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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.,

Plaintiffs,

v.

The **UNITED STATES OF AMERICA**; et al.,

Defendants.

Case No. 6:15-cv-01517-AA

Unopposed Motion for Leave to File *Amicus Curiae* Brief

Without Oral Argument

UNOPPOSED MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Natural Resource Defense Council (NRDC) respectfully requests permission to file the attached amicus curiae brief in support of Plaintiffs in this case. Pursuant to Local Rule 7-1(a), the undersigned hereby certifies that a good faith effort was made to confer with counsel for Plaintiffs, Federal Defendants, and proposed Intervenors on this motion. Federal Defendants take no position on the motion, proposed Intervenor-Defendants do not oppose the motion, and Plaintiffs support the motion. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the amicus curiae and their counsel made any monetary contribution.

Federal district courts possess the inherent authority to accept amicus briefs. *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008) ("District courts have inherent authority to appoint or deny *amici* which is derived from Rule 29 of the Federal Rules of Appellate Procedure." (quoting *Smith v. Chrysler Fin. Co.*, No. 00-CV-6003, 2003 WL 328719, at *8 (D.N.J. Jan. 15, 2003))); *see Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *United States v. Davis*, 180 F. Supp. 2d 797, 800 (E.D. La. 2001) (noting that district courts have "inherent authority" to appoint an amicus curiae and have generally "exercised great liberality in permitting" the filing of amicus briefs (quoting *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990))). The role of an amicus brief is to assist the court in "cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Newark Branch, N.A.A.C.P. v. Town of Harrison*, 940 F. 2d 792, 808 (3d Cir. 1991) (quoting *Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974)). "Even when a party is

very well represented, an amicus may provide important assistance to the court." *Jamul Action Comm. v. Stevens*, No. 13-cv-01920, 2014 WL 3853148, at *5 (E.D. Cal. Aug. 5, 2014) (quoting *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132 (3d Cir. 2002)). "District courts frequently welcome amicus briefs from nonparties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Safari Club Int'l v. Harris*, No. 14-cv-01856, 2015 WL 1255491, at *1 (E.D. Cal. Jan. 14, 2015) (internal quotation marks and citation omitted). This Court has granted similar motions in this case. *See* ECF 55, 70, 92.

NRDC is a nonprofit public health and environmental organization with more than 400,000 members across the United States. NRDC advocates for a just transition to a clean-energy economy. As part of that work, NRDC regularly litigates in federal courts. NRDC regularly seeks to intervene, as both plaintiff and defendant, in litigation involving the federal government. NRDC therefore has an interest in maintaining sensible rules governing intervention under Rule 24 of the Federal Rules of Civil Procedure. NRDC submits this brief to aid the Court in resolving the States' motion to intervene. ECF 475.

DATED this 13th day of July, 2021

Respectfully submitted,

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IDENTITY AND INTEREST OF AMICUS

The Natural Resources Defense Council (NRDC) is a nonprofit public health and environmental organization with more than 400,000 members across the United States. NRDC advocates for a just transition to a clean-energy economy. As part of that work, NRDC regularly litigates in federal courts. NRDC also regularly seeks to intervene, as both plaintiff and defendant, in litigation involving the federal government. NRDC therefore has an interest both in the subject of this action and in maintaining sensible rules governing intervention under Rule 24 of the Federal Rules of Civil Procedure. NRDC submits this brief to aid the Court in resolving the States' motion to intervene.

ARGUMENT

The States' Intervention Motion Should Be Denied Without Prejudice

The States seek to intervene for three limited purposes: (1) opposing Plaintiffs' motion for leave to amend their complaint; (2) participating in settlement negotiations, and (3) objecting to any proposed settlement "(if necessary)." States' Mot. Limited Intervention (States' Mot.) 1, ECF 475. None of these three purposes justifies intervention at this time. Indeed, as explained below, only the third purpose could potentially justify intervention here, but as the States' own motion makes clear, there is no way to know now whether such intervention will ever be "necessary."

The States' proposed brief in opposition to Plaintiffs' motion to amend—concededly—adds nothing to the Federal Defendants' opposition. *See id.* 1 n.2; ECF 475-1. The proposed opposition is a single page that simply incorporates by reference the Federal Defendants' opposition. *See* ECF 475-1. And the federal government vigorously defended that opposition at

oral argument. ECF 504. Opposing the motion to amend, therefore, is plainly insufficient to support the States' request for intervention.

The States' only remaining asserted purposes for intervention are participating in settlement negotiations and objecting to any possible settlement. The States identify no case or authority supporting their purported right to intervene to participate in settlement negotiations, and the bedrock principle that parties may "settl[e] their own disputes" cuts against allowing intervention for that novel purpose. *Loc. No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986). And with respect to the States' desire to object to a possible settlement, the more common and appropriate practice would be to consider the States' intervention request if and when the parties seek entry of a consent decree. That is because, as the States concede, it is speculative at this stage whether such intervention will be "necessary." States' Mot. 1. There are three possible ways in which the parties' settlement discussions might be resolved. This inherent uncertainty means the States' request to intervene to object to a possible settlement is, at best, premature.

First, Plaintiffs and Federal Defendants may fail to reach any settlement. If the parties are unable to reach a settlement, the States' interests will have been preserved and their intervention to oppose a settlement would be entirely unnecessary.

Second, the parties might reach an out-of-court settlement. But in that case, there will be nothing for this Court to do, and thus nothing for any intervenor to object to in this Court. That a nonparty may not intervene to prevent parties from settling out of court follows *a fortiori* from the well-established rule that an intervenor "does not have the right to prevent other parties from entering into a settlement agreement." *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 806-07 (9th Cir.), *modified*, 307 F.3d 943 (9th Cir. 2002), and *certified question answered sub nom. S. Cal.*

Edison Co. v. Peevey, 74 P.3d 795 (Cal. 2003). As the Supreme Court has explained, "[i]t has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes and thereby withdrawing from litigation." *Int'l Ass'n of Firefighters*, 478 U.S. at 528-29.

Third, the parties might reach an agreement and ask the Court to enter a consent decree. At that time, it is possible that the States will have an interest sufficient to object to any such proposed consent decree. But that will depend on the proposed decree's contents, which are unknown (and unknowable) at this time. When parties propose a consent decree, courts look to the relief in the decree to determine whether a would-be intervenor has an interest justifying intervention. *See Cronin v. Browner*, 898 F. Supp. 1052, 1061-64 (S.D.N.Y. 1995); *Alt. Rsch. & Dev. Found. v. Veneman*, 262 F.3d 406, 411 (D.C. Cir. 2001).

Many agreements that the parties in this case could seek to enter as consent decrees might not impair the States' protectable interests. For example, the proposed decree might simply require that a federal agency propose and consider taking some action on a particular timetable (e.g., to consider making certain lands unavailable for mineral extraction by a certain date), without dictating the substance of whatever final action may result. Such is the nature of most settlement agreements with the federal government. Ordinarily, the Administrative Procedure Act will prohibit the Department of Justice from committing the government by settlement agreement to issue particular rules that, per the APA, must be issued through notice and comment. *See* Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion, 23 Op. O.L.C. 126, 163-64, 167 (June 15, 1999); *see also Conservation Nw. v. Sherman*, 715 F.3d 1181, 1187 (9th Cir. 2013) (explaining that a consent

decree may not "permanently and substantially amend[] an agency rule that would have otherwise been subject to statutory rulemaking procedures").[1]

The States express concern that a settlement will somehow "deprive the States and their people of their rightful place in our constitutional order." States' Mot. 4. But the Department of Justice recognizes that the Attorney General may not "enter into a decree that would require unconstitutional governmental action in violation of the rights of private parties or the structural prerogatives of the states." 23 Op. O.L.C. at 140. Any fear the States may have that the federal government will agree to take unlawful action is thus purely speculative. *See Exec. Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 762 (4th Cir. 1993) ("[the settlement power] stops at the walls of illegality"); *Nat'l Audubon Soc'y, Inc. v. Watt*, 678 F.2d 299, 308 n.18 (D.C. Cir. 1982). The government may, however, agree to terms that "provide[] broader relief than the court could have ordered in the absence of consent." 23 Op. O.L.C. at 150; *see Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 389 (1992).

A settlement here might commit the federal government to taking some undefined future action, which might affect the States—and which they would then be free to challenge. However, under existing caselaw, the States would not be entitled to intervene in this Court to oppose such a decree. *Cf. Blake v. Pallan*, 554 F.2d 947, 954 (9th Cir. 1977) (denying intervention where movant could defend interests in subsequent litigation). In a similar context, where plaintiffs seek to compel a federal agency's compliance with a deadline to regulate, parties that might be affected by the resulting regulation may not intervene. *See Earth Island Inst. v. Wheeler*, 464 F.

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[1] Nevertheless, the government may agree (by private settlement or court-ordered decree) to limit its own discretion—for example, by adopting specific procedures to govern future rulemakings. Courts may enforce such limits. *See Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1127-29 (D.C. Cir. 1983).

Supp. 3d 1138, 1146 (N.D. Cal. 2020); *Sierra Club v. McCarthy*, 308 F.R.D. 9, 13 (D.D.C. 2015); *cf. In re Idaho Conservation League*, 811 F.3d 502, 514-15 (D.C. Cir. 2016) (denying intervention motion for lack of standing—and, in the alternative, for lack of impairment to interests—where would-be intervenor sought to object to consent decree establishing EPA deadline to regulate); *Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1326 (D.C. Cir. 2013) (same, on standing grounds only). In other words, parties potentially harmed by a resulting action must wait to see the substance of the action—they cannot intervene in the deadline suit. *Cf. California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006) ("Even if this lawsuit would *affect* the proposed intervenors' interests, their interests might not be *impaired* if they have 'other means' to protect them." (quoting *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004)). The same logic would apply here.

To be sure, it is possible that a proposed consent decree might include a provision that would give the States a legitimate reason to intervene to object to the decree at that time. But the Court can ensure that the States have notice of any such consent decree. *Cf.* 28 C.F.R. § 50.7 (DOJ policy to give opportunity for comment to nonparties before entry of any consent decree in "an action to enjoin discharges of pollutants"); 42 U.S.C. § 7413(g) (requiring publication in the Federal Register at least 30 days prior to filing of consent decree resolving claims under Clean Air Act).[2] The Court, and the parties, would then be in a much better position to assess whether the consent decree affects the States, or whether it merely requires the Federal Defendants to take

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[2] The Department of Justice Environment & Natural Resources Division maintains a website where it publishes "consent decrees that the Division has recently lodged in the federal district courts and on which the Division is currently accepting public comment." U.S. Dep't of Justice, Envt. & Nat. Res. Div., Proposed Consent Decrees, https://www.justice.gov/enrd/consent-decrees.

some undefined action at a later date. In the event a proposed consent decree may affect the States' interests, the Court could entertain a motion to intervene then.

Deferring intervention until that date does not prejudice the States; rather, it would allow the States "to air their views so that a court may consider them before making potentially adverse decisions." *Brumfield v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014); *see* States' Reply 4, ECF 506 (claiming they must be allowed to intervene to participate in settlement discussions because Federal Defendants may not "'make all the intervenors' arguments' in settlement negotiations" (quoting *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001)). But the mere possibility that a decree might affect the States does not give them a basis to intervene now, while it is unknown whether a consent decree will be proposed, much less what the contents of that consent decree might be.[3] If a proposed consent decree did "prejudice the rights" of the States or impose on them "duties or obligations," the States might have a valid basis to oppose entry of the decree. *Sierra Club v. North Dakota*, 868 F.3d 1062, 1067 (9th Cir. 2017) (citation omitted). But so long as "the [c]onsent [d]ecree 'does not bind [the States] to do or not to do anything,' 'imposes no legal duties or obligations on th[em] at all,' and 'does not purport to resolve any claims the[y] might have,' the States cannot block the [c]onsent [d]ecree merely by

[3] Even if the States were allowed to intervene at that later time, their rights would be limited; the States could present evidence and have their objections heard, but they could not unilaterally prevent entry of a consent decree between Plaintiffs and the government. *See Int'l Ass'n of Firefighters*, 478 U.S. at 529; *see, e.g.*, *NRDC v. Whitman*, No. C 99-03701 WHA, 2001 WL 1221774, at *14 (N.D. Cal. Sept. 24, 2001) (applying *Firefighters* to enter consent decree over intervenors' objections after "ample time for the public and the intervenors to respond to the terms of the proposed consent decree"), *appeal dismissed sub nom. NRDC v. EPA*, 35 F. App'x 590 (9th Cir. 2002). And if the Court were to find that the States lack an interest to intervene to challenge a proposed consent decree, the Court could instead allow them to voice their concerns as *amici*. *See, e.g.*, *Am. Coll. of Obstetricians & Gynecologists v. U.S. Food & Drug Admin.*, 467 F. Supp. 3d 282, 292-93 (D. Md. 2020) (denying states' intervention motion but accepting states' proposed brief as amicus brief), *appeal filed,* No. 20-1784 (4th Cir. July 17, 2020).

withholding their consent." *Id.* at 1069 (third, fourth, and fifth alterations in original) (quoting *Int'l Ass'n of Firefighters*, 478 U.S. at 529-30).

CONCLUSION

The States' motion to intervene should be denied without prejudice. The States should receive notice if the parties propose a consent decree and can decide then whether to seek intervention.

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