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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

**PRESCOTT DIVISION**

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| **CENTER FOR BIOLOGICAL DIVERSITY; SIERRA CLUB**; and **GRAND CANYON WILDLANDS COUNCIL**,<br><br>**Plaintiffs,**<br><br>V.<br><br>**UNITED STATES FOREST SERVICE**, a United States Government Agency,<br><br>**Defendant.** | **Case No. CV-12-8176-PCT-SMM**<br><br>**REPLY TO PLAINTIFFS' RESPONSE TO THE STATE OF ARIZONA'S MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF FILING A MOTION TO DISMISS** |

The State of Arizona ("Arizona") hereby replies to Plaintiffs' Memorandum in Response to Arizona's Motion to Intervene for the Limited Purpose of Filing a Motion to Dismiss. Plaintiffs in their Response offer no opposition to Arizona's Motion to Intervene and accept that Arizona can satisfy the requirements for intervention as set forth in Rule 24 of the Federal Rules of Civil Procedure. (Pls.' Resp. at 2.) Plaintiffs,

however, make other claims in their Response that are confusing, incorrect or misrepresent Arizona's positions and must be addressed in this reply.

**A. Plaintiffs' Claim that Arizona Mischaracterized Plaintiffs' Proposed Remedy and Their Claim that this Lawsuit Will Not Impose Restrictions on Hunting Must Be Interpreted as Plaintiffs No Longer Seeking an Injunction to Prohibit Hunting with Lead Ammunition on the Kaibab National Forest.**

Plaintiffs contend that Arizona has made a mischaracterization by asserting that Plaintiffs seek an injunction requiring the USFS to stop the use of lead ammunition on the national forest. (Pls.' Resp. at 9.) Based on a fair reading of the Complaint, Arizona reasonably believed Plaintiffs are seeking an injunction prohibiting the use of lead ammunition. Plaintiffs assert in their First Claim for Relief that the USFS is violating RCRA "by issuing Special Use permits for guiding and outfitting activities that *do not prohibit the use of lead ammunition within the Kaibab National Forest*." (Compl. at ¶ 46.) (Emphasis added). Immediately thereafter in the Request for Relief, Plaintiffs seek a court order enjoining the USFS from creating or contributing to the disposal of lead on the national forest. (Compl. at ¶ 47.) Arizona can hardly be faulted in characterizing the injunction Plaintiffs seek as requiring the USFS to stop the use of lead ammunition on the national forest when Plaintiffs allege that the USFS has violated the law by failing to prohibit lead ammunition.

Plaintiffs now take the position in their Response that an injunction banning lead ammunition is a mischaracterization. Plaintiffs also insist that "[t]his lawsuit does not seek to 'impose restrictions on hunting.'" (Pls.' Resp. at 11.) Despite Plaintiffs assertion otherwise, restricting the type of ammunition or weapon a hunter can use certainly

qualifies as a restriction on hunting, so if Plaintiffs now insist that an injunction banning lead ammunition is a mischaracterization, and this lawsuit does not seek to impose restrictions on hunting, Plaintiffs must concede they are no longer seeking an injunction that prohibits hunting with lead ammunition on the Kaibab National Forest.[1]

Nevertheless, Plaintiffs' position that this lawsuit is not intended to enjoin the use of lead ammunition weakens Arizona's position that such a ban impairs Arizona's legally protected interests and "directly interferes with Arizona's authority to adopt and enforce its own laws concerning the manner and methods of taking wildlife." (Arizona's Mot. to Intervene at 7.) If this lawsuit will impose no restrictions on hunting, including a ban on lead ammunition, Plaintiffs are likely to argue in response to Arizona's motion to dismiss that the outcome of this case will not impair Arizona's legal interests. To the extent the Court accepts this position, the Court should preclude Plaintiffs from later taking an inconsistent position that seeks an injunction imposing restrictions on hunting. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (explaining that a party prevailing on an issue cannot seek an advantage in litigation by later pursuing a contradictory position); *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782-83 (9th Cir. 2001) (holding that judicial estoppel precludes a party from gaining an advantage by asserting one position in a proceeding and then taking an inconsistent position in the same litigation).

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[1] Plaintiffs appear to suggest that the appropriate remedy to "abate" the danger from lead ammunition is to require hunters who use lead ammunition to "bury their gut piles or carry them out of the national forest." (Pls.' Resp. at 10.)

**B. Arizona Has Not Waived Its Sovereign Immunity by Filing a Limited Motion to Intervene.**

"The test for determining whether a state has waived its immunity from federal-court jurisdiction is a stringent one." *Atescadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). A state's waiver of sovereign immunity must be explicit or clearly implied and "only where stated by the most express language or by such overwhelming implication." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). The courts are to "strictly construe" a waiver of sovereign immunity, and if a waiver is found, to limit its scope "in favor of the sovereign." *Lane v. Pena*, 518 U.S 187, 192 (1996).

Plaintiffs claim to be unfamiliar with cases holding a state does not waive its immunity when it files a limited motion to intervene. (Plfs' Resp. at 7.) A number of cases, however, have in fact found that a state does not waive its immunity when it seeks to intervene for the purpose of obtaining a dismissal. *Zych v. Wrecked Vessel Believed To Be The Lady Elgin*, 960 F.2d 665 (7th Cir. 1992) (State of Illinois did not waive its sovereign immunity in filing a motion to intervene for the limited purpose of filing a motion to dismiss to preclude a judgment adverse to the Illinois' interests.); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F. Supp.2d 995, 1000 (W.D. Wis. 2004), *aff'd on other grounds*, 422 F.3d 490 (7th Cir. 2006) (Ho-Chunk Indian Nation may intervene for limited purpose of moving to dismiss for failure to join indispensable party without waiving its sovereign immunity.); *Wyandotte Nation v. City of Kansas City, Kansas*, 200 F. Supp.2d 1279, 1291 (D. Kan. 2002) ("Kansas has not waived its Eleventh Amendment immunity from suit by moving to intervene for the limited purpose of filing a motion to dismiss."); *Subaqueous Exploration and*

*Archeology, Ltd. v. Unidentified, Wrecked and Abandoned Vessel*, 577 F. Supp. 597, 614 (D. Md. 1983) (State of Maryland did not waive its sovereign immunity when it "expressly preserved its sovereign immunity in each motion that it has filed."); *see also Marx v. Government of Guam*, 866 F.2d 294, 301 (9th Cir. 1989) (Guam's limited appearance for purposes of filing motion to dismiss did not waive its sovereign immunity.) .

Plaintiffs also contend that Arizona's reference to *Southwest Center for Biological Diversity v. United States Bureau of Reclamation*, 143 F.3d 515 (9th Cir. 1998), is misplaced because the various states in that case seeking dismissal based on sovereign immunity filed a "special appearance" as opposed to a motion to intervene. (Pls.' Resp. at 7.) No real distinction exists between a "special appearance" and a limited motion to intervene because in both instances the states are making a limited appearance to file a motion to dismiss, and the filing of the motion to dismiss requires federal judicial authority to decide and this does not waive sovereign immunity. Moreover, the Ninth Circuit construes a special appearance for purposes of filing a motion to dismiss as a motion to intervene. *Marx*, 866 F.2d at 297 (explaining that the rules do not authorize a special appearance to file a motion to dismiss, so in order to do justice, the court must construe such a filing as a motion to intervene).

Either in the context of a special appearance or a limited motion to intervene, the important inquiry is whether a state expressly preserves it sovereign immunity in the documents filed in court. 577 F. Supp. at 614. A special appearance and limited

intervention are functional equivalents, provided the state expressly preserves its sovereign immunity. *Id*.

Lastly, the manner in which the state "appears" in federal court is less important than the scope of the appearance. *See McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989) (holding that the scope of a sovereign's appearance defines the scope of any waiver). If there is any waiver, it is limited to the sole reason for the motion to dismiss and does not extend to any other issues or claims. *Id.* at 630.

Arizona should not be forced to waive its immunity in order to obtain a judicial determination of immunity. Arizona has proceeded carefully in a manner consistent with the procedural rules and the case law in filing a limited motion to intervene and has expressly preserved its sovereign immunity in its motion. If the Court grants Arizona's motion to intervene, the Court should also find that Arizona has not waived its sovereign immunity and not defer this ruling until a later date.

### C. Prohibiting the Use of Lead Ammunition Jeopardizes Public Support for Releasing Additional Condors and Reintroducing Other Wildlife Species.

Plaintiffs incorrectly assert that Arizona is opposed to "actions designed to remove a toxin from the environment" because such actions jeopardize public support for condors and the release of other wildlife species. (Pls.' Resp. at 10.) The tradeoff is not between removing lead from the environment and public support for wildlife reintroductions. As stated in Arizona's Motion to Intervene, *mandating* that hunters take certain actions has the potential to lessen hunter support for the condor reintroduction program because hunters initially supported the reintroduction program with the understanding it would

not impose restrictions on hunting. In contrast to generally opposing mandates and prohibitions, hunters have overwhelmingly supported Arizona's voluntary program to reduce the amount of lead in the environment. Arizona has expended substantial sums of state money since 2003 on its lead reduction program, resulting in a rate of participation at nearly 90 percent in some form of voluntary lead reduction effort. This hardly supports Plaintiffs' contention that Arizona opposes actions to "remove a toxin from the environment." What Arizona opposes is a mandatory approach to lead removal to replace its highly effective voluntary approach.

**D. Conclusion.**

Arizona requests that the Court grant its limited motion to intervene, and hold that Arizona has not waived its sovereign immunity in filing the motion.

RESPECTFULLY SUBMITTED this 4th day of December, 2012.

TOM HORNE
Arizona Attorney General

/s/ James F. Odenkirk
James F. Odenkirk
Assistant Attorney General
Attorneys for State of Arizona

**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th day of December, 2012, I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

/s/ James F. Odenkirk
James F. Odenkirk