UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
No. 2:07-cv- 00045 BO

DEFENDERS OF WILDLIFE and THE NATIONAL AUDUBON SOCIETY Plaintiffs, v. **NATIONAL PARK SERVICE, et al.** Defendants, **DARE COUNTY, et al.** Intervenor-Defendants	**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DARE COUNTY, NORTH CAROLINA, HYDE COUNTY, NORTH CAROLINA AND THE CAPE HATTERAS ACCESS PRESERVATION ALLIANCE'S MOTION TO INTERVENE AND REQUEST FOR EXPEDITED RULING**

Dare County, North Carolina, Hyde County, North Carolina, and the Cape Hatteras Access Preservation Alliance ("CHAPA") (collectively, "Proposed Intervenors") submit the following Memorandum of Points and Authorities in support of their Motion requesting intervention as of right, or in the alternative, permissive intervention at the Court's discretion.

STATEMENT OF INTEREST

This case involves a challenge to the National Park Service's current policy of allowing responsible Off-Road Vehicle ("ORV") use within Cape Hatteras National Seashore ("Seashore") where such use does not result in harm to the Park. The Proposed Intervenors – a collection of local governments, ORV enthusiasts, recreational anglers, and ORV service providers whose economic health is heavily dependent on revenues from tourism related to ORV use – are the parties that will be most immediately and directly affected by the outcome of this case.

Plaintiffs' suit seeks, among other things, an injunction ordering Defendants to impose immediate restrictions on ORV use within the Seashore. See Complaint, Prayer for Relief, ¶ G. If the Plaintiffs are awarded the relief they seek, the interests of each of the Proposed Intervenors will be significantly and immediately harmed.

Description of Proposed Intervenors

Dare County, North Carolina contains much of what is known as North Carolina's Outer Banks resort and vacation area and contains approximately one-fourth of the North Carolina coastline. Recreational access to the Seashore beaches via ORV is an essential component of the County's tourist-based economy. As district court for the District of Columbia explained in Cape Hatteras Access Preservation Alliance v. Norton, 344 F. Supp. 2d. 108, 116 (D.D.C. 2004) ("CHAPA v. Norton"), "Dare County encompasses seven of the seashore's eight unincorporated villages and six municipalities, Duck, Kill Devil Hills, Kitty Hawk, Manteo, Nags Head, and Southern Shores. While the County's permanent population is 29,000, the county's average daily population during the summer months ranges from 200,000 to 225,000. Dare County's 2001 revenue from Tourism was over $365 million." Visitors to the Outer Banks routinely utilize ORVs to engage in recreational activities such as surf fishing, and picnicking, as well as to reach the significant portion of the Seashore and Cape Lookout that is not accessible by paved roads. See Declaration of Raymond Sturza, Ex. 1.

Hyde County, North Carolina is located in Northeastern North Carolina. Hyde County is one of North Carolina's largest by acreage, but has fewer than 5,500 residents. County attractions include the Ocracoke Island portion of the Seashore. Mainland residents make their living farming or commercial fishing while Ocracokers depend heavily on the tourist industry, "which generated an economic impact of $24 million in 2001. Ocracoke Beach is nationally

known tourist destination and is the sixth best beach in the U.S. as ranked by Dr. Stephen Leatherman of Florida International University." CHAPA v Norton, 344 F. Supp. 2d. at 116. Many areas of Hyde County, including a large portion of Ocracoke Island, are remote and accessible only by ORV.

The Cape Hatteras Access Preservation Alliance ("CHAPA") is a project of the Outer Banks Preservation Association ("OBPA"), which is dedicated to preserving and protecting a lifestyle and way of life historically prevalent on the Outer Banks of North Carolina, and specifically the Seashore. CHAPA's goal is to work with the National Park Service ("NPS") to develop a comprehensive ORV use and management plan that will meet the concerns of protecting the Seashore's resources without compromising the distinctive lifestyle and economic health of the islands that make up the Outer Banks. With over 10,000 active members (representing over 28 states and Canada), the OBPA and CHAPA work to protect and preserve local beaches within a framework of free and open beach access for all users, including properly licensed drivers and vehicles. United Mobile Sportsfishermen ("UMS"), an organization formed in the early 1960s and a member of CHAPA, promotes safe beach driving, environmental education and community involvement. UMS members routinely engage in ORV use in numerous National Parks and Seashores, including Cape Hatteras National Seashore. Indeed, recreational ORV users of the Seashore are the heart of OBPA's membership. As the district court for the District of Columbia recognized in CHAPA v. Norton, 344 F. Supp. 2d. at 116, "CHAPA members regularly operate off road vehicles, the main means of accessing seashore beaches for both recreational and commercial purposes. Off road vehicles provide recreational access to seashore beaches that is essential for the area's tourist based economy." See also Declaration of John Couch, Ex. 2.

ARGUMENT

Under Federal Rule of Civil Procedure 24(a)(2), a party shall be permitted to intervene as of right "when the applicant claims an interest in the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a)(2). In turn, a party may intervene at the discretion of the court, upon timely application, "when the applicant's claim or defense and the main action have a question of law or fact in common." See Fed. R. Civ. P. 24(b)(2). The proposed intervention at issue here is proper under either of these tests.

I. PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT

"An application of intervention, whether permissive or of right, must meet the requirement of timeliness." Spring Construction Co. v. Harris, 614 F.2d 374, 377 (4th Cir. 1980). In addition, the Fourth Circuit has held that a party may intervene as of right pursuant to Rule 24(a)(2) when party "can demonstrate 1) an interest in the subject matter of the action; 2) that the protection of this interest would be impaired because of this action; and 3) that the applicant's interest is not adequately represented by existing parties to the litigation." Teague v. Bakker, 931 F.2d 259, 260-61 (4th Cir. 1991) (citing Virginia v. Westinghouse Elec. Corp., 542 F.2d 214, 216 (4th Cir. 1976). See also United Guaranty Residential Insurance Co. of Iowa v. Philadelphia Savings Fund Society, 819 F.2d 473, 474 (4th Cir. 1987). Proposed Intervenors satisfy these requirements and therefore this Court should grant its Motion to Intervene as a matter of right.

A. Proposed Intervenor's Motion is Timely

In the Fourth Circuit, in considering whether an application for intervention is timely, "[m]ere passage of time is but one factor to be considered in light of all the circumstances. . . .

The most important consideration is whether the delay has prejudiced other parties." Spring Construction Co., 614 F.2d at 377. See also Western Elec., 672 F.2d at 386-87. The circumstances here show that Proposed Intervenors' motion is timely. This case remains in its infancy, having been filed less than two months ago, and none of the Defendants has yet answered the Complaint. In light of these facts, the addition of Proposed Intervenors to this suit can not prejudice the existing parties and Intervenor's motion should be deemed timely.

B. Proposed Intervenors Have a Legally Protected Interest in the Subject Matter of this Action

Rule 24(a)(2) requires that an applicant for intervention claim "an interest relating to the property or transaction which is the subject matter of the action." Fed. R. Civ. P. 24(a)(2). The Fourth Circuit has explained, "While Rule 24(a) does not specify the nature of the interest required for a party to intervene as a matter of right, the Supreme Court has recognized that '[w]hat is obviously meant . . . is a significantly protectable interest.'" Teague, 931 F.2d at 261 (quoting Donaldson v. United States, 400 U.S. 517, 531 (1971)). In Teague, the Fourth Circuit held that where the prospective intervenors "stand to gain or lose by the direct legal operation of the district court's judgment," intervention as of right is appropriate. 931 F.2d at 261. See also Smith v. Gale, 144 U.S. 509, 518 (1892) ("A complainant in intervention must have an interest in the matter in litigation of such a nature that he will either gain or lose by the direct legal operation of the judgment.").

Here there can be no question that Proposed Intervenors "stand to gain or lose by the direct legal operation" of this Court's judgment in this matter. Plaintiffs challenge the National Park Service's currently policy of permitting responsible ORV use within the Seashore. They seek immediate injunction requiring restrictions on all ORV use within the Seashore pending the promulgation of regulations for ORV use. See Complaint, Prayer for Relief, ¶ G. If Plaintiffs

are granted the relief they seek, the impact upon the Proposed Intervenors will be immediate and significant. This would affect Proposed Intervenors by: (1) denying access to public lands regularly utilized by the ORV enthusiasts and anglers; (2) decreasing overall ORV usage, thereby affecting the numerous businesses that provide goods and services to anglers and ORV enthusiasts; and (3) impacting the tourist economy that is reliant on continued access to public lands via ORV users. See Declaration of Raymond Sturza, Ex. 1; Declaration of John Couch, Ex. 2.

A victory for Plaintiffs would reduce the recreational opportunities of various types of ORV enthusiasts. For example, restrictions on ORV use in the Seashore would be significantly detrimental to the recreational fishing community, which relies upon ORVs to reach remote beach locations with the Seashore, and would have a disproportionate impact on the elderly and disabled. See Declaration of John Couch, Ex. 2, ¶7-9. Without ORVs, much of the Seashore would be effectively off-limits to the recreational fishermen that have fished the waters of the Seashore for decades. See id. Such restrictions would also significantly limit other recreational activities at the Seashore, including flounder gigging (fishing for flounder in the shallows near the beach in a flat hulled boat), scalloping, clamming, oystering, gathering seashells, as well as family picnics within the Seashore. See id.., ¶¶ 6-9.

These restrictions, in turn, will have a collateral impact on the businesses that depend on such access − negatively impacting the numerous businesses that provide goods and services to anglers and ORV enthusiasts. See id. ¶ 12. This would cause significant economic injury and disruption to the Proposed Intervenors. For local governments such as Dare County and Hyde County North Carolina, the relief sought by Plaintiffs threatens significant economic harm in the form of reduced tourist revenues. See Declaration of Raymond Sturza, Ex. 1, ¶¶ 5-8. ORV use

at the Cape Hatteras National Seashore is part of the culture in Dare County and Hyde County, North Carolina, and has been so for decades. Restrictions on ORV use in the Seashore would be significantly detrimental to the recreational fishing community, resulting in serious reductions in tourism. Such tourism losses would result in significant economic harm to both Dare and Hyde Counties, which derive large portions of their revenues from tourism-related activity. See id.

For example, John Couch of CHAPA faces direct harm from Plaintiffs' suit. As a small business owner who receives 85% of his revenue from tourists visiting the Outer Banks, Mr. Couch is heavily dependent upon the continuing growth of the Outer Banks as a tourist destination. See Declaration of John Couch, Ex. 2, ¶ 12. This is consistent with research commissioned by OBPA shows that a ban on ORV use would cause 24% of visitors not to return to the Outer Banks and would cause an additional 18% of visitors to return less often. See Declaration of Raymond Sturza, Ex. 1, ¶7. These tourism losses from restrictions on ORV use would significantly harm Mr. Couch's business, and cause him a direct economic injury. See Declaration of John Couch, Ex. 2, ¶ 12.

The United States District Court for the District of Columbia has already recognized the potential injury to the CHAPA and to Dare and Hyde Counties in other cases involving the Cape Hatteras National Seashore. That court held that the Counties had standing to challenge a rule promulgated under the Endangered Species Act that designated certain areas of the Cape Hatteras National Seashore as critical habitat for the piping plover, as species listed under the Endangered Species Act. See CHAPA v Norton, 344 F.Supp.2d 108. The court explained, "the Counties assert harm related to their tourism economy and their ability to maintain and repair infrastructure and seashore. The counties, like CHAPA business owners, fear that any restrictions or beach closures within the habitat will have a negative impact on their tourism

based economy. . . . Both CHAPA and the Counties have … alleged injuries that are actual or imminent … [and] … are causally related to the Service's designation…." Id. at 117.

The same court has likewise recognized Proposed Intervenors' interests in a case similar to this one. In Friends of the Earth, et al. v. United States Department of the Interior, et al., plaintiffs' complaint asked for an immediate moratorium on ORV use within all National Recreation Areas, National Seashores, National Lakeshores and National Preserves pending further ORV-related regulatory activity from the National Park Service, and requested a permanent ban on ORV use in all National Parks other than National Recreation Areas, National Seashores, National Lakeshores and National Preserves unless such use is specifically authorized by the enabling statute creating the Park.[1] Recognizing Proposed Intervenors' interests in that case, the court granted intervention for all of the Proposed Intervenors here.[2] See Court Order, Ex. 3.

Similarly, here the requested ORV restrictions will have an immediate adverse impact on the tourist based economy. Thus, Proposed Intervenors "stand to gain or lose by the direct legal operation of the district court's judgment," and intervention as of right is appropriate. Teague, 931 F.2d at 261.

C. Denial of Intervention Will Directly Impair Proposed Intervenors' Ability to Protect Their Interests

The disposition of this case threatens to impair Proposed Intervenors' recreational and economic interests as articulated above. Plaintiffs challenge the National Park Service's currently policy of permitting responsible ORV use within the Seashore, and seek a immediate restrictions pending further regulation. If Plaintiffs are successful, ORV users, ORV service

[1] That case remains pending in the district court for the District of Columbia.
[2] All of the parties seeking intervention by this motion likewise sought intervention Friends of the Earth. Other parties also sought and were granted the right to intervene, as well.

providers, and local governments dependant upon tourism-related spending and taxes would suffer an immediate and significant harm. See Teague, 931 F.2d at 261-62 and United Guarantee, 819 F.2d at 475 (finding direct such direct impairment where a judgment for one of the original parties would impede Proposed Intervenors' access to financial resources); Spring Construction, 614 F.2d at 377 (finding intervention appropriate where, "as a practical matter" the applicant's ability to protect his interests would be harmed). Without intervention, Proposed Intervenors face the "obvious injustice" of having their claims erased or impaired by this action without ever being heard. See United States v. Am. Tel. & Telegraph, 642 F.2d 1285, 1292 (D.C. Cir. 1980).

D. Proposed Intervenors Have an Interest in the Outcome of this Litigation That is not Adequately Represented by the Defendants

Finally, Proposed Intervenors' interests in this litigation are not adequately represented by the defendants, all of whom are entities or employees of the federal government, with broad public interests to consider. Indeed, Proposed Intervenors have reason to believe that the Plaintiffs and Defendants have begun exploring settlement options. Intervnors are very concerned that , unless they are allowed to participate in all aspects of any such discussions, their interests could be severely compromised.

As the Fourth Circuit has explained, the United States Supreme Court has held that an applicant for intervention satisfies this third prong of the test for intervention as of right "if it is shown that representation of its interest '*may be*' inadequate." United Guarantee, 819 F.2d at 475 (citing Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10) (quotations in Trbovich, italics in United Guarantee). Moreover, "the burden of making this showing should be treated as 'minimal.'" United Guarantee, 819 F.2d at 475 (citing Trbovich, 404 U.S. at 538-39). See also Teague, 931 F.2d at 262 ("we find on the present facts that the district court has failed to heed

the Supreme Court's determination that the burden on the applicant of demonstrating a lack of adequate representation 'should be treated as minimal.'" (citing Trbovich)). Finally, "Trbovich recognized that when a party to an existing suit is obligated to serve two distinct interests, which, although related, are not identical, another with one of those interests should be entitled to intervene." United Guarantee, 819 F.2d at 475 (citing Trbovich, 404 U.S. at 538-39). The test set forth in Trbovich is "whether each of the dual interests may 'always dictate precisely the same approach to the conduct of the litigation.'" United Guarantee, 819 F.2d at 475 (citing Trbovich, 404 U.S. at 539).

Trbovich involved a suit by the Secretary of Labor against the United Mine Workers and an application for intervention on the side of the Secretary by a member of the United Mine Workers. Intervention was granted. In Trbovich, the Court "found it unnecessary to explain how the interests of the Secretary and the union member did not coincide, only that the public interest of the Secretary was broader than the narrower interest of the complaining union member." United Guarantee, 819 F.2d at 475 (citing Trbovich, 404 U.S. at 538).

Likewise, the D.C. Circuit has often recognized that where the government does not have a financial stake in the outcome of a challenge it will not necessarily adequately represent the interests of private parties. See Dimond v. D.C., 792 F.2d 179, 192 (D.C. Cir. 1986) (noting the "large class of cases in this circuit recognizing the inadequacy of governmental representation of the interests of private parties in certain circumstances"). Indeed, a government entity is charged with representing the broader interests of the public, which are at times at odds with more narrow financial interests of private parties. See id. at 192-93; NRDC v. Costle, 561 F.2d 904, 912 (D.C. Cir. 1977). Thus, it is improper to assume that the government will adequately represent the recreational and economic interests of Proposed Intervenors.

The fact that the federal government may share Intervenor's viewpoint that its actions were legal is not enough. The courts have held that "a shared general agreement with [the Agency] that the [action] is lawful does not necessarily ensure agreement in all particular respects about what the law requires." NRDC, 561 F.2d at 912.

The dichotomy between the public and private interests here is clear. NPS is charged with managing the Nation's National Parks, including the Seashore, and, for purposes of this case, is concerned primarily with the health and well-being of the Seashore. NPS and the Department of Interior ("DOI") have no duty or obligation to represent the interests of the local governments dependent on tourist income or the ORV community, and have no incentive to fight for ORV access. Thus, the NPS and DOI's "general interest" in defending the NPS' regulatory actions is inadequate to represent the direct and more focused interests of the Proposed Intervenors.

In United Guarantee, the Fourth Circuit summarized the analysis this way: "while the interests of the Bank and Philadelphia may turn out to be the same, they may not be, and although the Bank's representation of Philadelphia's interest may be adequate, it also may be inadequate. Since the parties' interests may not dictate the same approach to the conduct of the litigation, and since the representation of Philadelphia by the Bank may be inadequate, we are of the opinion it was error to deny Philadelphia's motions to intervene. This is even more especially so when the motions were made timely and before the issues became as definitely fixed as they later will be . . ." 819 F.2d at 476.

Thus, NPS' representation of Proposed Intervenors' interests will very well not be adequate and NPS's interests will likely not dictate the same approach to the conduct of the

litigation that Proposed Intervenors would follow. In short, Proposed Intervenors' have satisfied the requirements under Rule 24 (a) (2) and should be granted intervention as of right.

II. ALTERNATIVELY, THIS COURT SHOULD ALLOW PROPOSED INTERVENORS TO PERMISSIVELY INTERVENE

In the alternative, Proposed Intervenors requests that they be permitted to intervene pursuant to the broad discretion afforded the Court under Rule 24(b). Rule 24(b) provides:

> Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or facts in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b). Thus, permissive intervention is based upon consideration of the following: (1) timeliness; (2) common questions of law or fact; and (3) no undue delay or prejudice to the parties.

A. Proposed Intervenors Motion is Timely and Will Not Unduly Prejudice the Parties to this Action

As discussed supra, this Motion is timely and will not unduly prejudice other parties to this litigation, which remains in the very early stages. Proposed Intervenors' participation in this case will not delay resolution of this case and will not prevent Plaintiffs from effectively asserting their legal theories. Thus, criteria 1 and 3 of the permissive intervention test are satisfied, and the only remaining consideration is whether Proposed Intervenors' defense has questions of law or facts in common with the main action.

B. Proposed Intervenors Have Defenses That Have Questions of Law and Facts In Common with Plaintiffs Claims

Proposed Intervenors unquestionably have defenses with questions of law in common with this action, i.e., whether the NPS's policy of permitting responsible ORV use at the Seashore is contrary to Executive Order 11644, and more broadly, whether ORVs are being utilized at the

Seashore in a manner that does not adversely affect the Park's natural, aesthetic or scenic values. Obviously, ORV enthusiasts – who are the ones using ORVs within National Parks on a day-to-day basis – are an important source of factual information on the impact of ORV's upon the Seashore. This Court should permit these users to intervene in this litigation and allow their views to be heard.

REQUEST FOR EXPEDITED RULING

Based upon a conversation with the United States Attorneys office, Proposed Intervenors have reason to believe that Plaintiffs and Defendants have begun exploring settlement options; that such discussions will proceeding ahead in the near future; and that Proposed Intervenors will not be privy to those discussions unless they are made parties in this case. It is absolutely essential that Proposed Intervenors be allowed to participate in those discussions to protect their interests. Therefore, Proposed Intervenors request an expedited ruling on their motion.

CONCLUSION

For the forgoing reasons, Proposed Intervenors respectfully requests that this Court expeditiously grant their Motion to Intervene.

DATED: November 28, 2007

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