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Coalition: American Sand Association

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,

Plaintiffs,

vs.

UNITED STATES BUREAU OF LAND MANAGEMENT, *et al.*,

Defendants.

AMA DISTRICT 37; CALIFORNIA OFF-ROAD VEHICLE ASSOCIATION; OFF-ROAD BUSINESS ASSOCIATION; SAN DIEGO OFF-ROAD COALITION; and AMERICAN SAND ASSOCIATION,

Applicants for Intervention

CASE NO: 3:06 CV 04884 SI

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE

[Fed. R. Civ. P. 24]

Date: January 5, 2007
Time: 9 a.m.
Courtroom: 10, 19th Floor
Judge: Susan Illston

I. INTRODUCTION

In this case, the plaintiffs, Center for Biological Diversity, *et al.* ("plaintiffs") have again challenged the planning documents that the Bureau of Land Management ("BLM") adopted to govern activities in the California Desert Conservation Area ("CDCA"). Specifically, plaintiffs have attacked the management plans for the Western Mojave (WEMO) desert region and the

Northern Colorado (NECO) desert region, as well as the Biological Opinions the Fish and Wildlife Service ("FWS") prepared in support of those plans.

Plaintiffs' lawsuit implicates every human activity permitted by BLM in the WEMO and NECO areas, including and especially motorized recreation. For this reason, the American Motorcyclists Association District 37, California Off-Road Vehicle Association, the Off-Road Business Association, the San Diego Off-Road Coalition, and the American Sand Association (collectively, the "OHV Groups") seek to intervene in this matter, just as they have done in other actions affecting the CDCA. (See, Declarations of Megan Grossglass, Roy Denner, Roger Van Matre, and Ed Waldheim). Plaintiffs seek an order from this Court that would restrict or eliminate the OHV Groups' access to certain areas of the CDCA, namely those located in the Western Mohave (WEMO) Desert Management Area and the Northern Colorado (NECO) Desert Management Area. Any such restriction, if ordered by this Court, would adversely impact the recreational and aesthetic, socioeconomic, and procedural interests of the OHV Groups and their members.[1] As in previous litigation involving the same parties, this Court should allow the OHV Groups to intervene to defend their legally protectable interests potentially impaired by Plaintiffs' requested relief.

Undersigned counsel has telephoned and emailed plaintiffs' and defendant's counsel regarding the proposed intervention. Defendants' counsel indicated that Defendants take no position regarding the motion. Plaintiffs' counsel indicated they wish to review the pleadings before taking any position on the motion.

II. FACTUAL BACKGROUND

By attacking the WEMO and NECO Plans (and their supporting documents), plaintiffs seek to prevent off-highway vehicle ("OHV") access to portions of the CDCA which have long supported OHV recreation. The CDCA was designated in 1976 as part of subchapter VI of the Federal Land Policy and Management Act ("FLPMA"). 43 U.S.C. § 1781. Congress found that the

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[1] Declaration of Megan Grossglass, at ¶¶3-11; Declaration of Roger Van Matre, at ¶¶ 3-11; Declaration of Roy Denner, at ¶¶3-11; and Declaration of Ed Walheim, at ¶¶ 3-11.

CDCA "contains historical, scenic, archeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources that are uniquely located adjacent to an area of large population…." 43 U.S.C. § 1781(a)(1). Congress emphasized the importance of recreation, including OHV, use, finding:

> [T]he use of all California desert resources can and should be provided for in a multiple use and sustained yield management plant [sic] to conserve these resources for future use and enjoyment, particularly outdoor recreation uses, including the use, where appropriate, of off-road recreational vehicles….

Id. at (4). The OHV Groups' members have regularly visited the CDCA. See Declaration of Ed Waldheim at ¶¶ 2-6; Declaration of Meg Grossglass at ¶¶ 2-6; Declaration of Roy Denner at ¶¶ 2-6 ; Declaration of Roger Van Matre at ¶¶ 2-6. The OHV Groups' members not only engage in OHV recreation for its own sake, but use OHVs to safely access remote wilderness areas of the CDCA, including those located in the WEMO and NECO. *Id.* In addition, members of the OHV Groups use their vehicles engage in a host of other family-oriented recreational pursuits, such as camping, photography, sightseeing, rock hounding, and wildlife viewing. *Id.* Many of the OHV areas implicated in plaintiffs' suit support organized events for which the OHV groups have received permits from BLM. See, Declaration of Roger Van Matre, at ¶ 3. Obviously, these permits and the ability to secure them in the future are jeopardized by the current litigation. *Ibid.*.

Over the last 25 years, BLM has attempted to develop comprehensive plans for addressing recreational use of the CDCA. The "CDCA Plan" was adopted in 1980, and has been amended over 100 times. Complaint at ¶ 54. In addition to the CDCA Plan, Defendant U.S. Fish and Wildlife Service ("USFWS") listed the Desert tortoise as a "threatened" species under the Endangered Species Act, 16 U.S.C. § 1531 et seq., in 1990. *Id.* at ¶56. Despite BLM's management efforts to address this species and numerous other factors, three of the Plaintiffs brought suit against BLM in 2000, alleging BLM failed to properly programmatically consult with the USFWS regarding the CDCA Plan. *Id.* at ¶ 72; *Center for Biological Diversity, et al. v. BLM*, Case No. C-00-0927 WHA-JCS (N.D. Cal.). One the OHV Groups seeking to intervene today, the San Diego Off-Road Coalition, obtained limited intervenor status, and was able to participate in negotiations involving Plaintiffs and the BLM. See, e.g., Declaration of Meg Grossglass at ¶¶ 4-5. After several months

of negotiations, a series of settlement agreements were reached and were ultimately entered in the form of a consent decree by Judge Alsup. See Complaint at ¶ 72.

Despite the substantial expense, agency efforts, and public involvement in the planning processes required by the Consent Decree, plaintiffs have initiated this suit to prevent implementation of the settlement-driven agency decisions. Specifically, plaintiffs target the biological opinions issued by Defendant USFWS on June 17, 2002 (regarding the Desert tortoise), and the WEMO and NECO Records of Decision. Plaintiffs attempt to invoke the right to judicial review under the Endangered Species Act, 16 U.S.C. § 1540(g), and the Administrative Procedure Act, 5 U.S.C. § 706(2). Plaintiffs ask the Court to declare unlawful and set aside the aforementioned biological opinion and decisions, as well as to declare that BLM's "implementation of the WEMO Plan violates Section 7(a)(2) of the ESA because the agency has failed to insure that its actions do not jeopardize the desert tortoise or destroy or adversely modify its critical habitat…." Complaint, Prayer for Relief, at p. 46, ¶¶ (3)-(8). In addition, plaintiffs ask the Court to enjoin the anticipated actions of defendants in "issuing any permit, approval, or other action within both WEMO and NECO action that may adversely affect the desert tortoise . . ." *Id.* at p. 47, ¶ (9). The OHV Groups therefore seek intervention in this case to defend their varied interests in the subject matter of this action and to continue their involvement in this ongoing litigation potentially influencing management of the public lands within the CDCA.

III. ARGUMENT

The Federal Rules of Civil Procedure provide for intervention "as of right" under Rule 24(a), or through "permissive intervention" under Rule 24(b). The Circuit Court's decision in *Kootenai Tribe v. Veneman*, 313 F.3d 1094 (9th Cir. 2002) clarifies interpretation of these rules. The Court has ample discretion to grant the OHV Groups "permissive intervention" with full rights as a party in this case.

A. Intervention As Of Right Under Rule 24(a).

The first avenue for prospective intervenors exists under the Federal Rules of Civil Procedure provisions addressing intervention "as of right." This option is addressed by Rule 24(a), whose requirements:

> may be broken down into four elements, each of which must be demonstrated in order to provide a non-party with a right to intervene: (1) the application must be timely; (2) the applicant must have a 'significantly protectable interest relating to the transaction that is the subject of the litigation; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the parties before the court.

League of United Latin American Citizens v. Wilson, 131 F.3d 1297, 1302 (9th Cir. 1997). Since a request for intervention as of right or for permissive intervention must be timely, the OHV Groups will specifically address timeliness here. The OHV Groups will only briefly address the other three elements in the Rule 24(a) analysis to avoid belaboring issues before this Court presently governed by the Circuit's "none but a federal defendant" rule.

1. <u>The Application for Intervention is Timely</u>.

Factors to be considered when determining whether a motion to intervene is timely include: (1) the stage of the proceedings; (2) prejudice to other parties; and (3) the reason for and length of delay in filing the motion to intervene. *Smith v. Marsh*, 194 F.3d 1045, 1051 (9th Cir. 1999). The Complaint was filed in this matter on May 28, 2003. The Federal Defendants have not yet answered the Complaint in this case. The OHV Groups satisfy any formulation of the timeliness requirement.

2. <u>Remaining Rule 24(a) Factors Under the Circuit's "None but a Federal Defendant" Rule</u>.

The Ninth Circuit has adopted a "none but a federal defendant" rule which precludes private parties from gaining intervention as of right in a National Environmental Policy Act ("NEPA") action. *Kootenai Tribe*, 313 F.3d at 1108. Under this rule, a private party cannot assert any interest meeting Rule 24(a)'s "interest prong" because "the federal government is the only proper defendant in an action to compel compliance with NEPA." *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1114 (9th Cir. 2000). Thus lacking the requisite interest, private intervenors similarly cannot meet Rule 24(a)'s "impairment" prong. Decisions in this Circuit regularly extend this logic to cases arising under statutes other than NEPA which impose federal land management duties upon the federal government. See *Forest Conservation Council v. U.S.*

Forest Service, 66 F.3d 1489, 1499 (9th Cir. 1995) (analyzing intervention in suit raising NEPA and National Forest Management Act claims); *Southwest Center for Biological Diversity v. U.S. Forest Service*, 82 F.Supp.2d 1070, 1073-1074 (D.Ariz. 2000) (involving Endangered Species Act claims).

Under these decisions private parties are still allowed to fully intervene in the "remedy phase" of public lands and environmental litigation. *Forest Conservation Council*, 66 F.3d at 1494. The OHV Groups demonstrate sufficient interests in this case to achieve this status. They previously participated in the administrative processes leading to the development of the desert management plans and biological opinions at issue here. See, e.g., Declaration Roy Denner at ¶¶ 7 and 11; Declaration of Roger Van Matre at ¶¶ 8-11. The OHV groups have also been involved in much, if not all, of the litigation that has taken place since the various CDCA plans were adopted by BLM. *See,* Declarations of Roger Van Matre, Roy Denner, Ed Waldheim, and Megan Grossglass.

The OHV Groups' members have recreational and aesthetic interests in some of the CDCA areas at issue here. *Id.* at ¶ 2. In addition, some of the OHV Groups and their members hold special use permits authorizing OHV events ostensibly challenged by this suit. Declaration of Roger Van Matre at ¶ 3. Finally, OHV Groups members conduct business operations authorized under special use permits or which are otherwise connected to ORV use. Declaration of Roy Denner at ¶ 6. Thus, Plaintiffs' requested injunctive relief would directly and adversely affect the OHV Groups' interests in the subject matter of this action.

Counsel for the OHV Groups does not believe that the Ninth Circuit decisions limiting intervention are correctly decided. Several circuits have refused to follow, if not flatly rejected, the Ninth Circuit's reasoning. *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1253-54 (10th Cir. 2001); *Kleissler v. U.S. Forest Service*, 157 F.3d 964, 971-972 (3rd Cir. 1998); *Mausolf v. Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996); *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994).

However, counsel recognizes this is not the place to argue for a change in the law and that decisions like *Kootenai Tribe* are presently binding upon this Court. The OHV Groups will not belabor these issues, but reserves the right to appeal from a decision applying the existing Ninth Circuit decisions, such as *Kootenai Tribe* and *Wetlands Action Network*, to limit intervention, and to also request full intervention should the law change while this case is pending before this Court.

Assuming these decisions govern this motion and "limited" intervention is the most available to any private party under Rule 24(a), the OHV Groups should be granted intervention and full party status in any remedial phase of this case, and be provided an opportunity to file an *amicus* brief and participate in oral argument during the liability phase as is often allowed in similar cases.

B. Permissive Intervention Is Appropriate.

Regardless of the outcome of the Rule 24(a) analysis, the OHV Groups can properly attain full party status in all aspects of this case through permissive intervention under Rule 24(b). That rule states:

> Upon timely application anyone may be permitted to intervene in an action; ...(2) when an applicant's claim or defense in the main action have a question of law or
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> fact in common... . In exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed.R.Civ.P 24(b). The *Kootenai Tribe* court analyzed the Rule 24(b) analysis at some length, noting that permissive intervention presents a lesser "interest" requirement than intervention as of right. *Kootenai Tribe*, 313 F.3d at 1110. The "none but a federal defendant" rule does not preclude permissive intervention under Rule 24(b).

This case parallels the permissive intervention analysis in *Kootenai Tribe*. The OHV Groups possess recreational and aesthetic, special use permit and socioeconomic interests "related to" the management schemes at issue, and hope to assert defenses "directly responsive" to Plaintiffs' claims. *Kootenai Tribe*, 313 F.3d at 1110. Intervenor-applicants here should fare no worse than intervenor-appellants in *Kootenai Tribe*, where the Circuit concluded "it was within the district court's discretion to decide whether to permit them to participate." *Id.* In this case involving important public land management issues, "the presence of intervenors [might] assist the court in its orderly procedure leading to the resolution of this case, which impact[s] large and varied interests." *Id.* at 1111.

Finally, it is important to note that the OHV Groups have been intensely involved, on both the administrative and the litigation front, with the desert management areas and plans that are the

subject of this lawsuit. For example, the OHV Groups were parties to two cases in the Northern District which implicated the WEMO and NECO areas: *Center for Biological Diversity v. BLM*, Case No. C-03-2509 SI (N.D. Cal.), and *American Motorcycle Association District 37 v. Norton, et al.*, Case No. 3:03-CV-3807 SI (N.D. Cal.). In addition, these same parties are currently involved in litigation in the Southern District which relates to the Environmental Impact Statement for the NECO Plan: *Off-Road Business Association v. U.S. Department of Interior*, Case No. 03-CV-1199 B (POR) (S.D. Cal.).

In addition, although the OHV Groups often work cooperatively with BLM and other federal agencies with respect to the management of the WEMO and NECO, and although the OHV Groups may at times in this litigation be allied with the federal defendants, the OHV Groups do not feel that their interest will be fully or adequately protected by the federal defendants alone. Declaration of Megan Grossglass, at ¶ 11; Declaration of Roy Denner, at ¶ 11; Declaration of Ed Waldheim, at ¶ 11; Declaration of Roger Van Matre, at ¶ 11. Nor do the OHV Groups believe that the federal defendants can properly address this case from the perspective of the end-user – *i.e.,* the family that camps and rides OHVs in the WEMO and NECO. *Id.*

For these reason, the Court can properly exercise discretion under Rule 24(b) to allow permissive intervention and afford the OHV Groups full party status in all aspects of this case.

IV. CONCLUSION

The OHV Groups should be allowed full participation in this case, as their interests are implicated directly. Under *Kootenai Tribe*, the Court can appropriately exercise discretion to allow full intervention in all aspects of the case. However, should the Court determine full intervention is not warranted, the OHV Groups nevertheless satisfy the requirements for limited intervention and should be provided party status in the remedy phase, and *amicus* status and the opportunity to participate in argument in the liability phase of this action.

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Respectfully submitted,

Dated: October 19, 2006 LAW OFFICE OF DAVID P. HUBBARD

By: /s/ David P. Hubbard

DAVID P. HUBBARD, ESQ.
Attorneys for Applicant-Intervenors