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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

UNITED STATES; *et al.*,

Defendants.

Case No. 3:18-cv-00569-MMD-CBC

PLAINTIFF'S OPPOSITION TO STATE OF SOUTH CAROLINA'S EMERGENCY MOTION TO INTERVENE

Plaintiff, the State of Nevada, by and through legal counsel, hereby files its Opposition to the State of South Carolina's ("South Carolina") Emergency Motion to Intervene and Memorandum of Points and Authorities in Support Thereof ("Motion to Intervene"). This Opposition is based on the attached points and authorities and all pleadings on file, and the exhibits attached thereto. Additionally, South Carolina's Motion to Intervene attached a proposed motion to transfer venue. *See* Exhibit B to South Carolina's Motion to Intervene. A proposed opposition to that proposed motion is included as Exhibit A to this Opposition.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL HISTORY

Defendants, the United States Department of Energy, Rick Perry, Secretary of Energy in his official capacity, the National Nuclear Security Administration, and Lisa E. Gordon in her official capacity as Administrator of the National Nuclear Security Administration (collectively "DOE" or "U.S. Defendants"), propose to ship one metric ton of plutonium from DOE's Savannah River Site in South Carolina, to DOE's Nevada National Security Site ("NNSS"), located approximately 90 miles northwest of the City of Las Vegas, Nevada. *See* Complaint (ECF No. 1) at ¶ 2. The material DOE proposes to ship is primarily plutonium-239, a fissile material that is toxic to humans. *Id.* at ¶ 4. Nevada will suffer irreparable harm due to DOE's failure to adequately describe its proposed action as required by the National Environmental Policy Act ("NEPA"), failure to prepare an environmental impact statement ("EIS") and failure to provide Nevada with an opportunity to meaningfully participate in the NEPA process. Further, Plaintiff contends that DOE's proposed action will result in increased radiation doses to Nevada citizens and would, in some circumstances, lead to contamination of the lands and the groundwater of Nevada with radioactive materials. *Id.* at ¶ 16.

In early 2000, DOE decided to construct and operate a mixed plutonium-uranium oxide nuclear fuel fabrication facility at DOE's Savannah River Site in South Carolina. *Id.* at ¶ 17. By statute, if DOE's mixed oxide fuel ("MOX") objective was not achieved by

January 1, 2014, then "the Secretary shall remove" from South Carolina "not less than one metric ton of defense plutonium" by no later than January 1, 2016. *Id.* at ¶ 18; *see also* 50 U.S.C. § 2566(c)(1). The statute further requires that removal of the defense plutonium be consistent with NEPA and all other applicable laws. DOE did not meet its MOX production objective by January 1, 2014, or any time thereafter. *See South Carolina v. U.S.*, 2017 WL 7691885 at *1 (D.S.C. Dec. 20, 2017), *aff'd*, 907 F.3d 742 (4th Cir. 2018). As a result, on February 9, 2016, South Carolina initiated a lawsuit (the "South Carolina case") against the underlying Defendants,[1] requesting that the United States District Court for South Carolina require DOE to remove the defense plutonium from South Carolina. *Id.*

On December 20, 2017, the United States District Court for South Carolina issued an injunction against the U.S. Defendants. *Id.* at *5. The court ordered that "the Secretary of Energy shall, consistent with [NEPA] and all other applicable laws, remove from the State of South Carolina, for storage or disposal elsewhere, not less than one metric ton of defense plutonium." *Id.* Notably, the court refused to specify how or where DOE must ship the plutonium. *Id.* at *4 (the court stated it must avoid "directing the Secretary on *how* to accomplish the removal task"). Instead, the court only stated that the plutonium must be stored or disposed of "elsewhere." *Id.* at *5. On October 26, 2018, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's decision. *South Carolina v. U.S., et al.*, 907 F.3d 742 (4th Cir. 2018).

On August 28, 2018, DOE informed Nevada that a supplement analysis would soon be posted to support the proposed shipment of one metric ton of plutonium to Nevada. *See* Complaint (ECF No. 1) at ¶ 40. On August 30, 2018, DOE issued its Supplement Analysis for the Removal of One Metric Ton of Plutonium from the State of South Carolina to Nevada, Texas, and New Mexico (the "SA"). *Id.* The SA proposed that "up to one metric ton of plutonium would be transported from SRS to the Device Assembly Facility" at

[1] In the South Carolina case, the plaintiff listed Lt. General Frank G. Klotz in his official capacity as Administrator of the National Nuclear Security Administration as a Defendant. Lisa E. Gordon succeeded Mr. Klotz on February 16, 2018, and is therefore a Defendant in the present case.

NNSS. *See* Exhibit A to Plaintiff's Complaint (ECF No. 1-1) at 13. In the SA, NNSA concluded that "there are no substantial changes in the proposed action that are relevant to environmental concerns or significant new circumstances or information relevant to environmental concerns that would supplement or require a new environmental analysis." *Id.* at iii.

On November 30, 2018, Plaintiff filed its Complaint against Defendants, which alleged that: (1) Defendants violated NEPA; (2) Defendants violated the Council on Environmental Quality NEPA Regulations; and (3) Defendants violated their own regulations. Concurrent with the filing of its Complaint, Plaintiff also filed a Motion for Preliminary Injunction. Notably, Nevada's Complaint and Motion for Preliminary Injunction relate **only to the DOE's proposed action to ship plutonium *to Nevada***. The Motion for Preliminary Injunction does not request that this Court require DOE to retain the plutonium in South Carolina or ship it to any other specific state.

On January 3, 2019, South Carolina filed its Emergency Motion to Intervene and Memorandum of Points and Authorities in Support Thereof.

II. LEGAL ANALYSIS

A. South Carolina is Not Entitled to "Intervention of Right" Under Fed. R. Civ. P. 24(a)(2).

Fed. R. Civ. P. 24(a) provides that "on timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is subject to 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."

South Carolina's Motion argues that it is entitled to intervention under subsection 2 of this rule. An applicant for intervention as of right must satisfy four criteria under Fed. R. Civ. P. 24(a)(2):

/ / /

> (1) the applicant must timely move to intervene; (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 situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties.

Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 950 (9th Cir. 2009).

Plaintiff does not contend that South Carolina's Motion is untimely, but it does take issue with South Carolina's qualification for intervention based on the other three criteria under the rule.

The second criterion requires the movant to show that it has a significantly protectable interest relating to the property or transaction that is the subject of the action. *Id.* This interest is only satisfied when "the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003) (*quoting Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993)). The interest must be "direct, substantial, and legally protectable." *Am. Ass'n of People With Disabilities v. Herrera*, 257 F.R.D. 236, 246 (D.N.M. 2008). An applicant meets this requirement "only if the resolution of the plaintiff's claims *actually will affect the applicant*." *Cicero v. Directv, Inc.*, 2010 WL 11463634, at *2 (C.D. Cal. Mar. 2, 2010) (emphasis added); *see also Greene v. U.S.*, 996 F.2d 973, 976–78 (9th Cir. 1993) (holding that an applicant lacked a "significantly protectable interest" in an action when the resolution of the plaintiff's claims would not affect the applicant directly). "An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable will not satisfy the rule." *Standard Heating & Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 571 (8th Cir. 1998) (*quoting Washington Elec. v. Massachusetts Mun. Wholesale Elec.*, 922 F.2d 92, 97 (2d Cir. 1990)).

In the present case, South Carolina's Motion to Intervene fails to identify a direct, non-speculative interest in this case. The Motion inaccurately states, "Nevada has sought injunctive relief to prevent the Federal Defendants from removing the weapons grade

plutonium from South Carolina." *See* Motion to Intervene (ECF No. 25) at 5:8–9. To the contrary, Nevada's Motion for Preliminary Injunction requests only that this Court enjoin Defendants from shipping the plutonium from South Carolina *to Nevada*. *See* Plaintiff's Motion for Preliminary Injunction (ECF No. 2) at 2. If granted, the preliminary injunction would not preclude DOE from shipping the plutonium to any other facility in compliance with NEPA and other applicable laws. Thus, South Carolina's Motion to Intervene fails to identify any direct, non-speculative interest South Carolina has in this litigation.

The third criterion requires that "the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest." *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009). "If an applicant intervenor's legal rights may be adequately protected in a future lawsuit . . . intervention may be properly denied." *Silver v. Babbitt*, 68 F.3d 481 (9th Cir. 1995). In the present case, South Carolina has not identified how the outcome of this case would impair South Carolina's ability to enforce its existing rights. If Defendants do not move the plutonium by January 1, 2020, South Carolina would still have the same recourse it possesses right now—filing for violation of the United States District Court for South Carolina's injunction. The outcome of the present case would not impair or impede South Carolina's ability to pursue its legal recourse against Defendants.

The last criterion for intervention as a matter of right is that "the applicant's interest must not be adequately represented by existing parties." *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009). "The most important factor to determine whether a proposed intervenor is adequately represented by a present party to the action is how the intervenor's interest compares with the interests of existing parties." *Id.* at 950–51. "When an applicant for intervention and an existing party *have the same ultimate objective*, a presumption of adequacy of representation arises." *PEST Comm. v. Miller*, 648 F. Supp. 2d 1202, 1212 (D. Nev. 2009) (emphasis added), *aff'd*, 626 F.3d 1097 (9th Cir. 2010). "If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation."

Prete v. Bradbury, 438 F.3d 949, 956 (9th Cir. 2006) (denying motion to intervene because "the ultimate objective for both defendant and intervenor-defendants" was the same); *see also U.S. v. City of Los Angeles, Cal.*, 288 F.3d 391, 402 (9th Cir. 2002) (denying intervenor-defendants motion because "they share the same objective as the United States"); *see also People's Leg. v. Miller*, 2012 WL 3536767, at *4 (D. Nev. Aug. 15, 2012) (finding that the intervenor-applicant failed to make a compelling showing of inadequate representation because the applicant and existing defendants "share the same ultimate objective").

This criterion proves the most fatal to South Carolina's Motion to Intervene because South Carolina has failed to identify any meaningful way in which its objective in this case differs from that of the present Defendants. As shown by the case law above, this factor primarily compares the ultimate goal or objective of the existing parties with that of the intervenor applicant. In this case, the ultimate objective of South Carolina and Defendants is identical—removal of plutonium from South Carolina. Since South Carolina and the U.S. Defendants share the same ultimate objective, South Carolina is required to make a "compelling showing" to demonstrate inadequate representation. However, South Carolina's Motion makes no such showing. Instead, South Carolina only points generally to its "sovereign interest in protecting its territory and its citizens' health and well-being." *See* South Carolina's Motion to Intervene at 7:3–4. However, this factor requires South Carolina to show how its objectives differ from the existing parties. This Court should deny South Carolina's Motion because South Carolina and Defendants share the identical objective of allowing DOE to remove the plutonium from South Carolina and transport it to Nevada. For this reason, the existing parties adequately represent South Carolina's objectives.

B. This Court Should Deny South Carolina Permissive Intervention Under Fed. R. Civ. P. 24(b).

Fed. R. Civ. P. 24(b)(1)(B) provides that a 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." "An applicant who seeks permissive intervention must prove that it meets three threshold requirements: (1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant's claims." *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). The applicant's common question of law or fact must be distinct from those likely to be raised by the existing parties. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002), *overruled on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) ("The language of the rule makes clear that if the would be intervenor's claim or defense contains no question of law or fact that is raised also by the main action, intervention under Rule 24(b)(2) must be denied").

South Carolina's Motion to Intervene does not identify any common questions of law or fact to permit intervention. This case is only tangentially related to South Carolina. This case is limited to DOE's proposed action of transporting defense plutonium to Nevada for indefinite "staging." The South Carolina case relates to DOE's compliance with 50 U.S.C. § 2566(c)(1), a statute specifically created to deal with MOX production in South Carolina. *See South Carolina v. U.S.*, 2017 WL 7691885 at *1 (D.S.C. Dec. 20, 2017), *aff'd*, 907 F.3d 742 (4th Cir. 2018). The only factual connection between the two cases is that the plutonium DOE is proposing to ship to Nevada is currently being stored in South Carolina. Although the plutonium may be coming from South Carolina, that fact is unrelated to the focus of Plaintiff's claims. Plaintiff primarily asserts a case based on NEPA. This case will involve assessment of all the environmental impacts that DOE's proposed action will have on Nevada. If the plutonium in question was to be transported from any other state in the country, rather than South Carolina, it would have no impact on the Plaintiff's case. Thus, South Carolina's loose factual connection to this case is secondary to the NEPA-based case that Plaintiff will present.

Additionally, the fact that South Carolina has secured a district court order requiring DOE to remove one metric ton of defense plutonium by January 1, 2020, does not have any legal impact on the laws DOE must comply with in removing the plutonium.

The Court will not apply any less stringent NEPA standard to ensure that DOE can abide by the South Carolina court's injunction. Ultimately, the South Carolina court's injunction should be *irrelevant* in determining whether DOE complied with NEPA in its proposal to ship one metric ton of plutonium to Nevada.

"But a district court has discretion to deny permissive intervention even if the applicant satisfies the threshold requirements." *People's Leg. v. Miller*, 2012 WL 3536767, at *3 (D. Nev. Aug. 15, 2012). "In exercising its discretion, a court should consider whether intervention will unduly delay or prejudice the original parties, whether the applicant's interests are adequately represented by the existing parties, and whether judicial economy favors intervention." *Id.* In *People's Legislature*, the court found that the intervenor-applicant had satisfied the three requirements for permissive intervention, and therefore "intervention [was] within the court's discretion." *Id.* at *5. Despite that, the court denied permissive intervention because the court found "that [applicant's] interests are adequately represented" by the existing parties. *Id.* Further, the court noted that "adding [the applicants] as parties would unnecessarily encumber the litigation and impede judicial economy." *Id.*

Similar to *People's Legislature*, even if the court finds that South Carolina has met the three criteria for permissive intervention under Fed. R. Civ. P. 24(b)(2), this Court should deny South Carolina's permissive request to intervene because the existing parties adequately represent South Carolina's interests. South Carolina and Defendants share the identical objective of defeating Plaintiff's claims and allowing DOE to remove the plutonium from South Carolina and transport it to Nevada. South Carolina has failed to outline any way that its objectives differ from that of the existing parties. Allowing South Carolina to intervene would likely result in the same or similar arguments being duplicated. This result would not be in the interest of judicial economy, and would serve only to encumber the litigation. Given these facts, Plaintiff requests that this Court use its discretion to deny South Carolina's permissive request to intervene.

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III. CONCLUSION

Ultimately, South Carolina has failed to provide sufficient basis for this Court to allow intervention in this case. South Carolina's Motion relies upon a mischaracterization of Nevada's case. Nevada simply seeks to stop plutonium shipments into Nevada, not to stop shipments out of South Carolina. Further, South Carolina's Motion fails to identify a direct, non-speculative interest in this case. The outcome of the present case would not impair or impede South Carolina's ability to pursue its legal recourse against Defendants. Most importantly, South Carolina has failed to identify any meaningful way in which its ultimate objective in this case differs from that of the present Defendants. For these reasons, Plaintiff requests that this Court deny South Carolina's Motion to Intervene.

DATED this 9th day of January, 2019.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 9th day of January, 2019, I served a true and correct copy of the foregoing PLAINTIFF'S OPPOSITION TO SOUTH CAROLINA'S EMERGENCY MOTION TO INTERVENE, by U.S. District Court CM/ECF electronic service to:

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INDEX OF EXHIBITS

EXHIBIT NO.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Plaintiff's [Proposed] Opposition to State of South Carolina's [Proposed] Motion to Transfer Venue and Memorandum of Points and Authorities in Support Thereof	12