UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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STATE OF NEVADA, Plaintiff, v. UNITED STATES; *et al.,* Defendants.	Case No. 3:18-cv-569-MMD-CBC ORDER

I. SUMMARY

Plaintiff State of Nevada initiated this case to challenge federal agency action resulting in the proposed shipment of one metric ton of plutonium from the Department of Energy's ("DOE") Savannah River Site ("SRS") in South Carolina to the DOE's Nevada National Security Site ("NNSS"). Pending before the Court is the State of South Carolina's Motion to Intervene ("Motion") (ECF No. 25). The Court has reviewed Nevada's response (ECF No. 28) and South Carolina's reply (ECF No. 32). The Court finds that permissive intervention is warranted and will grant the Motion.

II. RELEVANT BACKGROUND

Nevada filed this action against the government[1] on November 30, 2018, challenging the government's proposed plan to relocate the one metric ton of plutonium

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[1]In addition to the DOE, Nevada sues the United States Secretary of Energy, Rick Perry, in his official capacity, and the National Nuclear Security Administration ("NNSA") and its administrator, Undersecretary for Nuclear Security, Lisa E. Gordon, in her official capacity. (ECF No. 1 at 4.) These Defendants are collectively referred to as "the government" in this action.

from SRS to NNSS. (*See generally* ECF No. 1.) The government's proposed plan was made in response to an injunction order ("Order") issued by the United States District Court for the District of South Carolina in an action brought by South Carolina. *South Carolina v. United States*, 2017 WL 7691885, at **1, 5 (D. S.C. Dec. 20, 2017); *see also South Carolina v. United States*, 907 F.3d 742, 766 (4th Cir. 2018) (upholding the Order). The Order was issued pursuant to the National Environmental Protection Act of 1969 ("NEPA"), 42 U.S.C. 432 *et seq.*, and other applicable laws. The Order directs the DOE to remove "not less than one metric ton" of defense plutonium or plutonium materials from South Carolina's SRS "for storage or disposal elsewhere" by January 1, 2020. *United States*, 2017 WL 7691885, at *5. At present, the government's proposed "elsewhere" is the NNSS located approximately 90 miles northwest of Las Vegas. (ECF No. 1 at 2; ECF No. 32 at 3.)

Nevada contends that in choosing to relocate the plutonium to NNSS the government has failed to adequately comply with NEPA and persists in violation of implementing regulations of the Council of Environmental Quality, 40 CFR § 1502.9(c)(1), and DOE's own NEPA regulations, 10 CFR § 1021.314(a), by failing to prepare a supplemental draft and final environmental impact statement for the proposed action. (*Id.* at 4.) Nevada also filed a motion for preliminary injunction ("PI Motion") seeking to enjoin the government's shipment of plutonium to NNSS pending final disposition of this action. (ECF No. 2.) The hearing on the PI Motion is scheduled for January 17, 2019. (ECF No. 19.)

South Carolina filed its Motion on January 3, 2019, seeking to intervene in this action as a defendant. (ECF No. 25 at 2.) South Carolina requests that this Court rule on its Motion before ruling on the PI Motion before the Court, so that it may file its motion to transfer venue to the District of South Carolina.[2] (*Id.* at 10, n.1; ECF No. 32 at 2.)

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[2] By permitting South Carolina to intervene, the Court does not in any way address the merits of any motion to transfer venue. Nor does the Court intend to delay the January 17 scheduled hearing pending a ruling on such a motion.

III. DISCUSSION

South Carolina seeks intervention under Fed. R. Civ. P. 24(a) as of right or alternatively permissive intervention under Rule 24(b). The Court will exercise its discretion to grant South Carolina permissive intervention under Rule 24(b), and therefore need not address whether South Carolina is entitled to intervention as a matter of right. *See, e.g.*, *Students for Fair Admissions Inc. v. Univ. of N. Carolina*, 319 F.R.D. 490 (M.D. N.C. 2017) (granting permissive intervention without considering intervention as of right); *United States v. Navistar Int'l Corp.*, No. 15 cv 6143, 2016 WL 6948378 (N.D. Ill., Nov. 28, 2016) (same)).

Rule 24(b) permits the Court to allow anyone to intervene who submits a timely motion and "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). An applicant "who seeks permissive intervention must prove that it meets 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." *Donnelly v Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). However, a finding of the latter is unnecessary where, as here, in a federal question case the proposed intervener raises no new claims.[3] *Freedom From Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011). Because a court has discretion in deciding whether to permit intervention, it should consider whether intervention will cause undue delay or prejudice to the original parties, whether the applicant's interests are adequately represented by the existing parties, and whether judicial economy favors intervention. *Venegas v. Skaggs*, 867 F.2d 527, 530–31 (9th Cir. 1989).

As a preliminary matter the Court deems South Carolina's Motion timely. South Carolina contends it filed the Motion "at the earliest possible stage of the proceedings." (ECF No. 25 at 9.) Nevada initiated this action on November 30, 2018—only several weeks

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[3]*See* ECF No. 25 at 10 (South Carolina noting that "it is not seeking to bring any claims against either existing party" in this action).

ago at this juncture. Further, Nevada does not challenge the Motion's timeliness. Accordingly, the Court finds the Motion is timely.

The Court finds there are clear questions of law and fact in common between South Carolina's right to enforce the Order requiring removal of the plutonium and Nevada's action to enjoin shipment of the same to NNSS. Nevada insists that this action is only "tangentially" related to South Carolina and that the fact that the plutonium is coming from South Carolina is "unrelated" to this action which is limited to DOE's proposed action to transport plutonium to NNSS (ECF No. 28 at 8.). However, the Order requires that the removal of the plutonium from South Carolina be done in compliance with NEPA and other applicable laws, and Nevada's challenge of the proposed action is that DOE failed to comply with NEPA and other applicable laws. Thus, common questions of law and facts exist here.

The Court next finds that South Carolina's intervention in this action, at this time, would neither unduly delay the case nor unfairly prejudice the parties and South Carolina has significant interests in this matter that it has a right to protect.

As to delay, Nevada contends that South Carolina's intervention would encumber the proceedings in this Court by raising similar or same arguments as the government. (ECF No. 28 at 9.) But, like Nevada, South Carolina seeks an expedient resolution to this dispute. (ECF No. 25 at 10). The fact that South Carolina may raise similar arguments as the government would not unduly encumber the proceedings because the shared arguments would likely compel the same conclusions. That is to say that duplicative arguments would be efficiently resolved by a single answer in one court, barring the need for a separate action by South Carolina with potentially conflicting determinations. Further, the extent to which South Carolina's arguments may even slightly differ from the government's is more reason to permit it to intervene to protect its interests. The Court thus has no basis to conclude South Carolina's intervention would unduly delay the resolution of this matter.

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Furthermore, Nevada does not expressly argue that it would be unfairly prejudiced if the Court permits South Carolina to intervene. Nevada merely argues that South Carolina and the government share the common objective of defeating Nevada's claims to allow removal from South Carolina and transport to NNSS. (ECF No. 28 at 9.) However, a potential for a tag-team-defense by South Carolina and the government is only speculative, and ultimately outweighed by South Carolina's unique and significant interests to intervene. To be clear, like Nevada, South Carolina has significant interests in protecting its citizens and lands. The government cannot, nor does it purport to, protect South Carolina's interests on its behalf.

In sum, the Court concludes that South Carolina has satisfied the requirements for permissive intervention under Rule 24(b) and therefore grants South Carolina's Motion.

IV. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the motion before the Court.

It is therefore ordered that South Carolina's Motion to Intervene (ECF No. 25) is granted.

DATED THIS 14th day of January 2019.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE