

Lori Potter (CO Bar No. 12118)  
KAPLAN KIRSCH & ROCKWELL LLP  
1675 Broadway, Suite 2300  
Denver, CO 80202  
Tel: 303-825-7000  
Attorneys for Grand Canyon Private Boaters Association

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

River Runners for Wilderness, et al.	)	No. CV-06-0894 PCT-DGC
	)	
Plaintiffs,	)	MEMORANDUM OF POINTS
	)	AND AUTHORITIES IN
v.	)	SUPPORT OF MOTION TO
	)	INTERVENE BY GRAND
Joseph F. Alston, et al.	)	CANYON PRIVATE
	)	BOATERS ASSOCIATION
Defendants.	)	
_____	)	

**I. INTRODUCTION**

In 2000, the Grand Canyon Private Boaters Association (“GCPBA”) challenged the National Park Service’s (“NPS”) failure to update its Colorado River Management Plan and to adjust the allocation of boating permits between commercial and private boaters in accordance with current demand, environmental conditions and other new information. *Grand Canyon Private Boaters Ass’n v. Arnberger*, No. CV-00-1277-PCT-PGR (D. Ariz. Oct. 2, 2000). GCPBA, NPS and Grand Canyon River Outfitters Association (“GCROA”), also an applicant for intervention here, settled that case with an agreement by which NPS prepared the new Colorado River Management Plan (“CRMP”) and Environmental Impact Statement (“EIS”) now under challenge. Yeamans Declaration at ¶ 2.

## II. ARGUMENT

GCPBA meets the four requirements for intervention of right under Rule 24(a). (1) the application for intervention must be timely; (2) the applicant must claim a “significantly protectable” interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and (4) the applicant’s interest may be inadequately represented by the existing parties to the action.

### A. This Court Should Allow GCPBA to Intervene as of Right.

#### 1. The Motion to Intervene is Timely.

There are four pertinent factors in determining the timeliness of a motion to intervene: (1) the length of time between which a proposed intervenor actually knew or should have known of its interest in the case; (2) the extent of prejudice that existing parties may suffer as a result of a proposed intervenor’s failure to apply for intervention as soon as it actually knew or should have known of its interest in the case; (3) the extent of prejudice that proposed intervenors may suffer if a motion is denied; and (4) the existence of unusual circumstances militating for or against a determination that the motion is timely.

This motion to intervene is filed within 120 days of the filing of the Complaint. GCPBA can and will comply with the recent Case Management Order and its deadlines. GCPBA promptly obtained a copy of NPS’s Answer (dated June 9, 2006) and is submitting this motion and proposed answer within a reasonable period thereafter. The motion to intervene will not prejudice any party to the lawsuit because the Court, to date, has made no substantive rulings. *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 836-37 (9th Cir. 1998). Under the standard in one of the cases that plaintiffs

rely on in their opposition to GCROA's intervention, *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1499 (9<sup>th</sup> Cir. 1995), a motion to intervene was timely even after the principal parties had reached a settlement. *See U.S. v. Alisal Water Corp.*, 370 F.3d 915, 922 (9<sup>th</sup> Cir. 2004) (citing *Forest Conservation Council* on the timeliness prong). GCPBA has not waited until after a substantive decision of the court or after all the parties have reached an agreement following years of litigation, as in *United States v. Washington*, 86 F.3d 1499, 1503-05 (9<sup>th</sup> Cir. 1996). GCPBA has moved to intervene in a timely matter, and granting its intervention will cause neither delay of the proceedings nor prejudice to any party.

2. **Intervenor Has a Significantly Protectable Interest Relating to the Subject of the Action.**

To intervene as of right, an applicant must have a recognized interest in the subject matter of the litigation that might be impaired by disposition of a case and that will not be adequately protected by existing parties. *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5<sup>th</sup> Cir. 1994). Whether an applicant for intervention as of right demonstrates a sufficient interest in an action is a practical, threshold inquiry. *Northwest Forest Resource Council*, *supra*, 82 F.3d at 837. No specific legal or equitable interest need be established. *Id.*

In *Washington State Building and Construction Trades Council v. Spellman*, 684 F.2d 627, 629 (9<sup>th</sup> Cir. 1982), the Trades Council brought suit challenging the constitutionality of the Washington statute prohibiting importation of low-level radioactive waste originating outside the state. The court held that the public interest group that sponsored the statute as an initiative measure, "Don't Waste Washington," was entitled to intervene as a matter of right. *Id.* In this case, GCPBA, which filed the

litigation that led to NPS's decision under challenge here, should likewise be granted the right to intervene to support the outcome of a process that it "sponsored" or otherwise precipitated.

In *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of the Interior*, 100 F.3d 837, 839 (10th Cir. 1996), Dr. Robin Silver filed an application to intervene in a lawsuit challenging the decision of the U.S. Fish and Wildlife Service to protect the Mexican spotted owl under the Endangered Species Act. Dr. Silver had photographed and studied the owl in the wild and was instrumental in the initial decision to protect the owl under the Act. *Id.* The Tenth Circuit held that Dr. Silver had a right to intervene in the action because his direct involvement with the owl and advocacy for its protection amounted to a direct, substantial and protectable interest. *Id.* Intervenor did not need to show an economic interest in the owl. *Id.*

Similarly, here, GCPBA has been directly involved with the issue of river permit allocation. Advocacy for an equitable allocation for non-commercial boaters is one of the organization's core purposes. Yeamans Declaration at ¶ 1. GCPBA was instrumental in advocating for the adoption of the alternative that NPS selected in its final CRMP and EIS. *Id.* at ¶ 2. This Court should hold that GCPBA has a protectable interest here.

3. **This Action May, as a Practical Matter, Impair GCPBA's Ability to Protect Its Interests.**

Through its prior suit against NPS and its advocacy in the process that led to the new CRMP, GCPBA achieved its organizational goal: to "ensure the ability for all to obtain, on an equal and timely basis, an opportunity to experience a float trip through the Grand Canyon while protecting the resource." Yeamans Declaration at ¶ 1. This action seeks to undo the NPS's decision, which resulted in a significant increase in the number

of permits available to private boaters and adjusted the private-commercial allocation to 50-50. *Id.* at ¶ 3. A remand in this case may cause reconsideration of the allocation and may result in a delay in implementation of the gains that GCPBA achieved through its ten years of advocacy. *Id.* at ¶ 4. Thus, the outcome of this action may impair GCPBA's ability to protect its organizational interest in the benefits flowing from NPS's decision in the new CRMP.

In *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526 (9th Cir. 1983), the Ninth Circuit held that the National Audubon Society, a nonprofit organization devoted to the protection of wildlife, was entitled to intervene as a matter of right in a suit challenging the decision of the Secretary of the Interior to create a birds of prey conservation area. Like GCPBA here, the Audubon Society sought to intervene in support of the government's decision. The court held that an adverse decision would impair the Society's interest in the preservation of birds and their habitats. *Id.* at 528.

In *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of the Interior*, *supra*, 100 F.3d at 839, the Tenth Circuit held that Dr. Silver's interest as a wildlife photographer might be impaired by the disposition of a challenge to the Fish and Wildlife Service's decision to protect the Mexican spotted owl under the Endangered Species Act. Therefore, Dr. Silver had the right to intervene under Rule 24(a).

Similarly, GCPBA is entitled to intervene because its interest in the allocation of boating permits is directly affected by the claims at issue in this action. The plaintiffs' claims could impair GCPBA's interests by causing a remand to the agency to reconsider its decision to increase the allocation to private boaters of a full 50% of all boating

permits, a significant increase over the past practice. GCPBA has an interest in defending the decision that NPS made in response to GCPBA's prior litigation and public comment on the Draft CRMP and EIS.

4. **Representation by the Existing Parties to This Action May be Inadequate.**

Three factors are considered in evaluating the adequacy of representation of an intervenor's interest by an existing party: (1) whether the interests of the existing party and the intervenor are sufficiently similar that the existing party would undoubtedly make the same legal arguments as the intervenor; (2) whether the existing party is willing to make such arguments; and (3) whether the intervenor would add some necessary element not covered by existing parties to the proceedings. *Bates v. Jones*, 904 F. Supp. 1080, 1086-87 (N.D. Cal. 1995).

In *Sagebrush Rebellion, Inc. v. Watt*, supra, 713 F.2d at 526 and in *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of the Interior*, supra, 100 F.3d at 839, the intervenors satisfied the requirement of inadequacy of representation by showing that the federal government's representation of its interests might be inadequate. The courts held that the burden of making this showing was minimal. Id.

In this case, the United States will not necessarily represent the interests of GCPBA. Just six years ago, GCPBA had to file suit to force NPS to restart and complete the CRMP revision process. The interests of NPS and GCPBA are not so similar that the NPS will "undoubtedly" make the same legal arguments as will GCPBA. Here, GCPBA adds the unique perspective of the private boater whose interest is equity in permit allocation. By contrast, the NPS must represent the greater public interest.

Further, NPS has contracts with the commercial outfitters whose interests NPS must also represent. Thus, GCPBA's interests may not be adequately represented by the United States.

**B. GCPBA is Also Entitled to Intervene Permissively Pursuant to Fed. R. Civ. P. 24(b)**

If this Court concludes that GCPBA may not intervene as a matter of right, GCPBA moves in the alternative to intervene permissively pursuant to Fed. R. Civ. P. 24(b). Rule 24(b) provides that, upon timely application, anyone may be permitted to intervene in an action "when an applicant's claim or defense and the main action have a question of law or fact in common."

Permissive intervention under Rule 24(b) is a matter within the sound discretion of the district court. *Orange County v. Air California*, 799 F.2d 535, 539 (9<sup>th</sup> Cir. 1986). Under Rule 24(b), the applicant for intervention must meet three threshold requirements: "(1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant's claims." *U.S. v. Washington*, *supra*, 86 F.3d at 1506. In exercising its discretion, the court is required to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

GCPBA has satisfied the requirements for permissive intervention. As explained in Part A.1, this motion is timely and intervention will not unduly delay or prejudice the adjudication of this case. GCPBA will comply with the deadlines set in the Case Management Order.

GCPBA's defenses and the main action have a question of law or fact in common. A common question of law or fact exists when the court rules on "issues [that are] central

to...[the applicant's] claim." *Venegas v. Skaggs*, 867 F.2d 527, 530 (9<sup>th</sup> Cir. 1989). Here GCPBA's defenses have a factual and legal basis in common with the defenses asserted by the Park Service, but also add the perspective of the private, non-commercial boater that is not presented by any other defendant.

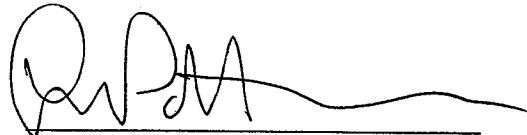
Finally, because federal district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States," "[i]n federal questions cases there should be no problem of jurisdiction with regard to an intervening defendant..." Charles A. Wright, et al., *7c Federal Practice and Procedure: Civil 2d* §1917 at 481 (2d ed. 1986).

Therefore, the Court should grant this motion to intervene, if not as a matter of right under Fed. R. Civ. P. 24(a), then as a matter within its discretion pursuant to Rule 24(b)(2).

### III. CONCLUSION

Consequently, GCPBA is entitled to intervene as a matter of right under Rule 24(a). In the alternative, GCPBA respectfully requests that this Court permit it to intervene under Rule 24(b).

Respectfully submitted this 24 day of July, 2006.



Lori Potter (CO Bar No. 12118)  
KAPLAN KIRSCH & ROCKWELL LLP  
1675 Broadway, Suite 2300  
Denver, CO 80202  
Telephone: 303-825-7000  
Facsimile: 303-825-7005

Attorneys for Intervenor Grand Canyon  
Private Boaters Association



Lori Potter (CO Bar No. 12118)  
KAPLAN KIRSCH & ROCKWELL LLP  
1675 Broadway, Suite 2300  
Denver, CO 80202  
Tel: 303-825-7000  
Attorneys for Grand Canyon Private Boaters Association

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA


River Runners for Wilderness, et al.	)	
	)	No. CV-06-0894 PCT-DGC
Plaintiffs,	)	
	)	DECLARATION FOR
v.	)	DAVID YEAMANS
	)	
Joseph F. Alston, et al.	)	
	)	
Defendants.	)	
_____	)	

## DECLARATION OF DAVID YEAMANS

I, David Yeamans, declare under penalty of perjury as follows:

1. I am president of Grand Canyon Private Boaters Association (GCPBA). GCPBA was established in 1996 to provide the self-outfitted boating public with an advocate for fair access for the non-commercial river runner in Grand Canyon. The organization's goal is to ensure the ability for all to obtain, on an equal and timely basis, an opportunity to experience a float trip through the Grand Canyon while protecting the resource.
2. In 2000, GCPBA challenged the National Park Service's failure to update its Colorado River Management Plan and to adjust the allocation of boating permits between commercial and private boaters in accordance with current demand, environmental conditions and other new information. *Grand Canyon Private Boaters Ass'n v. Arnberger*, No. CV-00-1277-PCT-PGR (D. Ariz. Oct. 2, 2000). GCPBA, NPS and Grand Canyon River Outfitters Association (GCROA) settled that case with an agreement by which NPS prepared the new Colorado River Management Plan (CRMP) and Environmental Impact Statement (EIS) now under challenge.
3. GCPBA submitted extensive comment on the Draft CRMP and EIS, including joint comments with GCROA on key issues such as the allocation of permits. NPS's Record of Decision selected the alternative advocated by GCPBA. The Record of Decision resulted in a significant increase in the number of permits available to private boaters and adjusted the private-commercial allocation to 50-50. These changes are presently being implemented.
4. Should the Park Service's Record of Decision be set aside and the matter remanded to the agency, GCPBA's interest in an increased allocation, which it has worked for ten years to achieve, may be impaired.

Dated: July 23, 2006

  
David Yeamans