No. 13-70366

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA ex rel. HENRY R. DARWIN, Director, Arizona Department of Environmental Quality,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator, United States Environmental Protection Agency,

Respondents.

Petition for Review
of U.S. Environmental Protection Agency Rulemaking
found at 77 Fed. Reg. 72,512 (Dec. 5, 2012)

MOTION TO INTERVENE BY NATIONAL PARKS CONSERVATION ASSOCIATION AND SIERRA CLUB

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INTRODUCTION

This case involves the U.S. Environmental Protection Agency's ("EPA's") plan to reduce excessive air pollution from three large coal-fired power plants in Arizona. EPA's regional haze plan requires installation of long-overdue, modern, and cost-effective pollution controls at Cholla Power Plant, Coronado Generating Station, and Apache Generating Station. EPA's plan will dramatically reduce air pollution and improve visibility in at least eighteen nearby national parks and wilderness areas. EPA's plan will also provide significant public health benefits to communities that live, work, and breathe the air around these power plants.

The State of Arizona's legal challenge, which lacks any basis under the Clean Air Act, threatens vital environmental and public health gains promised by EPA's action. Because Arizona seeks to overturn and weaken EPA's plan, and because the existing parties do not adequately represent their interests, National Parks Conservation Association and Sierra Club (collectively the "Conservation Organizations") respectfully move to intervene in support of EPA under Federal Rule of Appellate Procedure 15(d).

Petitioner State of Arizona takes no position on this motion to intervene and reserves the right to file a response after reviewing the motion. EPA takes no position on this motion.

BACKGROUND

I. The Clean Air Act's Regional Haze Requirements

Since our nation's founding, the United States has valued its diverse and stunning natural scenery. See, e.g., John Copeland Nagle, The Clean Air Act and Scenic Landscapes, 88 N.D. L. Rev. 571, 576 (2011). In what has been lauded as "America's best idea," Congress first set aside national parks in the 19th century to preserve and celebrate some of the nation's most spectacular scenery. Id. With the rapid industrialization of the nation, however, these remarkable scenic views have become increasingly marred by air pollution. Id. at 573. Today, air pollution is "perhaps the greatest threat to national parks," and pollution all too often degrades visibility in many of America's most iconic scenic areas. Id.

To reduce this threat to the national parks and other treasured public lands, Congress amended the Clean Air Act in 1977 to protect and improve visibility at national parks, wilderness areas, and other so-called "Class I" federal areas. 42 U.S.C. § 7491. Finding that Class I areas should enjoy the highest level of air quality, Congress set a national goal of preventing and remedying all human-caused visibility impairment at these areas. Id. § 7491(a)(1). Congress again amended the Clean Air Act in 1990 to further spur reductions of regional haze,

which obscures the scenic views at the nation's Class I areas. Id. § 7492.[1] The Act delegates implementation of the regional haze program to EPA. EPA's Regional Haze Rule sets a goal of achieving natural visibility conditions at every Class I area by 2064. 40 C.F.R. § 51.308(d)(1)(i)(B), (d)(1)(ii).

States are to achieve this national goal, in part, through the installation and operation of Best Available Retrofit Technology ("BART") controls at certain fossil fuel-fired power plants that were in existence in 1977 but were not in operation before 1962. 42 U.S.C. § 7491(b)(2)(A); 40 C.F.R. § 51.308(e). BART is defined as "an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction." 40 C.F.R. § 51.301; see also 42 U.S.C. § 7491(g)(2) (listing factors to consider when making BART determinations). BART is an essential component of the regional haze program because Congress largely grandfathered these antiquated sources into many of the Clean Air Act's requirements. See 70 Fed. Reg. 39,104, 39,111 (July 6, 2005). BART compels these older, disproportionately polluting sources to install up-to-date and cost-effective pollution controls.

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[1] Regional haze results from small particles in the atmosphere that impair a viewer's ability to see long distances, colors, and geologic formations. While some haze-causing particles result from natural processes, most result from geographically-dispersed anthropogenic sources of pollution. See 64 Fed. Reg. 35,714, 35,715 (July 1, 1999).

The Act's regional haze program establishes a national regulatory floor and provides states with the initial opportunity to develop regional haze state implementation plans ("SIPs") that are at least as stringent as this floor. 40 C.F.R. § 51.308. The program thus presents states with an unparalleled opportunity to protect and restore regional air quality by curbing visibility-impairing pollution from some of the nation's oldest and most polluting power plants and other sources. When a state's regional haze SIP fails to establish a program at least as stringent as the national floor, the Clean Air Act's cooperative federalism provisions require EPA to exercise federal oversight by disapproving the state plan and issuing a federal implementation plan ("FIP") in its place. 42 U.S.C. § 7410(c)(1); see also Mont. Sulphur & Chem. Co. v. EPA, 666 F.3d 1174, 1181 (9th Cir. 2012) (when a SIP fails to comply with the Clean Air Act, "EPA is empowered to step in and fill any deficiencies with a FIP").

II. EPA's Regional Haze Requirements For Cholla, Coronado, And Apache

In February 2011, Arizona submitted its regional haze SIP to EPA for review and approval. Arizona's SIP, however, failed to meet the Clean Air Act's basic requirements. In the first of three rulemakings on Arizona's regional haze plan, EPA disapproved many of the State's BART determinations for Cholla Power Plant, Coronado Generating Station, and Apache Generating Station. 77 Fed. Reg. 72,512 (Dec. 5, 2012) (amending 40 C.F.R. §§ 52.120, 52.145); 77 Fed.

Reg. 42,834 (July 20, 2012). EPA found that the Arizona SIP did little more than require the three power plants to continue using their existing weak pollution controls that are not the "best available retrofit technology" required by the Act. See 77 Fed. Reg. at 42,842–52. In place of the invalid SIP, EPA issued a FIP setting BART emissions limits that require the three coal plants to install and operate Selective Catalytic Reduction ("SCR"), which is the most effective pollution control technology for reducing nitrogen oxides pollution. 77 Fed. Reg. at 72,514–15. EPA's plan will cost-effectively reduce nitrogen oxides emissions by at least 22,700 tons per year and substantially improve visibility in at least 18 national parks and wilderness areas in Arizona and nearby states. Id. at 72,575.

A. The visibility benefits of EPA's plan

As EPA has recognized, Arizona contains a "wealth" of Class I areas that are "national treasures." 77 Fed. Reg. at 42,834. Pollution from Cholla, Coronado, and Apache mars the scenic views at twelve Class I areas in Arizona, including Grand Canyon, Petrified Forest, and Saguaro National Parks. Id. at 42,858, 42,861, 42,864. The Grand Canyon is the crown jewel of Arizona's Class I areas and one of the preeminent parks in the entire national park system. According to the National Park Service, the Grand Canyon's "scenic vistas [are] known throughout the world," and "[f]rom a scenic perspective alone it is unique

on the planet." Dkt. Item I-24, Ex. 2.[2] Recognizing both its intrinsic and tourism value, Congress and EPA have long sought to lessen visibility impairment at the Grand Canyon. See, e.g., 42 U.S.C. § 7492(f) (creating the Grand Canyon Visibility Transport Commission); Cent. Ariz. Water Conservation Dist. v. EPA, 990 F.2d 1531 (9th Cir. 1993) (upholding EPA's efforts to reduce emissions from the Navajo Generating Station).

Air pollution from Cholla, Coronado, and Apache significantly degrades air quality and decreases visibility at the Grand Canyon and the many other iconic national parks and wilderness areas in Arizona and nearby states. Visibility impairment is measured in deciviews (dv); the higher the dv value the worse the visibility impairment. See 40 C.F.R. § 51.301. A source causes visibility impairment if it is responsible for a 1.0 dv or greater visibility impact, and it generally contributes to visibility impairment if it is responsible for a 0.5 dv or greater impact. 40 C.F.R. Pt. 51, App. Y, § III.A.1. Visibility impairment from Cholla, Coronado, and Apache far exceeds these thresholds. For example, the units at Cholla subject to EPA's plan cause 7.8 dv of visibility impairment at Petrified Forest National Park, 6.55 dv of impairment at the Grand Canyon, and 2.5

[2] Because EPA has not yet filed the administrative record in this case, the Conservation Organizations cite to documents in EPA's rulemaking docket for Rule No. EPA-R09-OAR-2012-0021, which is available at www.regulations.gov. These documents are properly part of the administrative record. 42 U.S.C. § 7607(d)(4), (d)(7)(A).

dv or greater visibility impairment at 11 other Class I areas. Ariz. SIP App. D at 73–74 (located in Dkt. Folder B). Apache causes a 7.59 dv visibility impact at Chiricahua National Monument and a 5.22 dv impact at Saguaro National Park. Id. App. D at 49–50.

The three coal plants' cumulative visibility impacts are also inordinately large because of the high concentration of Class I areas in Arizona and nearby states. The Cholla units cause a staggeringly high 66.77 dv cumulative visibility impact at 13 Class I areas, which is among the highest cumulative visibility impacts of any power plant in the nation. Id. App. D at 73–74, App. E at pdf page 43. Coronado causes a more than 20 dv cumulative visibility impact at over 17 Class I areas. Id. App. D at 105. Apache causes a 31.66 dv cumulative visibility impact at 9 Class I areas. Id. App. D at 49–50.

EPA's plan will clean the air and improve the scenic views at the national parks and wilderness areas impacted by the Cholla, Coronado, and Apache coal plants. For example, EPA estimated its proposed plan would reduce Cholla's cumulative visibility impact by 7.21 dv, including a 1.34 dv improvement at Petrified Forest and a 1.06 dv improvement at the Grand Canyon. 77 Fed. Reg. at 42,861. EPA estimated its proposed plan would reduce Coronado's cumulative visibility impact by 3.07 dv. Id. at 42,864. At Apache, EPA's proposed plan would reduce the coal plant's cumulative visibility impact by 6.51 dv, including a

1.59 dv improvement at Chiricahua Wilderness, a 1.51 dv improvement at Chiricahua National Monument, and a 1.10 dv improvement at Galiuro Wilderness. Id. at 42,858. While EPA weakened the emissions limits for each of these three power plants in its final plan to provide "flexibility" and "extra margin[s] of compliance" to the plants' owners, EPA's final plan will still provide significant visibility benefits. See 77 Fed. Reg. at 72,514–15.

B. Public health, economic, and environmental benefits of EPA's plan

Investments in modern pollution controls at Cholla, Coronado, and Apache will also yield significant health, economic, and environmental benefits. The same pollutants that mar scenic views at national parks and wilderness areas—primarily nitrogen oxides, sulfur dioxide, and particulate matter—also cause significant health impacts. Emissions of these pollutants cause and worsen respiratory diseases and asthma attacks, aggravate heart disease, and cause premature death. Dkt. Item I-24, Ex. 5. The Clean Air Task Force estimates that emissions from the three coal plants collectively cause approximately 41 deaths, 63 heart attacks, and 747 asthma attacks annually. Dkt. Item I-24 at 6–7.

In addition, EPA's plan will result in substantial economic benefits that far outweigh the costs of investing in SCR. EPA has recognized that requiring antiquated power plants to invest in modern pollution controls is a job-creating mechanism that "support[s] local growth." 77 Fed. Reg. 57,864, 57,909 (Sept. 18,

2012) (EPA haze plan for Montana). Moreover, EPA's plan will improve air quality at national parks that annually draw millions of visitors from across the United States and around the world to Arizona. In 2010, over 4.3 million people visited the Grand Canyon, and this tourism supported over 6,800 jobs and resulted in over $428 million in spending. Dkt. Item I-24, Ex. 4. Over 1.4 million people visited Chiricahua National Monument and Petrified Forest and Saguaro National Parks in 2010; these visitors supported over 1,100 jobs and $74 million in spending. Id. National park visitors highly value scenic views and will cut park visits short if they perceive air quality to be degraded. Dkt. Item I-24, Ex. 11.

EPA's plan will also provide important environmental benefits. The pollution reductions required by the plan will reduce acid rain, ground-level ozone, and nitrogen deposition—all of which have adverse ecological impacts. Dkt. Item I-24, Exs. 12–16.

III. Movant Conservation Organizations

National Parks Conservation Association ("NPCA") is a national nonprofit organization, with approximately 358,000 members nationwide, dedicated to protecting and enhancing America's national parks for present and future generations. NPCA advocates for national parks, educates decision-makers and the public about the importance of preserving the parks, and works to strengthen and uphold the laws that protect the parks. NPCA has over 8,300 members in

Arizona that care deeply about air quality and protecting scenic vistas at national parks and other Class I areas in Arizona and nearby states.

Sierra Club is a national nonprofit organization with over 602,000 members dedicated to exploring, enjoying, and protecting wild places; and practicing and promoting the responsible use of the Earth's ecosystems and resources. Sierra Club has more than 11,400 members in Arizona that regularly visit and enjoy the magnificent scenery at the national parks and wilderness areas in Arizona and nearby states.

Both Conservation Organizations participated extensively in the administrative process leading to EPA's plan and submitted multiple comment letters and expert reports to EPA.

ARGUMENT

I. Legal Standard

A motion to intervene must be filed within thirty days of a petition for review and include a "concise statement of the interest of the moving party and the grounds for intervention." Fed. R. App. P. 15(d). While this Court has not directly spoken to the issue, when ruling on a motion to intervene under Appellate Rule 15(d) appellate courts generally apply the standards and policies of intervention in the district courts under Federal Rule of Civil Procedure 24. Sierra Club, Inc. v. EPA, 358 F.3d 516, 517–18 (7th Cir. 2004). A movant is entitled to intervene as

of right under Civil Rule 24(a) if: (1) the motion to intervene is timely; (2) the movant has a "significant protectable interest" in the subject matter of the litigation; (3) the movant's interest may be impaired by the litigation; and (4) the existing parties may not adequately represent the movant's interest. Citizens for Balanced Use v. Mont. Wilderness Ass'n, 647 F.3d 893, 897 (9th Cir. 2011).

This Court has stated that the requirements for intervention should be "broadly interpreted in favor of intervention." Id. Moreover, the Court recently affirmed its "liberal policy in favor of intervention [which] serves both efficient resolution of issues and broadened access to the courts." Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173, 1179 (9th Cir. 2011) (en banc) (quoting United States v. City of Los Angeles, 288 F.3d 391, 397–98 (9th Cir. 2002)).

II. The Conservation Organizations' Motion Is Timely.

The Conservation Organizations' Motion to Intervene is timely filed within thirty days of January 31, 2013, when Arizona filed its petition for review. See ECF No. 1-2; Fed. R. App. P. 15(d).

III. The Conservation Organizations Have A Substantial Interest In EPA's Regional Haze Plan And The Litigation.

EPA's regional haze plan secures significant reductions in air pollution. The Conservation Organizations' numerous aesthetic, recreational, health, and environmental interests in those reductions warrant intervention in this case. A movant seeking intervention has a sufficient interest in the litigation if "the interest

is protectable under some law, and . . . there is a relationship between the legally protected interest and the claims at issue." Wilderness Soc'y, 630 F.3d at 1179 (quoting Sierra Club v. EPA, 995 F.2d 1478, 1484 (9th Cir. 1993)). This Court has noted its "consistent approval" of intervention to protect environmental interests. Id. at 1179–80; see also Citizens for Balanced Use, 647 F.3d at 897–98 (movants had significant protectable interest in protecting wilderness).

Installing and operating SCR at Cholla, Coronado, and Apache will reduce nitrogen oxides pollution by at least 22,700 tons per year. 77 Fed. Reg. at 72,575. Members of the Conservation Organizations are directly harmed by Cholla, Coronado, and Apache's air pollution, and will benefit in numerous ways from the reduction in pollution resulting from EPA's plan.

First, the Conservation Organizations and their members have an interest in realizing the substantial visibility improvements at the many national parks and wilderness areas where visibility will improve under EPA's plan. See supra at 6–8. Preserving and protecting national parks and wilderness areas are key priorities for the Conservation Organizations. Carl Johnson Decl. ¶¶ 1, 3 (Ex. 1); Sandra Bahr Decl. ¶¶ 7–8 (Ex. 2); Bill Corcoran Decl. ¶¶ 4–7 (Ex. 3); Yolanda Andersen Decl. ¶¶ 4–6 (Ex. 4). To further these goals, the Conservation Organizations have actively participated in the development of regional haze plans in Arizona and

nearby states and worked extensively to preserve the pristine nature of the region's national parks and wilderness areas. Bahr Decl. ¶¶ 8–10; Corcoran Decl. ¶¶ 5–7.

In addition, members of the Conservation Organizations regularly visit the national parks and wilderness areas where visibility is impaired by Cholla, Coronado, and Apache's emissions. Johnson Decl. ¶ 5; Bahr Decl. ¶ 6; Corcoran Decl. ¶ 3; Andersen Decl. ¶ 8. The visibility improvements resulting from EPA's plan will enhance the members' use and enjoyment of these national parks and wilderness areas. For example, NPCA and Sierra Club member Carl Johnson is a professional nature photographer. On a recent visit to the Grand Canyon, the haze impaired Mr. Johnson's view beyond five miles and obscured the canyon's bottom. Johnson Decl. ¶ 6. Reducing haze-forming pollution will greatly improve Mr. Johnson's professional and personal use and enjoyment of impacted Class I areas. Id. In addition, Sierra Club member Sandra Bahr, who regularly visits the Grand Canyon and greatly values the park's scenic views, is often negatively impacted by haze that obscures those views. Bahr Decl. ¶ 6. Ms. Bahr's frequent visits to Petrified Forest National Park and Chiricahua National Monument are also less enjoyable when haze mars the scenic views. Id.

Second, EPA's plan will reduce the public health toll of Cholla, Coronado, and Apache's excess pollution on the Conservation Organizations' members. Air pollution from the three coal plants causes the Conservation Organizations'

members to suffer increased risks of premature death, respiratory diseases, and heart disease. See supra at 8. EPA's plan will reduce the coal plants' air pollution and result in cleaner air for the Conservation Organizations' members—and all Arizonans—to breathe. See, e.g., Johnson Decl. ¶¶ 7–8; Bahr Decl. ¶ 8; Corcoran Decl. ¶ 3.

Third, the Conservation Organizations and their members have an interest in the other environmental benefits of EPA's plan. Air pollution from Cholla, Coronado, and Apache causes acid rain, ground-level ozone, and nitrogen deposition. See supra at 9. By significantly reducing air pollution from the three coal plants, EPA's plan will reduce these other environmental impacts, and thus benefit the Conservation Organizations and their members. Bahr Decl. ¶¶ 5, 8; Corcoran Decl. ¶¶ 3, 5.

Finally, the Conservation Organizations have an interest in this litigation because they participated extensively in EPA's rulemaking process. See, e.g., Bahr Decl. ¶¶ 9–10. In 2011 and 2012, the Conservation Organizations submitted detailed comment letters to EPA on the Arizona haze plan. Dkt. Item I-24 & Ex. 1; 77 Fed. Reg. at 72,515–72 (responding to the Organizations' comments). The Conservation Organizations also commissioned and submitted to EPA three expert reports analyzing EPA's regional haze plan. Dkt. Item I-24, Attachs. 1–3; 77 Fed. Reg. at 72,521–23, 72,539–40, 72,556–57 (discussing expert reports). This Court

has repeatedly recognized that when public interest groups take an active role in administrative proceedings, those groups have a significant interest in defending the legality of the proceedings. See, e.g., Prete v. Bradbury, 438 F.3d 949, 954 (9th Cir. 2006); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1397–98 (9th Cir. 1995). Accordingly, the Conservation Organizations have a substantial interest in this litigation.

IV. The Litigation Threatens The Conservation Organizations' Interests.

This litigation undoubtedly threatens to impair the interests of the Conservation Organizations and their members because Arizona seeks to strike down or weaken EPA's regional haze requirements for Cholla, Coronado, and Apache. Intervention is appropriate when, as here, the litigation "may, as a practical matter, impair or impede [a movant's] ability to protect its interest." Citizens for Balanced Use, 647 F.3d at 897.

In comments to EPA, Arizona claimed EPA does not have legal authority to issue a federal regional haze plan for the three coal plants and that EPA's plan violated the Clean Air Act. Dkt. Item I-28. Arizona has also expressed its goals for this litigation in stark terms. In a press release announcing Arizona's lawsuit, Attorney General Tom Horne called EPA's plan "absurd" and "ludicrous," and he vowed to "do all [he] can to stop this bureaucratic overreach." Press Release, Ariz.

Attorney Gen. Tom Horne (Jan. 31, 2013) (Ex. 5). Arizona undoubtedly seeks to thwart the long-overdue clean-up of these coal plants through this litigation.

If the Court strikes down EPA's plan, the Conservation Organizations will lose the aesthetic, recreational, health, and environmental benefits described above. EPA's plan requires the three coal plants to install SCR and reduce nitrogen oxides emissions by at least 22,700 tons per year. If Arizona prevails, these pollution reductions will be lost. Such an outcome would allow increased haze at the many renowned national parks and wilderness areas that stand to benefit under EPA's plan, thus harming the Conservation Organizations and their members who visit these areas. Johnson Decl. ¶ 8; Bahr Decl. ¶ 11; Corcoran Decl. ¶ 8; Andersen Decl. ¶ 9. An unfavorable outcome in this case would further deprive the Conservation Organizations' members of the additional public health and environmental benefits of reduced pollution. Moreover, the Conservation Organizations' extensive efforts to secure a strong regional haze plan for the three coal plants would be nullified by an adverse determination in this case. <u>See</u> <u>supra</u> at 14. Each of these harms and setbacks are sufficient for intervention.

V. EPA Does Not Adequately Represent The Conservation Organizations' Interests.

The Conservation Organizations' interests are not adequately represented by EPA. The burden to show inadequate representation "is minimal and satisfied if the applicant can demonstrate that representation of its interests may be

inadequate." Citizens for Balanced Use, 647 F.3d at 898 (internal quotation marks omitted). Any presumption that the government adequately represents its citizens does not apply when the government and the party seeking intervention have "fundamentally differing points of view . . . on the litigation as a whole." Id. at 899. The government also does not adequately represent private interests when it "is required to represent a broader view than the more narrow, parochial interests" of the movants. Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1499 (9th Cir. 1995), abrogated by Wilderness Soc'y, 630 F.3d at 1180.

EPA does not adequately represent the Conservation Organizations' interests because the Organizations and the agency will likely make different arguments in defense of EPA's plan. Throughout the administrative process, the Conservation Organizations advocated for stronger and more protective emissions limits for the three coal plants than those ultimately required by EPA. Dkt. Item I-24 at 10–42. Rather than strengthen the regional haze emissions limits as requested by the Conservation Organizations, EPA weakened the proposed emissions limits in its final rule to provide "flexibility" and "extra margin[s] of compliance" to the plants' owners. See 77 Fed. Reg. at 72,514–15. Furthermore, while EPA may assert that its regional haze plan resulted from the proper exercise of its discretion, the Conservation Organizations will likely argue that SCR technology was required under the Clean Air Act and that EPA had discretion to issue far more

protective emissions limits given SCR's high performance capabilities. The government does not adequately represent a movant's interests when it may not be "capable and willing to make" all of a movant's arguments. Citizens for Balanced Use, 647 F.3d at 898.

The Conservation Organizations' interests are further misaligned with EPA's because the Organizations are focused on improving and protecting the environment, and have local members directly affected by EPA's plan. In contrast, the agency represents a broader spectrum of views—including private economic and business interests—that may substantially differ from those of the Conservation Organizations. Whether in litigation or potential settlement discussions, EPA may attempt to balance those diverse interests in a manner that places a lower priority on the Conservation Organizations' goals. This Court has recognized that in these circumstances, "the government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.'" Id. at 899 (quoting WildEarth Guardians v. U.S. Forest Serv., 573 F.3d 992, 996 (10th Cir. 2009)).

EPA does not adequately represent the Conservation Organizations' interests for the additional reason that the agency began this rulemaking only after the Organizations and other environmental groups sued EPA for its failure to act in a

timely manner. See 77 Fed. Reg. 75,704, 75,712 (Dec. 21, 2012); 77 Fed. Reg. at 42,839. In similar situations, this Court has doubted the government's ability to adequately represent the prospective intervenors and has granted intervention. See, e.g., Citizens for Balanced Use, 647 F.3d at 899–901; Idaho Farm Bureau Fed'n, 58 F.3d at 1398. Consequently, EPA cannot adequately represent the Conservation Organizations' interests in this case and the Organizations meet all the requirements to intervene in this litigation.[3]

VI. Courts Regularly Grant Intervention In Other Regional Haze Cases.

In litigation over EPA's regional haze plans for other states, this Court and others have regularly allowed the Conservation Organizations and other groups to intervene to defend EPA's haze plans from state and industry challenges.[4] Courts

[3] In addition to meeting the standards to intervene as of right under Civil Rule 24(a), the Conservation Organizations meet the requirements for permissive intervention under Civil Rule 24(b). Permissive intervention requires a common question of law or fact between the applicants' claim or defense and the main action. Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1108–09 (9th Cir. 2002), abrogated by Wilderness Soc'y, 630 F.3d at 1180. Permissive intervention is appropriate here because the Conservation Organizations intend to assert defenses of EPA's regional haze plan that "squarely respond" to Arizona's likely claims. See id. at 1111. In addition, the Conservation Organizations' intervention at this early stage of the litigation is timely, it would not prejudice the existing parties, and the Organizations' "intervention will contribute to the equitable resolution of this case." See id. & n.10.

[4] See, e.g., PPL Mont. LLC v. EPA, No. 12-73757 (9th Cir. filed Nov. 16, 2012) (NPCA, Sierra Club, and other environmental organization granted intervention); Nebraska v. EPA, No. 12-3084 (8th Cir. filed Sept. 4, 2012) (NPCA and Sierra Club granted intervention); Oklahoma v. EPA, No. 12-9526 (10th Cir. filed Feb. 24, 2012) (Sierra Club granted intervention); Pub. Serv. Co. v. EPA, No.

have also regularly granted intervention to states and industry groups in environmental challenges to EPA haze plans.[5] The Conservation Organizations' intervention request is similarly routine and it raises no novel issues of fact or law that distinguishes it from these successful requests for intervention.

CONCLUSION

For the foregoing reasons, NPCA and Sierra Club respectfully request the Court to grant their motion to intervene in support of EPA.

Respectfully submitted March 4, 2013,

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11-9557 (10th Cir. filed Sept. 16, 2011) (NPCA, Sierra Club, and other environmental organizations granted intervention).

[5] See, e.g., NPCA v. EPA, No. 12-73710 (9th Cir. filed Nov. 14, 2012) (PPL Montana granted intervention); Moapa Band of Paiute Indians v. EPA, No. 12-73388 (9th Cir. filed Oct. 19, 2012) (State of Nevada and Nevada Power Company granted intervention); NPCA v. EPA, No. 12-3085 (8th Cir. filed Sept. 4, 2012) (State of Nebraska and Nebraska Public Power District granted intervention); NPCA v. EPA, No. 12-2331 (8th Cir. filed June 5, 2012) (State of North Dakota and multiple electric utilities granted intervention).

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Attorneys for National Parks Conservation Association and Sierra Club

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Intervention Movants National Parks Conservation Association and Sierra Club are nonprofit conservation organizations. Neither of the organizations have a parent corporation and no publicly held corporation owns a ten percent or greater interest in either organization.

s/ Michael A. Hiatt
Michael A. Hiatt

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2013, I electronically filed the foregoing **MOTION TO INTERVENE** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that service will be accomplished by the appellate CM/ECF system on the following:

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