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18
19 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA

20 STATE OF NEVADA,
21
22 Plaintiff,

23 vs.

24 UNITED STATES; UNITED STATES
DEPARTMENT OF ENERGY; RICK PERRY,
in his official capacity as Secretary of Energy;
25 NATIONAL NUCLEAR SECURITY
ADMINISTRATION; and LISA E.
26 GORDON-HAGERTY, in her official capacity as
Administrator of the National Nuclear Security
27 Administration and Undersecretary of Nuclear
Security,

28 Defendants

Case 3:18-CV-00569-MMD-CBC

**STATE OF SOUTH CAROLINA'S
EMERGENCY MOTION TO
INTERVENE
AND MEMORANDUM OF
POINTS
AND AUTHORITIES IN SUPPORT
THEREOF**

1 COMES NOW the State of South Carolina (South Carolina), by and through its counsel,
2 and respectfully moves to intervene in this action as a Defendant. In support, South Carolina
3 states as follows: (1) South Carolina is entitled to intervention as of right in this action pursuant
4 to Fed.R.Civ.P. 24(a) because its interests will be affected by the disposition of this litigation and
5 are not adequately protected by any other party; and (2) South Carolina has a claim or defense
6 that shares with this action a common question of law or fact such that intervention should be
7 allowed pursuant to Fed.R.Civ.P. 24(b).
8

9 The underlying facts and legal basis for this Emergency Motion are more fully set forth
10 in the following Memorandum of Points and Authorities. This Emergency Motion is made
11 pursuant to LR 7-4 and is supported by the Declaration of Randolph R. Lowell, attached hereto
12 as **Exhibit A**. In accordance with Rule 24(c), FRCP, South Carolina's proposed motion to
13 transfer venue is attached hereto as **Exhibit B**.
14

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. INTRODUCTION**

17 Plaintiff alleges the Federal Defendants have violated the National Environmental Policy
18 Act (NEPA), 42 U.S.C.A. §§ 4321, *et seq.*, implementing regulations promulgated by the
19 Council on Environmental Quality (CEQ), and United States Department of Energy (DOE)
20 NEPA regulations in issuing a Supplement Analysis for its Final Complex Supplemental
21 Programmatic Environmental Impact Statement, effective August 24, 2018. The relief requested
22 by Plaintiff for the alleged violation is a declaration that the Federal Defendants actions have
23 violated NEPA, as well as CEQ and DOE regulations, and an order enjoining them from
24 shipping any plutonium from the Savannah River Site (SRS), located in South Carolina, to
25 DOE's Nevada National Security Site (NNSS), which DOE is undertaking pursuant to a court
26 order from the District of South Carolina.
27
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1 On December 20, 2017, the U.S. District Court for the District of South Carolina issued
2 an Injunction Order instructing the Federal Defendants that:

3 Within two years from entry of this injunctive order (or at the latest
4 by 1/1/2020), the Secretary of Energy shall, consistent with the
5 National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321
6 *et seq.*, and other applicable laws, remove from the State of South
7 Carolina, for storage or disposal elsewhere, not less than one
metric ton of defense plutonium or defense plutonium materials, as
defined by 50 U.S.C. § 2566.

8 *United States*, 2017 WL 7691885, *5 (D.S.C. Dec. 20, 2017). This Injunction Order was issued
9 to enforce the State of South Carolina’s statutory rights, set forth at 50 U.S.C.A. § 2566(c), to the
10 mandatory removal of not less than one metric ton of defense plutonium or defense plutonium
11 materials from the state, for storage or removal elsewhere. The South Carolina District Court
12 further retained continuing jurisdiction over the matter to ensure compliance with the order for
13 removal. *Id.*

15 Section 2566(c) could hardly be clearer in its deadlines, including
16 for the removal of defense plutonium from South Carolina if the
17 MOX production objective is not achieved. Moreover, those
18 deadlines reflect the Secretary of Energy’s own proposal,
19 following congressionally mandated negotiations with South
20 Carolina. The statutory deadlines promote one of the purposes in
21 the initial NDAA authorizing the MOX project: ensuring an
22 expeditious disposal of the defense plutonium in South Carolina,
either by MOX processing or by removal. Importantly, the two
most recently enacted NDAs did not modify the deadlines fixed
by § 2566(c). They instead reiterated Congress’s desire that the
plutonium transferred to the SRS be either processed or removed
from the State.

23 *South Carolina v. United States*, 907 F.3d 742, 762-63 (4th Cir. 2018) (internal citations
24 omitted). Both the text and the history of § 2566(c) support the Injunction Order’s two-year
25 timeframe for removal of defense plutonium. *Id.* at 763.

26 The Injunction Order provides that the District of South Carolina has retained jurisdiction
27 to enforce its terms and to make such further orders as may be necessary or appropriate. *South*
28

1 *Carolina v. United States*, 2017 WL 7691885 at *5. The terms of the Injunction Order further
2 required the Federal Defendants to submit regular status reports, with each report required to set
3 forth in detail the status and substance of any NEPA review and “any impediments to
4 Defendants’ compliance with this injunctive order and any steps Defendants are taking to
5 address such impediment(s).” *Id.* at *6. The Fourth Circuit upheld the Injunction Order on
6 October 26, 2018. *South Carolina v. United States*, 907 F.3d 742 (4th Cir. 2018).

8 II. ARGUMENT

9 A. South Carolina is entitled to intervene as of right because its interests will be 10 affected by the disposition of this litigation and are not adequately protected by 11 any other party

12 A party seeking to intervene as of right pursuant to Fed.R.Civ.P. 24(a) must: (1) timely
13 move to intervene; (2) demonstrate a significantly protectable interest relating to the property or
14 transaction that is the subject of the action; (3) be situated such that the disposition of the action
15 may impair or impede the party’s ability to protect that interest; and (4) establish that its interest
16 will not be adequately represented by existing parties. *Donnelly v. Glickman*, 159 F.3d 405, 409
17 (9th Cir. 1998). While an applicant for intervention has the burden to show that these four
18 elements are met, the requirements are broadly interpreted in favor of intervention. *Citizens for*
19 *Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 897 (9th Cir. 2011) (citing *Prete v.*
20 *Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006)).

21 A liberal policy in favor of intervention serves both efficient
22 resolution of issues and broadened access to the courts. By
23 allowing parties with a practical interest in the outcome of a
24 particular case to intervene, we often prevent or simplify future
25 litigation involving related issues; at the same time, we allow an
26 additional interested party to express its views before the court.

27 *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002) (quotations omitted).

28 The State of South Carolina meets this standard and therefore must be permitted to intervene in
this matter.

1 **i. Intervention is timely.**

2 South Carolina’s request for intervention is timely as Plaintiff’s complaint and motion for
3 preliminary injunction were only recently filed. Timeliness is a flexible concept and its
4 determination is left to the court’s discretion. *United States v. Alisal Water Corp.*, 370 F.3d 915,
5 921 (9th Cir. 2004). Three factors are weighed in reaching a timeliness determination: (1) the
6 stage of the proceeding at which intervention is sought; (2) the prejudice to the other parties; and
7 (3) the reasons for and length of any delay. *Id.* This motion is being made at an early stage of the
8 proceedings as Plaintiff filed its complaint and motion for preliminary injunction on November
9 30, 2018. No answer has been filed in this case and no discovery has taken place. Further, no
10 prejudice will result from South Carolina’s intervention in this matter, as it will not inject new
11 substantive legal issues into this lawsuit. *Id.* at 922. As such, South Carolina’s request for
12 intervention has been timely made.
13
14

15 **ii. South Carolina has significantly protectable interests relating to the**
16 **property or transaction that is the subject of this action.**

17 The State of South Carolina has significantly protectable interests in enforcement of the
18 District of South Carolina’s Injunction Order and in seeing that the Federal Defendants meet
19 their *statutory* obligation to remove one metric ton of defense plutonium and defense plutonium
20 materials from the state. *See* 50 U.S.C.A. § 2566. An applicant has a significant protectable
21 interest in an action if the interest is protectable under some law and there is a relationship
22 between the legally protected interest and the claims at issue. *Donnelly*, 159 F.3d at 409. The
23 relationship requirement is met “if the resolution of the plaintiff’s claims actually will affect the
24 applicant.” *Id.* at 410. There is no bright-line rule to the “interest” test. Rather, “[w]hether an
25 applicant for intervention demonstrates a sufficient interest in an action is a ‘practical, threshold
26 inquiry,’ and ‘[n]o specific legal or equitable interest need be established.’” *Nw. Forest Res.*
27 *Council v. Blickman*, 82 F.3d 825, 837 (9th Cir. 1996) (quoting *Greene v. United States*, 996
28

1 F.2d 973, 976 (9th Cir. 1993)). When injunctive relief is sought that will have “direct,
2 immediate, and harmful effects upon a third party’s legally protectable interests, that party
3 satisfies the ‘interest test’ of Fed. R. Civ. P. 24(a)(2).” *Forest Conservation Council v. U.S.*
4 *Forest Serv.*, 66 F.3d 1489, 1494 (9th Cir. 1995).

5
6 South Carolina clearly meets this interest test. South Carolina has an interest in the
7 removal of plutonium from the state that is legally protected by both Section 2566(c) and the
8 Injunction Order. Nevada has sought injunctive relief to prevent the Federal Defendants from
9 removing the weapons grade plutonium from South Carolina. The Federal Defendants are
10 removing the plutonium from the state pursuant to the Injunction Order, which was procured
11 after years of protracted litigation between South Carolina and the Federal Defendants
12 concerning the Federal Defendants’ failure to meet their statutory obligations. Because an
13 injunction in this matter would impair the Federal Defendants’ ability to comply with the
14 Injunction Order, the injunctive relief sought will have direct, immediate, and harmful effects
15 upon South Carolina’s legally protected interests. South Carolina therefore meets the interest test
16 for intervention as of right.

17
18 **iii. Disposition of this action will impair South Carolina’s ability to protect**
19 **its interests.**

20 South Carolina cannot be excluded from this controversy without impairing its ability to
21 protect its significant interests. The question of whether protectable interests will be impaired by
22 litigation must be put in practical terms rather than in legal terms. *Akina v. Hawaii*, 835 F.3d
23 1003, 1012 (9th Cir. 2016) (internal quotation omitted). The Ninth Circuit follows the guidance
24 of the Rule 24 advisory committee notes that provide: “[i]f an absentee would be substantially
25 affected in a practical sense by the determination made in an action, he should, as a general rule,
26 be entitled to intervene.” *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 822
27 (9th Cir. 2001) (quoting Fed.R.Civ.P. 24 advisory committee note to 1966 amendment). South
28

1 Carolina's interest in the prompt removal of plutonium from the state in accordance with Section
2 2566(c) and the Injunction Order would clearly be impaired by an injunction precluding the
3 Federal Defendants from proceeding with their current plans for removal from the SRS. The
4 Injunction Order requires the Federal Defendants to remove one metric ton of plutonium from
5 the SRS no later than January 1, 2020. Clearly, an order enjoining them from proceeding with
6 their current removal plans would have a practical effect on South Carolina's rights under the
7 Injunction Order. As such, South Carolina's interests would be impaired by disposition of this
8 action in its absence.
9

10 **iv. South Carolina's interests will not be adequately represented by the**
11 **Parties.**

12 South Carolina's interests will not be adequately represented by the parties to this action.
13 The burden of showing inadequacy of representation is minimal and satisfied if the applicant can
14 demonstrate that representation of its interests may be inadequate. *Arakaki v. Cayetano*, 324 F.3d
15 1078, 1086 (9th Cir. 2003) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10
16 (1972)). The following three factors are to be examined in evaluating the adequacy of
17 representation: (1) whether the interest of a present party is such that it will undoubtedly make all
18 of a proposed intervenor's arguments; (2) whether the present party is capable and willing to
19 make such arguments; and (3) whether a proposed intervenor would offer any necessary
20 elements to the proceeding that the other parties would neglect. *Id.* Any doubt as to whether the
21 existing parties will adequately represent an intervenor should be resolved in favor of
22 intervention. *California Dump Truck Owners Ass'n v. Nichols*, 275 F.R.D. 303, 307 (E.D. Cal.
23 2011) (citing *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216
24 (11th Cir. 1993)).
25
26

27 South Carolina has a distinct sovereign interest from that of Nevada and the Federal
28 Defendants. When a state is a party to a suit involving a matter of sovereign interest, it is

1 presumed to represent the interests of its citizens. *Environmental Defense Fund, Inc. v.*
2 *Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979); *Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3d
3 Cir. 1976). South Carolina has a sovereign interest in protecting its territory and its citizens'
4 health and well-being, and in preventing the potential hazards that arise by further prolonging the
5 Federal Defendants' storage of defense grade plutonium at the SRS. It also has a sovereign
6 interest in enforcing its rights under Section 2566(c) and the Injunction Order. Given these
7 unique sovereign interests, South Carolina's interests are distinct from and will not be adequately
8 represented by the existing parties. Further, in light of the Federal Defendants' steadfast refusal
9 to comply with its statutory directive to promptly remove plutonium from the SRS, thus
10 necessitating a federal court order requiring it to do so, it is clear that the Federal Defendants are
11 neither capable of making nor willing to make the arguments necessary to protect South
12 Carolina's interests in this matter.
13
14

15 South Carolina has timely moved to intervene in this matter to protect its significant
16 interests, which will be severely impaired if this matter proceeds in its absence. Because no other
17 party will adequately protect these unique and significant interests, Fed.R.Civ.P. 24(a) demands
18 that South Carolina be allowed to intervene in this action as of right.
19

20 **B. Permissive intervention by South Carolina is warranted based on shared
common facts, law, and interests.**

21 In the alternative, South Carolina should be permitted to intervene in this action pursuant
22 to Fed.R.Civ.P. 24(b). An applicant for permissive intervention must establish three threshold
23 requirements: (1) an independent ground for jurisdiction; (2) the motion is timely; and (3) the
24 applicant's claim or defense and the main action have a question of law or fact in common.
25 *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011) (citing
26 *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992)). However, the
27
28

1 independent jurisdictional grounds requirement does not apply to proposed intervenors in
2 federal-question cases when the proposed intervenor is not raising new claims. *Id.* at 844.

3 Once the court determines that the initial conditions for intervention under Fed.R.Civ.P.
4 24(b) are met, some factors a court may consider in deciding to permit jurisdiction include: “the
5 nature and extent of the intervenors’ interest, their standing to raise relevant legal issues, the
6 nature and extent of the intervenors’ interest, their standing to raise relevant legal issues, the
7 legal position they seek to advance, and its probable relation to the merits of the case.” *Spangler*
8 *v. Pasadena City Bd. of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977). In exercising its discretion, a
9 court must consider whether intervention will unduly delay the main action or will unfairly
10 prejudice the existing parties. *Donnelly v. Glickman*, 159 F.3d at 412 (citing Fed.R.Civ.P.
11 24(b)(2); *Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989), *aff’d on other grounds*, *Venegas*
12 *v. Mitchell*, 495 U.S. 82 (1990)).

13 Because this Court is exercising federal-question jurisdiction and South Carolina does not
14 seek to bring any counterclaims or cross-claims, it is not required to make any showing that its
15 intervention is supported by independent jurisdictional grounds. In addition, South Carolina has
16 made this motion to intervene in a timely fashion. As discussed in Section II.A.i., *supra*, this
17 action was initiated on November 30, 2018 and South Carolina has filed this motion at the
18 earliest possible stage of the proceedings. As to the final factor, there are clear questions of law
19 and fact in common between Nevada’s action to enjoin the Federal Defendants’ proposed actions
20 and South Carolina’s opposition to the injunction. There are also clear questions of law and fact
21 in common between South Carolina’s right to enforcement of the Injunction Order – which
22 requires both removal and NEPA compliance – and Nevada’s action to enjoin removal and
23 require NEPA compliance. *See, e.g.*, ECF #1, Nevada Compl. ¶¶2, 17-22 (discussing the
24 Injunction Order), Relief Requested C (seeking to enjoin the shipment of plutonium from SRS to
25 NNSS).

1 Furthermore, intervention will neither unduly delay this action nor unfairly prejudice the
2 parties. South Carolina seeks an expedient resolution to this dispute, as the Injunction Order
3 requires the Federal Defendants to complete the required removal by January 1, 2020. In
4 addition, South Carolina is only seeking to protect its rights under the Injunction Order – it is not
5 seeking to bring any claims against either existing party, and its participation will be limited to
6 protecting its existing rights and interests.¹
7

8 Finally, this Court should exercise its discretion to permit intervention because South
9 Carolina has a unique, significant interest that will be seriously affected if this action proceeds
10 without it. As previously discussed in Section II.A.ii, *supra*, South Carolina’s interests are
11 significant, as they entail both its legal interests as well as its sovereign interests. The South
12 Carolina District issued the Injunction Order requiring removal based on South Carolina’s
13 statutory right under Section 2566(c) to have the plutonium removed from the SRS. Further,
14 South Carolina has a sovereign interest in protecting its citizens and territory. Neither Nevada
15 nor the Federal Defendants are in a position to adequately protect these unique and significant
16 interests. Further, in light of the Federal Defendants prior efforts to delay removing the
17 plutonium from the SRS, it is clear that they would not be able to adequately protect South
18 Carolina’s interests in defending against the requested injunction.
19

20
21 South Carolina has timely moved to intervene in this action in defense of the Federal
22 Defendants’ proposed actions because it has significant and unique interests that will not be
23 adequately protected in its absence. The defenses that South Carolina seeks to advance share
24 common questions of law and fact with this action, and neither party will be prejudiced by
25 intervention. For these reasons, this Court should exercise its discretion under Fed.R.Civ.P. 24(b)
26 to permit it to intervene as a defendant in this action
27

28 ¹ However, South Carolina asserts that the District Court for the District of South Carolina is the proper venue to decide this dispute, as further set forth in its Motion to Transfer Venue.

1 **III. CONCLUSION**

2 As provided above and in the accompanying Answer, the State of South Carolina’s right
3 to intervene in this matter is beyond dispute. South Carolina has timely moved to intervene in
4 this matter to protect its significant interests – both its sovereign interests and its rights under the
5 order of the District of South Carolina. Precluding South Carolina from this lawsuit would
6 impair its ability to protect these interests, which no other party will adequately protect.
7 Moreover, South Carolina has a defense that shares a common question of law and fact with the
8 existing action. As such, South Carolina satisfies the requisite elements for intervention of right
9 pursuant to Fed.R.Civ. P. 24(a) and/or permissive intervention pursuant to Fed.R.Civ.P. 24(b).
10

11 For the reasons set forth above, and in light of its indisputable, significant, and distinct
12 interest in this matter, the State of South Carolina respectfully requests that this Court issue an
13 order granting South Carolina party status as an Intervenor-Defendant, allowing South Carolina
14 to file the Motion to Transfer Venue attached hereto as Exhibit B, and such other relief as the
15 Court may deem just and proper.
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1 South Carolina respectfully requests that this Court issue an Order requiring the parties to
2 brief this Motion on an expedited basis so that South Carolina can be a party to this case and can
3 appear at the hearing on the State of Nevada's Motion for Preliminary Injunction set for January
4 17, 2019. A [Proposed] Order setting an expedited briefing schedule is attached hereto as

5 **Exhibit C.**

6
7 DATED this 3rd day of January 2019.

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Attorneys for the State of South Carolina

CERTIFICATE OF SERVICE

The undersigned, an employee of Dickinson Wright PLLC, hereby certifies that on the 3rd day of January 2019, pursuant to Fed. R. Civ.P. 5(b) a copy of **STATE OF SOUTH CAROLINA'S EMERGENCY MOTION TO INTERVENE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** was served electronically to all parties of interest through the Court's CM/ECF system as follows:

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/s/ Mina Reel
An employee of Dickinson Wright PLLC

EXHIBIT TABLE

Exhibit	Description	Pages²
A	Declaration of Randolph R. Lowell	4
B	South Carolina’s [Proposed] Motion to Transfer Venue	12
C	[Proposed] Order Setting an Expedited Briefing Schedule	3

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² Exhibit Page counts are exclusive of exhibit slip sheets.