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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

PRESCOTT DIVISION

Center for Biological Diversity, et al.,

Plaintiffs,

vs.

United States Forest Service,

Defendant, and

National Rifle Association of America and Safari Club International,

Proposed Defendant-Intervenors.

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

REPLY IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE

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I. INTRODUCTION

The National Rifle Association of America and Safari Club International (collectively "NRA/SCI") moved to intervene in this action and the Plaintiffs (collectively "CBD Plaintiffs") filed an opposition to NRA/SCI's proposed intervention. This Court should grant intervention as of right because, contrary to CBD Plaintiffs' arguments, (1) NRA/SCI have shown that the United States Forest Service ("Defendant" or "Forest Service") will not adequately represent their interests in the liability phase of the litigation, and (2) NRA/SCI's desire to participate in the litigation of one of the main issues of the case — the impact of lead ammunition on the environment, including the California condor — will not unduly delay the proceedings. Alternatively, if this Court denies intervention as of right, NRA/SCI have adequately demonstrated the requisites for permissive intervention.

In 2010, Judge Paul G. Rosenblatt granted intervenor status to NRA in a lawsuit brought by Plaintiff Center for Biological Diversity ("CBD") against the U.S. Bureau of Land Management. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt. (CBD v. BLM)*, 266 F.R.D. 369 (D. Ariz. 2010). That lawsuit, also concerning lead-based ammunition use on public land in northern Arizona, was procedurally similar to this action, and in that lawsuit, CBD made the same two arguments as raised in their opposition here. *Id.* at 374-75. Neither of those arguments was successful in preventing NRA from intervention as of right in *CBD v. BLM*. *Id*.[1]

Nonetheless, CBD Plaintiffs offer their Response in Opposition (the "Opposition"), a document that fails to recognize relevant law and includes pages of

[1] CBD Plaintiffs contend *CBD v. BLM* is distinguishable, claiming that, since that ruling, "significant new scientific data has been added . . . demonstrating the risk to wildlife posed by spent lead ammunition[.]" Opp. at 13:2-4 & n.13. Whether this alleged new data is relevant to this Action is a merits issue that has nothing to do with intervention. For purposes of intervention, which involves the possible impairment of NRA/SCI's interests in hunting, *CBD v. BLM* cannot be distinguished on this alleged ground.

premature argument as to the merits of this matter. Accordingly, NRA/SCI file this Reply to rebut CBD Plaintiffs' erroneous arguments and to further prove that NRA/SCI have not only met the requirements for intervention as of right, but have also presented a sufficient basis for permissive intervention.

II. ARGUMENT

A. NRA/SCI Meet the Requirements for Intervention as of Right

As demonstrated in their opening motion (the "Motion"), NRA/SCI meet the four requirements of a party seeking to intervene as of right. Mot. at Section IV.A. The Opposition only challenges NRA/SCI as to one of those elements, thus conceding NRA/SCI has met the three remaining criteria. As confirmed by the discussion below, NRA/SCI have also met the fourth and final requirement by showing that the Forest Service may not provide adequate representation of NRA/SCI's interests.

1. CBD Plaintiffs Ignore Relevant Authority that Shows the Presumption of Adequate Representation Does Not Arise on the Facts Alleged

In response to NRA/SCI's demonstration of inadequate representation, CBD Plaintiffs assert that NRA/SCI cannot rebut the presumption of adequate representation, thus precluding intervention as of right. Opp at. 6:8-9. CBD Plaintiffs are able to reach that incorrect conclusion because they simply ignore on-point authority cited in the Motion that is directly contrary to their position:

> the presumption does not arise when [an] entity is "required to represent a broader view than the more narrow, parochial interests" of a proposed intervenor. *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (abrogation as to NEPA issue only).

Mot. at 13:22-14:3; *see also Arakaki v. Cayetano*, 324 F.3d 1078, 1087-88 (9th Cir. 2003) (citing *Forest Con.*, 66 F.3d at 14499 among others).

CBD Plaintiffs' Opposition fails to discuss this "parochial interest" standard. In fact, CBD Plaintiffs selectively cite *Arakaki* regarding the adequate representation presumption ("[w]here parties share the same ultimate objective, differences in litigation

strategy do not normally justify intervention"), but then fail to address *Arakaki's* discussion of the "parochial interest" standard, which directly limits the portion of *Arakaki* cited and relied on by CBD Plaintiffs. Opp. at 6:23-26.

By ignoring the relevant case law, CBD Plaintiffs avoid discussing the obvious fact the NRA/SCI represent a much smaller and more homogenous group than the general public, who are represented by the Forest Service in this case. *See infra* Section A.2. Here, just like in *Forest Con.*, the Forest Service must represent the broad public interest. *Forest Con.*, 63 F.3d at 1499. CBD Plaintiffs do not, and cannot, argue that NRA/SCI's members are going to have their interests and position at the forefront of the Forest Service's defense of this action. Even presuming the Forest Service is "seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, [such] task . . . is on its face impossible." *Nat'l Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977); s*ee also WildEarth Guardians v. Nat'l Parks Serv.*, 604 F.3d 1192, 1200 (10th Cir. 2010) ("Where a government agency may be placed in the position of defending both public and private interests, the burden of showing inadequacy of representation is satisfied."). Because the Forest Service is not going to represent the "more parochial" interests of NRA/SCI, the presumption of adequate representation does not arise in this instance.

2. The Presumption of Adequate Representation Does Not Prevent Intervention

CBD Plaintiffs claim "the NRA and the Forest Service share the same ultimate' objective—regulatory status quo for the Kaibab National Forest" (the "Kaibab NF"). Opp. at 6:4-6. Accordingly, CBD Plaintiffs contend the presumption of adequate representation precludes intervention as of right. CBD Plaintiffs are wrong. "Just because [two] 'entities occupy the same posture in the litigation'" does not necessarily mean "the government's representation of the public interest" is "'identical to the individual parochial interest[.]'" *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) (citation omitted).

As stated in the Motion, NRA/SCI believe the Forest Service's objective in this case "is presumably[2] [(1)] avoiding a finding of liability against it under RCRA and [(2)] preserving its ability to continue to regulate uses of its lands without potential RCRA liability." Mot. at 13:19-21. CBD Plaintiffs contend, without explanation, that the objectives stated above are the same as NRA/SCI's objective of "preserving the regulatory status quo for the Kaibab [NF.]" Opp. at 6:4-23. It is not.

CBD Plaintiffs provide no evidence to support the claim that the Forest Service's objective in this matter is to "preserv[e] the regulatory status quo for the Kaibab [NF.]" Indeed, both aspects of the Forest Service's presumed objective could be met via a result that has direct negative impact on NRA/SCI's interests. For example, the Forest Service could "avoid[] a finding of liability" *and* "continue to regulate uses of its lands without potential RCRA liability" by settling with CBD Plaintiffs on terms that are adverse to NRA/SCI's interests. Mot. at 13:19-20. In such a scenario, a settlement could require the Forest Service to enact, participate in, or not object to, the creation of a lead-ammunition ban for the Kaibab NF. Both aspects of the Forest Service's presumed objective could also substantively be met by a final judgment in the Forest Service's favor that indicates *hunters*, and not the Forest Service, "contributed" to the alleged violation. Clearly, that result *would not* meet NRA/SCI's objective, and yet it would satisfy the two aspects of the Forest Service's presumed objective.

The Forest Service also must consider how it chooses to deal with this case in light of the ongoing spate of lawsuits brought by CBD and similar organizations. That is, the Forest Service must consider the "big picture" and cannot necessarily make policy decisions in this case without considering the ramifications on other current and

[2] Because the Forest Service has taken no position on NRA/SCI's proposed intervention or otherwise made a statement of how NRA/SCI's objectives compare to the Forest Service's, and because NRA/SCI's allegations are to be taken as true for the purpose of the instant Motion, NRA/SCI's presumptions as to what the Forest Service's objectives are should be considered correct. *See Sw. Center for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001).

anticipated litigation against the federal government. This complicates its objectives in this action. Because NRA/SCI does not have the same "big picture" concerns, NRA/SCI's objective is qualitatively different than the Forest Service's.

Also, CBD Plaintiffs claim "the federal government . . . has long believed that exposure to spent lead ammunition in the environment is the main threat to condor survival." Opp. at 8, n.8. If the foregoing is true, then the Forest Service, unlike NRA/SCI, might not be completely adverse to a ruling in favor of CBD Plaintiffs. It is reasonable to believe such ruling could lead to the Forest Service creating restrictions regarding the use of lead-based ammunition on land it manages, or put pressure on the Arizona Game & Fish Department to enact restrictions on the use of lead-based ammunition in the Kaibab NF. Once again, this plausible objective for the Forest Service is not in line with NRA/SCI's objective. Because NRA/SCI and the Forest Service's objectives are not sufficiently similar, the presumption of adequate representation is not applicable. [4]

3. NRA/SCI Have Made the "Minimal" Showing that the Forest Service's Representation of NRA/SCI's Interests May Not Be Adequate

As discussed in the Motion, there are three non-dispositive factors courts review in analyzing whether a current party will sufficiently represent the interests of a potential

[4] *Citizens for Balanced Use* ("*Citizens*") is instructive here. In *Citizens*, the Forest Service was defending an interim order it issued regarding the scope of recreational use on certain federal land. *Citizens*, 647 F.3d at 899. Both the Forest Service and the proposed intervenor intended to defend the interim order, but for different reasons. *Id*. The Forest Service believed the interim order was too broad, but the Forest Service issued it anyway, to comply with a prior court order that the Forest Service was contemporaneously appealing. *Id*. The proposed intervenor, however, believed the interim order was substantively correct and not over-broad. *Id*. On these facts, the Ninth Circuit Court of Appeals held the presumption of adequacy was not applicable, as the positions of the parties "represents more than a mere difference in litigation strategy . . . but rather demonstrates the fundamentally differing points of view between Applicants and the Forest Service on the litigation as a whole." *Id*. Here, because NRA/SCI and the Forest Service appear to have "fundamentally differing points . . . on the litigation as a whole," the presumption of adequacy of representation does not arise.

intervenor. *See* Mot. at IV.A.4. Those factors weigh in favor of intervention here. The Opposition states "[n]one of the three factors weigh in favor of NRA intervention at the liability phase." Opp. at 7:9. Because CBD Plaintiffs misapply or unreasonably transmogrify these factors to serve their purposes, their arguments fail.

a. CBD Plaintiffs' Opinion as to the Merit of NRA/SCI's Arguments Is Irrelevant as to the Factor Concerning Whether a Party Will "Undoubtedly" Make All of NRA/SCI's Arguments

The first factor at issue is "whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments[.]" *Citizens*, 647 F.3d at 898 (citation omitted). Further, on a related point, "the 'most important factor' in assessing the adequacy of representation is 'how the interest compares with the interests of existing parties.'" *Id*. (citation omitted).

At this stage, NRA/SCI are not required "to anticipate specific differences in trial strategy[; i]t is sufficient for [NRA/SCI] to show that, because of the difference in interests, it is likely that [the Forest Service] will not advance the same arguments as [NRA/SCI]." *Berg*, 268 F.3d at 824. Thus, even though the Motion shows a difference in interest, making it likely the Forest Service would not advance the same arguments as NRA/SCI, NRA/SCI went the additional step to provide a specific example: "[NRA/SCI] intend to argue . . . that the best scientific evidence available *does not* sufficiently establish a nexus between condor illness and hunters' use of lead ammunition, in the Kaibab NF or otherwise." Mot. at 14:17-21 (italics in original). The Forest Service will not "undoubtedly" make this argument, because, as CBD Plaintiffs appear to admit, the Forest Service may be unlikely to challenge the "basic underlying theory that hunter-shot lead projectiles pose a particular threat to condors[.]" Opp. at 8:4-7. As CBD Plaintiffs state, "the government has consistently taken [a position opposite to the one proffered by NRA/SCI] for more than a decade[.]" *Id.* at 8:8-10. Thus, under the CBD Plaintiffs' view, there can be little doubt that the Forest Service *will not* "undoubtedly make all of a proposed intervenor's arguments[.]" *Citizens*, 647 F.3d at 898 (citation omitted).

CBD Plaintiffs, however, appear to argue that there is an additional part of this factor not expressly stated in the relevant authority. CBD Plaintiffs seem to contend that the relevant factor actually is something like the following: "whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments *that the party opposing the intervention finds to be meritorious*." *Cf.* Opp. at 8 n.9 & 9:2-4. This is absurd. "Courts are to take all well-pleaded, nonconclusory allegations in the motion to intervene . . . and declarations supporting the motion as true absent sham, frivolity or other objections." *Berg*, 268 F.3d at 820.

CBD Plaintiffs do not argue that NRA/SCI's position is based on sham, frivolity, or other inappropriate motive. Instead, they only make the premature allegation that NRA/SCI's argument is without merit. Indeed, about one-third of the Opposition contains argument on merits issues that are inappropriate in a response to a motion to intervene. Therefore, as NRA/SCI's merits arguments must be taken as true at this stage, CBD Plaintiffs fail in their attempt to modify the first factor and, accordingly, this factor unambiguously weighs in favor of intervention.

b. CBD Plaintiffs' Attempt to Evade the "Capable and Willing" Factor Cuts in Favor of Intervention

The second factor is "whether the present party is capable and willing to make such arguments[.]" *Citizens*, 647 F.3d at 898 (citation omitted). CBD Plaintiffs' statement on this factor is as follows. "Defendant is certainly *capable* of making the argument the NRA suggests, but the fact that it may be *unwilling* to do so speaks more to weakness of the argument than it does to the adequacy of representation at the liability phase." Opp. at 9:4-8 (italics in original). CBD Plaintiffs' statement shows that they recognize that the Forest Service is probably unwilling to make NRA/SCI's arguments, which means this factor cuts in favor of intervention. That CBD Plaintiffs improperly argue a merits issue in this context is of no import. *See Berg*, 268 F.3d at 820.[5]

[5] CBD Plaintiffs contend that "practical considerations" cut against intervention during the liability phase because CBD Plaintiffs contend (1) NRA/SCI dispute an issue that the

c. The "Necessary Element" Factor Does Not Weigh Against Intervention Just Because CBD Plaintiffs Give Little Value to NRA/SCI's Potential Contribution to this Action

The final factor at issue is "whether a proposed intervenor would offer any necessary elements to the proceedings that other parties would neglect[.]" *Citizens*, 647 F.3d at 898 (citation omitted). CBD Plaintiffs speculate that even if NRA/SCI make a material showing that "the scientific deficiencies that underlay the contested conclusion that condors are dying from the ingestion of hunter-shot lead[,] that would not undermine Plaintiffs' claim that spent lead ammunition in the environment 'may present' an imminent and substantial endangerment." (Opp. at 13-14.) This contention not only goes to the merits of the case, but makes no sense. If NRA/SCI can show that condors are not dying from the ingestion of hunter-shot lead (and risk to condors is plainly at the heart of CBD Plaintiffs' case (see Comp. at ¶¶ 34-42)), then such information would necessarily tend to undermine, and potentially defeat, CBD Plaintiffs' case.

CBD Plaintiffs also contend that "the federal government . . . has acquired significant and 'particular expertise' regarding the threats facing condors in Arizona." Opp. at 4:10-14. Thus, CBD Plaintiffs take the position that it is "absurd" for NRA/SCI to contend that they are unaware of the Forest Service having particular expertise

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Forest Service (and others) does not, and (2) NRA/SCI's "likelihood of prevailing . . . is extremely low[.]" Opp. at 9:18-19. CBD speculates that NRA/SCI's participation will result in unnecessary time- and resource-consumptive litigation. This is a strange argument for two reasons. First, "likelihood of success" is not one of the relevant factors in determining adequacy of representation. Second, if it is the case that all parties on both sides disagree with NRA/SCI on a foundational issue, that obviously favors intervention under all three factors. In any event, if the elements are met, the Court "must" grant intervention. Fed. R. Civ. P. 24(a). In addition, to the extent the Court is concerned about the possibility of unrelated collateral issues being raised by NRA/SCI, intervention as of right can be tailored as the Court sees fit. *See* Fed. R. Civ. P. 24 advisory committee's note (1966) ("An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.").

regarding "the scientific deficiencies that underlay the contested conclusion that condors are dying from the ingestion of hunter-shot lead." *Id.* Mot. at 16:4-7.

First, CBD is conflating the *federal government* with the actual named defendant here, the Forest Service. It is disingenuous at best to conflate the two, as the entire federal government is not going to be participating in this case. Second, CBD Plaintiffs are mixing up two classes of material: (1) the entirety of publically available information regarding California condor "threats," and (2) non-public information and expertise critically evaluating what is purported to be "scientific." Notwithstanding the goal that all scientific research be unbiased, the Forest Service is unlikely to have information or expertise critical of the work of others performing research related to California condors, *e.g.*, the U.S. Fish & Wildlife Service. And even if it did possess such information, it is not unreasonable to believe that the Forest Service might not release such information in this litigation, for any number of reasons.

At the very least, this factor does not weigh against intervention. And inasmuch as the other two factors discussed in this subsection weigh in favor of intervention, on balance, the Forest Service's representation of NRA/SCI's interests will be insufficient. Thus, because NRA/SCI have met the "minimal" burden of showing the inadequate representation element for a proposed intervenor (*Arakaki*, 324 F.3d at 1086), and because it is undisputed they have met the three other intervention elements, NRA/SCI have met all of the relevant requirements, and intervention as of right should be granted.

B. CBD Plaintiffs' Request that NRA/SCI's Participation Be Limited to the Remedy Phase of this Action Is Unjustified

The best way for NRA/SCI to protect their demonstrated interests in hunting in the Kaibab NF with the ammunition of their choice, including lead ammunition, is to defend against the CBD Plaintiffs' RCRA claims and defeat them at the outset. If that occurs, the remedy phase will not occur. Nothing in the Federal Rules or case law suggest that it is proper or reasonable to relegate an intervenor to the remedy phase. CBD Plaintiffs cite to no Federal Rule of Civil Procedure or case that supports their suggestion. In fact, Rule

24(c) requires the intervenor to file a complaint or answer with its motion. The assertion of claims or defenses demonstrates that an intervenor is seeking to participate as a full party, not a party who must wait for the remedy phase to assert its interests.

The existence of other situations in which lead ammunition was banned is irrelevant. The legal issue here is whether the Forest Service has violated RCRA. If it has not, then that law cannot be used to establish a lead ammunition ban in the Kaibab NF. Whether or not NRA/SCI members could use non-lead ammunition to hunt in the Kaibab NF if lead was banned is also irrelevant. The current status quo is that lead ammunition is allowed and that some of the members of NRA/SCI wish to continue to use it. In short, CBD Plaintiffs again appear to want to argue the merits of this case. The Court should reject CBD Plaintiffs' attempt to create a rule of intervention — relegating parties to the remedy phase only — found nowhere in rules or case law.[6]

C. Permissive Intervention Will Give a Voice to those Who Are Likely to Be Most Affected by the Relief Sought

In their opening motion, NRA/SCI demonstrated why permissive intervention would be appropriate if the Court did not grant intervention as of right. Mot. § IV.B. In response, CBD Plaintiffs baldly state that NRA/SCI's participation would unduly delay and prejudice the parties' rights. Opp. at 17:1-17. CBD Plaintiffs' again essentially ask the Court to resolve the merits in their favor and conclude that no possible defense exists. CBD Plaintiffs therefore suggest that any effort by NRA/SCI to present a defense will unnecessarily delay the case. This argument not only improperly asks the Court to address the ultimate merits issues of the case, but would effectively erect nearly insurmountable barriers to permissive intervention. The circumstances in this case are similar to those in *CBD v. BLM*, wherein NRA participated as an intervenor without introducing delay, much less undue delay. Presumably, CBD believed just as strongly in

[6] This argument appears to be trying to invoke the now-rejected rule that intervenor-defendants are only allowed to participate in the remedial phase of environmental litigation, such as under the National Environmental Policy Act. *See Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179-80 (9th Cir. 2011) (*en banc*).

its arguments on the merits in that case as it does here. Yet, CBD ultimately lost on the merits in *CBD v. BLM*, demonstrating the resolution of merits issues in deciding a motion to intervene is premature and improper. *See CBD v. BLM*, Case No. 3:09-cv-08011-PCT-PGR (D. Ariz.) (Dkt. 134 at 20:14-27, 23:1-23).

III. CONCLUSION

In light of the foregoing, NRA/SCI respectfully request that this Court grant NRA/SCI's Motion to Intervene as of Right. Alternatively, NRA/SCI request they be granted permissive intervention. Finally, if the Court does not grant intervention, NRA/SCI request that the Court allow NRA/SCI to participate in this case as amici curiae.

Respectfully submitted this 11th day of January, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 2013, I electronically transmitted the Reply in Support of Motion for Leave to Intervene, 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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