IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

ATCHAFALAYA BASINKEEPER, et al.

*Plaintiffs*,

vs.

DAVID BERNHARDT, et al.

*Defendants*.

Case No. 20-651-BAJ-EWD

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO SAFARI CLUB INTERNATIONAL'S MOTION TO INTERVENE**

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Plaintiffs, Atchafalaya Basinkeeper, et al., hereby submit this Memorandum in Opposition to the November 17, 2020, Motion to Intervene of Safari Club International in the above-captioned matter. Dkt. No. 15. Plaintiffs oppose intervention by Safari Club International (Safari Club) as of right pursuant to Fed. R. Civ. P. 24(a)(2), and by permission of the Court pursuant to Fed. R. Civ. P. 24(b)(1)(B), and participation as *amicus*.

The Court should deny Safari Club's intervention because the applicant has failed to satisfy the necessary prerequisites for intervention of right under Fed. R. Civ. P. 24(a)(2). Moreover, Safari Club also does not qualify for permissive intervention or *amicus* status, because both its interest and its expertise lie in the area of hunting, and not in the legal, factual, and scientific issues concerning the listing status of the Louisiana black bear under the Endangered Species Act (ESA) that are the subject of this case. Safari Club's permissive intervention or participation as *amicus* could also prejudice the parties, result in duplicative briefing, and fruitlessly complicate the pending case. If nevertheless granted, Safari Club's permissive intervention or participation as *amicus* should be properly limited so as not to allow for duplicative briefing or prejudice the parties.

## RELEVANT FACTS

On January 7, 1992, the Louisiana black bear (*Ursus americanus luteolus)*, was listed as threatened pursuant to the Endangered Species Act. 57 Fed. Reg. 588 (January 7, 1992). The Louisiana black bear is one of sixteen recognized subspecies of the American black bear (*Ursus americanus*), which is the official state mammal of Louisiana. The listing decision was based on the modification and reduction of bear habitat and the threat of future habitat conversion and human-related mortality.

In 2015, one year after the U.S. Fish and Wildlife Service (Service) completed its first 5-year review of the status of the Louisiana black bear recommending continued listing, the Service proposed delisting of the Louisiana black bear. 80 Fed. Reg. 29394 (May 21, 2015). Soon thereafter, on March 11, 2016, the Service issued the final delisting rule. 81 Fed. Reg. 13124 (Mar. 11, 2016).

Black bears in Louisiana have been protected from recreational hunting since 1984. *See* 81 Fed. Reg. 13159. The black bear continues to be protected from taking, possession, and trade by State laws. *See* La. Admin. Code Title 76; La. R.S. Title 56; *see also* Davidson, et al., “Louisiana Black Bear Management Plan” (Jan. 2015) at 57 (“the potential removal from federal protection would not alter or negate state penalties for poaching or harming a Louisiana black bear”). The Louisiana Department of Wildlife and Fisheries (LDWF) is responsible for the post-delisting management of the Louisiana black bear in this state. 81 Fed. Reg. at 13160.

On September 30, 2020, Plaintiffs filed the instant suit challenging the 2016 delisting decision. Dkt. No. 1. Plaintiffs assert claims under the Endangered Species Act and the Administrative Procedure Act challenging the Service’s compliance with the ESA listing standards, the sufficiency of the scientific support the Service relied on in its delisting determination, and the Service’s recovery determination. On November 17, 2020, Safari Club International filed the instant motion to intervene, accompanied by declarations of members and a proposed answer to Plaintiffs’ complaint. Dkt. No. 15.

Pursuant to the parties’ joint Motion for Temporary Stay of Proceedings and Certain Pending Deadlines Stay (Dkt. No. 8), the matter was stayed – including the deadline to file an opposition to Safari Club’s motion to intervene – pending the Court’s ruling on Defendants’ Motion to Transfer Venue (Dkt. No. 5). On March 13, 2021, the Court issued a Ruling and

Order (Dkt. No. 25) denying Defendants' Motion to Transfer Venue and automatically lifting the stay. The Court set a deadline of March 29, 2021 to file opposition to Safari Club's International Motion to Intervene. Dkt. No. 26. On March 25, 2021, Defendants answered Plaintiffs' complaint. Dkt. No. 33. Also, on March 25, 2021, the State of Louisiana filed a motion to intervene in the case. Dkt. No. 34.

## ARGUMENT

Safari Club International seeks to intervene as of right, or in the alternative, be allowed permissive intervention as a defendant or *amicus curiae* status in support of the 2016 decision to delist the Louisiana black bear. This Court should deny Safari Club's motion to intervene on the basis that it fails to satisfy the requirements for intervention of right pursuant to Fed. R. Civ. P. 24(a). This Court should also exercise its broad discretion to deny Safari Club's request for permissive intervention under Rule 24(b) and participation as *amicus* to avoid prejudice to the parties, and in consideration of Safari Club's lack of meaningful contribution to the just adjudication of the relevant legal questions pending before the Court.

### I. SAFARI CLUB HAS FAILED TO DEMONSTRATE ENTITLEMENT TO INTERVENTION OF RIGHT

To intervene of right under Fed. R. Civ. P. 24(a)(2), an applicant must meet the following four requirements:

> (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.
>
> Fed. R. Civ. P. 24(a)(2).

If Safari Club fails to satisfy any one requirement, intervention of right must be denied. *See Entergy Gulf States, La., LLC v. U.S. Envtl. Protection Agency,* 817 F.3d 198, 203 (5th Cir.

2016); *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994); *Kneeland v. Nat'l Collegiate Athletic Ass'n,* 806 F.2d 1285, 1287 (5th Cir. 1987), *cert. denied*, 484 U.S. 817, 108 S.Ct. 72, 98 L.Ed.2d 35 (1987). Safari Club bears the burden of proving an entitlement to intervene in the case. *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996). The inquiry is flexible, "measured by a practical rather than technical yardstick," and "focuses on the particular facts and circumstances surrounding each application." *Id.*

Plaintiffs do not contest the timeliness of Safari Club's motion to intervene, but question whether the Safari Club's interests are legally protectable and if Plaintiffs prevail, are likely to be impaired by that outcome. In addition, Plaintiffs assert that the Defendants, and potential state intervenor, can adequately represent Safari Club's shared ultimate objective in this matter: to defend the delisting decision. This Court should deny Safari Club's motion to intervene because, based on the evidence offered in support thereof, it has failed to satisfy each of the four requirements for intervention of right per Fed. R. Civ. P. 24(a)(2). In consideration of the case context and facts presented in this matter, Safari Club's motion should be denied.

**a. Safari Club Cannot Show that it has a Legally Protectable Interest that is Likely to be Impaired if Plaintiffs Prevail**

i. Safari Club's Interests are Not Legally Protectable

Safari Club's purported interests are not legally protectable under the circumstances. The second requirement for intervention as a matter of right under Fed. R. Civ. P. 24(a)(2) is that the applicant must have a "direct, substantial, [and] legally protectable" interest in the subject matter of the action. *Sierra Club,* 18 F.3d at 1207, quoting *Piambino v. Bailey*, 610 F.2d 1306, 1321 (5th Cir. 1980), *cert. denied*, 449 U.S. 1011, 101 S.Ct. 568, 66 L.Ed.2d 469 (1980). *See also Edwards,* 78 F.3d at 1004; *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 568 (5th Cir. 2016), quoting *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*

*(NOPSI )*, 732 F.2d 452, 464 (5th Cir. 1984) ("The touchstone of the inquiry is whether the interest alleged is 'legally protectable.'"); *Donaldson v. United States,* 400 U.S. 517, 531, 91 S.Ct. 534, 542 27 L.Ed.2d 580 (1971) (stating the interest must be "a significantly protectable interest.").

Courts in this Circuit have found that the interest inquiry "turns on whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out a certain way" and as such "an intervenor fails to show a sufficient interest when he seeks to intervene solely for ideological, economic, or precedential reasons; that would-be intervenor merely *prefers* one outcome to the other." *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015); *Lotief v. Bd. of Supervisors of Univ. of La. Sys.,* No. 18-991-JWD-EWD, 2019 U.S. Dist. LEXIS 90274, at *6-7 (M.D. La. May 29, 2019). While a property interest is "almost always adequate" because "it is concrete, specific to the person possessing the right, and legally protectable," non-property interests may support intervention only when they are "concrete, personalized, and legally protectable." *Lotief,* 2019 U.S. Dist. LEXIS 90274, at *7, citing *Texas*, 805 F.3d at 658.

In the instant case, the transaction that is the subject of the matter is the Service's 2016 decision to delist the Louisiana black bear. Safari Club alleges two interests of its members: (1) to hunt Louisiana black bears, and (2) "the proper conservation of this species, which may include population management through well-regulated hunting." Memorandum in Support of Safari Club International's Motion to Intervene ("SCI Memo") at 5, 7 (Dkt. No. 5-1); Declaration of Gregory Dale Elliott ("G. Elliott Decl."), at ¶ 10 (Dkt. No. 5-3); Declaration of Melissa Evans Elliott ("M. Elliott Decl."), at ¶ 10 (Dkt. No. 5-4); Declaration of Howard David Wilson ("Wilson Decl."), at ¶ 11 (Dkt. No. 5-5). Safari Club also alleges two interests of the

organization: (1) "in promoting and protecting sustainable-use conservation through hunting", and (2) "to preserve its members' ability to participate in future black bear hunting in Louisiana." SCI Memo at 8; Declaration of Rew R. Goodenow ("Goodenow Decl."), at ¶ 10, 12 (Dkt. No. 15-2).[1] Safari Club contends that "all of these interests involve the subject matter of this suit—delisting of the Louisiana black bear." SCI Memo at 8. However, Plaintiffs contend that Safari Club does not have a legally protectable interest in the subject matter of this action, which is the delisting of the Louisiana black bear. Whether Safari Club's goal to hunt black bears will be realized will not depend primarily on whether or not the bear is relisted, but on whether the bear has recovered to the point of being sustainable enough to allow some killing of the subspecies by hunting. This determination would be made by the LDWF if the bear is delisted. That agency has so far has declined to do so.

The freedom to hunt and wildlife conservation are provided for by the Louisiana Constitution and are interests shared by many of the individual Plaintiffs and Plaintiffs' members and the proposed intervenor's members alike. La. Const. Art. I, Sec. 27 ("The freedom to hunt, fish, and trap wildlife, including all aquatic life, traditionally taken by hunters, trappers and anglers, is a valued natural heritage that shall be forever preserved for the people. Hunting, fishing and trapping shall be managed by law and regulation consistent with Article IX, Section 1 of the Constitution of Louisiana to protect, conserve and replenish the natural resources of the state."); Dkt. No. 1 (Plaintiffs' Complaint). However, this freedom is not without limits.

[1] As a practical matter, with respect to the purported interests, it is unclear whether Safari Club's interests in hunting and conservation pertain to the Louisiana black bear (*Ursus americanus luteolus*) subspecies specifically, the American black bear (*Ursus americanus*), or both. *See e.g.,* SCI Memo at 1 (discussing interest in "preserving the likelihood that the State of Louisiana will open a well-regulated hunting season for black bears."), and at 4 (discussing members' declarations "interests in hunting Louisiana black bears."). It cannot be known whether an interest primarily focused on hunting black bears could be impacted by the litigation without knowing how or whether relisting would necessarily include *americanus,* particularly given the hybridization concern raised by Plaintiffs in this matter.

Presently, there is no authorized hunt of black bears in Louisiana. The Louisiana black bear is a "species of special concern," and according to the LDWF, is ranked as "S2 (imperiled)" in Louisiana, with recognized ongoing threats of "habitat loss and degradation due to agricultural, industrial and residential development and poaching."[2] While many states across the country have open seasons for black bear hunting, none allow hunting of the imperiled Louisiana black bear subspecies.[3] In Louisiana, both the American black bear – the official state mammal of Louisiana – and the genetically unique Louisiana black bear subspecies remain protected from open hunting seasons. La. R.S. 49:161.1 ("The official state mammal shall be the black bear."). The state's decision not to open a hunting season to date reflects that the state has not determined that the present population numbers can support a sustainable bear hunt.

The individual Plaintiffs and members of Plaintiff organizations have a variety of interests relative to the Louisiana black bear, including conservation of this genetically unique subspecies, its supporting habitat and important role in Louisiana's ecology. *Complaint* at 8-14. Many of the Plaintiffs are avid hunters who share an interest with Safari Club in sustainable hunting, but they recognize what Safari Club fails to see, which is that the ongoing threats to the subspecies' survival require continued protection under the ESA in order to achieve sustainable population numbers to support the long-term survival of the subspecies and its habitat, including the possibility of hunting. *Id.*

Whether or not the population figures are adequate to support sustainable hunting is not and will not be determined by the ultimate outcome of this case. But, if Plaintiffs prevail in this

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[2] La. Admin. Code Title 76, Pt I, Ch. 3, §315. Louisiana Black Bear Species Profile, LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES, *available at https://www.wlf.louisiana.gov/species/detail/30.*

[3] If Safari Club members want to hunt black bears, the following states have authorized black bear hunts: Alaska, Arizona, Arkansas, California, Idaho, Maine, Montana, New Mexico, Oregon, Utah, Virginia, Washington, Wisconsin, Wyoming. These states do not have populations of the subspecies Louisiana black bear, but of the far more numerous American black bear (*Ursus americanus*).

lawsuit and the bear is relisted, federal protections under the ESA are likely to assist in the bear's recovery, and make it more likely that a sustainable hunt will eventually be possible, furthering the Safari Club's claimed interests. If the data reflect that present population numbers do not support sustainable hunting of the bear, relisting could result in improved management of known threats leading to a healthier, more sustainable and growing population that might eventually support hunting. If the Louisiana black bear does not meet the legal criteria to be removed from protection of the ESA, that means that as a matter of fact as well as law, it cannot be hunted sustainably.

Safari Club has not articulated a character of interest this Circuit has found supportive of intervention in a case such as the present. *See, e.g., Lotief,* 2019 U.S. Dist. LEXIS 90274, at *13 (discussing the difference of character of the interests in *Edwards v. City of Houston* where "'intervenors are unique because they engineered the drive that led to a city charter amendment' and had 'a particular interest in cementing their electoral victory and defending the charter amendment itself.'"). Safari Club is not a "real party in interest" with a direct interest targeted by the suit. *League of United Latin Am. Citizens v. Clements*, 884 F.2d 185, 187 (5th Cir. 1989) (applicant can intervene if it is a "real party in interest"); *United States v. 936.71 Acres of Land,* 418 F.2d 551, 556 (5th Cir. 1969) (defining the "real party in interest" as one "who, by substantive law, possesses the right sought to be enforced"); *Sierra Club v. Glickman*, 82 F.3d 106 (5th Cir. 1996) (finding farmers to be "real party in interest" in suit to enjoin agency funding to farmers pumping water from an aquifer); *Conservation Law Foundation of New England, Inc. v. Mosbacher*, 966 F.2d 39, 43 (1st Cir. 1992) (explaining in a case involving agency regulation of fishing off the New England coast that "[t]he fishing groups seeking intervention are the real targets of the suit and are the subjects of the regulatory plan. Changes in the rules will affect the

proposed intervenors' business, both immediately and in the future."). In this case, Plaintiffs' Complaint does not target Safari Club or hunting. Safari Club does not allege a property interest threatened by the litigation, and is not an intended beneficiary of the challenged delisting decision. *Texas,* 805 F.3d at 657, 660. Rather, Safari Club's interests are more removed from the purpose, scope and outcome of this litigation.

The interests raised by Safari Club pertain to sustainable-use conservation and possible future hunting opportunities are neither contingent upon nor related to whether the 2016 delisting decision is arbitrary and capricious, an abuse of discretion, not in accordance with law, or based on the best available science. Whether or not the decision to delist is in error or legally defensible poses legal issues that are not causally related to future hunting prospects of this species. The facts on the ground about the population status of the bear at the time of the delisting and at present will not be affected by the outcome of this case. If, as the LDWF has so far determined, the species is not sufficiently recovered to allow hunting, the Safari Club's articulated interests in hunting the bear, in conservation of the subspecies, in promoting sustainable-use conservation and in preserving the ability to participate in future hunts may well be better advanced if this Court rules that the bear must be re-listed than they would be without ESA protection.

ii. If Plaintiffs Prevail, Safari Club's Interests May Be Protected, Not Impaired

The third requirement for intervention as a matter of right under Fed. R. Civ. Pro. 24(a) "is that the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect his interest." *Sierra Club,* 18 F.3d at 1207. The Safari Club makes conclusory claims with respect to its interests and the alleged impairment thereof if Plaintiffs succeed in this litigation. However, as discussed above, if the bear has not

recovered sufficiently to allow hunting, whether under the ESA or state regulation, the Plaintiffs' prayer for relief may actually protect, and not impede or impair, legitimate future interests in sustainable use conservation and hunting of the Louisiana black bear when and if its recovery status supports these interests.

Even if the Court affirms the delisting, if the status of the bear continues to reflect minimal population expansion and recognized threats such as poaching and vehicular mortality, it would be highly unlikely that the LDWF, the state wildlife agency managing the subspecies, will authorize a hunt, unless and until continuing threats to the bear are addressed. The greatest potential to adequately address and reduce threats to this genetically unique species is with federal assistance through relisting under the ESA and employing proper management and recovery plans in consideration of ongoing threats and the best scientific data available.

Safari Club offers no support for its conclusory presumption that the delisting decision is favorable to its interests, given that no hunting season has been established in the five years since delisting. Safari Club has failed to show that it has a legally protectable interest that is threatened by this case. Arguably, interests in future sustainable-use hunting and conservation may be threatened if the Service succeeds on the merits, the bear remains delisted, and ongoing threats continue to impact population figures to deprive the Club of an opportunity to participate in a sustainable hunt. If the bear is relisted and federal protections are sufficiently employed to mitigate these threats such that recovery is actually achieved, there is a much greater possibility of future sustainable-use hunting with an increased, sustainable bear population. The litigation outcome will neither adversely impact the short-term realization of Safari Club's interest, since the bear remains protected under state law, and no hunting is permitted regardless of the outcome

of this case, nor the long-term realization of its interests in recovery being achieved to support sustainable-use hunting.

The present case is distinguishable from cases where the disposition of the action had an incontrovertible, direct impact on the applicant's ability to protect its interests. *See, e.g., League of United Latin Am. Citizens v. City of Boerne,* 659 F.3d 421, 435 (5th Cir. 2011) (finding that disposing of a case in which the subject of the action (a modified consent decree) deprived the applicant of his right to vote for all members of the city council would leave him "entirely unable to protect his interest"). But here, Safari Club offers no evidence to show that that the outcome of this case will leave it entirely unable to protect its interests. Under either outcome, Safari Club can support agency management and interventions to address threats to the bear that impede its interests in achieving a sustainable population that could support hunting. Safari Club has offered no evidence that it has endeavored to protect its interests through conservation or otherwise in the years since the delisting decision.

Safari Club claims that its members' plans "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." SCI Memo at 9; G. Elliot Decl. at ¶ 11; Wilson Decl. at ¶ 15. But this claim is conclusory and unsupported, and presumes that our success will cause the impairment to the hunting interests rather than recognizing that the status of the bear, independent of the litigation outcome, is the actual source of Safari Club's allegedly impaired interests. Under the status quo, the alleged impairment to its interests has been and will continue to be a result of unsuccessful efforts to manage this subspecies to achieve a sustainable population that could allow hunting in the face of known threats to its survival.

This case asks whether the Louisiana black bear has recovered under the purview of the Endangered Species Act such that the delisting decision was supported on the basis of a recovery finding. Art. I, Sec. 27 of the Louisiana Constitution protects the freedom to hunt, but the law restricts this right to that "managed by law and regulation," which has not since 1984 and does not currently allow hunting of the Louisiana black bear. Safari Club has failed to adequately allege impairment of its interests should Plaintiffs win, and whether its interests are legally protectable. Safari Club cannot meet two and three of the intervention requirements per Rule 24(a)(2).

**b. Safari Club Cannot Show that its Interests Will Not Be Adequately Represented**

The final requirement for intervention as a matter of right under Fed. R. Civ. Pro. 24(a) "is that the applicant's interest must be inadequately represented by the existing parties to the suit." *Sierra Club,* 18 F.3d at 1207. "Although the applicant's burden of showing inadequate representation is minimal, 'it cannot be treated as so minimal as to write the requirement completely out of the rule.'" *Edwards,* 78 F.3d at 1005, quoting *Cajun Elec. Power Co-op., Inc. v. Gulf States Utilities, Inc.*, 940 F.2d 117, 120 (5th Cir. 1991); *Entergy,* 817 F.3d at 203. As such, this Circuit's jurisprudence has created two presumptions of adequate representation. *Entergy,* 817 F.3d at 203, quoting *Brumfield v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014).

The first presumption of adequate representation arises "when the putative representative is a governmental body . . . charged by law with representing the interests of the absentee", including citizens of the governmental entity. *Edwards,* 78 F.3d at 1005 (noting that "the heightened showing required to overcome [this presumption] is restricted, however, to those suits involving matters of sovereign interest.") (internal citation omitted). To overcome this

presumption, Safari Club must show that its interest is different from the government and will not be represented by it. *Id.*

The second presumption of adequate representation "arises when the would-be intervenor has the same ultimate objective as a party to the lawsuit" and "[i]n such cases, the applicant for intervention must show adversity of interest, collusion, or nonfeasance on the part of the existing party to overcome the presumption." *Entergy*, 817 F.3d at 203; *Edwards* 78 F.3d at 1005, citing *United States v. Franklin Parish Sch. Bd.*, 47 F.3d 755, 757 (5th Cir. 1995); *Kneeland*, 806 F.2d at 1288; *Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir. 1984); and *International Tank Terminals, Ltd. v. M/V Acadia Forest*, 579 F.2d 964, 967 (5th Cir. 1978). "In order to show adversity of interest, an intervenor must demonstrate that its interests diverge from the putative representative's interests in a manner germane to the case." *Entergy,* 817 F.3d at 204, quoting *Texas*, 805 F.3d at 662.

Pursuant to both presumptions of adequate representation, Safari Club must show that its interests diverge from the federal Defendants, and the applicant state intervenor, and that these governmental entities will not adequately represent its interests. If this Court grants the State of Louisiana's motion to intervene in the case, it can adequately represent Safari Club's interests in participating in future hunts and sustainable-use conservation of this subspecies. The interests of the State in seeking intervention include its sovereign interests in governing animals and their habitats in the state, and "as a legal representative for the Louisiana Department of Wildlife and Fisheries, and interest in protecting and regulating the Louisiana black bear, its habitat, and its interactions with people." Memorandum in Support of the State of Louisiana's Motion to Intervene ("State Memo"), at 5 (Dkt. No. 34-1). Each of Safari Club's member declarants are Louisiana residents with an interest in hunting Louisiana black bears. G. Elliot Decl. at ¶ 1

(resident of Oakdale, Louisiana); M Elliot Decl., at ¶ 1 (resident of Oakdale, Louisiana); H. Wilson Decl. at ¶ 1 (resident of Lafayette, Louisiana). Given the State's similar interests relative to Louisiana's wildlife, and the Louisiana black bear in particular, if the state is allowed to intervene, it can adequately represent the interests of Safari Club in this litigation.

In addition to representing the interests of all Louisianans, the State specifically represents the Louisiana Department of Wildlife and Fisheries, the state agency "responsible for management of the state's renewable natural resources including all wildlife."[4] LDWF oversees and enforces the laws of Louisiana relative to wildlife, including the issuance of hunting licenses, and the post-delisting management of the Louisiana black bear. La. R.S. 36:605; La. R.S. 56:30.1. The State's legal representation of the LDWF and its interests include consideration of wildlife management through harvests as evidenced in LDWF's post-delisting management plan for the Louisiana black bear. State Memo at 7. Given the similar interests of the State and Safari Club, the presumption of adequate representation has not been overcome. Moreover, the ultimate objective of the Defendants, the State and Safari Club are all aligned – to defend the delisting decision.

Safari Club shares the same ultimate objective with the Defendants and proposed state intervenor: to uphold the 2016 delisting of the Louisiana black bear. SCI Memo at 9-10 (conceding that "they share common ground" and "both seek to defend the plaintiffs' allegations"). Safari Club does not allege collusion or nonfeasance. Instead, it contends that the Defendants do not share the same interests in participating in a hunt, sustainable-use conservation through hunting or the impact of the delisting on the state's ability to open a black bear hunting season. SCI Memo at 10. The Club alleges that its focus "will be both narrower and

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[4] LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES, *About Us, available at https://www.wlf.louisiana.gov/page/about-us*.

deeper than that of the Federal Defendants." *Id.*[5] However, as noted above, these interests will be adequately represented if the Court granted the State's intervention.

But the Defendants can also adequately represent the interests of Safari Club. The movant's allegations do not show adversity of interest, but rather suggest that the Defendants cannot protect the "*possibly* divergent interests of Safari Club and its members." SCI Memo at 11. (emphasis added). Unlike the circumstances in both the *Entergy* and *Texas* cases, Safari Club has not identified specific ways in which its interests diverge from the Defendants that have or will impact the litigation. *Entergy,* 817 F.3d at 204 (discussing the divergent interests in litigation whereby the EPA sought to stay the case, and the proposed intervenor opposed the stay as against their interests in expediently obtaining records); *Texas,* 805 F.3d at 663 (discussing how the proposed intervenors showed adversity of interest by "specifying the particular ways in which their interests diverge" and "identifying the particular way in which these divergent interests have impacted the litigation."). Defendants and Safari Club raise the same affirmative defenses to Plaintiffs' Complaint, *i.e.*, failure to state a claim for which relief may be granted, failure to meet standing and subject-matter jurisdiction (including ripeness) requirements. Dkt. No. 15-6 (Safari Club International's Proposed Answer), Dkt. No. 33 (Federal Defendants' Answer). The movant points to not material diverging interests that will impact the litigation.

Safari Club fails to show that its interests diverge from the Defendants in a manner germane to this case to overcome the second presumption by adversity of interest. The Fifth Circuit in *Texas v. United States,* found the intervenors overcame the presumption by adversity

[5] To the extent Safari Club claims that it "may pursue the litigation in directions that Federal Defendants are unwilling or unable to go" such as to challenge plaintiffs standing to bring this case (SCI Memo at 10-11), Plaintiffs in this matter have affirmatively alleged standing and, in consideration of the dismissal without prejudice of the prior related matter, will affirmatively address standing considerations that are relevant at all times during the course of any litigation. In the prior related matter, this was the only issue raised by Safari Club that was in any way distinct from the defense argued by the federal defendants. In every other respect relative to the merits, its arguments mirrored the federal defendants.

of interest where, not only did they "specify the particular ways in which their interests diverge from the Government's", but also because they "identify the particular way in which these divergent interests have impacted the litigation." 805 F.2d at 663.

In the prior related case dismissed without prejudice by the District Court for the District of Columbia, Safari Club and the federal defendants did not present any "real and legitimate additional or contrary arguments" or "lack of unity" in their objectives (to defend the delisting) sufficient to demonstrate that the federal defendants' representation *may* be inadequate in this case. *See Texas,* 805 F.3d at 663, quoting *Brumfield,* 749 F.3d at 346. Rather, Safari Club agreed with the Defendants on the merits arguments, with its only contribution challenging the standing of Plaintiffs, which in any event a court is always required to determine, and has been challenged by both the federal Defendants and proposed state intervenor in the present case. Dkt. No. 33 at p. 35; Dkt. No. 34-2 (State of Louisiana's Proposed Answer) at p. 23. Similar to the proposed intervenor in *Hopwood v. Texas,* Safari Club has "not connect[ed] [any] alleged[] divergent interests with any concrete effects on the litigation." *Texas*, 805 F.3d at 662, citing *Hopwood v. Texas*, 21 F.3d 603, 605-606 (5th Cir. 1994) ("The proposed intervenors have not demonstrated that the State will not strongly defend its affirmative action program. Nor have the proposed intervenors shown that they have a separate defense of the affirmative action plan that the State has failed to assert.").

Safari Club's mission is "dedicated to wildlife conservation and outdoor education." SCI Memo at 4. The U.S. Fish & Wildlife Service's mission is to "conserve, protect and enhance fish, wildlife and plants and their habitats."[6] The mission of the Louisiana Department of Wildlife and Fisheries is to "manage, conserve, and promote wise utilization of Louisiana's

[6] U.S. FISH AND WILDLIFE SERVICE, *About the U.S. Fish and Wildlife service, available at https://www.fws.gov/help/about_us.html.*

renewable fish and wildlife resources and their supporting habitats."[7] Each of these missions shares a common objective of wildlife conservation. Because the Defendants and potential state intervenor are equipped to adequately represent the interests of Safari Club and its members, and because Safari Club has failed to show a fundamental adversity of interests between it and the Defendants, it has not met the fourth requirement for intervention of right.

Safari Club has failed to rebut either the first or second presumption of adequate representation, and its conclusory claim that it may be inadequately represented by the Defendants does not meet the de minimis standard of proof required, even assuming it had overcome the presumptions of adequate representation. Considering Safari Club's failure to show how it will meaningfully contribute to the Court's evaluation of the issues presented here, and its aligned ultimate objective with the both Defendants and proposed state intervenor in affirming the delisting decision, Safari Club has failed to sufficiently support its claim of intervention of right under Fed. R. Civ. P. 24(a).

## II. THE COURT SHOULD DENY SAFARI CLUB'S REQUESTS FOR PERMISSIVE INTERVENTION AND TO PARTICIPATE AS *AMICUS CURIAE*

The court should deny Safari Club's alternative requests for permissive intervention and participation as *amicus curiae* because its involvement may prejudice the parties and result in duplicative briefing, and will not significantly contribute to the resolution of the factual and legal issues in the case. Permissive intervention is discretionary with the court, which *may* allow timely intervention if the movant 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 determining whether to allow permissive intervention, courts "must consider whether the intervention will unduly delay or

[7] LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES, *Mission Statement, available at https://www.wlf.louisiana.gov/page/about-us*.

prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). The Fifth Circuit explained that courts should consider "'whether the intervenors' interests are adequately represented by other parties' and whether they 'will significantly contribute to full development of the underlying factual issues in the suit.'" *Lotief,* 2019 U.S. Dist. LEXIS 90274, at *15.

The interests of Safari Club are adequately represented by both the federal defendants and the potential state intervenor. Moreover, Safari Club has failed to show how its intervention will contribute to the development of factual and legal issues in the suit. Permissive intervention "is wholly discretionary with the [district] court . . . even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied." *Lotief,* 2019 U.S. Dist. LEXIS 90274, at *15, quoting *NOPSI,* 732 F.2d at 470-471. Safari Club does not claim to offer any scientific expertise on the relevant legal and factual issues before the Court in this case. Safari Club's inclusion in this matter is not compatible with efficiency and due process in so far as its involvement is duplicative and its interests are otherwise adequately represented. Thus, this Court should deny its request to be allowed to permissively intervene.

Federal courts likewise have broad discretion whether or not to allow participation as *amicus curiae.* "Historically, *amicus curiae* is an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and advises the Court in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another." *Cmty. Ass'n for Restoration of Env't (CARE) v. DeRuyter Bros. Dairy,* 54 F.Supp.2d 974, 975 (E.D. Wash. 1999). In considering whether to grant *amicus* participation, courts look to the following factors: "(1) whether the proposed *amicus* is a disinterested entity; (2) whether there is opposition to the entry of the *amicus*; (3) whether counsel is capable of making arguments without the assistance of an *amicus*; (4) the strength of

the information and argument presented by the potential *amicus curiae's* interests; and, perhaps most importantly (5) the usefulness of the information and argument presented by the potential *amicus curiae* to the court." *Wildearth Guardians v. Lane,* No. CIV 12-118 LFG/KBM, 2012 U.S. Dist. LEXIS 189661, at *5-6 (D. N.M. June 20, 2012), citing *Ass'n of Am. Sch. Paper Suppliers v. United States,* 683 F.Supp.2d 1326, 1328 (Ct. Int'l Trade 2010).

Safari Club's inclusion in this case would be "duplicative of the much more extensive briefing of the same issues by the parties." *Wildearth Guardians*, 2012 U.S. Dist. LEXIS 189661, at * 11. Similar to the District of New Mexico's assessment of Safari Club's *amicus* request in *Wildearth Guardians v. Lane,* "[t]his is neither a situation where a party is not represented competently or not represented at all, nor where an *amicus* can present unique information to help the Court in a way that is beyond the parties' attorneys' ability to provide." *Id* at *11-12. Plaintiffs oppose the Club's intervention and amicus participation in this case because the matter does not concern hunting rights. The parties are fully capable of representing the variety of interests in this case, and Safari Club does not propose to bring any novel or unique information pertaining to the legal and factual issues in the case. *Id.* Safari Club's "presence in this action is not necessary to fully analyze" the claims. *Lotief,* 2019 U.S. Dist. LEXIS 90274, at *11.

For the same reasons that Safari Club's participation as a permissive intervenor would not significantly contribute to the just and equitable adjudication of the legal questions presented here, its participation as *amicus* is not warranted. However, if the Court determines to grant *amicus* status, it should limit Safari Club's participation to one brief supporting Defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion.

**CONCLUSION**

Safari Club has no right to intervene in this matter because it fails to meet all four requirements for intervention of right. Fed. R. Civ. P. 24(a). Furthermore, this Court should exercise its broad discretion to deny to allow permissive intervention or *amicus* participation by Safari Club in this case because it cannot offer any helpful expertise or novel information pertaining to the issues in this case.

For the foregoing reasons, Safari Club International's Motion to Intervene should be denied. If it is nevertheless allowed to participate as an intervenor or amicus, its participation should be reasonably conditioned so as to not result in duplicative briefing or otherwise prejudice the parties.

Respectfully submitted this 29th day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum in Opposition to Safari Club International's Motion to Intervene was served upon all counsel of record through the ECF system this 29th day of March, 2021.

*s/* Misha L. Mitchell