UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, Plaintiff, v. KENNETH L. SALAZAR[1/], in his official capacity as Secretary of the Interior, et al., Defendants.	Case No. 1:08-cv-02243 (CKK)

DEFENDANTS' RESPONSE TO THE MOTIONS FOR INTERVENTION FILED BY MOUNTAIN STATES LEGAL FOUNDATION AND THE NATIONAL RIFLE ASSOCIATION

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[1/] Dirk Kempthorne, former Secretary of the U.S. Department of the Interior, has been replaced by Kenneth L. Salazar as Secretary. Mr. Salazar is, therefore, automatically substituted for Mr. Kempthorne pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

I. INTRODUCTION

Two organizations, the Mountain States Legal Fund ("MSLF") and the National Rifle Association ("NRA") (collectively, "Applicants"), have moved to intervene as defendants in this action. See Docket Nos. 6 and 10. In their motions to intervene, Applicants assert that their members have a significant interest in upholding the challenged regulations governing possession of firearms in national park and refuges and that these interests are not adequately represented by the Federal Defendants. Id. Both MSLF and NRA seek intervention as of right or, in the alternative, permissive intervention. Id. Federal Defendants take no position with respect to Applicants' requests for intervention, except to request that any intervention be limited so that Applicants are prohibited from seeking discovery or extra-record consideration that is inappropriate in litigation under the Administrative Procedure Act. 5 U.S.C. §§ 701-706 ("APA").

II. FACTUAL BACKGROUND

On December 10, 2008, the U.S. Department of the Interior published amended final regulations governing possession and transportation of firearms in national park areas and national wildlife refuges. 73 Fed. Reg. 74966 (amending 36 C.F.R. §2.4 and 50 C.F.R. §27.42). As amended, the regulations allow possession of "concealed, loaded, and operable firearms" within a national park or refuge "in accordance with the laws of the state in which" the national park or refuge area "is located, except as otherwise prohibited by applicable federal law." Id. The amended regulations took effect on January 9, 2009. Id.

On December 30, 2008, Plaintiff in the above-captioned matter, the Brady Campaign to Prevent Gun Violence ("Brady Campaign"), initiated a lawsuit styled Brady Campaign to Prevent Gun Violence v. Salazar, Case No. 1:08-cv-02243 (CKK) (D.D.C.), alleging that the Defendants' actions in promulgating the regulations governing firearms possession in national parks and refuges violates the National Environmental Policy Act, 42 U.S.C. § 4331 et seq. ("NEPA"), the National Park Service Organic Act, 16 U.S.C. §1 et seq. ("Organic Act"), the National Wildlife Refuge Administration Act, 16 U.S.C. § 668 et seq. ("NWRSA"), and the Administrative Procedure Act. See Docket No. 1. On January 6, 2009, the National Park Conservation Association ("NPCA") in

a companion case entitled National Park Conservation Association v. Kempthorne, Case No. 1:09-cv-00013 (CKK) (D.D.C.) initiated a similar lawsuit challenging the promulgation of the regulations on firearms possession in national parks and refuges. See National Park Conservation Association v. Kempthorne, Case No. 1:09-cv-00013 (CKK) (D.D.C.), Docket No. 1 ("NPCA"). Plaintiffs in NPCA allege the same statutory violations as the plaintiffs in Brady Campaign , but they also allege a violation of the National Historic Preservation Act, 16 U.S.C. §470 ("NHPA"). See NPCA; Docket No. 1. To date, the companion cases have not been consolidated.

On January 6, Plaintiff NPCA in Case No. 1:09-cv-00013 filed a motion for a preliminary injunction seeking to enjoin the final regulations. Id., Docket No. 4. On January 9, 2009, Plaintiffs in Brady Campaign joined in NPCA's motion for a preliminary injunction and incorporated by reference the memorandum filed by NPCA in support of injunctive relief. See Docket No. 5.[2/]

On January 23, 2009, MSLF filed a motion to intervene as a defendant in both the Brady Campaign and NPCA cases.[3/] Pursuant to a Minute Order entered by the Court on January 26 2009, Federal Defendants on January 27 advised the Court that we would oppose intervention as of right, but take no position on permissive intervention.[4/] See Docket No. 14. On January 28, the NRA filed a similar motion to intervene in only the Brady Campaign case. The Court subsequently entered a scheduling order requiring Federal Defendants to file their responses to MSLF's and NRA's motions to intervene in the two companion cases no later than February 13, 2009. See Court's Minute Orders

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[2/] Under the initial briefing schedule established by the Court, see January 9, 2009 Minute Order, Federal Defendants' responses to the Plaintiffs' preliminary injunction motions were due on January 30, but at the parties' request, the Court enlarged the original deadlines and Federal Defendants' opposition is now due today, February 13, 2009. See January 27, 2009 Minute Order.

[3/] On January 23, 2009, MSLF, in the companion case entitled National Parks Conservation Association, et. al. v. Salazar, Case No. 1:09-cv-00013 (CKK) (D.D.C.) filed a similar motion to intervene as a defendant and submitted a memorandum in support of that motion that is the same as the memorandum supporting intervention in this case. See National Parks Conservation Association, et. al. v. Salazar, Case No. 1:09-cv-00013 (CKK),Docket No. 11.

[4/] As indicated herein, Federal Defendants subsequently determined to take no position on intervention, including as of right, except to request imposition of conditions to prevent any intervention from unduly multiplying or delaying these proceedings.

dated January 27 and January 29, 2009. Therefore, in accordance with the Court's Orders, Federal Defendants hereby file their combined response to both MSLF and NRA's motions to intervene.

III. STANDARDS FOR INTERVENTION

A. Intervention as of Right

Rule 24 of the Federal Rules of Civil Procedure provides, in relevant part:

> [O]n timely motion, the court must permit anyone to intervene who: . . . claims an interest relating to the property or transaction that is 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). In interpreting this rule, the D.C. Circuit has identified four conditions that must be met by a movant seeking intervention as of right:

> 1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether the applicant is 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 (4) whether the applicant's interest is adequately represented by existing parties.

Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731 (D.C. Cir. 2003) (internal quotations and citation omitted). Failure to satisfy any of these elements is grounds for denial of intervention as of right. See Building & Construction Trades Dep't, AFL-CIO v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994); Humane Society v. Clark, 109 F.R.D. 518, 520-22 (D.D.C. 1985).

"[I]n addition to establishing its qualification for intervention under Rule 24(a)(2), a party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution." Fund for Animals, 322 F.3d at 731-32 (citation omitted). However, "any person who satisfies Rule 24(a) will also meet Article III's standing requirement." Roeder v. Islamic Republic of Iran, 333 F.3d 228, 233 (D.C. Cir. 2003), cert. denied, 542 U.S. 915 (2004).

B. Permissive Intervention

As an alternative to intervention as of right, Rule 24 of the Federal Rules of Civil Procedure provides, in relevant part, that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed.

R. Civ. P. 24(b)(1)(B). "In order to litigate a claim on the merits under Rule 24(b)(2), the putative intervenor must ordinarily present: (1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." E.E.O.C. v. Nat'l Children's Center, Inc., 146 F.3d 1042, 1046 (D.C.Cir.1998) (citation omitted). "In exercising its discretion [to grant permissive intervention], the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

> Rule 24(b) vests district courts with considerable discretion, providing that the court 'may' allow intervention if the requirements of the rule are met. District courts have the discretion, in other words, to deny a motion for permissive intervention even if the movant established an independent jurisdictional basis, submitted a timely motion, and advanced a claim or defense that shares a common question with the main action.

Nat'l Children's Center, Inc., 146 F.3d at 1048.

IV. ARGUMENT

A. Federal Defendants Take No Position on Applicants' Requests for Intervention Except to Request That Any Intervention Be Limited So That It Does Not Unduly Multiply or Delay These Proceedings

As indicated above, Federal Defendants take no position with respect to Applicants' requests for intervention.[5/] In the event the Court finds that intervention is appropriate, however, Applicants should not be allowed to unduly multiply or delay these proceedings. In an APA case, judicial review is generally limited to the agency's administrative record, and discovery or extra-record consideration is improper. See Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 7 (D.C. Cir. 1998); James Madison Ltd. By Hecht v. Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996), cert. denied, 519 U.S. 1077 (1997); Community for Creative Non-Violence v. Lujan, 908 F.2d 992, 997-998 (D.C. Cir. 1990);Friends Of The Earth v. U.S. Dep't. of Interior, 236 F.R.D. 39, 42 (D.D.C. 2006); Common Sense Salmon Recovery v. Evans, 217 F. Supp.2d 17, 20 (D.D.C. 2002). Accordingly, in the event the Court finds that intervention is appropriate, Federal

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[5/] The Government notes that the Court has already permitted MSLF and NRA to file amici curiae briefs in opposition to Plaintiffs' preliminary injunction motions. See Court's Minute Orders dated January 27 and January 29, 2009. Federal Defendants would not object to Applicants' continuing participation as amici.

Defendants respectfully request the Court to limit Applicants' scope of intervention to prohibit them from seeking discovery or extra-record consideration that is inappropriate in litigation under the APA.

V. CONCLUSION

For the foregoing reasons, in the event the Court determines to grant Applicants' requests for intervention, Federal Defendants respectfully request the Court to limit Applicants' scope of intervention to prohibit them from seeking discovery or extra-record consideration that is inappropriate in litigation under the APA.

Respectfully submitted this 13th day of February 2009,

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