

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE NEW MEXICO OFF-HIGHWAY
VEHICLE ALLIANCE,

Plaintiff,

v.

UNITED STATES FOREST SERVICE,
an agency of the United States
Department of Agriculture; THOMAS
TIDWELL, in his official capacity as
Chief of the United States Forest Service;
MARIA T. GARCIA, in her official
capacity as Santa Fe National Forest
Supervisor; GILBERT ZEPEDA, in his
official capacity as Southwestern Region
Deputy Regional Forester; UNITED
STATES DEPARTMENT OF
AGRICULTURE; and TOM VILSACK,
in his official capacity as Secretary of the
United States Department of Agriculture,

Defendants, AND

CENTER FOR BIOLOGICAL DIVERSITY,
INC.; WILDEARTH GUARDIANS; and
SIERRA CLUB,

Proposed Defendants-Intervenors.

Case No. 1:12-cv-01272-WJ-LFG

**Memorandum in Support of Motion to
Intervene**

INTRODUCTION

The Center for Biological Diversity, WildEarth Guardians, and the Sierra Club (collectively “the Center”) hereby submit this memorandum in support of its Motion to Intervene in this matter. In an effort to address the threats posed by off-highway vehicle (“OHV”) use on the Santa Fe National Forest, Federal-Defendants (the “Forest Service”) set out to prepare a new Travel Management Plan (“Travel Plan”) for the forest in 2007. The new Travel Plan would manage OHV use on the forest and designate specific roads, trails, and areas for motorized use in an area covering approximately 1.6 million acres in New Mexico. The new Travel Plan took several years to develop and complete and involved extensive public participation from a variety of groups and individuals who both supported and opposed expanded OHV vehicle access throughout the forest. The Forest Service ultimately chose an approach that provides OHV users with access to thousands of miles of roads.

Despite the Forest Service’s efforts to provide a high-level of motorized recreation, Plaintiff New Mexico Off-Highway Vehicle Alliance (“NMOHVA”) filed suit on December 10, 2012, to reverse the decision of the Forest Service. As set forth below, the Center actively participated in the travel planning process and has long worked to protect and preserve the Santa Fe National Forest and ensure reasonable restrictions on OHV use. Because NMOHVA’s lawsuit threatens to undermine much of its work, the Center respectfully requests that it be allowed to intervene as defendants in this litigation to ensure that its interests are represented.

ARGUMENT

I. The Center is entitled to intervene as of right.

Federal Rule of Civil Procedure 24(a) provides that:

On timely motion, the court must permit anyone to intervene who ... 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.

Fed. R. Civ. P. 24(a). The Tenth Circuit has identified four requirements that must be met for a party to intervene as of right: (1) a timely motion to intervene; (2) a claimed interest relating to the property or transaction at issue; (3) the applicant's interest may as a practical matter be impaired or impeded; and (4) the applicant's interest is not adequately represented by existing parties. *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001) (citing *Coalition of Arizona/New Mexico Counties v. Dep't of Interior*, 100 F.3d 837, 840 (10th Cir. 1996)). The Tenth Circuit "follows 'a somewhat liberal line in allowing intervention.'" *Utah Ass'n of Counties*, 255 F.3d at 1249 (quoting *Nat'l Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977)). The Center satisfies this four-part test for intervention as of right.

A. The motion is timely.

In the Tenth Circuit, "[t]he timeliness of a motion to intervene is assessed 'in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances.'" *Utah Ass'n of Counties*, 255 F.3d at 1250 (quoting *Sanguine, Ltd. V. U.S. Dep't of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984)). In *Utah Ass'n of Counties*, the Tenth Circuit found a motion to intervene to be timely even though filed two and one half years after the complaint was filed, and despite substantial case activity including "document discovery,

discovery disputes, and motions by defendants seeking dismissal on jurisdictional grounds.” *Id.* at 1250-51.

Here, the Center’s motion is timely because it has not delayed in seeking intervention, granting the present motion would not prejudice any party, and no unusual circumstances exist. Indeed, to date, no responsive pleading has been filed in this case, the administrative record has not yet been compiled and filed, only an initial scheduling order has been entered,¹ and no significant filings have been made other than NMOHVA’s complaint. For these reasons, the Center satisfies the timeliness requirement for intervention as of right.

B. The Center has protectable interests in OHV management on the Santa Fe National Forest.

An applicant for intervention must have an interest that is “direct, substantial, and legally protectable.” *Utah Ass’n of Counties*, 255 F.3d at 1251. Although having a direct, substantial, and legally protectable interest is likely to justify intervention, “other interests may suffice.” *San Juan County, Utah v. U.S.*, 503 F.3d 1163, 1194-95 (10th Cir. 2007). The interest inquiry is “highly fact-specific” and is “primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Utah Ass’n of Counties*, 255 F.3d 1251-52. “The interest of the intervenor is not measured by the particular issue before the court but is instead measured by whether the interest the intervenor claims is *related to the property that is the subject of the action.*” *Id.* (emphasis in original). “The applicant must have an interest that could be adversely affected by the litigation. But practical judgment must be applied in determining whether the strength of the interest and the

¹ An Initial Scheduling Order has been entered by the Court, requiring a Joint Status Report to be filed by March 4, 2013, and setting a Scheduling Conference for March 7, 2013. Dkt. 13.

potential risk of injury to that interest justify intervention.” *San Juan County*, 503 F.3d at 1199.

The Tenth Circuit has recognized that “the requirements for intervention may be relaxed in cases raising significant public interests.” *Id.* at 1201.

In *San Juan County*, the Tenth Circuit found that an environmental organization’s “concern in ... the potential damage to the environment arising from vehicular traffic [on public lands] ... is a legally protectable interest.” *San Juan County*, 503 F.3d at 1199. Further, the Court noted that the environmental organization would have had standing in the case if it had filed suit, and therefore it met the legally protectable interest test. *Id.* As in *San Juan County*, here, the Center’s interests in the potential damage to the Santa Fe National Forest arising from OHV use on the forest are direct, substantial, and legally protectable. Further, the Center has standing to sue over the Santa Fe National Forest travel management planning decision, and therefore has a legally protectable interest in the present case.

The Center has direct, substantial, and legally protectable interests in the Santa Fe National Forest’s ecological, biological, scientific, scenic, historic, and aesthetic resources, which are protected by a number of environmental and land management statutes and regulations, including the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347, the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1787, the Endangered Species Act, 16 U.S.C. § 1531-1544, and the Travel Management Rule, 36 C.F.R. §§ 212, 251, 261, 295. The Center includes three public interest environmental organizations that have worked for years to protect the ecological, biological, scientific, scenic, historic, and aesthetic resources of the Santa Fe National Forest. *See* Declaration of Jay Lininger (“Lininger Dec.”) at 2-3 ¶¶ 2-5; Declaration of Bryan Bird (“Bird Dec.”) at 2-3 ¶¶ 3-4, 7; Declaration of Norma McCallan

(“McCallan Dec.”) at 2-3 ¶¶ 3, 5; Declaration of Cynthia Tuell (“Tuell Dec.”) at 2-5 ¶¶ 4-7, 9, 11-13.

The Center for Biological Diversity (“CBD”), for example, has staff who live and work in New Mexico, and members who regularly recreate on the forest. Lininger Dec. at 2 ¶ 2. Members of CBD regularly visit the forest for its outstanding opportunities to enjoy solitude, mountain biking, hiking, and other quiet-use activities, and are harmed by OHV use on the forest. *Id.* at 2-6 ¶¶ 2-4, 8-9. CBD has been deeply involved in the Santa Fe National Forest travel management planning process, including submitting extensive comments and administratively appealing the decision. Tuell Dec. at 2-5 ¶¶ 4-7, 9, 11-13.

WildEarth Guardians is headquartered in Santa Fe, New Mexico, and has staff who live and work in New Mexico, as well as members who regularly recreate on the forest. Bird Dec. at 1-3 ¶¶ 2-6. These members regularly visit the forest for its outstanding opportunities to enjoy solitude, mountain biking, hiking, and other quiet-use activities, and are harmed by OHV use on the forest. *Id.* at 2-3 ¶¶ 5-6, 9. WildEarth Guardians has been deeply involved in the Santa Fe National Forest travel management planning process, including submitting extensive comments and administratively appealing the decision. *Id.* at 3 ¶¶ 7-8.

The Sierra Club has staff and volunteers who live and work in New Mexico, as well as members who regularly recreate on the forest. McCallan Dec. at 1-2 ¶¶ 2-4. These members regularly visit the forest for its outstanding opportunities to enjoy solitude, hiking, cross-country skiing, and other quiet-use activities, and are harmed by OHV use on the forest. *Id.* at 2-3 ¶ 4-6. The Sierra Club has been deeply involved in the Santa Fe National Forest travel management

planning process, including submitting extensive comments and administratively appealing the decision. *Id.* at 3 ¶ 5.

In sum, the Center's interest in protecting the Santa Fe National Forest from harm from OHV use is legally protectable and therefore it has "claim[ed] an interest relating to the property or transaction that is the subject of the action." The Center satisfies the legally protectable interest requirement for intervention as of right.

C. The Center's interests might be impaired by this litigation.

Rule 24(a)'s impairment requirement "requires the intervenors to demonstrate that the disposition of this action may as a practical matter impair or impede their ability to protect their interest." *Utah Ass'n of Counties*, 255 F.3d at 1253. Rule 24(a) "refers to impairment 'as a practical matter.' Thus, the court is not limited to consequences of a strictly legal nature." *Id.* (quoting *Natural Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978)). "To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal." *Id.* (citation omitted). The Tenth Circuit has noted that "[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...." *San Juan County*, 503 F.3d at 1195 (quoting Fed. R. Civ. P. 24 Advisory Committee's Note to 1966 Amendments). Additionally, the Tenth Circuit has held that an intervenor's "interest in the environmental impact of ... vehicular traffic satisfies the conditions of Rule 24(a)(2)" that an intervenor be "so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest." *Id.* at 1201.

Here, if NMOHVA's requests for relief are granted, the interests of the Center would be impaired. NMOHVA seeks an order from this Court vacating the Santa Fe National Forest's travel planning decision and reinstating the previous travel management policy of the forest. Complaint at 13-14 ¶ 12(a)-(b). Should NMOHVA be successful, the Santa Fe National Forest would be left without protections on OHV use until a new travel decision is made, which, based on the amount of time taken to develop the current decision, could take years. A subsequent travel decision could provide fewer restrictions on OHV use on the forest than the existing decision, which would harm the legally protectable interests of the Center.

Such relief would adversely affect the ability the Center to protect and defend the natural resources of the Santa Fe National Forest. *See* Lininger Dec. at 3-6 ¶¶ 5-6, 8-9; Bird Dec. at 3 ¶ 9; McCallan Dec. at 3 ¶¶ 5-6. Furthermore, such relief would have a significant adverse impact on the quiet enjoyment of the forest by the Center's members, as well as their recreational, scenic, and aesthetic interests in the forest. *Id.* This would impair the ability of the Center's members to use and enjoy the Santa Fe National Forest in the future. *Id.* Because the Center's members are so situated that the disposition of this action may as a practical matter impair their ability to protect their recreational, scenic, and aesthetic interests in the forest, the Center satisfies the impairment requirement for intervention as of right.

D. The existing parties do not adequately represent the Center's interests.

The Supreme Court has explained that the inadequate representation requirement of Rule 24(a) "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." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972). "The possibility that the interests of the

applicant and the parties may diverge ‘need not be great’ in order to satisfy this minimal burden.” *Utah Ass’n*, 255 F.3d at 1254 (citing *Natural Res. Def. Council*, 578 F.2d at 1341).

The Tenth Circuit has found “merit” in arguments stating that the possibility of inadequate representation is “easily made when the party upon which the intervenor must rely is the government, whose obligation is to represent not only the interest of the intervenor but the public interest generally, and who may not view that interest as coextensive with the intervenor’s particular interest.” *Id.* at 1254-55. “In litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor.” *Id.* 1255-56.

In *Utah Ass’n*, the Tenth Circuit found there to be inadequate representation of interests and granted intervention as of right to a group of environmental organizations despite the fact that both the government and the environmental groups had previously both vigorously defended the same government decision. *Id.* Amongst the reasons listed by the Tenth Circuit for why intervention as of right was proper was federal defendants’ failure to take a position on the applicant’s motion to intervene in the litigation. *Id.* at 1256 (federal defendants’ “silence on any intent to defend the [intervenors’] special interests is deafening.”) (citation omitted).

In this case, Plaintiff, the NMOHVA, does not adequately represent the Center’s interests. The NMOHVA’s interest in reducing or eliminating restrictions on OHV use on the Santa Fe National Forest directly conflicts with the Center’s interest in opposing such a reduction or elimination of restrictions on OHV use on the forest. *See* Lininger Dec. at 3-6 ¶¶ 6-9; Bird Dec. at 2-3 ¶¶ 5-9; McCallan Dec. at 2-3 ¶¶ 4-6.

Further, the Forest Service does not adequately represent the Center's interests. Here, the Center represents the particularized concerns of the environmental community, whereas the Forest Service represents the broader public interest. *See e.g., Utah Ass'n*, 255 F.3d at 1254-56 (the government must represent the public interest generally, not just the interests of would-be intervenors). While the Center has an interest in restricting OHV use on the forest, the Forest Service must represent the interests of the entire public, including OHV users such as the members of NMOHVA, and therefore cannot adequately represent the interests of the Center. Further, the Center administratively appealed the Santa Fe National Forest travel management planning decision for what it argued were insufficient restrictions on OHV use on the forest. *See Tuell Dec.* at 4-5 ¶¶ 13. The Forest Service affirmed the Santa Fe National Forest's travel management planning decision with instructions. *See Tuell Dec.* at 5 ¶ 14. This demonstrates the divergent interests between the two parties. Additionally, the Forest Service has not taken a position on the Center's motion, nor has it stated that it will adequately defend the Center's interests. *See e.g., Utah Ass'n*, 255 F.3d at 1256 (no position by government on motion to intervene supports assertion that government will not represent the interests of would-be intervenors).

Because the Forest Service's interests do not mirror those of the Center's, it is likely that the Agency will not advance the same legal arguments as the Center in this case. Similarly, it is likely that two parties may differ on the interpretation of law and framing of legal arguments in this case. *See e.g., Forest Guardians v. U.S. Forest Serv.*, 2008 WL 5975041 at *4 (D.N.M. August 29, 2008) (noting that an intervenor and federal defendant may interpret the law differently because of differing interests).

Finally, should NMOHVA prevail in this case, the Forest Service would not adequately represent the Center's interests in the remedial phase of the case. The Forest Service would not be able to present evidence of direct harm to the Center's members that would result from the relief NMOHVA seeks. Such information would be a crucial component of the Court's evaluation of the balance of harms.

The Center has demonstrated that the existing parties to this case do not adequately represent its interests in this litigation, and therefore intervention as of right is proper.

II. Alternatively, the Center should be allowed permissive intervention.

In addition to meeting the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a), the Center also meets the requirements for permissive intervention under Federal Rule of Civil Procedure 24(b).

Rule 24(b) describes the requirements that must be met to qualify for permissive intervention:

On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact.

Fed. R. Civ. P. 24(b).

Here, the Center meets the requirements of Rule 24(b) because it seeks to defend the Santa Fe National Forest's travel management planning decision and therefore will address questions of law and fact in common with those raised in NMOHVA's complaint. Furthermore, in the present case, the Center has a substantial interest in restricting OHV use on the Santa Fe National Forest, and its participation in the travel management planning process could contribute to the resolution of this case.

Finally, the Center's intervention will not unduly delay or prejudice the adjudication of the original parties' rights. No responsive pleading has been filed, the administrative record has not yet been filed, only an initial scheduling order has been entered, and no significant filings have been made other than NMOHVA's complaint.

Given the importance of the issues involved, the Center's interests, and the early stage of this case, permissive intervention is appropriate under Rule 24(b).

CONCLUSION

For the foregoing reasons, the Center should be granted intervention as of right pursuant to Rule 24(a). However, should the Court decide that the Center does not meet the requirements of Rule 24(a), it requests that the Court allow it to intervene pursuant to Rule 24(b).

Dated: February 11, 2013

Respectfully submitted,

/s/ Erik Schlenker-Goodrich

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CERTIFICATE OF SERVICE

I, Erik Schlenker-Goodrich, hereby certify that on February 11, 2013, I electronically filed the foregoing Motion to Intervene through the Court's CM/ECF system, which caused the following counsel of record to be served by electronic means:

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