will adversely impact the experience and success the hunters
 2 will have in the Kaibab NF. NRA and SCI have both a current interest in and a
 3 decades-long record of opposing unjustified impingements on hunting and ammunition
 4 choice both nationally and specifically in Arizona. *See* Decl. of Chris W. Cox (“Cox
 5 Decl.”) ¶¶ 6-9; Decl. of Rew Goodenow (“Goodenow Decl.”) ¶¶ 9-10.²

7 **III. FACTUAL BACKGROUND**

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

9 NRA is a tax-exempt corporation under § 501(c)(4) of the Internal Revenue Code,
 10 incorporated in New York in 1871, and its principal offices are in Fairfax, Virginia.

11 Cox Decl. ¶ 3. NRA’s membership includes approximately five million individuals,
 12 with many members in Arizona alone. *Id.* ¶ 5. One of NRA’s primary purposes is “to
 13 promote and defend hunting as a shooting sport and as a viable and necessary method of
 14 fostering the propagation, growth, conservation, and wise use of our renewable wildlife
 15 resources.” *Id.* ¶ 4. NRA has represented the interests of hunters by sponsoring
 16 pro-hunting legislation and referenda, as well as challenging unreasonable anti-hunting
 17 laws and regulations. *See id.* ¶¶ 6-9.

21 **B. General Background Regarding SCI and Its Advocacy Activities**

22 SCI is a non-profit corporation incorporated in the State of Arizona, operating
 23 under § 501(c)(4) of the Internal Revenue Code, with principal offices and place of
 24 business in Tucson, Arizona. Goodenow Decl. ¶ 3. Its membership includes
 25 approximately 50,000 individuals from the United States and many countries around the
 26 world. *Id.* ¶ 4. It has tens of thousands of members throughout the country who hunt
 27

28 _____
 2 All cited declarations are filed concurrently with this Motion.

1 innumerable species, and many hunt within the Kaibab NF. *Id.* ¶ 7-8. Its missions are
 2 the conservation of wildlife, protection of the hunter, and education of the public
 3 concerning hunting and its use as a conservation tool. *Id.* ¶ 5. The conservation
 4 mission of SCI is carried out in part through its sister organization, Safari Club
 5 International Foundation (“SCIF”). SCIF’s missions include funding and directing
 6 worldwide programs dedicated to wildlife conservation and outdoor education. *Id.* ¶ 6.

8 **C. Hunting in the Kaibab NF**

9 Without a doubt, hunting is a popular recreational activity in Arizona, including in
 10 the Kaibab NF and surrounding areas.³ Hunting permits for big game are issued in
 11 Arizona to hunters who participate in a drawing.⁴ Many of the people who seek these
 12 tags, as well as the guides who assist hunters, are members of NRA, SCI, or both. *See*
 13 Decl. of Todd Geiler (“Geiler Decl.”) ¶¶ 2-3; Decl. of Don Martin (“Martin Decl.”) ¶¶
 14 2-3; Decl. of Jack Leslie Rainey (“Rainey Decl.”) ¶¶ 3, 15; Decl. of Michael John Rusing
 15 (“Rusing Decl.”) ¶¶ 3-4, 14; Decl. of Thomas Lee Britt (“Britt Decl.”) ¶¶ 2-3, 15. NRA
 16 and SCI members have hunted in the Kaibab NF using lead ammunition and have definite
 17 plans to return to the Kaibab NF to hunt various species using lead ammunition. Rainey
 18 Decl. ¶¶ 3, 10-11, 15; Rusing Decl. ¶¶ 2-3, 11, 13-14; Britt Decl. ¶¶ 2-3, 8-9, 15.

19 Lead ammunition is traditionally used for hunting because, as to that particular
 20 use, hunters generally consider it to be abundant, economical, and ballistically proven
 21 when compared to non-lead ammunition. *See* Geiler Decl. ¶¶ 5-6; Martin Decl. ¶¶ 5, 7;

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 27 ³ *See generally* Hunt Arizona, 2015, Survey, Harvest and Hunt Data for Big and Small
 28 Game, <https://www.azgfd.com/PortalImages/files/hunting/HuntAZ/HuntAZbook2015Rev2.pdf>
 (last visited April 6, 2016).

⁴ *Id.* at 1 (noting that big-game hunting permits are issued via a drawing in Arizona).

1 Rainey Decl. ¶¶ 12, 14; Rusing Decl. ¶¶ 12; Britt Decl. ¶¶ 10, 13-14. Moreover, it is, at
2 best, difficult to procure non-lead ammunition in Arizona in calibers for hunting small
3 game and turkey, both of which are often hunted in the Kaibab NF. Britt Decl. ¶ 12.
4
5 A ban on the use of lead ammunition in the Kaibab NF will diminish the hunting
6 experience of NRA and SCI members. *E.g.*, Martin Decl. ¶¶ 5, 7; Rainey Decl. ¶ 16;
7 Rusing Decl. ¶ 15; Britt Decl. ¶¶ 16-17.

8 **IV. ARGUMENT**

9 **A. NRA and SCI Are Entitled to Intervene as a Matter of Right**

10
11 NRA and SCI are entitled to intervene as a matter of right because of their
12 members' strong interests in continuing to hunt with lead ammunition in the Kaibab NF.

13 Under RCRA:

14
15 [i]n any action under subsection (a)(1)(B) of this section in a court of the
16 United States, any person may intervene as a matter of right when the
17 applicant claims an interest relating to the subject of the action and he is so
18 situated that the disposition of the action may, as a practical matter, impair
or impede his ability to protect that interest, unless the Administrator or the
State shows that the applicant's interest is adequately represented by
existing parties.

19 42 U.S.C. § 6972(b)(2)(E). Similarly, Rule 24(a) provides that:

20
21 the court must permit anyone to intervene who . . . claims an interest
22 relating to the property or transaction that is the subject of the action, and is
23 so situated that disposing of the action may as a practical matter impair or
adequately represent that interest.

24 As the standards under RCRA and Rule 24(a) are nearly identical, NRA and SCI will rely
25 on the abundant cases interpreting Rule 24.

26
27 For cases brought under Rule 24, the Ninth Circuit has established a four prong
28 test to determine whether intervention as a matter of right is warranted:

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

7 *California ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006) (citation
8 omitted). The Ninth Circuit “construe[s] Rule 24(a) liberally in favor of potential
9 intervenors.” *Id.* Because NRA and SCI meet the requirements of each prong of the
10 test, intervention should be granted as a matter of right, just as it was in *CBD v. BLM*.

11 **1. NRA and SCI’s Motion to Intervene Is Timely**

12 NRA and SCI’s motion to intervene is timely under the three-factor standard used
13 by courts in this Circuit: “(1) the stage of the proceeding at which an applicant seeks to
14 intervene; (2) the prejudice to other parties; and (3) the reason for and length of the
15 delay.” *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004) (citation
16 omitted). Timeliness is a threshold question addressed to the sound discretion of the
17 district court. *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991). “Court must
18 consider all of the circumstances in the particular case when making the determination and
19 timeliness is to be construed broadly in favor of the party seeking intervention.” *Silver v.*
20 *Babbitt*, 166 F.R.D. 418, 424 (D. Ariz. 1994) *aff’d*, 68 F.3d 481 (9th Cir. 1995). In
21 addition, the court should be more lenient when intervention is sought as a matter of right.
22 *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984); *Silver*, 166 F.R.D. at 424.

23 NRA and SCI initially moved to intervene for the first time shortly after the
24 plaintiffs filed their complaint in September 2012, prior to the time that the Service’s
25 initial response to the complaint was due. Dkt. 28 (filed Nov. 21, 2012), Dkt. 46
26 (motion to dismiss filed Dec. 14, 2012). On July 2, 2013, this Court dismissed the
27
28

1 plaintiffs' complaint and denied as moot NRA and SCI's motion to intervene. Dkt. 81.

2 The Ninth Circuit only recently remanded the case back to this Court, and the
3 Court has not set trial dates or discovery deadlines or otherwise established any
4 substantive deadlines. Therefore, intervention at this time will not prejudice any party.
5
6 *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (holding
7 intervenor's application was timely as it "was filed at a very early stage, before any
8 hearings or rulings on substantive matters"). NRA and SCI have filed prior to the
9 scheduling conference set for April 18, 2016. Due to the early intervention attempted
10 here and prompt efforts to move again for intervention, allowing intervention will not
11 prejudice the parties or cause delay. Thus, as to all three factors, the Motion is timely.
12

13 **2. NRA and SCI Have Significant Protectable Interests in This**
14 **Action**

15 NRA, SCI, and their members have protectable interests in continuing to hunt in
16 the Kaibab NF using lead ammunition, which interests are at risk in this case. "The
17 movant must, however, demonstrate a 'significantly protectable interest' in the lawsuit to
18 merit intervention. ... To demonstrate this interest, a prospective intervenor must establish
19 that (1) 'the interest [asserted] is protectable under some law,' and (2) there is a
20 'relationship between the legally protected interest and the claims at issue.'" *Ctr. for*
21 *Biological Diversity v. U.S. Bureau of Land Mgt.*, 266 F.R.D. 369, 373 (D. Ariz. 2010)
22 (bracket in original) (citation omitted); *accord Donnelly v. Glickman*, 159 F.3d 405, 409
23 (9th Cir. 1998) (citation omitted).
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1 **a. NRA and SCI Assert Interests Protected by Law**

2 As to the first factor, the ability to hunt in the Kaibab NF using lead ammunition is
3 protected by Federal and State law, in particular the State of Arizona’s game laws.

4
5 Courts make a practical, threshold inquiry into an applicant’s interest, bearing in mind
6 that the test “is primarily a practical guide to disposing of lawsuits by involving as many
7 apparently concerned persons as is compatible with efficiency and due process.”

8 *Fresno County v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (citation omitted).
9

10 NRA and SCI members seek to hunt with lead ammunition in the Kaibab NF.
11 *See supra* Section III.C. Hunting is allowed in the Kaibab NF, as regulated by state
12 law.⁵ State law allows hunting of numerous species and sets limitations, such as
13 seasons, bag limits, and methods of take. *See e.g.*, Ariz. Admin. Code § R12-4-318
14 (seasons for lawfully taking game); § R12-4-120 (bag limits for big game); § R12-4-304
15 (lawful methods for taking wild game). Arizona law generally allows hunting with lead
16 ammunition. *See* Ariz. Admin. Code § R12-4-304 (excluding lead ammunition only as
17 to waterfowl hunting). The interest described above is significant and protected by law.
18
19

20 NRA and SCI’s nationwide advocacy for hunters’ rights also establishes their
21 “interest” in this litigation. NRA and SCI each have an organizational mission to
22 preserve the tradition of hunting, and to protect it from unreasonable and unnecessary
23 restrictions. *See* Cox Decl. ¶¶ 4, 6-9; Goodenow Decl. ¶ 5. Hunting permits for the
24 Kaibab NF are sought by literally thousands of hunters yearly, many of whom are NRA
25

26 _____
27 ⁵ *See, e.g.*, United States Forest Service, *North Kaibab Ranger District*,
28 <http://www.fs.usda.gov/recarea/kaibab/recreation/hunting/recarea/?recid=11697&actid=545>
(last visited April 6, 2016) (“Big Game Hunting is regulated by . . . Arizona and allowed on the Kaibab [NF] during open seasons with applicable permits.”).

1 and SCI members.⁶ Hunting in the Kaibab NF is immensely popular and a legitimate
2 interest that NRA and SCI seek to protect.⁷ See Geiler Decl. ¶¶ 2-3; Britt Decl. ¶¶ 2-3;
3 15.

4
5 Furthermore, NRA and SCI have a long history of advocacy related to protecting
6 and preserving the rights of hunters to continue to enjoy areas that have traditionally been
7 open to hunting. See Cox Decl. ¶¶ 6-9; Goodenow Decl. ¶¶ 5, 9-10. NRA and SCI
8 each have an established record of advocating against restrictions on hunting based on
9 scientifically unsupported claims of alleged environmental harm. See Cox Decl. ¶¶ 6-9;
10 Goodenow Decl. ¶ 10. Because the main goal of CBD Plaintiffs' lawsuit is to eliminate
11 the use of lead ammunition in the Kaibab NF, and because NRA and SCI have an interest
12 in preventing such limitation as part of their missions to protect hunters' rights and
13 opportunities, NRA and SCI possess interests sufficient to satisfy Rule 24(a).
14
15

16 **b. A Relationship Exists Between NRA and SCI's Legally**
17 **Protected Interests, and CBD Plaintiffs' Claims**

18 As demonstrated in the above discussion, NRA and SCI also meet the second
19 element of the "significant protectable interest" test – "a 'relationship' between its legally
20 protected interest and the plaintiff's claims." *Donnelly*, 159 F.3d at 409 (citation
21 omitted). "The relationship requirement is met 'if the resolution of the plaintiff's claims
22 actually will affect the applicant.'" *United States v. City of Los Angeles, Cal.*, 288 F.3d
23

24
25 ⁶ See, e.g., Hunt Arizona, 2015, Survey, Harvest and Hunt Data for Big and Small Game, at
26 2, <https://www.azgfd.com/PortalImages/files/hunting/HuntAZ/HuntAZbook2015Rev2.pdf> (last
visited April 6, 2016) (discussing number of hunters seeking deer tag).

27 ⁷ See generally Jonathan Silberman, PhD., *Economic Data on Fishing and Hunting*
28 *for the State of Arizona and for Each Arizona County*, available at
http://www.azgfd.gov/pdfs/w_c/FISHING_HUNTING%20Report.pdf (last visited
April 11, 2016).

1 391, 398 (9th Cir. 2002) (citing *Donnelly*, 159 F.3d at 410). This rule is not to be
2 applied rigidly: “a party has a sufficient interest for intervention purposes if it will suffer
3 a practical impairment of its interests as a result of the pending litigation.” *California ex*
4 *rel. Lockyer*, 450 F.3d at 441.

5
6 CBD Plaintiffs contend hunting with lead ammunition is resulting in an “imminent
7 and substantial endangerment to health or the environment[,]” and accordingly, that
8 hunting with lead ammunition in the Kaibab NF should be enjoined. *See* Compl. ¶¶ 3-4
9 (Dkt. 1). If this action is successful, hunting likely will be restricted by a ban or other
10 limits on hunters using lead ammunition in the Kaibab NF. Such a result would
11 “practically impair” the interests in hunting asserted by NRA and SCI’s members. A
12 direct relationship exists between NRA and SCI’s interests and CBD Plaintiffs’ claims.
13

14 **3. The Relief CBD Plaintiffs Seek May Impair NRA and SCI’s** 15 **Interest in Protecting Hunting in the Kaibab NF**

16 As explained above, NRA and SCI’s interests are directly related to CBD
17 Plaintiffs’ claim. Under the third prong of the Rule 24(a) intervention inquiry, a party
18 must demonstrate the litigation “may as a practical matter impair or impede” the
19 applicant’s ability to protect an interest. Fed. R. Civ. P. 24(a)(2); *see California ex rel.*
20 *Lockyer*, 450 F.3d at 440. “If an absentee would be substantially affected in a practical
21 sense by the determination made in an action, he should, as a general rule, be entitled to
22 intervene.” *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001)
23 (relying on Advisory Committee Notes). The relief CBD Plaintiffs seek – a lead
24 ammunition ban applicable to hunting in the Kaibab NF – will have a significant and
25 practical impact on NRA and SCI members and their ability to hunt in the manner that
26
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1 has occurred for generations. Similarly, a settlement whereby the Service agrees to
2 some level of restriction on lead ammunition use also would adversely affect the interests
3 of NRA and SCI members. Such an injunction or settlement would deprive Kaibab NF
4 hunters of the ammunition considered to be abundant, economical, and effective. NRA
5 and SCI meet the requirements of the third prong of the Rule 24(a) intervention analysis.
6

7 **4. NRA and SCI's Interests Are Not Adequately Represented by**
8 **the Service**

9 In light of NRA and SCI's specific interests in continuing to hunt with lead
10 ammunition in the Kaibab NF, the existing parties do not adequately represent NRA and
11 SCI's interests. Rule 24(a)'s final prong requires an applicant for intervention as a
12 matter of right to show that its interests are "inadequately represented by the parties to the
13 action." *California ex rel. Lockyer*, 450 F.3d at 440. The Supreme Court has
14 characterized this showing as "minimal." *Trbovich v. United Mine Workers of Am.*, 404
15 U.S. 528, 538 n.10 (1972). The following three factors are considered to determine if
16 the existing parties adequately represent the interests of a proposed intervenor:
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18

19 (1) whether the interest of a present party is such that it will undoubtedly
20 make all of a proposed intervenor's arguments; (2) whether the present
21 party is capable and willing to make such arguments; and (3) whether a
22 proposed intervenor would offer any necessary elements to the proceedings
23 that other parties would neglect. ... As previously stated by the Ninth
24 Circuit, "[t]he most important factor in determining the adequacy of
25 representation is how the interest [of the proposed intervenor] compares
26 with the interests of existing parties."

27 *Ctr. for Biological Diversity.*, 266 F.R.D. at 374 (citation omitted). The court in *CBD v.*
28 *BLM* held that NRA proved its interests were not adequately represented by the
defendants in that case, noting that "NRA is focused on the hunting aspect and protecting

1 its members' rights and all hunters' rights to hunt with lead ammunition[, and that] is not
2 the objective of the current Defendants.” *Id.* at 374.

3 **a. No Presumption or Assumption of Adequacy Arises Here**

4
5 This case does not present an instance where a presumption or assumption of
6 adequate representation arises. This presumption can arise in the context of a proposed
7 intervention when: (1) “an applicant for intervention and an existing party have the same
8 ultimate objective[.]” and (2) the proposed intervenor and a governmental entity are on
9 the same side. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003), *as amended*
10 (May 13, 2003).

12 Here NRA and SCI, and the Service have different objectives. NRA and SCI's
13 main objectives in intervening are preserving their members' ability to continue to use
14 lead ammunition and obtaining a ruling indicating that the normal use of lead
15 ammunition in the Kaibab NF does not create: (1) an “imminent and substantial
16 endangerment to health or the environment” under 42 U.S.C. § 6972(a)(1)(B), or (2) a
17 legal basis to limit lead ammunition use because of alleged health concerns related to
18 members of the experimental condor population released in Arizona. The Service's
19 main objective, on the other hand, is presumably to avoid a finding of liability against it
20 and preserve its ability to manage its lands without potential RCRA liability.

23 Though the presumption may arise in other types of cases where a government
24 entity is “on the same side” as a proposed intervenor, that presumption does not arise
25 when that entity is “required to represent a broader view than the more narrow, parochial
26 interests” of a proposed intervenor. *Forest Conservation Council v. U.S. Forest Serv.*,
27 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated by Wilderness Soc. v. U.S. Forest Serv.*,
28

1 630 F.3d 1173 (9th Cir. 2011) (abrogation as to NEPA issue only). The Service is
2 charged with representing the general public, which includes a broad spectrum of land
3 users, including non-hunters, some of whom may advocate restricting or eliminating the
4 use of lead ammunition in the Kaibab NF. NRA and SCI, in contrast, represent a
5 narrower and more focused interest in this case: maintaining the status quo for hunting.
6

7 The Service taking no position on this proposed intervention further confirms that
8 no presumption arises in this case. RCRA's intervention provision only recognizes the
9 presumption at issue if proven by a governmental entity. 42 U.S.C. § 6972(b)(2)(E) (the
10 Court shall grant intervention as of right where all other requirements are met "unless the
11 Administrator or the State shows that the applicant's interest is adequately represented by
12 existing parties."). Because the "adequate representation" presumption can only arise in
13 RCRA cases when raised by a governmental party, and because the Service has chosen
14 not to raise that argument, no presumption arises against NRA and SCI's intervention.
15
16

17 **b. All Relevant Factors Indicate NRA and SCI's Interests**
18 **Are Not Adequately Represented by the Service**

19 Under the first of the three factors, NRA and SCI are inadequately represented in
20 this Action unless existing parties "*will undoubtedly make all*" of NRA and SCI's
21 arguments. *Arakaki*, 324 F.3d at 1086 (emphasis added). NRA and SCI intend to
22 argue, among other things, that the best scientific evidence available *does not* sufficiently
23 establish a nexus between condor illness and hunters' use of lead ammunition, in the
24 Kaibab NF or otherwise. If necessary, NRA and SCI are prepared to disprove CBD
25 Plaintiffs' scientific assertions upon which the alleged endangerment is based.
26

27 In contrast, though the Service will presumably challenge the conclusion that
28 hunting with lead ammunition results in a violation of RCRA, it seems at least possible

1 that the Service will not challenge CBD Plaintiffs’ proffered evidence and basic
2 underlying theory that hunter-shot lead projectiles pose a particular threat to condors.⁸
3 Indeed, prior to the introduction of California condors into Arizona in 1996, the United
4 States Fish and Wildlife Service (“FWS”), which works with the Service on condor
5 preservation issues, stated it *expected* some of the introduced condors would die as a
6 result of ingesting lead present in hunter-shot carrion. *See Endangered and Threatened*
7 *Wildlife and Plants: Establishment of a Nonessential Experimental Population of*
8 *California Condors in Northern Arizona*, 61 Fed. Reg. 54,044, 54,055 (Oct. 16, 1996).
9
10 FWS stated that the loss “would presumably be more than compensated by natural and
11 captive reproduction.” *Id.* Because the Service apparently may not fully oppose CBD
12 Plaintiffs’ theory regarding hunter-shot lead ammunition, it is doubtful the Service will
13 make NRA and SCI’s arguments that run contrary to that theory.
14
15

16 A court also must determine if the present party is capable and willing to make
17 the same arguments as the proposed intervenor. *Arakaki*, 324 F.3d at 1086. Because
18 the Service’s responsibilities are to a broad class of divergent interests (see *supra*
19 Section IV.A.4.a), it is not “capable and willing” to make the narrow arguments NRA
20 and SCI will make to maintain the status quo for hunting in the Kaibab NF. Thus, this
21 factor weighs in favor of finding the Service does not adequately represent NRA and
22 SCI’s interests.
23
24

25 Finally, in relation to the third factor, NRA and SCI plan to argue scientific
26 deficiencies that underlay the CBD Plaintiffs’ conclusion that condors are dying from the

27 ⁸ *See, e.g.*, Wildlife Specialist Report, Motorized Travel Plan, Dixie National Forest
28 (March 2009), at 19, http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5220848.pdf (last visited April 6, 2016).

1 ingestion of hunter-shot lead. Accordingly, the Service may not defend against CBD
2 Plaintiffs' hunting-related allegations as comprehensively and zealously as NRA and SCI
3 will. For all these reasons, NRA and SCI meet the requirements for intervention as of
4 right, and requests the Court grant this Motion.
5

6 **B. Alternatively, the Court Should Grant Permissive Intervention Under**
7 **Rule 24(b)**

8 If the Court does not grant intervention as a matter of right, NRA and SCI request
9 that the Court grant them permissive intervention. Rule 24(b)(1)(B) allows for
10 intervention, in the Court's discretion, where the proposed intervenor has a "claim or
11 defense that shares with the main action a common question of law or fact" and the
12 motion is timely. "[T]he court must consider whether the intervention will unduly delay
13 or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).⁹

15 NRA and SCI meet all of the prerequisites for permissive intervention. As
16 expressed throughout this Memorandum, NRA and SCI seek to protect hunting as it
17 exists today in the Kaibab NF. NRA and SCI's defenses arise directly in response to the
18 allegations in the Complaint. *See generally* Proposed Answer filed with this Motion.

19 As a result, NRA and SCI's defenses share substantial questions of law and fact with the
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21 _____
22 ⁹ In addition to the timeliness and common claim or defense requirements from the rule, in
23 some circumstances the Ninth Circuit requires permissive intervenors to show independent
24 grounds for jurisdiction. *See, e.g., League of United Latin Amer. Citizens v. Wilson*, 131
25 F.3d 1297, 1308 (9th Cir. 1997). But the Court more recently "clarif[ied] that the
26 independent jurisdictional grounds requirement *does not apply* to proposed intervenors in
27 federal-question cases when the proposed intervenor is not raising new claims." *Freedom*
28 *from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011) (emphasis
added). Here, as in *Geithner*, "the district court is exercising federal-question
jurisdiction" and NRA and SCI are not bringing "any counterclaims or cross-claims," so
NRA and SCI are "not required to make any further showing that [their] intervention is
supported by independent jurisdictional grounds." *Id.*; *see also Jackson v. Abercrombie*,
282 F.R.D. 507, 520 (D. Haw. 2012) (same).

1 issues raised by this action. And as discussed at Section IV.A.1 *supra*, this Motion is
2 timely and will not prejudice the rights of the existing parties.

3 Because NRA and SCI's interests are not represented by existing parties, NRA
4 and SCI's participation will contribute to an equitable resolution of this case and
5 "contribute to a full development of the underlying issues in the suit." *Or. Env't'l*
6 *Council v. Or. Dep't of Env't'l Quality*, 775 F. Supp. 353, 359 (D. Or. 1991).

7 Accordingly, if this Court denies intervention pursuant to Rule 24(a), intervention is
8 nonetheless proper under Rule 24(b).
9

10
11 **C. As a Final Alternative, NRA and SCI Seek Amici Status.**

12 Finally, if the Court does not grant intervention, NRA and SCI request the Court
13 exercise its discretion to allow NRA and SCI to participate in this case as amici curiae.
14 *See, e.g., Silver v. Babbitt*, 166 F.R.D. 418, 435 (D. Ariz. 1994) *aff'd*, 68 F.3d 481 (9th
15 Cir. 1995) (granting amicus status to movant for intervention).
16

17 **V. CONCLUSION**

18 For the foregoing reasons, NRA and SCI satisfy the requirements for intervention
19 as of right as well as permissive intervention. In light of the foregoing, NRA and SCI
20 respectfully request this Court grant NRA and SCI's Motion to Intervene as of Right.
21 Alternatively, NRA and SCI request they be granted permissive intervention. As a final
22 alternative, NRA and SCI seek amici status.
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1 Respectfully submitted this 14th day of April, 2016.

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MICHEL & ASSOCIATES, P.C.

4

/s/ C.D. Michel
C.D. Michel, *Attorneys for Proposed*
Defendant -*Intervenor National Rifle*

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SAFARI CLUB INTERNATIONAL

7

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CERTIFICATE OF SERVICE

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I hereby certify that on this 14th day of April, 2016, I electronically transmitted the Notice of Motion and Motion for Leave to Intervene by the National Rifle Association of America and Safari Club International, Memorandum of Points and Authorities in Support, and Declarations in Support 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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