TAMARA S. GALANTER (SBN 142532)
MARLENE DEHLINGER (SBN 292282)
SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, CA 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816
Galanter@smwlaw.com

CAROL R. VICTOR (SBN 161728)
EAST BAY REGIONAL PARK DISTRICT
2950 Peralta Oaks Court
Oakland, CA 94605
Telephone: (510) 635-0135
Facsimile: (510) 569-1417
Cvictor@ebparks.org

Attorneys for Defendant-Intervenor
East Bay Regional Park District

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a California public corporation,

Plaintiff,

and

CLAREMONT CANYON CONSERVANCY, a California non-profit corporation,

Proposed Plaintiff-Intervenor

v.

FEDERAL EMERGENCY MANAGEMENT AGENCY, a federal government entity; ROBERT J.

Case No. 3:17-cv-03461-LB

EAST BAY REGIONAL PARK DISTRICT'S OPPOSITION TO CLAREMONT CANYON CONSERVANCY'S MOTION TO INTERVENE

The Hon. Laurel Beeler

Date: January 18, 2018
Time: 9:30 a.m.
Place: Courtroom C

FENTON, JR., in his official capacity; CALIFORNIA OFFICE OF EMERGENCY SERVICES, a California public agency; and MARK S. GHILARDUCCI, in his official capacity;

Defendants,

and

HILLS CONSERVATION NETWORK, INC., a nonprofit public benefit corporation, and EAST BAY REGIONAL PARK DISTRICT, a local agency,

Defendant-Intervenors.

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INTRODUCTION

Defendant-Intervenor East Bay Regional Park District ("Park District") opposes and objects to the Claremont Canyon Conservancy's ("CCC") Motion to Intervene, filed December 18, 2017 ["Motion," ECF Docket ("Dkt.") No. 71]. CCC's Motion fails to meet the requirements for either intervention as of right or permissive intervention.

Since March 2015, the existing parties here have been litigating over funding to reduce wildfire hazards in the East Bay Hills. Now, thirty months into that dispute and more than six months into the most recent chapter, CCC attempts to interject itself into the proceedings. Unlike Defendant-Intervenors Hills Conservation Network ("HCN") and the Park District, CCC was not a party to the underlying litigation or the settlement that led to the withdrawal of funding.

CCC's participation would disrupt and delay the litigation and parties' settlement efforts. CCC refuses to have a magistrate hear the case, thus requiring reassignment of the case to a judge who knows nothing about the history and underlying issues of the litigation. Further, given CCC's delay in seeking to intervene and its categorical rejection of potential settlement options, CCC would undermine the parties' efforts to resolve the litigation through a settlement and mediation process that is well underway.

CCC does not meet the requirements for intervention—either as of right or permissive. Its interest in having certain vegetation removed from Claremont Canyon with federal grant funding is too far removed from the procedural claims at issue in the litigation. As a result, the Regents of the University of California's ("University") success in the litigation would not directly address CCC's interest. CCC also waited too long to intervene. Its intervention now would disrupt and delay the litigation and the parties' efforts to resolve the dispute without costly and lengthy litigation. Furthermore, CCC's participation is unnecessary because the University will adequately represent any interests that CCC *does* have in this case. CCC also impermissibly seeks to expand the scope of the University's lawsuit to include a challenge to the termination of the City of Oakland's ("Oakland") grant funds, which is not at issue in this litigation.

If CCC wishes to participate in the litigation, it should do so as an amici, not as a party.

BACKGROUND

The Park District is a special district that maintains and operates a system of regional parks in Alameda and Contra Costa Counties, including several large parks in the East Bay Hills. To address the risk of wildfires in the East Bay Hills, the Park District developed a Wildfire Hazard Reduction and Resource Management Plan ("Fire Plan"), setting forth vegetation management strategies for reducing wildfire hazards while improving habitat and restoring native vegetation on Park District lands.

To help implement the Fire Plan, the Park District applied for federal funding from the Federal Emergency Management Agency ("FEMA") to reduce the risk of future wildfire disasters by performing vegetation management work described in its Fire Plan on roughly 540 acres in eleven regional parks. Plaintiff ("Pl.") Complaint, ¶¶ 29, 32, 37.

Plaintiff University and the City of Oakland, which also own undeveloped open space in the East Bay Hills, similarly requested federal funding from FEMA for wildfire hazard reduction projects. *Id*., ¶ 32. The University submitted two grant applications seeking funds to remove flammable vegetation on about 100 acres, *id*., ¶¶ 33, 34, while Oakland submitted an application for funding to remove vegetation on 359 acres, *id*., ¶ 36.

FEMA prepared an environmental impact statement ("EIS") pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., that evaluated the potential impacts of the fire hazard reduction work proposed by the Park District, the University, and Oakland in their respective grant applications. Pl. Complaint, ¶¶ 46, 47. The EIS also evaluated roughly 1,060 acres of "connected areas" adjacent to the grant-funded work, where the Park District intended to remove vegetation without federal funding. *Id*., ¶ 38.

FEMA released the final EIS in December 2014. *Id*., ¶ 58. It issued a Record of Decision ("ROD") in February 2015 approving grant funds for the Park District, the

University, and Oakland. *Id*., ¶ 60. Each of those three entities' grants included funding for vegetation removal in Claremont Canyon: 21.6 acres on Park District land (Claremont Canyon Regional Preserve), 42.8 acres on University land (Claremont-PDM), and 13.7 acres on Oakland land (Claremont Canyon-Stonewall). Administrative Record ("AR") 13.1-002 at 14 (ROD 10); AR 10.1-015 at 26, 49, 52, 56 (Final EIS 3-12, 3-35, 3-38, 3-42). The Park District also would remove vegetation with no federal funding on an additional 130 acres of connected acres in Claremont Canyon. AR 10.1-015 at 1, 56 (Final EIS 1-1, 3-42). The Park District work would occur throughout the Claremont Canyon Regional Preserve on both sides of Claremont Avenue in Oakland, including in areas adjacent to residences neighboring Claremont Canyon. AR 10.1-015 at 56, 586 (Final EIS 3-42, 6.1-10).

The ROD prompted two lawsuits challenging FEMA's compliance with NEPA, both of which presented circumscribed challenges to FEMA's decision, contesting in their briefing only the EIS' analysis of the University's and Oakland's project areas. *See Hills Conservation Network v. Federal Emergency Management Agency et al.*, No. 3:15-cv-01057-LB (N.D. Cal.); *SPRAWLDEF, et al. v. Federal Emergency Management Agency et al.*, No. 15-cv-02331-LB (N.D. Cal). While the Park District was named as a defendant in both actions, the briefing in neither case challenged FEMA's analysis of, or decision to approve funding for, the Park District project areas.

CCC was not a party to either lawsuit. Nor did it ever seek to intervene in either case. Although CCC participated in the administrative process for the EIS, its participation in the litigation was limited to two CCC members presenting information on wildfire hazard reduction—on behalf of the Sierra Club and SPRAWLDEF—during a settlement session for the two cases after they were consolidated. Motion at 6.

As a result of a settlement in the *HCN* case, to which the Park District was a signatory, FEMA agreed to withdraw funding for the University and Oakland (Pl. Complaint, ¶¶ 77-81) but left its funding for the Park District in place, including the

funding for vegetation management in Claremont Canyon (AR 18.1.1-022 at 3 (Amended ROD 2)).

In September 2016, FEMA issued the Amended ROD, withdrawing its approval of funding for the University and Oakland and terminating the grants to those entities. *See* AR 18.1.1-022 at 2-4 (Amended ROD 1-3). The Court dismissed the *HCN* case with prejudice after HCN filed a notice of the settlement and request for dismissal. Pl. Complaint, ¶¶ 87, 99.

The University's instant suit arises from the settlement in the *HCN* case. It brings procedural challenges to FEMA's September 2016 decision to terminate the University's two grants, raising claims under the Stafford Act, 42 U.S.C. § 5133 et seq., the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 et seq., and NEPA. *See* Pl. Complaint, ¶¶ 1, 7. The Court granted HCN permissive intervention in this suit on October 26, 2017, and on November 8, 2017 issued an order granting parties' stipulation for the Park District to intervene as well. Dkt. Nos. 51, 56. The parties have since begun settlement discussions. They have selected a mediator, participated in a telephone conference with the mediator on November 28 2017, and set mediation dates for February 2 and 5, 2018. Dkt. Nos. 64, 65, 67; unnumbered 12/1/17 Dkt. entry; Galanter Decl., ¶¶ 2, 3. The parties have a pre-mediation telephone conference with the mediator scheduled for January 11, 2018. Dkt. No. 68. They must submit mediation statements on January 26, 2018 and will hold individual telephone calls with the mediator on February 1, 2018. Galanter Decl., ¶ 3. The Court has also issued a scheduling order with a March 1, 2018 deadline for filing motions for summary judgment. Dkt. No. 52. CCC filed its motion to intervene on December 18, 2017 and on December 19, 2017 declined magistrate judge jurisdiction. Dkt. Nos. 71. 74.

ARGUMENT

I. CCC Fails to Meet The Requirements for Intervention as of Right.

Federal Rule of Civil Procedure 24(a)(2) permits intervention as of right only where an applicant meets each of four criteria: "(1) [the applicant] has a significant

protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) (internal quotations omitted). Because CCC fails to meet all of these criteria, its Motion must be denied. *Id*.

A. CCC Does Not Have a Legally Protected Interest in This Litigation.

For CCC to establish that it has a "significant protectable" interest in this litigation, it must demonstrate that it will *actually* be affected by resolution of the University's claims. *Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003). An interest "several degrees removed from the . . . backbone of [the] litigation" is not sufficient to support intervention as of right. *United States v. Alisal Water Corp*., 370 F.3d 915, 920 (9th Cir. 2004). Moreover, a party may not claim a protectable interest in "new, unrelated issues" that it attempts to "inject . . . into the pending litigation." *Arakaki*, 324 F.3d at 1086.

CCC cannot claim a protectable interest here. Its underlying concern—vegetation removal from Claremont Canyon (Motion at 8)—is too far removed from the central issues of this litigation. The University, which brought this action, seeks markedly different, and purely procedural, relief: it would have FEMA reevaluate its decision to terminate the University's funding, following procedures required under the Stafford Act, the APA, and NEPA. Resolution in the University's favor will, therefore, not directly result in restoration of the University's removal of any vegetation from University-owned lands in Claremont Canyon. It would merely require FEMA to reassess its termination of the University's grant funding and to follow any legally-required procedures in deciding whether to terminate that funding. CCC's concerns are therefore too distant from the issues and potential remedies in this case to allow for intervention as of right. *Alisal Water Corp.*, 370 F.3d at 920.

Furthermore, through its intervention, CCC impermissibly attempts to expand the scope of this litigation by having FEMA reexamine its decision to terminate *Oakland's*

grant funding. As CCC asserts, "[i]f allowed to intervene, the Conservancy . . . will vigorously argue for grant restoration, both as to the University and as to Oakland, which is currently unrepresented in these proceedings." Motion at 5. FEMA's termination of Oakland's funding is not at issue in this case. By issuing separate Notices of Termination for Oakland's and the University's grants, FEMA terminated those grants through separate actions. *See* AR 18.1.1-011 (FEMA 9/6/16 Notice of Termination re Oakland grant PDMC-PJ-09-2006-004); AR 18.1.1-012 (FEMA 9/6/16 Notice of Termination re University grant PDMC-PJ-09-2006-003); AR 18.1.1-013 (FEMA 9/6/16 Notice of Termination re University grant PDMC-PJ-09-CA-2005-011). The University's Complaint does not raise procedural challenges to FEMA's termination of Oakland's funding nor seek restoration of that funding. And Oakland has not challenged FEMA's termination of its funding. CCC may not, therefore, use intervention as a vehicle to introduce issues before the court related to FEMA termination of Oakland's grant funding, which is not at issue in the pending litigation. *Arakaki*, 324 F.3d at 1086.

B. Disposition of This Litigation Will Not Impair CCC's Claimed Interest.

Because CCC does not have a protected interest in the litigation, the outcome of the litigation *cannot* impair CCC's claimed interest. As explained above in Section I.A., CCC's interest is just too removed from the procedural issues before the Court in this action. And even if CCC's interests were not too many steps removed from the litigation, or CCC did not seek to expand the scope of the litigation, CCC overstates its case in maintaining that "the Conservancy and its members [remain] at risk from a future wildfire" *unless* the Court restores the University's funding. Motion at 10; *see also id*. at 4-5 (making similar claims regarding risk to residents due to termination of both Oakland's and the University's grants).

The risk of wildfire remains with or without funding to the University. Neither the University nor any other entity can prevent wildfires. The purpose of the FEMA-funded vegetation management is to reduce the risk of wildfires and minimize the damage when wildfires do occur. *See* AR 10.1-015 at 6 (Final EIS 1-6). The University is not the only

entity addressing fire risk in Claremont Canyon. The Park District will treat the majority of acreage in Claremont Canyon. *See* AR 10.1-015 at 26, 56, 341 (Final EIS at 3-12, 3-42, 4.13-11). It will reduce the risk of wildfires on more than 150 acres in the Canyon, including in areas adjacent to residences. AR 10.1-015 at 26, 56 (Final EIS 3-12, 3-42). Even without vegetation management on University or Oakland land, the Park District will play a significant and essential role in reducing the hazards of wildfires in Claremont Canyon.

C. The University Will Adequately Protect The Interests of CCC and Its Members.

In determining whether a proposed intervenor is adequately represented by an existing party, the most important factor is "how the [intervenor's] interest compares with the interests of existing parties." *Arakaki*, 324 F.3d at 1086. Where an applicant for intervention and an existing party share the same "ultimate objective," a presumption arises that the existing party will adequately represent the applicant's interests, and a "compelling showing" is required to demonstrate inadequate representation. *Id.* at 1086; *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950-51 (9th Cir. 2009).

Here, the University would adequately protect CCC's interests in the litigation, precluding CCC's intervention as of right. The University's and CCC's objectives are aligned. Both challenge FEMA's termination of the University's grant funding as "procedurally improper." Motion at 4; *see also* Pl. Complaint, ¶¶ 101-139; CCC Proposed Complaint, ¶¶ 35-40. And CCC in fact *admits* that the University's "interests are aligned with those of the Conservancy." Motion at 10. CCC never contends that the University will inadequately represent its interests in court. Instead CCC asserts that it must be allowed to intervene as of right because the University *might* accept a settlement that does not restore funding for vegetation management or selectively removes certain vegetation in Claremont Canyon. CCC offers no support for these allegations. The University's land in Claremont Canyon makes up over 40 percent of the acreage for

which the University had received funding under the original ROD. There is no reason to believe that it would abandon its interest in the Claremont Canyon area in this litigation.

Courts do not permit intervention based on the potential intervenor's conjectures that it will be inadequately represented. As explained by the court in *Public Service Co. v. Patch*, the factor regarding adequacy of representation by an existing party "is more than a paper tiger. A party that seeks to intervene as of right must produce some tangible basis to support a claim of purported inadequacy." 136 F.3d 197, 207 (1st Cir. 1998). CCC provides no basis for its claim that the University will inadequately represent CCC's interests.

D. CCC's Motion Is Not Timely.

In evaluating whether an applicant's motion to intervene is timely, courts weigh three factors: (1) the stage of the proceedings, (2) prejudice to existing parties due to the applicant's delay in intervening, and (3) the reason for and length of delay in seeking intervention. *Alisal Water Corp*., 370 F.3d at 921. CCC's motion is untimely under each of these factors.

First, the proceedings here have progressed significantly. The litigation of this matter began when HCN and SPRAWLDEF/Sierra Club filed lawsuits challenging the Final EIS for FEMA's grant funding for the Park District, the University, and Oakland's removal of vegetation to reduce wildfire risk in the East Bay Hills. Although CCC participated in the administrative process for the EIS, it chose not to file suit and not to intervene. And while two CCC members shared information at a prior mediation held for the two cases, they participated on behalf of the SPRAWLDEF/Sierra Club, and not as a party. See Motion at 3. Even in *this* chapter of the litigation, the University filed its Complaint over six months ago, on June 14, 2017, and FEMA and the California Office of Emergency Services filed their respective Answers to the Complaint on August 17, 2017 and September 5, 2017. Dkt. Nos. 1, 15, 31. The initial case management occurred on October 26, 2017. Dkt. No. 53. In addition, HCN and the Park District successfully

intervened more than two months ago and the Administrative Record is already filed and briefing scheduled. Dkt. Nos. 51, 52, 56.

Second, CCC's intervention at this stage of the litigation will prejudice the existing parties and likely disrupt and delay the proceedings. Significantly, CCC has declined magistrate judge jurisdiction. Dkt. No. 74. In taking this stance, it ignores that the current magistrate has presided over the related cases in this litigation since the beginning, and knows the parties, the complicated facts, and the cases' procedural history. Reassigning the present case at this late stage will delay the litigation and waste the court's resources.

CCC's intervention will also delay the parties' settlement efforts. Settlement discussions are well underway and parties have already participated in a telephone conference with the mediator. Dkt. No. 64; Galanter Decl., ¶ 2. The parties will participate in a second conference call with the mediator on January 11, 2017. Dkt. No. 68. Mediation briefs are due January 26, 2018, the parties will have individual telephone calls with the mediator on February 1, 2018, and mediation sessions are scheduled for February 2 and February 5, 2018. Galanter Decl., ¶ 3. CCC's intervention would require delays to this schedule. Thus, in addition to delaying the litigation, CCC's intervention will delay the mediation.

Furthermore, CCC's intervention in the litigation will jeopardize a successful settlement, forcing the parties to resolve this case by going to trial. CCC asserts in its Motion that its presence in the case is necessary to ensure that the University does not accept settlement terms that would change the vegetation management methodology or agree to a settlement that does not restore the University's funding. Motion at 10-11. This hardline position will undermine the parties' efforts to settle by limiting options and further polarizing the parties.

Third, CCC's Motion lacks any credible explanation of changed circumstances that justify its intervention in the case at this stage in the proceedings, and of why it failed to seek intervention sooner. *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016). Although CCC states that HCN's and the Park District's intervention in October

and early November 2017, respectively, triggered CCC's need to intervene in the case, this argument rings hollow. The legal and factual issues remain the same regardless of HCN's and the Park District's presence in the case. Moreover, HCN and the Park District have been parties to the underlying litigation that gave rise to this case. CCC apparently did not see it as essential to intervene there and fails to establish why it is entitled to intervention as of right now.

II. CCC Fails to Meet The Requirements for Permissive Intervention and Should Not Be Permitted to Intervene.

A. CCC Does Not Meet The Threshold Requirements for Permissive Intervention.

A court grants permissive intervention at its discretion. *Donnelly*, 159 F.3d at 412. To qualify for permissive intervention in this Circuit, the applicant must first show that (1) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common; (2) there are independent grounds for jurisdiction; *and* (3) the motion is timely. *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996); *see also* Fed. R. Civ. P. 24(b)(1)(B). CCC fails to meet either the second or third criteria. But "even if all three requirements are satisfied, the district court has discretion to deny permissive intervention." *SEC v. Small Bus. Capital Corp*., 2014 U.S. Dist. LEXIS 104233, *6 (N.D. Cal. July 29, 2014).

CCC does not meet the second threshold requirement because it fails to establish its independent grounds for jurisdiction in this case. *Nw. Forest Res. Council*, 82 F.3d at 839. "A party seeking permissive intervention must demonstrate a basis for federal jurisdiction independent of the court's jurisdiction over the underlying action." *EEOC v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1509-10 (9th Cir. 1990); *see also Blake v. Pallan*, 554 F.2d 947, 955-56 (9th Cir. 1977) (proposed intervenor lacked independent grounds of jurisdiction under plaintiff's federal securities claims where he had no involvement in the securities transactions at issue). CCC fails to even mention any, let alone establish that it has, independent grounds for jurisdiction. Rather, CCC tries to reassure the Court that it will not enlarge the scope of the litigation. But as detailed in

Section I.A above, CCC *does* seek to expand the scope of this litigation by having FEMA reexamine its decision to terminate *Oakland's* grant funding, which is not at issue in the University's lawsuit. Motion at 5.

Likewise, CCC does not meet the third threshold requirement of timeliness. As described above, its motion fails under all three factors courts weigh in assessing whether a motion for intervention is timely: (1) the stage of the proceedings; (2) the prejudice to the parties; and (3) the length of and any reason for any delay. *San Jose Mercury News, Inc. v. U.S. Dist. Court-N. Dist.*, 187 F.3d 1096, 1100-01 (9th Cir. 1999) (superseded by statute on other grounds). And in assessing a request for permissive intervention, courts analyze the timeliness requirement more strictly than they do for intervention as of right. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997).

First, CCC seeks to intervene more than six months after the case was filed, after settlement efforts have already begun, and as the parties are poised to enter mediation. Second, CCC's late intervention would prejudice existing parties. The addition of CCC would change the underlying interests and dynamics in the case, and will cause a delay by pushing out the mediation date. And CCC's entrenched position regarding acceptable settlement terms could stymie mediation and force the case to trial. Moreover, if CCC intervenes, its objection to magistrate judge jurisdiction will require transfer of the case to a district court judge. This would further delay the litigation and waste the court's resources. Finally, as described above in Section I.D, CCC inadequately justifies why it seeks to intervene only now, after this case has been litigated for more than six months and after failing to seek intervention in underlying, related litigation.

B. Additional Factors Demonstrate That CCC Should Not Be Permitted to Intervene.

If CCC were able to satisfy the threshold requirements for permissive intervention, which it cannot, the Court must then consider whether the intervention would "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). The Court could also consider additional factors such as "the nature and extent

of the intervenors' interest," "whether the intervenors' interests are adequately represented by other parties," and "whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

All of these considerations support denial of CCC's motion to intervene. First, as discussed above in Sections I.D and II.A, granting CCC's motion to intervene would unduly delay this action and would prejudice the adjudication of the existing parties' rights. *See* Fed. R. Civ. P. 24(b)(3). Second, to the extent that CCC has any interest in this case, it shares the same objectives as the University in ensuring that FEMA determinations regarding University grant funding comply with the law. Third, as discussed above in Section I.C, the University already adequately represents CCC's interests. Finally, as an intervenor, CCC would not provide any needed assistance to the court nor help to resolve the legal or factual issues in this case. CCC has no special expertise in the statutes at issue here. It also provides no expertise on reducing wildlife risk that the University and Park District do not already provide, and its absence from the related cases in this litigation make it less familiar with relevant facts than the current parties.

CONCLUSION

For the foregoing reasons, the Park District opposes CCC's Motion to Intervene as of right or permissively, and respectfully requests that the Court deny CCC's Motion. The Park District would not object to CCC's participation as an amici in this litigation.

DATED: January 4, 2018

SHUTE, MIHALY & WEINBERGER LLP

By: /s/
TAMARA S. GALANTER

Attorneys for Defendant-Intervenor
East Bay Regional Park District