

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

ATCHAFALAYA BASINKEEPER, *et al.*,

Plaintiffs,

v.

DAVID BERNHARDT, Secretary of the
Interior, *et al.*,

Defendants,

and

SAFARI CLUB INTERNATIONAL,

Proposed Defendant-Intervenor.

Civ. No. 20-cv-00651-BAJ-EWD

MEMORANDUM IN SUPPORT OF SAFARI CLUB INTERNATIONAL'S
MOTION TO INTERVENE

I. Introduction

The removal of the Louisiana black bear from the Endangered Species Act (“ESA”) list of threatened species at issue in this case benefits the interests of members of Safari Club, primarily in preserving the likelihood that the State of Louisiana will open a well-regulated hunting season for black bears. Safari Club members have definite plans to participate in any such hunt. For this and other reasons, Safari Club was granted intervention as of right to defend the delisting in a previous case in which the delisting was challenged in the U.S. District Court for the District of Columbia. *Pub. Emps. for Env'tl. Responsibility v. Bernhardt*, No. 18-cv-01547-JDB, ECF 22 (“D.C. case”) (granting Safari Club intervention as of right). All the plaintiffs in the D.C. case are plaintiffs in this litigation, and the claims for relief in this litigation are similar to the claims for relief alleged in the D.C. case. Thus, Safari Club seeks to participate as a defendant-intervenor to

again defend the U.S. Fish and Wildlife Service's ("Service") 2016 delisting. Safari Club moves to participate as a party to represent its own interests and the interests of its members.

Safari Club should be granted intervention as of right because its motion satisfies all four requirements of Federal Rule of Civil Procedure 24(a): (1) this motion is timely and will not cause prejudice or delay to any of the parties; (2) Safari Club and its members have significant protectable interests in hunting black bears in Louisiana, and hunting will only be possible if the delisting remains in place; (3) these interests would be harmed if Plaintiffs prevail in this legal challenge and the Court sets aside the delisting; and (4) Safari Club's interests cannot be adequately represented by Federal Defendants. If this Court does not grant Safari Club intervention as of right, Safari Club requests that the Court grant permissive intervenor status, because Safari Club's defenses and the main action have questions of law and fact in common. Finally, if this Court denies intervention as of right and permissive intervention, it should grant leave for Safari Club to participate as an amicus curiae.

II. Factual and Procedural Background

A. The Delisting of the Louisiana Black Bear

The Service proposed to delist the Louisiana black bear in May 2015. 80 Fed. Reg. 29394 (May 21, 2015). The Service held two public hearings and accepted comments for 60 days regarding the proposed delisting. On March 11, 2016, the Service removed the Louisiana black bear from the federal list of threatened wildlife. 81 Fed. Reg. 13124 (Mar. 11, 2016).

B. The Procedural History of the D.C. Case and this Case

On June 28, 2018, all but one of the plaintiffs in this case filed a complaint against Federal Defendants challenging the delisting in the U.S. District Court for the District of Columbia. No.

18-cv-01547-JDB, ECF 1.¹ Safari Club was granted intervention as of right to defend the delisting. The parties then completed summary judgement briefing in the D.C. case. *Id.*, ECFs 24 – 34. In its summary judgement briefing, Safari Club challenged the plaintiffs’ standing to assert their claims. *Id.*, ECFs 25 and 33. On February 7, 2020, the district court dismissed the case for lack of jurisdiction, finding that the plaintiffs did not have standing. *Id.*, ECFs 39 and 40. That dismissal was without prejudice. *Id.*

On September 30, 2020, Plaintiffs filed a complaint realleging three of the four counts from the D.C. case complaint. ECF 1. On October 1, 2020, a scheduling conference was set for December 10, 2020, and a status report is due November 17, 2020. ECF 3. No other orders have been issued. On November 5, 2020, Federal Defendants filed a motion to transfer venue to the District of Columbia.²

C. Proposed Defendant-Intervenor Safari Club International

Safari Club is a nonprofit organization incorporated in Arizona, operating under § 501(c)(4) of the Internal Revenue Code. Safari Club’s headquarters are in Washington, D.C. and it maintains an office in Tucson, Arizona. Safari Club’s membership includes approximately 45,000 individuals from the United States and many countries around the world. Safari Club has approximately 525 members and two chapters in Louisiana. Its mission and purposes include the conservation of wildlife, protection of the hunter, and education of the public concerning hunting and its use as a conservation tool. R. Goodenow Decl., Ex. A, ¶¶ 3-5.

Safari Club works with its sister organization, Safari Club International Foundation (“SCI Foundation”), to carry out its conservation mission. SCI Foundation is a nonprofit organization

¹ Healthy Gulf is a plaintiff in this litigation and was not a plaintiff in the D.C. case.

² Safari Club supports Federal Defendants’ motion.

incorporated in Nevada, operating under § 501(c)(3) of the Internal Revenue Code. Its principal offices and place of business are in Tucson, Arizona. Its missions include funding and directing worldwide programs dedicated to wildlife conservation and outdoor education. A significant percentage of Safari Club's and SCI Foundation's annual revenues, including a portion of the dues and fees paid by each member of Safari Club (including each Louisiana member), goes to support SCI Foundation's conservation efforts around the world. In addition, each individual chapter of Safari Club raises its own funding for conservation efforts locally and across the globe. *Id.* ¶¶ 6-8.

Safari Club and SCI Foundation's advocacy and conservation interests focus on the "sustainable use" of wildlife. This concept recognizes that the well-managed utilization of wildlife produces benefits that directly advance and incentivize conservation. Hunting has been a valuable tool in the conservation of many game species and their associated habitats, including numerous species in North America. *Id.* ¶¶ 9-10. As many Safari Club members hunt and enjoy recreational pursuits in Louisiana, Safari Club's purposes encompass support and protection of hunting in Louisiana. *Id.* ¶¶ 11-12.

Safari Club regularly engages in litigation to defend hunting and the participation of hunters in sustainable-use conservation. For example, Safari Club has participated in numerous cases involving the listing or delisting of black bears, gray wolves, and grizzly bears.³ Safari Club

³ The D.C. case is one example. *See also Defs. of Wildlife v. Kempthorne*, 535 F. Supp. 2d 121, 123 (D.D.C. 2008) (Safari Club intervened as defendant in case involving listing status of Florida black bear); *Humane Soc'y of the U.S., et al. v. Salazar, et al.*, No. 13-cv-00186 (D.D.C. 2013) (Safari Club intervened in defense of Western Great Lakes gray wolves delisting); *Defenders of Wildlife, et al. v. Salazar, et al.*, No. 12-cv-01833 (D.D.C. 2012) (Safari Club intervened in defense of delisting of Wyoming's gray wolves); *Crow Indian Tribe, et al. v. United States., et al.*, No. 17-cv-00089-DLC (D. Mont. 2017) (Safari Club intervened in defense of Greater Yellowstone Ecosystem grizzly bear delisting).

has also participated as a plaintiff/appellant or defendant-intervenor in several cases involving the hunting of black bear.⁴

The declarations of Safari Club members, attached as exhibits to this motion and memorandum, document their interests in hunting Louisiana black bears. For example, Safari Club member Gregory Elliott, a resident of Oakdale, Louisiana and a founder and current president of the Louisiana Acadiana Chapter of Safari Club, intends to hunt black bears in Louisiana during the first season that hunting is announced. G. Elliott Decl., Ex. B, ¶ 10. Melissa Elliott, a Safari Club member and current Chapter Secretary of the Louisiana Acadiana Chapter, plans to hunt black bears in Louisiana during the first season that the Louisiana Department of Wildlife and Fisheries establishes a hunt. M. Elliott Decl., Ex. C, ¶ 10. Safari Club member Howard Wilson similarly explained:

I have always believed, because I am a Louisiana hunter and because of the abundance of black bears I have witnessed on a very common occurrence, that when and if I ever had an opportunity to harvest a black bear it would be a Louisiana black bear and that I would hunt it just as President Roosevelt did so many years ago.

H. Wilson Decl., Ex. D, ¶ 11.

III. Argument

A. Safari Club is Entitled to Intervene as of Right under Federal Rule 24(a)(2)

Safari Club has filed a timely motion for intervention. Safari Club's and its members'

⁴ *Ctr. for Biological Diversity v. Zinke*, 313 F. Supp. 3d 976, 980 (D. Alaska 2018) (defendant-intervenor); *N.J. Outdoor All. v. N.J. Dep't of Env'tl. Prot.*, No. A-0525-18T4, 2018 WL 6005064 (N.J. Super. Ct. App. Div. Nov. 16, 2018) (appellant); *Animal Prot. League of N.J. v. N.J. Dep't of Env'tl. Prot.*, 423 N.J. Super. 549, 34 A.3d 784 (App. Div. 2011) (intervenor-respondent); *N.J. Animal Rights All. v. N.J. Dep't of Env'tl. Prot.*, 396 N.J. Super. 358, 934 A.2d 52 (App. Div. 2007) (intervenor-respondent); *Safari Club Int'l v. N.J. Dep't of Env'tl. Prot.*, 373 N.J. Super. 515, 521 (App. Div. 2004) (appellant); *WildEarth Guardians v. U.S. Forest Serv.*, No. 19-cv-00203-CWD (D. Idaho 2019) (motion to intervene pending decision).

significant protectable interests in hunting Louisiana black bears will be impaired by the relief that Plaintiffs seek. The existing parties will not adequately represent these interests. Because it meets all the requirements of Federal Rule of Civil Procedure 24(a), Safari Club is entitled to intervene as of right.

Federal Rule of Civil Procedure 24(a), which governs intervention as of right, states in pertinent part:

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)(2). The Fifth Circuit has determined that intervention as of right depends upon the applicant's ability to satisfy four prerequisites: (1) the timeliness of the motion; (2) a showing of interest in the subject of the action; (3) a possible impairment or impediment of the applicant's ability to protect that interest; and (4) inadequate representation by the existing parties to the suit. *E.g., Brumfield v. Dodd*, 749 F.3d 339, 341 (5th Cir. 2014). "Although the movant bears the burden of establishing its right to intervene, Rule 24 is to be liberally construed." *Id.* Safari Club satisfies all four prerequisites.

1. This Motion is Timely

Safari Club has timely asserted its own interests and the interests of its members who will be significantly impacted by the outcome of this litigation. "Timeliness is to be determined from all the circumstances." *NAACP v. New York*, 413 U.S. 345, 366 (1973). The case is still in the earliest stages. Federal Defendants have not yet filed response to Plaintiffs' complaint. As it has done in countless other cases, Safari Club will abide by all merits briefing schedules established

by this Court. No prejudice will come to any party from the granting of this motion at this stage of the litigation. Consequently, this motion is timely.

2. Safari Club and Its Individual Members Have Direct, Substantial Legal Interests in the Outcome of this Lawsuit

Safari Club has direct, substantial legal interests in the subject matter of this suit. A party demonstrating an interest in the subject matter of the suit should be granted intervention as of right. *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994). The Fifth Circuit has defined the interest test as one of efficiency rather than one of exclusivity: “‘The ‘interest’ test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.’” *Id.* (quoting *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1203 n.10 (5th Cir. 1992)).

Plaintiffs ask this Court to invalidate the 2016 delisting and return the Louisiana black bear to the ESA threatened species list. With the bear delisted, the state can consider species management options including opening a bear season, in which Safari Club members will participate. If the bear returns to ESA threatened status, the state will not consider or authorize a black bear hunting season. Safari Club members have direct and concrete interests in participating in a bear season authorized under state law.

Safari Club members have definite future plans to hunt Louisiana black bear when the state opens a season. E.g., G. Elliott Decl. ¶ 10; M. Elliott Decl. ¶ 10. In addition, Safari Club members are concerned with the proper conservation of this species, which may include population management through well-regulated hunting. Safari Club member Howard Wilson explained:

[If Plaintiffs are successful,] I will likely lose any opportunity to hunt black bears in the state and play a role in the state’s management of our growing bear population. I will also know that the countless hours and significant monetary resources that I have provided for the survival as well as harvesting to maintain the species and the taxes I have paid for local, state and federal efforts towards the

species will have been wasted. Relisting of the bears will be demoralizing for me when I have spent a lifetime doing the right thing for all wildlife because my efforts will have been for nothing.

H. Wilson Decl. ¶ 15.

Safari Club, as an organization, has an interest in promoting and protecting sustainable-use conservation through hunting. R. Goodenow Decl. ¶ 10. Safari Club also seeks to preserve its members' ability to participate in future black bear hunting in Louisiana. *Id.* ¶ 12. All of these interests involve the subject matter of this suit—delisting of the Louisiana black bear—and Safari Club's intervention on its own behalf, and on behalf of its members, will allow these interests to be included alongside Plaintiffs' interests, and therefore advance the goal of disposing of lawsuits compatible with efficiency and due process.

3. Plaintiffs' Proposed Relief Will Impair Safari Club's Interests

If Plaintiffs obtain the relief they seek, the interests of Safari Club members will be impaired because they will not be able to participate in future black bear hunts in Louisiana as long as the bear is listed. An intervenor-applicant can show its interest will be impaired when the government's decision was favorable to the intervenor-applicant, and the present action directly attacks that prior favorable decision. *E.g., Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 566–67 (5th Cir. 2016) (intervenor-applicant's interest in the government's regulatory scheme that benefited applicant was legally protectable and would be impaired if plaintiffs' challenge to the scheme was successful). The delisting is favorable to Safari Club's members, and Safari Club and its members' interests will be impaired if Plaintiffs are successful because Plaintiffs are challenging the favorable delisting determination.

In addition, an intervenor-applicant's interest will be impaired when the plaintiffs' requested relief would constrain the intervenor's future opportunities. *See, e.g., Black Fire*

Fighters Ass'n of Dallas v. City of Dallas, 19 F.3d 992, 994 (5th Cir. 1994) (holding that non-black firefighters' interests would be impaired, even though they did not have currently enforceable rights to promotions, because a consent decree between the city and black firefighters would give black firefighters a guaranteed number of promotions and prospectively interfere with non-black firefighters' promotion opportunities); *see also Texas v. United States*, 805 F.3d 653, 659–61 (5th Cir. 2015) (documenting similar holdings).

Safari Club members who plan to hunt black bears in Louisiana when the state authorizes hunts will be harmed if Plaintiffs' success in this litigation deprives them of opportunities to hunt. *See, e.g., G. Elliott Decl.*, ¶ 11; *H. Wilson Decl.*, ¶ 15. Safari Club's interest in promoting sustainable-use conservation through hunting, which can occur prior to the state implementing a hunting season, will also be impaired if Plaintiffs are successful. Accordingly, Safari Club and its members satisfy the third requirement for intervention as of right.

4. The Parties to this Lawsuit Offer Inadequate Representation

Federal Defendants inadequately represent Safari Club's interests in defending against Plaintiffs' legal challenges, and for this reason, Safari Club's motion should be granted.

An intervenor-applicant satisfies the "minimal" inadequate representation standard by showing that existing defendants' representation "may" be inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see also, Texas v. United States*, 805 F.3d at 661. This is not a high bar. *Brumfield*, 749 F.3d at 345 ("The burden on the movant is not a substantial one.") (citation omitted). When the defendant represents the "broad public interest" of its various constituents, and the intervenor applicant represents a more specific private interest, the intervenor demonstrates that the adequacy of representation prong is not met. *See, e.g., Sierra Club v. Espy*, 18 F.3d at 1207–08. Such existing defendants do not provide adequate representation, even though

“they share common ground” with the intervenor-applicant in that both seek to defend the plaintiffs’ allegations. *Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996); *see also*, *Abita Springs v. U.S. Army Corps of Eng’rs*, No. 15-cv-0451, 2015 WL 13533518, *3 (E.D. La. Sept. 25, 2015) (noting that “the Fifth Circuit has found that a government defendant does not adequately represent the interests of a private entity, even if they seek the same ultimate outcome”) (collecting authorities).

Federal Defendants do not participate in Louisiana black bear hunting under state law. They do not practice sustainable-use conservation through hunting. While they will generally defend the delisting, they do not have an interest in the impact of the delisting on the state’s ability to open a black bear hunting season. Safari Club does. Defendant-Intervenor status will allow it to protect these interests.

Federal Defendants do not share Safari Club’s concerns, even though both parties seek to defend the delisting. The Service made the delisting decisions based on five risk factors identified in the Section 4 of the ESA. *See* 16 U.S.C. § 1533(a)(1). Under the ESA, because the Louisiana black bear no longer met the definition of a threatened species, the Service applied the ESA and implemented the delisting. But Federal Defendants did not, and do not, consider the impact of the delisting on individuals’ ability to hunt Louisiana black bear. Consequently, Safari Club’s focus will be both narrower and deeper than that of Federal Defendants.

Further, Safari Club may pursue the litigation in directions that Federal Defendants are unwilling or unable to go.⁵ For example, in the D.C. case that previously addressed the Louisiana

⁵ Through various briefing strategies (*e.g.*, staggered briefing, coordination between parties), Safari Club can avoid duplicating the arguments of the Federal Defendants. Safari Club will endeavor to assist in the efficient resolution of this case, as it has done in other cases in which it intervened.

black bear delisting, both the federal defendants and Safari Club defended the delisting but the district court agreed with an argument made “only by Safari Club,” and dismissed the case. *Pub. Emps. for Env'tl. Responsibility v. Bernhardt*, No. 18-cv-01547-JDB (D.D.C. 2020), ECF 39. Without Safari Club’s participation, the court may not have been alerted to the fact that the plaintiffs lacked standing. The “value added” by intervenors reflects the policy reasons why the intervention standard is “liberal[.]” See *Brumfield*, 749 F.3d at 341; see also *Humane Soc’y of the U.S. v. Kempthorne*, 527 F.3d 181, 188 (D.C. Cir. 2008) (Safari Club successfully moved the D.C. Circuit to vacate a ruling made moot by regulations issued by the defendant Service, although the Court denied a similar motion made by the Service).

While Safari Club may share some common interests with Federal Defendants in the ultimate outcome of this case, the obligations of Federal Defendants to their larger constituencies make it impossible for them to provide representation that will protect the unique and possibly divergent interests of Safari Club and its members—whose interests are, specifically, focused on responsible and sustainable-use conservation. Additionally, Safari Club will be able to assist in the efficient resolution of the case.

Accordingly, Safari Club fulfills the four criteria required for intervention as of right, and the Court should grant its motion to intervene as of right.

B. Alternatively, the Court Should Permit Safari Club to Intervene Under Rule 24(b)(2)

If the Court finds that Safari Club does not meet the criteria for intervention as of right, Safari Club alternatively seek permissive intervention under Federal Rule of Civil Procedure 24(b), which states:

On 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 In

exercising its discretion, 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).

As discussed above, Safari Club's motion to intervene is timely. The lawsuit was recently initiated by Plaintiffs, and Federal Defendants have not yet responded to the Complaint.

Safari Club and it and its members have significant protectable interests in the subject matter of this action. Safari Club's defenses will respond to Plaintiffs' claims and will include, but may not be limited to, arguments in support of the legality of Federal Defendants' delisting and Plaintiffs' lack of standing to pursue this challenge. These arguments relate to issues under the ESA that Safari Club has litigated before and has an interest in addressing, including but not limited to alleged hybridization, historical habitat, peer review, assessment of the listing factors, and standing—to name a few. Safari Club's defenses share substantial questions of law and fact with the claims raised by Plaintiffs' Complaint and Federal Defendants' likely defenses. *Accord* D.C. case, ECF 22 (granting Safari Club intervention as of right).

Safari Club's intervention at this time will not unfairly delay or prejudice the adjudication of the parties' rights. Safari Club will abide by all briefing schedules established by this Court and will work to avoid duplicative briefing. At this early stage, Safari Club can be "seamlessly integrated" as an intervenor into any briefing schedule and not cause undue delay or prejudice the adjudication of the rights of the existing parties. *City of Baker Sch. Bd. v. City of Baker*, No. 06-cv-937-RET-DLD, 2007 WL 9702695, *2 (M.D. La. Feb. 15, 2007).

Moreover, by allowing Safari Club to intervene, the Court will have a party to this action that will advocate for the rights of those who wish to participate in hunting Louisiana black bear. Safari Club can contribute to the informed resolution of this litigation as a representative of interested stakeholders who are not otherwise represented. As an engaged defendant-intervenor,

Safari Club has proven helpful in the resolution of other wildlife and hunting cases—including the previous lawsuit involving the Louisiana black bear—and can do so again here. Indeed, the D.C. court agreed with an argument that only Safari Club made in the D.C. case. Accordingly, even if this Court denies Safari Club’s intervention as a matter of right, it should grant permissive intervention in this action.

C. Amicus Curiae

If the Court does not grant Safari Club intervenor status, Safari Club requests that the Court allow it to participate as an amicus curiae and to file briefs in this case, including in support of any motion for summary judgment by Federal Defendants and in opposition to any such motion by Plaintiffs. The Court has “inherent authority” to allow the participation of an amicus curiae, and “courts have exercised great liberality in permitting an amicus curiae to file a brief in a pending case” *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990). “There are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful to or otherwise desirable by the court.” *Id.* For all the reasons described above concerning Safari Club’s interests in this case, the Court should exercise its discretion so that Safari Club has a voice in this important public interest case.

IV. Conclusion

Safari Club satisfies the requirements for intervention as of right and permissive intervention. This motion is timely and documents the substantial interests that Safari Club and its members have in the delisting of the Louisiana black bear. Federal Defendants will defend the legality of the delisting, but do not share Safari Club’s interests in the potential future sustainable hunting of the bears. In addition, Federal Defendants must defend this case in a way that reflects

the interests of its diverse stakeholders. Without Safari Club's participation, the interests of non-governmental persons and entities who support sustainable-use conservation of Louisiana black bears, including through hunting, will not adequately be represented.

Dated: November 17, 2020.

Respectfully Submitted,

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