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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, v. RYAN ZINKE, in his official capacity as Secretary of the Interior; and U.S. DEPARTMENT OF THE INTERIOR, Defendants STATE OF ALASKA, Applicant Defendant-Intervenor.	)	Case No. 3:17-cv-00091-JWS **STATE OF ALASKA'S MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE (Fed. R. Civ. P. 24)**

INTRODUCTION

On April 20, 2017, the Center for Biological Diversity ("CBD") filed this lawsuit challenging the validity of the Congressional Review Act ("CRA").[1] Specifically, the lawsuit challenges action taken by Congress and the President under the CRA to revoke hunting regulations adopted by the Fish and Wildlife Service restricting hunting on National Wildlife Refuges within the State of Alaska, ("FWS Rule"), 81 Fed. Reg. 52,248 (August 5, 2016).

Action was taken by the House of Representatives and the Senate, and the joint resolution (HJR 69) was signed by the President to become law as Pub. L. No. 115-120, 131 Stat. 86. This law revoked the FWS Rule and, under the terms of the CRA, the agency is prevented from adopting a substantially similar rule.

The State of Alaska ("State" or "Alaska") has the authority to manage and protect wildlife within its borders, including on federal lands, except to the extent expressly preempted by Congress when acting under Constitutional grants of authority to the federal agencies.[2] The United States Fish and Wildlife Service ("FWS") Rule exceeded FWS authority and would have invalidated certain hunting methods and means authorized by the Alaska Board of Game. Alaska opposed the FWS Rule and supported use of the CRA to revoke the FWS Rule. Alaska has an interest in this lawsuit to maintain

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[1] 5 U.S.C. §§ 801–808.

[2] *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976); *Geer v. Connecticut*, 161 U.S. 519, 528 (1896), *overruled on other grounds by Hughes*, 441 U.S. at 322; 43 C.F.R. § 24.3(a).

its authority to manage wildlife (both predator and prey) for sustained yield, and to continue to regulate hunting methods and means throughout the state.

Alaska seeks to fully participate in all proceedings in this case to protect the State's sovereign interest in the independent management of its wildlife, including regulating hunting methods and means, and to protect subsistence uses, a way of life that is vital to many Alaskans. These interests would be significantly impacted by the rulings requested by CBD.

Alaska asks for entry of an Order granting Alaska leave to intervene in this dispute as a matter of right under Fed. R. Civ. P. 24(a)(2). Alternatively, Alaska asks for entry of an Order granting Alaska permissive leave to intervene under Rule 24(b). This Motion is supported by the Declarations of Bruce Dale and Hazel Nelson. Neither Plaintiffs nor Defendants take a position on this motion. Intervenor applicants do not oppose this motion.

BACKGROUND

As stated above, Alaska asserts authority to manage and protect wildlife within the state, including on federal land, except to the extent expressly preempted by federal law. The FWS, as a federal land management agency within the Department of the Interior, must abide by that established principle of law which is also articulated in Department regulations: "In general the States possess broad trustee and police powers over fish and

wildlife within their borders, including fish and wildlife found on Federal lands within a State." [3]

Exercising its authority, Alaska, through its Board of Game, adopts regulations governing the methods and means for taking wildlife.[4] Special emphasis is placed on the use of wildlife determined to have a customary and traditional use for subsistence purposes.[5]

The FWS Rule would have restricted certain methods and means for taking predators on Refuges. Contrary to statements made in a press release published by CBD on the day this lawsuit was filed, Alaska's regulations do not allow hunters to disturb wolf dens, nor do Alaska's regulations allow hunters to shoot wolves and bears from aircraft.

A joint resolution of disapproval under the CRA must simply say that the agency's new rule "shall have no force or effect."[6] If a majority of both chambers pass a CRA disapproval resolution, it is sent to the President for signature or veto. This process is consistent with the bicameralism and presentment requirements for passing laws as confirmed by the Supreme Court in *INS v. Chadha*.[7] If the President signs the disapproval resolution (or Congress overrides a presidential veto), the agency rule is repealed. If the

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[3] 43 C.F.R. § 24.3(a).

[4] 5 AAC 84, 5 AAC 85, 5 AAC 92.

[5] *Id.*, and AS 16.05.258, 5 AAC 99.

[6] 5 U.S.C. § 802(a). ("That Congress disapproves the rule submitted by the _____ relating to _____, and such rule shall have no force or effect.").

[7] 462 U.S. 919, 946-951 (1983).

rule had previously taken effect (as with the FWS Rule), it "shall be treated as though such rule had never taken effect."[8]

The CRA also provides that once Congress repeals a rule using this process, the rule "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."[9]

HJR 69 was introduced in the House in February 2017. After passing the House on February 16, 2017 and Senate on March 21, 2017, it was signed by the President on April 2, 2017 and became Pub. L. 115-20. The FWS Rule is revoked and shall be treated as if it had never taken effect.

CBD filed this lawsuit on April 20, 2017 alleging two counts. The first count is a constitutional challenge, alleging that the CRA's prohibition on future rulemaking "in substantially the same form" as a nullified regulation unconstitutionally infringes on the executive branch in violation of the separation of powers. The second count is a statutory challenge, alleging that the CRA does not permit congressional disapproval of hunting regulations — which fall within the exception to the CRA's effective date provision — during a new session of Congress.

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8 5 U.S.C. § 801(f).

9 5 U.S.C. § 801(b)(2).

ARGUMENT

I. Alaska may intervene as a matter of right (Fed. R. Civ. P. 24(a)).

The Court must permit Alaska to intervene if Alaska submits a timely motion to intervene and "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."[10] This rule is construed "broadly in favor of proposed intervenors."[11] A "prospective intervenor 'has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation.'"[12]

The Ninth Circuit recognizes a four-part test for intervention as a matter of right:

(1) The application for intervention must be timely;

(2) The applicant must have a "significantly protectable" interest relating to the property or transaction that is the subject of the action;

(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 that interest; and

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[10] Fed. R. Civ. P. 24(a)(2).

[11] *Wilderness Soc'y v. U.S. Forest Service*, 630 F.3d 1173, 1179 (9th Cir. 2011) (*en banc*) (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002)).

[12] *Id*. (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)).

(4) The applicant's interest must be inadequately represented by the existing parties in the lawsuit.[13]

A. Alaska's motion to intervene is timely.

The Court will consider three factors in determining whether a motion to intervene is timely: (1) the stage of the proceedings, (2) prejudice to existing parties, and (3) the reason for delay in moving to intervene.[14] Prejudice to existing parties is the most important timeliness consideration.[15]

This Motion is filed within weeks after the lawsuit was initiated. No responsive pleadings have been filed. At this early stage of the proceedings, there was no delay in seeking intervention and Alaska's intervention will not prejudice existing parties.

B. Alaska has a significantly protectable interest in the subject matter of the action.

The second element for intervention as a matter of right requires that the proposed intervenor demonstrates a "significantly protectable interest" by showing that "the injunctive relief sought by the plaintiffs will have direct, immediate, and harmful effects upon [its] legally protectable interest."[16] The Ninth Circuit applies this broad interest criterion to involve "as many apparently concerned persons as is compatible with efficiency and due process."[17] It is generally enough that the interest asserted is

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13 *Wilderness Soc'y*, 630 F.3d at 1177; Fed. R. Civ. P. 24(a).

14 *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004).

15 *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984).

16 *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001).

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

protectable under some law and that there is a relationship between the protected interest and the claims at issue.[18]

Here, Alaska has several specific and significantly protectable interests in the subject matter of the dispute. The desire for self-management of natural resources, including management of Alaska's wildlife resources, was a driving force behind Alaska statehood.[19] Ownership of the resources passed to Alaska upon statehood under the Alaska Statehood Act.[20] General management authority over fish and wildlife within Alaska passed from the federal government to Alaska shortly after Alaska's adoption of a comprehensive fish and game code.[21]

The Alaska Constitution requires the State to manage these resources for the maximum benefit and use.[22] Under Alaska's Constitution, wildlife is reserved to the people for common use,[23] and must be "utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses."[24]

Sw. Ctr. for Biological Diversity, 268 F.3d at 818.

18 *Sw. Ctr. for Biological Diversity*, 268 F.3d at 818.

19 *See, e.g., Pullen v. Ulmer*, 923 P.2d 54, 57 n. 5 (Alaska 1996); *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 47, 82 S.Ct. 552, 555 (1962).

20 Pub. L. No. 85-508, (1958), 72 Stat. 339.

21 *See* Executive Order No. 10857, 25 Fed. Reg. 33 (Dec 29, 1959) (transferring management of fish and wildlife resources to the State of Alaska effective January 1, 1960); *see also Metlakatla Indian Community, supra*, 369 U.S. at 47 n.2, 82 S. Ct. at 555.

22 Alaska Const. Art. VIII, §§ 1-2.

23 Alaska Const. Art. VIII, § 3.

24 Alaska Const. Art. VIII, § 4.

Under Alaska law, responsibility for wildlife management in Alaska is constitutionally vested in the Alaska legislature,[25] but regulatory authority has been statutorily delegated to the Alaska Board of Game,[26] and administrative authority to the Commissioner of the Alaska Department of Fish and Game.[27] Subject to a subsistence priority,[28] the Alaska Board of Game uses its authority to manage wildlife, including the authority to regulate taking of wildlife resources. Under this authority, the Alaska Board of Game has adopted comprehensive wildlife regulations.[29]

Courts have consistently held that rights such as those asserted by Alaska are sufficient to meet the standards required to intervene as a matter of right.[30] The State has a significant protectable interest that could be impacted by this lawsuit because the State has an interest in maintaining its legal role with regard to wildlife management and

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25 Alaska Const. Art. VIII, § 2.

26 AS 16.05.221; AS 16.05.241; AS 16.05.255; AS 16.05.258.

27 AS 16.05.010; AS 16.05.020; AS 16.05.050; AS 16.05.060; AS 16.05.241.

28 AS 16.05.258.

29 AS 16.05.255; 5 AAC 84; 5 AAC 85; 5 AAC 92.

30 *See, e.g.*, *Scotts Valley Band of Pomo Indians v. United States*, 921 F.2d 924 (9th Cir.1990) (finding that a City's interests in taxing and regulating contested lands were significantly protectable interests warranting intervention as of right); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 997-98 (8th Cir.1993) (finding that county's and landowners' property values that could be affected by the outcome of the litigation were protectable interests warranting intervention), *Douglas County v. Babbitt*, 48 F.3d 1495, 1497, 1501 (9th Cir.1995) (holding that a county asserting proprietary environmental interests in lands adjacent to federal land had standing to challenge the Secretary of the Interior's failure to comply with NEPA); *Sierra Club v. Robertson*, 960 F.2d 83, 84 (8th Cir.1992) (finding that a State's asserted interests in fish and wildlife, recreational opportunities, and water quality were sufficient to proceed as plaintiff-intervenor challenging the Forest Service's forest management plan).

regulating hunting and trapping.[31] The State of Alaska has a significant interest in defending the CRA and revocation of the FWS Rule in this litigation. The "interest" standard is met.[32]

C. The outcome of this lawsuit could impact Alaska's interests.

A third criterion for intervention as of right is that the action's disposition may, as a practical matter, impair or impede the intervenor's ability to protect the asserted interest.[33] The question of impairment is not separate from the question of existence of an interest.[34] In reviewing this prong, courts look to the "'practical consequences' of denying intervention, even where the possibility of future challenge to the regulation [remains] available."[35] The Rule 24 advisory committee note provides "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene."[36]

In this lawsuit, CBD seeks to invalidate a federal statute for the purpose of seeking to reinstate a revoked agency rule. The relief requested by plaintiff would interfere with

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31 *See* Declarations of Bruce Dale and Hazel Nelson.

32 *U.S. v. State of Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) (no serious dispute that Idaho had an interest in anadromous fish runs in the upper tributaries of the Columbia River in Idaho and that its participation would not prejudice other parties, therefore its Rule 24(a)(2) motion to intervene in litigation involving a management plan which could have significant impact upon its fish resources should have been granted).

33 *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d at 1177.

34 *See, e.g., Natural Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978).

35 *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977).

36 *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822 (quoting Rule 24 advisory committee's notes).

Alaska's exercise of its sovereign jurisdiction over its wildlife. It could divest the State of its sovereign control over fish and wildlife, an essential attribute of state sovereignty. Reinstatement of the FWS Rule would allow an agency regulation to preempt valid Alaska regulations, in spite of legislation to the contrary passed by Congress and signed into law by the President. Without intervention, Alaska would be under constraints imposed by judicial directives and interpretations that effectively would limit Alaska's regulations on almost 80 million acres in the State, and Alaska will have had no say in those directives or interpretations.

D. The parties do not adequately represent Alaska's interests.

If an applicant meets the conditions of timeliness and impairment of interest, intervention shall be permitted "unless the applicant's interest is adequately represented by existing parties."[37] According to the United States Supreme Court, "[t]he requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal."[38] The final criterion is whether the representation of Alaska's interests by existing parties "may be" inadequate. The burden of that showing is minimal.[39] In assessing representation, courts consider (1) whether the present parties' interests are such that they will undoubtedly make all of the intervenor's arguments, (2) whether the present parties are capable and willing to make those arguments, and (3) whether the would-be intervenor

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37 Fed. R. Civ. P. 24(a)(2).

38 *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10, (1972).

39 *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823.

would offer any necessary elements to the proceedings that other parties would neglect.[40] The inquiry should focus on the subject of the action, not just the particular issues before the court at the time of the motion.[41]

As a preliminary matter, as an adverse party, Plaintiffs cannot adequately represent Alaska's interests.[42]

Alaska's interests are also not adequately represented by Defendants. Alaska acknowledges the ultimate goal of both Alaska and Defendants may be to uphold the CRA. However, Alaska has a separate and distinct interest in the management, conservation and regulation of all wildlife and other natural resources within its jurisdiction, including on federal lands.[43] Pertaining to that interest, the State and Federal-Defendant's interests are not aligned. Alaska contends the underlying regulation promulgated by the FWS was unlawful and filed a lawsuit to challenge the same.[44] In this lawsuit, CBD alleges that Alaska's regulations amounted to "aggressive predator control efforts [that] conflict with [FWS's] statutory mandates to conserve natural diversity."[45] To the extent this litigation addresses FWS's statutory mandates—or Alaska's sovereign

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40 *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822.

41 *Id.* at 823.

42 *See United States v. Stringfellow*, 783 F.2d 821, 828 (9th Cir. 1986) (adverse party cannot adequately represent applicant's interests), *rev'd on other grounds by Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987).

43 Alaska Const. Art. VIII, §§ 1, 2, 4; AS 16.05.020.

44 *State of Alaska v. Zinke*, et. al. No. 3:17-cv-00013-JWS.

45 Complaint, Dkt. 1, ¶ 34.

interest to manage the fish and wildlife within its borders — the Federal-Defendants will not adequately represent the State's interests.

Similarly, Alaska's interests are also not adequately represented by the applicant intervenors, even though we share the goal of upholding the CRA and maintaining the State's authority.[46] While other applicant intervenors may also seek to uphold the CRA, their interests are focused on the representing their personal interests or the interests of their members. The interests of the applicant intervenors are far narrower than those asserted by Alaska in its wildlife, natural resources, and all of its citizens.[47]

In sum, the other parties to this dispute will not raise Alaska's arguments in defense of the CRA, particularly those defenses arising from Alaska's role as a sovereign entity and Alaska's interest in sustained yield management of its wildlife resources. Given Alaska's unique role, the other parties to this dispute simply cannot raise all of Alaska's anticipated or potential arguments. In addition, if the parties engage in any form of settlement and/or mediation it is likely that a future settlement proposal solely between Plaintiffs and Defendants would not necessarily consider Alaska's interests. It is

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[46] *See, e.g.*, *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992) (finding Arkansas' interest not adequately protected by Plaintiffs because "[t]he State is a government entity, obliged to represent the interests of all of its citizens … the State has an interest in protecting and promoting the state economy on behalf of all of its citizens … the State has an interest in protecting its tax revenues").

[47] *See, e.g.*, *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) (in holding private applicants and United States Forest Service interest sufficiently different, court stated "the government's representation of the public interest may not be identical to the individual parochial interest of a particular group just because both entities occupy the same posture in the litigation") (internal quotations omitted).

paramount that Alaska be involved in such discussions to ensure its interests are also considered.

II. Alternatively, Alaska is entitled to permissive intervention (Fed. R. Civ. P. 24(b)).

The State believes it is entitled to intervene in this case as of right. However, should the Court determine otherwise, the State should be permitted to intervene under Fed. R. Civ. P. 24(b):

> Upon timely application anyone may be permitted to intervene in an action … when an applicant's claim or defense and the main action have a question of law or 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.

As explained above, Alaska's motion is timely.

In addition, by virtue of its statutory and constitutional responsibilities described above, Alaska holds claims and defenses in common with questions of law and fact raised by Plaintiff's complaint. Alaska shares Defendant's interest in upholding the validity of the CRA and the validity of the revocation of the Refuge Rule. Alaska's participation will "contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented."[48]

Allowing the State to intervene at this stage of the case will not unduly delay or prejudice the rights of any parties. The case will be able to proceed on its existing schedule, with the State's participation and sovereign perspective.

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[48] *U.S. Postal Service v. Brennan*, 579 F.2d 188, 192 (9th Cir. 1978); *accord, Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002).

As a result, in the event this Court finds Alaska is not entitled to intervention as a matter of right, Alaska nonetheless satisfies the elements for Rule 24(b). As such, this Court should enter an Order granting Alaska leave to intervene in this lawsuit.

CONCLUSION

For the reasons set forth above, Alaska asks the Court to recognize the State's right to intervene in this matter, or, in the alternative, grant the State permission to intervene. A proposed Order to that effect is hereby lodged with this Motion.

Dated: May 31, 2017.

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CERTIFICATE OF SERVICE

I certify that on May 31, 2017 the foregoing was served electronically on all parties via CM/ECF.

/s/ Cheryl R. Brooking

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