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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,

Plaintiffs,

v.

DIRK KEMPTHORNE, *et al.*,

Defendants.

AMERICAN PETROLEUM INSTITUTE, *et al.*,

Proposed Defendant-Intervenors.

No. C-08-1339-CW

REPLY MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE BY AMERICAN PETROLEUM INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL MINING ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND AMERICAN IRON AND STEEL INSTITUTE

Date: Hearing vacated

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INTRODUCTION

Proposed Defendant-Intervenors the American Petroleum Institute ("API"), Chamber of Commerce of the United States of America ("Chamber"), National Mining Association ("NMA"), National Association of Manufacturers ("NAM"), and American Iron and Steel Institute ("AISI") (collectively "the Associations") submit this reply in further support of their Motion to Intervene, filed September 4, 2008. The Associations requested full intervention on Claims Two through Seven of Plaintiffs' Second Amended Complaint, either as a matter of right under Fed. R. Civ. P. 24(a) or, alternatively, permissively under Fed. R. Civ. P. 24(b)(1)(B).

No party opposes the Associations' intervention as a matter of right to defend Claims Two and Four, which, respectively, raise a claim under the Endangered Species Act ("ESA") challenging the listing of the polar bear as "threatened" rather than "endangered ("Listing Rule"), and a claim under the ESA and Administrative Procedure Act ("APA") challenging the rule issued under ESA Section 4(d) to implement specific conservation measures tailored to the polar bear ("4(d) Rule"). *See* Second Amended Complaint, filed July 16, 2008 ("Second Am. Compl."), Second and Fourth Claims for Relief. Plaintiffs, the Center for Biological Diversity, Natural Resources Defense Council, and Greenpeace, Inc., however, request that the Court require the Associations to file a joint brief on those two claims either with other proposed Defendant-Intervenors or with Defendant-Intervenors Alaska Oil and Gas Association ("AOGA") and Arctic Slope Regional Corporation ("ASRC").

As to Claims Three and Seven (failure to designate critical habitat under the ESA and failure to promulgate a list of non-lethal deterrence measures under the Marine Mammal Protection Act ("MMPA"), respectively), the Court already determined (in the context of AOGA and ASRC's motions to intervene) that interests like those the Associations seek to protect will be impacted by the adjudication of the merits of those claims. Order Granting in Part Motions for Leave to

Intervene by Alaska Oil and Gas Association and Arctic Slope Regional Corporation, Aug. 13, 2008 ("Order"), at 6. Thus, Plaintiffs' assertion that the Associations have "no legally protectable interest" in these claims has effectively already been considered and rejected by this Court.[1]

Finally, relying on the Court's prior Order, Plaintiffs argue that the Associations should not be allowed to intervene on the merits of the Fifth and Sixth Claims, which, respectively, challenge the 4(d) Rule on APA notice and comment grounds and on joint National Environmental Policy Act ("NEPA")/APA grounds. Neither Plaintiffs' brief nor the Court's prior Order addresses (i) whether intervention as a matter of right on NEPA and APA claims should be limited to the remedy phase when the proposed intervenor has established interests that will be substantially impacted by a decision on the merits of those claims or (ii) whether permissive intervention on the merits of such claims is warranted.

Thus, as a practical matter, what remains for the Court to decide regarding the Associations' motion to intervene is whether the Associations should be confined, as Plaintiffs urge, to (i) filing a joint brief with other Defendant-Intervenors; and (ii) participating in only the remedy phase of the NEPA and APA claims in Claims Five and Six.[2] For the reasons explained below and in the

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[1] On September 23, 2008, Plaintiffs and Defendants filed a Stipulation and [Proposed] Order to Extend Deadline for Administrative Record and Modify Briefing Schedule, in which they informed the Court that they had reached an "agreement in principle" resolving Claim Three (failure to designate critical habitat) and Claim Seven (failure to promulgate list of non-lethal deterrence measures under the Marine Mammal Protection Act ("MMPA")). Because there is no final agreement and Plaintiffs have not yet moved to dismiss these two Claims, the Associations seek intervention on Claims Three and Seven.

[2] Again, as to Claims Three and Seven, the Court previously found that AOGA and ASRC "have satisfied the four-factor test for intervention as a matter of right with respect to Plaintiffs' claims under the ESA and MMPA." Order at 6. Like AOGA and ASRC, the Associations have established distinct interests in the ESA and MMPA claims which satisfy the test for intervention as a matter of right. *See* Notice of Motion, Motion to Intervene as Defendants, and Memorandum in Support by American Petroleum Institute, Chamber of Commerce of the United States of America, National (con't) . . .

Associations' previous memorandum, the Court should reject both of those contentions.

ARGUMENT

I. THE COURT SHOULD ALLOW THE ASSOCIATIONS TO FILE THEIR OWN SUMMARY JUDGMENT BRIEF.

By agreeing to the Associations' intervention as a matter of right with respect to Claims Two and Four to defend against the challenges to the Listing Rule and 4(d) Rule, Plaintiffs have failed to dispute (and indeed make no attempt to dispute) that the Associations' interests will not be adequately represented by existing parties (or potentially existing parties like the National Petroleum & Refiners Association ("NPRA") and the Edison Electric Institute ("EEI")) – a factor considered for intervention as a matter of right under Fed. R. Civ. P. 24(a). *See* Ass'n Mot. at 5 (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1995)).

Despite their concession on this point, Plaintiffs essentially argue that the Associations' interests align with interests represented by the other current or proposed Defendant-Intervenors and, thus, that the Associations should be required to file a joint brief either with NPRA and EEI (assuming the Court grants their intervention), or with AOGA and ASRC. *See* Plaintiffs' Response to American Petroleum Institute, Chamber of Commerce of the United States of America, National Mining Association, National Association of Manufacturers, and American Iron and Steel Institute's Motion to Intervene as Defendants, filed Sept. 18, 2008 ("Plfs' Resp.") at 6-7. In this, Plaintiffs are mistaken. Contrary to their contention, none of the other current or proposed Defendant-Intervenors can or will represent the Associations' interests such that a joint brief would be warranted.

In their motion to intervene, the Associations provided detailed explanations and affidavits

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Mining Association, National Association of Manufacturers, and American Iron and Steel Institute, filed Sept. 4, 2008 ("Ass'n Mot.") at 10, 14. The Court's prior decision therefore should govern the Associations' intervention on those two Claims and Plaintiffs made no argument to the contrary.

supporting their interests in the issues raised by each of Claims Two through Seven. The other organizations, however, did not assert specific interests for each of those Claims. *See* Notice of Motion and Motion of the Alaska Oil and Gas Association for Leave to Intervene; Memorandum of Points and Authorities in Support Thereof, filed June 6, 2008 ("AOGA Mot.") (seeking intervention of right for all claims, but focusing on interest in the 4(d) Rule; seeking intervention on NEPA remedy); Notice of Motion and Motion of Arctic Slope Regional Corporation to Intervene; Memorandum of Points and Authorities in Support Thereof, filed July 3, 2008 ("ASRC Mot.") (same); Notice of Motion and Motion of National Petrochemical and Refiners Association to Intervene; Memorandum of Points and Authorities in Support Thereof, filed Aug. 27, 2008 ("NPRA Mot.") (focusing only on interest in 4(d) Rule; seeking intervention in NEPA remedy); Notice of Motion and Motion for Leave to Intervene as Defendant; Memorandum of Points and Authorities in Support Thereof, filed Aug. 28, 2008 by Edison Electric Institute ("EEI Mot.") (seeking intervention based on interest in Listing Rule and 4(d) Rule; seeking intervention in NEPA remedy). Thus, the only claims in which the all other organizations have asserted an interest in common with the Associations are Claims Four, Five, and Six, which challenge the 4(d) Rule. Only EEI has actually asserted an interest in Claim Two, which challenges the Listing Rule. Further, none of the other organizations specifically argued they that they an interest in Claim Three (failure to designate critical habitat) or Claim Seven (failure to promulgate a list of non-lethal deterrence measures under the MMPA). The other organizations therefore undoubtedly will not make all of the arguments that the Associations will make, nor do the other organizations' predominant focus on the 4(d) Rule indicate that they would be willing to make all of these arguments.

Moreover, even for Claims Four, Five, and Six (concerning the 4(d) Rule on which the other organizations predominantly focus), each current and proposed Defendant-Intervenor has *distinct* interests that it seeks to protect in defending the 4(d) Rule. Plaintiffs oversimplify the issue by

claiming that each organization wants to defend the Listing Rule and 4(d) Rule "for precisely the same reasons . . . ." Plfs' Resp. at 6. Simply because the current and proposed Defendant-Intervenors want the same *result*, does not mean that they have the same *interests* such that each organization can adequately represent the other organizations' interests.[3]

Specifically, the Associations – which include *five separate* associations – have broader interests than any of the other organizations. Plaintiffs, however, focus on only the American Petroleum Institute ("API"), claiming that it is no different than NPRA, AOGA, or ASRC, or on the *nationwide* nature of these Associations, claiming that they are no different than the other nationwide organizations, NPRA and EEI. But, API, for example, represents nearly 400 companies, which are not just petrochemical refiners and manufacturers (like NPRA) but also *producers*, *distributors*, and *marketers* throughout the entire nation (unlike NPRA, AOGA, or ASRC). *See* Ass'n Mot. at 7. Moreover, the four other Associations – the Chamber, NMA, NAM, and AISI – undeniably represent companies unlike any of the other existing or proposed Defendant-Intervenors, which Plaintiffs fail to acknowledge. *See id.* 7-8. The Chamber represents broader interests than any other Association or other current or proposed intervenor. Because the Rules at issue potentially impact the sectors across the entire United States economy, the Chamber is uniquely situated to represent the myriad interests of those various sectors. Also, the nationwide character of these Associations is irrelevant to determining whether their distinct interests are represented by other organizations. NMA, NAM, and AISI each have unique interests in their particular member companies' mining, manufacturing, or iron and steel operations – operations that NPRA, EEI,

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[3] Under Plaintiffs' logic, the Defenders of Wildlife, which has sought intervention on Plaintiffs' behalf, should be required to file a joint brief with Plaintiffs because the interests of all of the environmental groups are the same.

AOGA, and ASRC do not and could not represent.

Finally, Plaintiffs' requested limitation also would penalize the Associations for filing a timely intervention motion (which Plaintiffs do not dispute), simply because the Associations filed their intervention motion after other organizations sought intervention. Plaintiffs cite no authority for penalizing an intervenor that has indisputably met the requirements for intervention as a matter of right simply for filing after other intervenors. The Court also did not see fit to require AOGA and ASRC to file a combined brief, *see* Order at 9 ("AOGA and ASRC must file their *own oppositions* and any cross-motion by December 4, 2008"), and given the breadth of the Associations' arguments, there is no need to impose that requirement here.

II. UNLIKE THE OTHER DEFENDANT-INTERVENORS, THE ASSOCIATIONS HAVE SHOWN A PROTECTABLE INTEREST IN THE MERITS OF THE NEPA AND APA CLAIMS UNDER CLAIMS FIVE AND SIX.

Plaintiffs fail to respond to the argument that the Associations will be substantially affected by a decision on the merits of the NEPA claim (under Claim Six) and APA claim (under Claim Five). *See* Ass'n Mot. at 15. Instead, Plaintiffs point to the Court's Order denying AOGA and ASRC intervention on the merits of those claims. AOGA and ASRC, however, did not specifically argue that they had concrete interests in the merits of the NEPA and APA claims or that they would be substantially affected by a decision on the merits of those claims – arguments that would have been required to support intervention as a matter of right on those claims. Instead, AOGA and ASRC argued that they should be granted permissive intervention on those claims or, alternatively, be allowed to intervene in the remedy phase of those two claims. Thus, the type of arguments regarding the actual interest in the merits of the NEPA and APA claims were not arguments considered by the Court in determining whether to extend the rule in *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002) to the issue of intervention in this case.

Conversely, the Associations have shown that they have such interests in the merits of those

claims. Specifically, although the government is the subject of the NEPA and APA claims, the Associations will be subject to the impacts of a decision on whether the government's actions violated those two statutes, which could result in possible delay or a potential halt of projects. Those direct impacts therefore warrant consideration of whether the *Kootenai Tribe* rule should apply to prevent the Associations from defending the merits of the NEPA and APA claims.

Alternatively, neither the Court nor Plaintiffs addressed whether permissive intervention should be denied on the merits of NEPA and APA claims – an argument advanced by the Associations as well as AOGA and ASRC. Under the test for permissive intervention, a protectable interest is not required, *see* Ass'n Mot. at 17, thus, the Court's rationale that private parties lack a significantly protectable interest in the merits of NEPA and APA claims is inapplicable. The Associations therefore reiterate their request, which is undisputed by Plaintiffs, for permissive intervention on the merits of the NEPA and APA claims.

CONCLUSION

For the foregoing reasons and those stated in the Associations' opening memorandum, the Associations respectfully request that the Court grant full intervention either as a matter of right or permissively on Claims Two through Seven.

DATED: September 25, 2008

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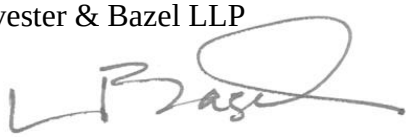

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