IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UTAH DINÉ BIKÉYAH, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants, BRANDON SULSER; BIGGAME FOREVER; SPORTSMEN FOR FISH & WILDLIFE; UTAH BOWMEN'S ASSOCIATION; UTAH WILD SHEEP FOUNDATION; MICHAEL NOEL; SANDY JOHNSON; and GAIL JOHNSON, Applicant Defendant-Intervenors.	)	No. 1:17-cv-02605-TSC

REPLY IN SUPPORT OF
DEFENDANT-INTERVENORS' MOTION TO INTERVENE
(FRCP 24)

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[1] Authorities upon which Applicants chiefly rely are marked with an *.

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INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24, Brandon Sulser, BigGame Forever, Sportsmen for Fish & Wildlife, the Utah Bowmen's Association, the Utah Wild Sheep Foundation, Michael Noel, Sandy Johnson, and Gail Johnson (collectively, "Applicants") have moved to intervene in this litigation. Federal Defendants take no position on Applicants' motion. ECF No. 23. Plaintiffs oppose intervention, asserting that Federal Defendants will undoubtedly represent Applicants' interests adequately. ECF No. 24.[2]

In doing so, Plaintiffs misapprehend the standard Applicants must satisfy to show that existing parties "may" not adequately represent their interests, a burden which the Supreme Court and D.C. Circuit have repeatedly confirmed "is not onerous." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986); *see Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (citation omitted) (the burden to show inadequacy of representation "should be treated as minimal"). When a party seeks to intervene on the side of the government, courts "look skeptically" on the argument that the government can adequately represent an intervenors' narrower personal, professional, organizational, and economic interests. *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 321 (D.C. Cir. 2015).

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[2] Plaintiffs oppose intervention on no other grounds, implicitly conceding that Applicants have met all other requirements to intervene.

Here, that skepticism would be well placed. Applicants have direct and narrow interests they wish to advance, including ensuring that the lands at issue remain accessible for disabled and elderly recreationists, guaranteeing the ability of sportsmen to engage in conservation projects, and safeguarding grazing rights on the land. *See, e.g.*, Declaration of Brandon Sulser ¶¶ 9, 10; Declaration of Ryan Benson ¶ 14; Declaration of Troy Justensen ¶ 10; Declaration of Sandy Johnson ¶¶ 7, 8. Unlike Applicants, Federal Defendants do not give primacy to these parochial interests, even if it has occasionally cited them and many other interests to justify its actions. *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003). That Applicants' desired outcome in this litigation aligns with the government—always true when a party seeks to intervene to defend government action—cannot be conclusive. If it were, intervention would be strongly disfavored, rather than liberally granted. *See Fund for Animals*, 322 F.3d at 736; *Crossroads*, 788 F.3d at 321; *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977); *Cty. of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 48 (D.D.C. 2007).[3]

Additionally, Plaintiffs argue that this Court should not grant Applicants' permissive intervention. Should this Court rule that Applicants are not entitled to

[3] Further demonstrating how often courts grant motions to intervene on the side of the federal government, Plaintiff National Trust for Historic Preservation has repeatedly appeared in this and other district courts as an intervenor-defendant aligned with the federal government. *See, e.g.*, *Nat'l Min. Ass'n v. Scarlett*, No. CIV.A. 00-283 (RWR), 2006 WL 1194224 (D.D.C. May 4, 2006), *aff'd sub nom. Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702 (D.C. Cir. 2008); *Kane Cty., Utah v. Kempthorne*, 495 F. Supp. 2d 1143, 1145 (D. Utah 2007), *aff'd sub nom. Kane Cty. Utah v. Salazar*, 562 F.3d 1077 (10th Cir. 2009); *Wilderness Watch, Inc. v. Creachbaum*, 225 F. Supp. 3d 1192, 1197 (W.D. Wash. 2016).

intervene as of right, then it should still allow permissive intervention because Applicants' participation will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Finally, Plaintiffs argue in the alternative that, should this Court grant intervention, that Applicants' participation should be limited. Plaintiffs' Memo. (ECF No. 24) at 16-18. Plaintiffs' objections are without merit, and this Court should grant Applicants' motion to intervene and allow them to participate fully in this litigation.

I.

FEDERAL DEFENDANTS MAY NOT ADEQUATELY REPRESENT APPLICANTS' INTERESTS

A would-be intervenor need only show a possibility that the existing parties' representation of its interests "may be" inadequate, a standard that has been repeatedly described as "minimal," and "not onerous." *Trbovich v. United Mine Workers of Am.*, 404 U.S. at 538 n.10; *Dimond*, 792 F.2d at 192. This Court and the D.C. Circuit "look skeptically on government entities serving as adequate advocates for private parties." *Crossroads*, 788 F.3d at 321 (citing *Fund For Animals*, 322 F.3d at 736; *Costle*, 561 F.2d at 912–13). Ignoring this skepticism, Plaintiffs argue that Applicants' interests are adequately represented because both Applicants and Federal Defendants are defending the legality of Proclamation 9681. Plaintiffs' Memo. (ECF No. 24) at 11–12. The D.C. Circuit has consistently rejected similar arguments. *See Fund for Animals*, 322 F.3d at 736; *Crossroads*, 788 F.3d at 321; *Costle*, 561 F.2d at 912; *Cty. of San Miguel*, 244 F.R.D. at 48.

Here, Applicants seek intervention to defend their specific interests in continuing to use the public lands at issue as they did prior to the establishment of the Bears Ears National Monument. Among those uses are driving motorized vehicles to recreate on the land, engaging in wildlife transplants and conservation, and grazing cattle on the land. *See, e.g.*, Declaration of Brandon Sulser ¶¶ 9, 10; Declaration of Ryan Benson ¶¶ 13, 14; Declaration of Troy Justensen ¶ 10; Declaration of Sandy Johnson ¶¶ 4, 7.

The fact that Proclamation 9681 addresses some of Applicants' interests does not mean Applicants and the Federal Defendants are specifically aligned in their interests, as Plaintiffs contend. Plaintiffs' Memo. (ECF No. 24) at 13–14. It is unlikely that the government will elevate Applicants' specific interests over the government's other interests it wishes to advance in this case. *Fund For Animals*, 322 F.3d at 736 (Federal government taking applicant intervenors' interest into account when it issued a decision does not mean it would give those interests "the kind of primacy" that intervenors would give them in litigation). The Federal Defendants have broader interests at stake, including institutional interests in preserving the agencies' power. *See Costle*, 561 F.2d at 912 ("EPA is broadly concerned with implementation and enforcement of the settlement agreement, appellants are more narrowly focussed [sic] on the proceedings that may affect their industries."). Additionally, many of the defendants are in charge of regulating Applicants' conduct on the public lands, which further demonstrates that the two sides' interests are not necessarily aligned in this case. *See Crossroads,* 788 F.3d at

321 (Holding that federal agency would not adequately represent prospective intervenor's interests in part because defendant agency is "an agency that could seek to regulate" the intervenor's conduct after litigation.). Therefore, Applicants "should not need to rely on a doubtful friend to represent [their] interests, when [they] can represent" themselves. *Id.*

Furthermore, the differing interests between Applicants and Federal Defendants will likely lead to different arguments in support of Proclamation 9681's lawfulness. *Dimond*, 792 F.2d at 193 (considering whether applicants for intervention would make "the same legal arguments" as one factor in support of intervention). A central issue in this case is the scope of the President's authority under the Antiquities Act. Plaintiffs' Memo. (ECF No. 24) at 11 (framing the legal issue in this case as "[d]id President Trump have authority under the Constitution and the Antiquities Act to issue Proclamation 9681"). While Applicants and Defendants generally agree that the President had the authority under the Antiquities Act to reduce the Bears Ears National Monument, they disagree on the scope of the President's authority under the Act. *See* Memorandum in Support of Motion to Intervene (ECF No. 17-1) at 22.

For example, there is likely a dispute between Applicants and the Federal Defendants over the President's obligations under the Antiquities Act. Plaintiffs allege that the December 4, 2017 Proclamation, and Defendants' subsequent actions, violate the constitutional duty to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3, cl. 5; Complaint ¶¶ 214-220. One of the laws the President must

faithfully execute is the Antiquities Act, which provides that national monuments "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). It is likely that Proclamation 9681 was not only permissible, but, as Applicants believe, was required by the President's obligation to ensure that national monuments be confined to the smallest area compatible with protection of the monument objects.

It is unlikely that Federal Defendants will make this argument. The government, including some of the defendants in this case, is currently defending the designation of the Northeast Canyons and Seamounts National Marine Monument in a challenge brought by commercial fishers. *Massachusetts Lobstermen's Association v. Ross*, No. 1:17-cv-00406-JEB (D.D.C. filed Mar. 7, 2017). One of the legal issues in that case is the Antiquities Act's requirement that the President keep monument designations to the smallest area compatible with the proper care and management of monument objects. *See id.* ECF No. 1. It is likely that defendants would not to make any arguments in this case that would contradict their position in *Massachusetts Lobstermen's Association*. Additionally, President Trump and Secretary Zinke reviewed over 26 monuments, but Secretary Zinke only recommended modifications to some of the monument proclamations and the President has only reduced two monuments so far. *See* Plaintiffs' Memo. (ECF No. 24) at 6–8; Memo. for the President from Ryan K. Zinke, Sec'y of the Interior, Final Report Summarizing Findings of the Review of Designations Under the

Antiquities Act (Dec. 5, 2017).[4] Federal Defendants will not want to advance any argument that would require them to revisit their earlier recommendations and actions on which monuments should be modified or reduced.

Therefore, "[i]t is apparent" that Applicants and Federal Defendants "hold different interests" despite the fact that they agree that Proclamation 9681 is lawful. *Crossroads*, 788 F.3d at 321; *Cty. of San Miguel*, 244 F.R.D. at 48 ("[A]lthough the FWS and the intervenor-applicants share a common interest—upholding the FWS's listing determination—that shared interest does not guarantee adequate representation of the intervenor-applicants' interests and those of their members."). Although Applicants and Federal Defendants agree on the lawfulness of Proclamation 9681, Applicants, like the intervenors in *Crossroads*, "disagree about the extent of the" executive branch's "regulatory power" at issue in this case. *Crossroads*, 788 F.3d. at 321.[5]

The "weight of authority in this Circuit" favors Applicants in this case. *Crossroads*, 788 F.3d at 321. The D.C. Circuit and this Court have repeatedly rejected the arguments that Plaintiffs now advance. *Fund for Animals*, 322 F.3d at 736; *Crossroads*, 788 F.3d at 321; *Costle*, 561 F.2d at 912; *Cty. of San Miguel*, 244 F.R.D.

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[4] *Available at* https://www.doi.gov/sites/doi.gov/files/uploads/revised_final_report.pdf.

[5] Applicants may also disagree with Federal Defendants on "the scope of the administrative record, and post-judgment strategy." *Crossroads*, 788 F.3d at 321 (finding inadequacy of interests and granting motion to intervene). For example, Federal Defendants could choose not to appeal an adverse decision, which would leave Applicants with no method for defending their interests in this litigation.

at 48. Accordingly, this Court should hold that the Federal Defendants may not adequately represent Applicants' interest, and grant Applicants' motion to intervene.

II.

IF THIS COURT DOES NOT GRANT INTERVENTION AS OF RIGHT, THEN IT SHOULD GRANT PERMISSIVE INTERVENTION

Should this Court rule that Applicants are not entitled to intervention as of right, then this Court should still grant permissive intervention under Federal Rule of Civil Procedure 24(b). Plaintiffs argue that Applicants participation would be "duplicative" and is not necessary to protect any "exposure nor potential liability associated with this litigation." Plaintiffs' Memo. (ECF No. 24) at 15. Applicants participation would not be duplicative, because, as demonstrated above, Applicants have different interests than the federal government and will likely advance different arguments about why Proclamation 9681 is lawful. Furthermore, while Applicants may not face liability should this Court rule in favor of Plaintiffs, they still have strong interests in ensuring that the Bears Ears National Monument is not returned to its original size. *See* Memorandum in Support of Motion to Intervene (ECF No. 17-1) at 10–19. This is especially true of Applicants Sandy and Gail Johnson, whose business was threatened by the original monument designation. *See* Declaration of Sandy Johnson ¶¶ 6, 7, 8.

III.

THIS COURT SHOULD NOT LIMIT APPLICANTS' PARTICIPATION IN THIS SUIT

Finally, Plaintiffs argue that, should this Court grant intervention, it should place several restrictions on Applicants' participation. Plaintiffs' Memo. (ECF No. 24)

at 16–18. There is no cause for imposing these limits at this time. Intervenors are generally entitled to be put on an "equal footing" with the original parties. *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1146 (D.C. Cir. 2009) (per curiam). This is especially true for an intervenor entitled to intervene of right because "Rule 24(a) considerably restricts the court's discretion . . . by providing that such a party '*shall* be permitted to intervene[.]'" *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 382 n.1 (1987) (Brennan, J., concurring) (emphasis in original). "Accordingly a district court has less discretion to limit the participation of an intervenor of right than that of a permissive intervenor." *See id.* at 381-82.

Indeed, absent a showing that Applicants' involvement would cause "actual delays or other hardships," there is no justification for Plaintiffs' request to limit Applicants' participation. *Am. Great Lakes Ports Ass'n v. Zukunft*, No. 16-1019, 2016 WL 8608457, at *5–6 (D.D.C. Aug. 26, 2016) (denying party's request to limit scope of intervenor's participation). The limitations requested by Plaintiffs are unnecessary because Applicants are committed to the efficient adjudication of this case and do not intend to burden themselves, the other parties, or the Court with duplicative briefing. Accordingly, this Court should reject Plaintiffs' attempt to limit Applicants' participation as intervenors.

CONCLUSION

This Court should grant Applicants' Motion to Intervene.

DATED: January 31, 2018.

Respectfully submitted,

s/ Jonathan Wood

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Certificate of Service

I hereby certify that on January 31, 2018, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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