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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Plaintiff, v. FEDERAL EMERGENCY MANAGEMENT AGENCY, *et al.*, Defendants.	No. 17-cv-03461-LB FEDERAL DEFENDANTS' OPPOSITION TO CLAREMONT CANYON CONSERVANCY'S MOTION TO INTERVENE Date: January 18, 2018 Time: 9:30 a.m. Courtroom No. C, 15th Floor Hon. Laurel Beeler

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FEDERAL DEFENDANTS' OPPOSITION TO CLAREMONT CANYON CONSERVANCY'S MOTION TO INTERVENE

I. Introduction

On December 18, 2018, the Claremont Canyon Conservancy ("CCC") filed a motion to intervene in this action as a plaintiff. Docket No. 71. The Federal Emergency Management Agency ("FEMA"), Robert J. Fenton, Jr., and Jeffrey D. Lusk (collectively, the "Federal Defendants"), oppose both intervention as of right and permissive intervention by CCC. In this litigation (the "*Regents* case"), The Regents of the University of California ("Plaintiff" or "University") seeks a determination that FEMA's termination of authorization of grant funding to the University was inconsistent with a federal grant regulation, the Administrative Procedure Act ("APA"), and the National Environmental Policy Act ("NEPA"). Intervention as of right should be denied because CCC's motion is untimely, CCC lacks a sufficiently protectable interest in the grant funding, this litigation brought by the University does not threaten to impair CCC's asserted interest, and CCC has not made a compelling showing that the University will not provide adequate representation in the prosecution of the claims. Permissive intervention should also be denied because CCC's motion is untimely, allowing CCC to intervene would likely lead to delay, CCC does not have a protectable interest, and CCC's intervention would prejudice the Federal Defendants.

II. Background

In March 2015, FEMA made an award to the California Office of Emergency Services ("Cal OES") of grant funding relating to certain subprojects of an overall project to reduce hazardous fire risk in the East Bay Hills. In February 2015 FEMA issued its "Hazardous Fire Risk Reduction Record of Decision" ("ROD") authorizing grant funding for projects to reduce fire risk in the East Bay Hills. In March 2015, FEMA made an award to Cal OES of grant

funding to implement the ROD. In September 2016, FEMA, with the consent of Cal OES, issued an Amended ROD withdrawing authorization of grant funding for two University subprojects within the overall project (the Claremont Canyon and Strawberry Canyon subprojects), and it terminated the grants to Cal OES for those subprojects. Grant funding for East Bay Regional Park District fire risk mitigation subprojects in the East Bay Hills continues to be authorized under the Amended ROD.

In June 2017, the University filed its Complaint challenging the termination of the authorization of grant funding for the two University subprojects. Docket No. 1. Plaintiff alleges three claims in its Complaint: (1) that the termination of grant funding for the two University subprojects was inconsistent with a grant regulation (2 C.F.R. § 200.339(a)(3)); (2) that the issuance of the Amended ROD violated the APA, and (3) that the issuance of the Amended ROD violated NEPA. *See* Complaint (Docket No. 1) and Federal Defendants' Answer (Docket No. 15). This case has been related to *Hills Conservation Network v. FEMA*, Case No. 3:15-cv-01057-LB (the "*HCN* case"), and *SPRAWLDEF and Sierra Club, et al. v. FEMA, et al.*, Case No. 3:15-cv-02331-LB (the "*SPRAWLDEF* case"). Docket No. 14. Two entities have been allowed permissive intervention, the Hills Conservation Network ("HCN")[1] and the East Bay Regional Park District ("EBRPD"). Docket Nos. 51 and 55.

[1] In addition to the federal *HCN* case, HCN also filed a case in State court (Alameda County Superior Court Case No. 1016823477) challenging the University's potential fire mitigation projects in the East Bay Hills under the California Environmental Quality Act ("CEQA"). HCN's CEQA petition was filed on July 15, 2016. Docket No. 36, Exhibit A. A preliminary injunction was issued in the State court CEQA case enjoining the University from implementing its potential East Bay Hills fire mitigation projects on October 27, 2016. Docket No. 36, Exhibit B. This case was dismissed *without prejudice* after the University rescinded its approval of its potential fire mitigation projects. *See* Yu Decl. Exhibits 1, 2, and 3.

The original parties to the litigation filed a Joint Case Management Statement on October 19, 2017 (Docket No. 48). On October 26, 2017, the Court held a case management conference and entered a Scheduling Order. Docket No. 52. The Federal Defendants filed the administrative record in this case on December 7, 2017. Docket Nos. 69 and 70. Under the Joint Case Management Statement and the Scheduling Order, the University was required to raise in writing by December 21, 2017, any challenges to the sufficiency of the Federal Defendants' administrative record. No written challenges to the sufficiency of the administrative record were raised by the University. Declaration of Elizabeth Yu ("Yu Decl.") (Attachment 1 to this Opposition), ¶ 2.

CCC was aware of this *Regents* case by no later than September 2017. Declaration of Stuart M. Flashman ("Flashman Decl.") (Docket No. 71-3), ¶ 2. CCC did not move to intervene until December 18, 2017, well after the Federal Defendants and Defendant Ghilarducci filed their Answers, after the case management conference held by this Court took place, after the Scheduling Order was issued by this Court, and after the Federal Defendants filed the administrative record. Unlike the existing parties, CCC has filed a declination of Magistrate Judge jurisdiction. Docket No. 74. Also, unlike the existing parties to this litigation, CCC was not an original party to either the earlier *HCN* or *SPRAWLDEF* cases. Nor did CCC seek to intervene in either of those cases. *See* dockets in the *HCN* and *SPRAWLDEF* cases.

CCC's motion asserts that CCC does not seek to expand this litigation beyond the University's claims (Docket No.71, at 8-9). However, CCC's motion also states that CCC seeks to "restore" grant funding to the City of Oakland, an entity that has not challenged the Amended ROD nor sought to intervene in this litigation (Docket No. 71, at 1-2, 7).

III. Intervention of Right

Rule 24 of the Federal Rules of Civil Procedure provides for intervention of right and permissive intervention. CCC has moved on both grounds. Rule 24(a) provides for intervention of right, upon a timely motion, by any party who

> (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

CCC has not claimed that a statute provides an "unconditional right to intervene" under Rule 24(a)(1), but asserts that it has a right to intervene under Rule 24(a)(2). To satisfy Rule 24(a)(2):

> A party seeking to intervene as of right must meet four requirements: (a) the applicant must timely move to intervene; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties.

Arakaki v. Cayetano, 324 F.3d 1078, 1083 (9th Cir. 2003).

Failure to satisfy any one of these four requirements is fatal to the application for intervention as of right. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009). CCC fails to satisfy any of the four requirements so its motion should be denied.

A. CCC's motion to intervene is not timely.

CCC's motion should be denied because it is not timely. In *American Civil Liberties Union v. Burwell*, No. 16-03539-LB, 2017 WL 492833, at *3 (N.D. Cal. Feb. 7, 2017), this Court held that a motion for intervention was timely where the proposed intervenor filed its motion to intervene before the government answered the complaint. Here, in contrast, CCC seeks to intervene long after the Federal Defendants and Defendant Ghilarducci filed their

Answers, after the motion to relate this case to the *HCN* and *SPRAWLDEF* cases was granted and this case was reassigned to this Court, after HCN and EBRPD were granted intervention, after the Case Management Conference was held and the Scheduling Order issued, and after the administrative record was filed. Moreover, CCC has declined to consent to Magistrate Judge jurisdiction. If the motion to intervene were granted, the Defendants would need to file additional Answers, and additional case management and scheduling proceedings would need to be held before a new judge. CCC's belated motion to intervene, if granted, is likely to cause substantial delays and is therefore untimely.

CCC claims that its motion is timely because the administrative "record's preparation has hardly been finished, and it is not unlikely that there will be further negotiations and possible motions over its full extent." Docket No. 71, at 9. CCC is wrong. The Federal Defendants' Administrative Record was completed and filed on December 7, 2017, and the University has not raised any written challenges to the administrative record. The matter is on schedule for merits briefing. CCC's claim of potential delay to the litigation schedule is unfounded and does not negate CCC's dilatory filing of its motion to intervene.

B. CCC does not have a significantly protectable interest in the University's claim.

In order for CCC to demonstrate a "significantly protectable" interest in this case, the resolution of the University's claims against FEMA must directly impact CCC. *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998) ("An applicant generally satisfies the 'relationship' requirement only if the resolution of the plaintiff's claims actually will affect the applicant."); *Greene v. United States*, 996 F.2d 973, 976-78 (9th Cir. 1993) (holding that an applicant lacked a "significantly protectable interest" in an action when the resolution of the plaintiff's claims would not affect the applicant directly). In this case, the University challenges FEMA's

termination of funding authorization for grants to the University. CCC did not apply for such grant funding and has no direct interest in such grant funding. Rather, CCC only expresses a generalized environmental interest in fire mitigation in the Claremont Canyon. As it does not have a direct interest in the grant funding, it does not have a "significantly protectable interest" sufficient to justify intervention as of right.

In *Westlands Water District v. United States*, 700 F.2d 561, 563 (9th Cir. 1983), the Court held that the Environmental Defense Fund's interest in water quality did not provide a sufficient interest to support its intervention in a suit concerning contracts between the existing parties respecting the delivery of water. *See also California ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 792 F.2d 779, 781 (9th Cir. 1986) ("property owners who allege at most incidental, rather than direct effects upon their land" do not have a sufficient interest to support intervention). Similarly, here, CCC's generalized interest in fire risk reduction is not sufficient to support intervention in the University's grant termination dispute with FEMA.

Simply because CCC may care deeply about fire risk does not create the direct interest in the University's claims needed to justify intervention. See *Kane County, Utah v. United States*, No. 08-315, 2009 WL 959804, at *2 (D. Utah Apr. 6, 2009), *aff'd*, 597 F.3d 1129 (10th Cir. 2010) (Court held that, while it was clear that the proposed intervenor "has an interest in the sense that it cares deeply about the outcome of the decision," its interest was insufficient to support intervention where it did not have a direct interest in the actual claim in the existing litigation). "[To] hold otherwise would create an open invitation" for virtually any interested person to intervene. *United States v. Alisal Water Corp.*, 370 F.3d 915, 920 (9th Cir. 2004). FEMA received over 13,000 public comments on the Draft Hazardous Fire Risk Reduction Environmental Impact Statement ("EIS"), East Bay Hills. *See HCN* case Docket No. 78 (Federal

Defendants' Motion for Summary Judgment in the *HCN* case), page 11 of 44. CCC, like the many other public commenters, was not an applicant for the University's grants and had no direct interest in the grant authorization that was terminated. To allow CCC to intervene would be an open-ended invitation to any public commenter to intervene. Thus, CCC lacks the requisite interest necessary to support intervention.

C. The University's complaint does not threaten to impair CCC's interest.

In order to satisfy the "impairment" requirement for intervention as of right, the proposed intervenor must also establish that its asserted interest will suffer a practical impairment "as a result of the pending litigation." *Buffin v. City and County of San Francisco*, No. 15-04959-YGR, 2017 WL 889543, at *3 (N.D. Cal. Mar. 6, 2017). The University's litigation seeks to restore grant funding support for wildfire mitigation in Claremont Canyon. The status quo ante to this litigation is that authorization for grant funding for the University's projects has been terminated. If the University prevails in this litigation, presumably that would be consistent with CCC's asserted interest. If, instead, the Federal Defendants prevail in the litigation, CCC would merely be in the same place as the status quo ante. Thus, it cannot be said that this litigation threatens to impair CCC's asserted interests.

As illustrated in *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 837-38 (9th Cir. 1996), cases where public interest groups were determined to have sufficient interests that may be sufficiently impaired as a result of the pending litigation to support intervention have typically involved situations where public interest groups sought to intervene to defend existing challenged governmental action that they had been the proponents of or actively supported. In contrast, CCC does not seek to defend the existing governmental action (the termination of authorization of grant funding for the University's subprojects) that is challenged in this action.

As this litigation is consistent with, rather than contrary to, CCC's asserted interests, it does not threaten to impair CCC's interests.

D. CCC has not demonstrated that the University will not provide adequate representation.

CCC's motion also fails because it has not demonstrated that the University will not adequately represent CCC's interests. The most important factor in determining adequacy of representation is how the proposed intervenor's interest compares with the interests of the existing parties. When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises, and the proposed intervenor can rebut that presumption only with a "compelling showing" to the contrary. *Arakaki v. Cayetano*, at 1086; *Perry v. Proposition 8 Official Proponents*, 587 F.3d at 950-51; *Drakes Bay Oyster Company v. Salazar*, No. 12-06134-YGR, 2013 WL 451813, at *5 (N.D. Cal. Feb. 4, 2013).

Here, CCC and the University share the same ultimate objective – challenging FEMA's withdrawal of authorization of grant funding for the University's East Bay Hills subprojects. Indeed, in CCC's proposed Complaint In Intervention (Docket No. 71-2), the three causes of action simply adopt the three causes of action in the University's Complaint (Docket No. 1) by cross-reference. Accordingly, there is a presumption of adequacy of representation by the University.

CCC has made no showing to rebut the presumption of adequacy of the University's representation, much less a "compelling showing." To the contrary, CCC states that "[T]he Conservancy believes that the Regents are acting in good faith in attempting to restore FEMA's grant to them" (Docket No. 71, at 7), negating any argument that the University is a reluctant plaintiff that will not do an adequate job in the litigation of its claims.

CCC merely speculates that if it is not allowed to intervene the University might be tempted to accept a settlement that CCC does not like. Docket No. 71, at 7-8. But speculation about potential settlement compromises the University may or may not accept at some point in the future is not a compelling showing that the University will not adequately litigate its claims, which are the very same causes of action asserted in CCC's proposed Complaint in Intervention.

The focus in evaluating the adequacy of representation is on whether the proposed intervenor's legal arguments will be substantially different from any of the existing parties. So for instance, in *Arikaki v. Cayetano*, 324 F.3d at 1087, the Court held that Hoohuli was not entitled to intervene because it had not made a compelling showing that it would make necessary legal arguments in litigating the case that existing parties would not make. *See also Perry v. Proposition 8 Official Proponents*, 587 F.3d at 951-55 (the Court denied intervention because there was no showing that its approach to the litigation would be meaningfully different than that of existing parties). Also, in *Drakes Bay Oyster Co. v. Salazar*, 2013 WL 451813, at *7, the Court held that the proposed intervenor had not shown that the existing defendants would not make the substantive arguments in the litigation that the proposed intervenors would make. *See also Freedom from Religion Foundation v. Geithner*, 644 F.3d 836, 842 (9th Cir. 2011) (where no evidence that the existing party has actually urged a narrower interpretation of the challenged statute than that of the proposed intervenor, inadequacy of representation not shown); *California ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986) (district's assertion that it would have argued its interests more vigorously than existing parties does not amount to a showing of inadequate representation).

Nowhere do the cases or the language of Rule 24 indicate that a proposed intervenor is entitled to intervene as of right to attempt to thwart potential settlement compromises by the

existing plaintiff in order to serve the intervenor's interests, rather than the interests of the party that brought the suit in the first place. Having failed to make a compelling showing of substantively different litigation arguments, CCC has not shown the inadequacy of representation by the University that is necessary to support CCC's intervention as of right.

Accordingly, as CCC's motion is untimely, it lacks a sufficiently protectable interest, its asserted interests would not be impaired by the litigation, and CCC has failed to show that the University will not adequately represent its interests as to the litigation, CCC's motion for intervention as of right should be denied.

IV. Permissive Intervention

Rule 24 of the Federal Rules of Civil Procedure provides for permissive intervention only if, upon timely application, a party

> (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact . . . . In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Fed. R. Civ. P. 24(b).

For the reasons stated above in section III.A. of this brief, CCC's motion to intervene is untimely and should be denied for failure to satisfy that threshold requirement. Also, as noted in section III.B, CCC does not have a legally protectable interest in this case.

The Court also should deny permissive intervention because the intervention will unduly delay or prejudice the adjudication of the original parties' rights: (a) CCC's intervention could result in the transfer of this case to a judge who is unfamiliar with the related cases and background of this case and create a potential for conflicting results, (b) CCC's addition to the case will consume additional time and resources and add no value to the litigation of the case, (c) CCC seeks to expand the litigation to encompass the grant termination with respect to the City of Oakland, an entity that is not a party to this case and has not sought to intervene in this litigation,

and (d) the main objective of CCC's intervention seems to be a desire to prevent the University from potentially entering into a settlement that is satisfactory to the University, but not to CCC. As a result, CCC's intervention would likely lead to undue delay to the litigation and prejudice to Defendants.

First, Federal Defendants moved to relate this case to the *HCN* and *SPRAWLDEF* cases in July 2017 so that the Court that was already familiar with the background of this case would hear this case. Relating the cases avoids the duplication of labor and expense that would have occurred if the *Regents* case were handled by a different judge than handled the *HCN* and *SPRAWLDEF* cases, serves the interests of judicial economy, and avoids the potential of a conflicting ruling or directive if this case were to be handled by a different judge in the event the *SPRAWLDEF* case is remanded by the Ninth Circuit. *See HCN* case Docket No. 117 (Federal Defendants' Administrative Motion to Consider Whether Cases Should be Related), at 4. CCC's intervention, along with its declination of Magistrate Judge jurisdiction, would result in the transfer of this case to a different judge, and would prejudice the Federal Defendants for the same reasons as outlined in the motion to relate.

Second, permissive intervention should be denied where the participation of the proposed intervenor would consume additional time and resources and the value added by intervention does not outweigh any potential delay or prejudice. *See*, *e.g. Perry v. Proposition 8 Official Proponents*, 587 F.3d at 955-56 (" 'the participation of [the Campaign] . . . in all probability would consume additional time and resources of both the Court and the parties' " and "it was well within the district court's discretion to find that the delay occasioned by intervention outweighed the value added by the Campaign's participation in the suit."); *Kane County, Utah v. United States*, 597 F.3d 1129, 1136 (10th Cir. 2010) (district court's denial of permissive intervention affirmed where proposed intervenor had not shown inadequate representation by an existing party); *Drakes Bay Oyster Co. v. Salazar*, 2013 WL 451813, at * 9 ("while the Proposed Intervenors may have a unique point of view and expertise, intervention as a party will not necessarily facilitate resolution on the merits, but is likely to result in duplicative briefing adding

a layer of unwarranted procedural complexity. . . . the benefits of proposed intervention are outweighed by the efficient resolution of the pending dispute.")

CCC has not identified any substantive legal arguments it wishes to make that the University will not make. Indeed, CCC states in its motion that "[i]ts position is in almost all respects identical to that of the Regents." Docket No. 71, at 9. Thus, allowing CCC to intervene will add no value to the litigation, while resulting in duplicative briefing that will consume additional time and resources of both the Court and existing parties. Also, there would likely be a need to file additional Answers and, if the case were transferred to a different judge, there would be a need for additional case management proceedings, all of which would result in delay. While CCC may care deeply about the outcome of this case, permissive intervention should not be granted on that basis, as it would appear to extend an invitation to any member of the public to intervene despite the lack of a direct interest.

Third, CCC seeks to interject new issues that are not part of this case. Specifically, CCC states that it seeks to "restore" grant funding to the City of Oakland. Docket No. 71, at 7. The City of Oakland is not a party to this case and has not challenged FEMA's Amended ROD or the termination of authorization of grant funding for its East Bay Hills subprojects.[2] As in *United States v. Alisal Water Corp.*, 370 F.3d at 922, it is appropriate for this Court to deny permissive intervention when the intervenor seeks to interject new issues since this could prolong the litigation or otherwise prejudice the existing parties.

Fourth, CCC admits that it seeks to intervene primarily to thwart the existing parties from entering into a settlement that may be acceptable to the Plaintiff who brought the case, but not acceptable to CCC. Docket No. 71, at 7-9. For example, CCC speculates that: "Especially during settlement negotiations, the Regents may be tempted to accept a settlement that would

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[2] Notably, in the *SPRAWLDEF* case, the City of Oakland acknowledged that it is no longer a grantee and simply asked the Court to dismiss it from the case. *SPRAWLDEF* case Docket No. 100 (City of Oakland's Statement of Non-Opposition to Federal Defendants' and EBRPD's Joint Motion to Dismiss).

restore funding to address some of the University's property, but not necessarily Claremont Canyon. It might also be tempted, as has already occurred with EBRPD, to accept a settlement in which funding was restored with "strings" attached limiting or eliminating the removal of fire-prone tree species." Docket No. 71, at 7-8. A party's seeking to intervene merely to attack or thwart a remedy is disfavored. *United States v. Alisal Water Corp.*, 370 F.3d at 922. Since CCC's true objective is to try to thwart any settlement CCC does not like, even if the University finds it acceptable, CCC's intervention is likely to make any effort to settle this case even more difficult than it otherwise would be, thereby causing prejudice to the existing parties.

This Court should deny permissive intervention because CCC will not add value to the litigation, will delay the case, and will prejudice the existing parties.

V. Conclusion

As CCC has not established the four requirements necessary for intervention as of right and because permissive intervention would cause undue delay and prejudice to the adjudication of the existing parties' rights, CCC's motion to intervene should be denied.

Date: January 3, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 3, 2018, I served the Federal Defendants' Opposition to Claremont Canyon Conservancy's Motion to Intervene, with the attached Declaration of Elizabeth Yu, on counsel of record for the parties and the proposed intervenor in this case through the Court's electronic service system.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: January 3, 2018

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