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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

TUGAW RANCHES, LLC,

Plaintiff,

HON. BRAD LITTLE, *et al.*,

Plaintiffs-Intervenors

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants,

THE NATIONAL AUDUBON SOCIETY, *et al.*,

Proposed Defendants-Intervenors.

Case No. 4:18-cv-00159-DCN

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

In this lawsuit, Plaintiffs seek nothing less than the total, nationwide invalidation of vital protections for the greater sage-grouse, an iconic American species on the precipice of irreversible decline, if not extinction. Plaintiffs have sought this sweeping court order even though (1) their alleged injuries are limited to Idaho; (2) Plaintiff Tugaw Ranches, LLC concedes it has not been affected by "enforce[ment]" or "implement[ation]" of the sage-grouse protections, ECF No. 1 ¶¶ 44, 46, and; (3) Intervenor-Plaintiffs (all of whom are statewide elected officials in Idaho) plead no facts showing concrete injuries to the rights of their offices (as opposed to the rights of the State of Idaho or its legislative bodies). Simultaneously, the federal agencies charged with defending sage-grouse protections in this litigation have—in a variety of related agency proceedings—clarified that they, too, would like those protections undone.

In light of Plaintiffs' extreme requests for relief and the grave threat all existing parties pose to the sage-grouse and its habitat, the National Audubon Society and The Wilderness Society now seek leave to intervene in this matter. Consistent with their rich history of advocating for the sage-grouse's conservation in Idaho and elsewhere, Applicants easily satisfy the criteria for intervention as of right under Federal Rule of Civil Procedure 24(a)(2). Applicants have legally protected interests in the sage-grouse and the federal lands on which the species resides, and those interests are plainly threatened by Plaintiffs' unjustified request for relief, which would immediately eradicate among the most effective protections for the species. Applicants' request is also timely, arriving during a lengthy stay proposed by the existing parties and prior to the lodging of the administrative record (let alone the Court's consideration of the merits). Finally, no existing party adequately represents Applicants' interests. Although Federal

Defendants may nominally occupy litigation footing similar to Applicants, they most certainly do not possess the expertise, focus, and ultimate goals of Applicants, an observation that would have been accurate even before Federal Defendants recently undertook final agency action confirming that they—like Plaintiffs—seek to unwind the very sage-grouse protections that are the focus of this lawsuit.

Separately—and even if Applicants did not satisfy the requirements for intervention of right—permissive intervention is appropriate under Federal Rule 24(b)(1)(B) for the reasons stated above. Accordingly, the Court should grant Applicants' motion.

BACKGROUND

I. The Greater Sage-Grouse's Decline And Remedial Land Use Plans.

The greater sage-grouse once existed across vast expanses of the North American sagebrush steppe: grouse populations once totaled millions of birds and ranged over an area now covered by thirteen western states and three Canadian provinces. 80 Fed. Reg. 59,858, 59,864 (Oct. 2, 2015). Today, sage-grouse number less than ten percent of their historic population and occupy only about half of their historic range. *Id.* at 59,864. The culprit is a loss of sagebrush steppe habitat, on which the sage-grouse relies for food, shelter, and reproduction (the species nests on the ground and is therefore particularly dependent on suitable and undisturbed vegetative cover). *Id.* at 59,888. Primary threats to this habitat include oil and gas development, infrastructure, agricultural conversion, wildfire and invasive plants, and grazing. *Id.* at 59,888-59,914.

The Department of the Interior (acting through the Bureau of Land Management ("BLM")) and the Department of Agriculture (acting through the United States Forest Service ("USFS")) manage public lands with sage-grouse habitat under the Federal Land Policy and Management Act ("FLPMA") and the National Forest Management Act ("NFMA"),

respectively. Those statutes require the agencies to promulgate and (when appropriate) revise land use plans for the comprehensive management of federal holdings. 43 U.S.C. § 1712(a) (FLPMA); 16 U.S.C. § 1604(a) (NFMA). In 2015, BLM and USFS attempted to arrest the sage-grouse's decline by revising 98 such plans in Idaho and nine other western states (the "2015 Plans"). The 2015 Plans' key feature was the establishment of "new sage-grouse priority habitat designations with heightened management protections across some 67 million acres of federal land." *W. Watersheds Project v. Schneider*, No. 1:16-CV-83-BLW, 2019 WL 5225454, at *3 (D. Idaho Oct. 16, 2019). These designations, in turn, required best management practices for activities like grazing and energy development. The Plans' protections include:

- Establishment of Sagebrush Focal Areas, with approximately 12 million acres of non-waivable protections from oil and gas development, 10 million acres recommended for withdrawal from mineral extraction, protections from industrial-scale renewable energy, and prioritization for restoration;
- 23 million acres of Priority Habitat Management Areas with stringent restrictions for damaging activities, and 32 million acres of General Habitat Management Areas with additional protective management;
- Percent limitations on surface disturbance and "buffers" where surface disturbance is prohibited around leks (sage-grouse breeding areas);
- Requirements to prioritize oil and gas leasing and development outside of sage-grouse habitat, and;
- Requirements for compensatory mitigation for permitted activities that result in harm to grouse habitat.

See Rutledge Decl. ¶ 15; Gehrke Decl. ¶ 22

II. Defendants' Efforts To Unwind The Plans And Related Litigation.

Beginning in 2018, BLM and USFS abruptly changed course and—notwithstanding the undisputed threats to the sage-grouse—proposed *removing* protections for the species by rolling back significant portions of the 2015 Plans. In March of 2019, BLM finalized its rollback, *see* 84 Fed. Reg. 10,322 (Mar. 20, 2019), and, in July, USFS announced a 60-day window to object to the agency's proposal before it became final. 84 Fed. Reg. 37,233 (July 31, 2019). Applicants for intervention (among others) objected to USFS' proposal, and the agency has not yet conclusively resolved those objections or otherwise finalized its proposed rollbacks.

In May of 2019, a coalition of conservation groups challenged BLM's revised plans under FLPMA and the National Environmental Policy Act ("NEPA") in a division of this Court and subsequently sought preliminary relief enjoining the plans' implementation. On October 16, 2019, the court in that matter granted the coalition's motion. *See Schneider*, 2019 WL 5225454, at *1. The Court began by noting that the effect of BLM's rollback (which is largely similar to USFS' proposed rollback) is to "substantially reduce protections for sage grouse without any explanation that the reductions [are] justified by, [e.g.], changes in habitat, improvement in population numbers, or revisions to the best science[.]" *Id.* at *4. The Court then concluded that plaintiffs were likely to demonstrate that (1) BLM failed to consider alternatives to its revisions that would have protected the sage-grouse; (2) the revisions were contrary to the best available science; (3) BLM failed to consider cumulative threats to the sage-grouse, and; (4) BLM failed to alert the public that its revisions would jettison compensatory mitigation tools. *Id.* at *7-*10. The Court therefore enjoined BLM from implementing its rollbacks and clarified that "[t]he 2015 Plans remain in effect" pending a final judgment. *Id.* at *11.

Meanwhile, Plaintiff Tugaw Ranches, LLC initiated this lawsuit, alleging in March of 2018 that the Congressional Review Act, 5 U.S.C. § 801 *et seq.* ("CRA"), required BLM and

USFS to submit the 2015 plans to Congress and that they failed to do so. Among Plaintiff's requested relief is "an injunction requiring Defendants to submit the Sage Grouse Rules to Congress under the CRA; or that it [sic] stop implementing the rules if it fails to do so." ECF No. 1 at 18. Federal Defendants subsequently moved to dismiss Plaintiff's Complaint on the sole ground that the CRA bars Plaintiff's claim for relief. ECF No. 14. When that motion was largely briefed, Idaho's Governor, the Speaker of the Idaho State House of Representatives, and the President Pro Tempore of the Idaho State Senate sought (and were later granted) leave to intervene. ECF Nos. 20, 32. Like Tugaw Ranches, the State Intervenors seek an injunction invalidating the 2015 Plans across the country. ECF No. 33 at 11. State Intervenors also seek a declaration that the 2015 Plans "were . . . promulgated without observance of procedure required by law . . . in violation of the APA[.]" *Id.*

On February 25, 2019, the Court denied Federal Defendants' Motion to Dismiss, ECF No. 39, but later stayed proceedings—at the existing parties' joint request—"until [USFS] issues new Greater Sage Grouse Plan Amendments, and submits those amendments with its 2015 Amendments to Congress, or until September 30, 2019, whichever occurs first." ECF No. 47 at 1. The Court extended that stay until January 8, 2020, ECF No. 49, after the parties notified the Court that USFS had not yet completed its rollback of sage-grouse protections, ECF No. 48.

APPLICANTS FOR INTERVENTION

Applicant National Audubon Society is a national nonprofit conservation organization dedicated to protecting birds and the places they need, today and tomorrow, throughout the Americas using science, advocacy, education, and on the-ground conservation. Audubon has advocated for birds on public lands for over 110 years and has been deeply engaged in protecting the greater sage-grouse for decades. Audubon has over 1.7 million members nationwide, with

6,300 of those members in Idaho. Audubon and its members participated in every stage of the federal government's 2015 national sage-grouse planning effort, including facilitation of the original population modeling and building consensus among conservationists, ranchers, sportsmen, business owners, mineral developers, miners, state governments, federal agencies, and Congress. Audubon views the science-based management of greater sage-grouse as critical to Idaho's sagebrush ecosystem and the more than 350 plants and animal species that depend on it.

Applicant The Wilderness Society ("TWS") is a national conservation organization devoted to protecting wilderness and inspiring Americans to care for wild places. It contributes to better protection, stewardship, and restoration of public lands, preserving the nation's rich natural legacy for current and future generations. TWS has more than one million members and supporters nationwide—including more than 1,700 in Idaho—and has offices in Boise and Salmon, Idaho. TWS actively engaged in the planning efforts for the 2015 Plans since their inception, including by submitting scoping comments in April 2012, when the federal planning efforts formally commenced; commenting on the draft plans in 2013 and 2014; submitting additional comments and administrative protests on the proposed plans in 2015; and submitting additional recommendations throughout the process. TWS also met with federal and state representatives, and worked with members of the conservation community and other stakeholders to advocate for completion of the plans and for implementing a strong, science-based, landscape-level approach to conserving the greater sage-grouse and the sage-grouse ecosystem. TWS members, responding to notifications from its WildAlert network, have submitted thousands of comments on the federal plans and have urged Congress to support the completion and implementation of these plans.

As set forth in the attached declarations, Applicants' members and staff live, work, hunt, and recreate on lands throughout the western United States that are protected under BLM's and USFS' 2015 Plans. Applicants' members and staff regularly observe and study the grouse and the ecosystem on which it depends, and are keenly interested in protecting the species.

ARGUMENT

I. Applicants Are Entitled To Intervene As Of Right Under Rule 24(a)(2).

Under Federal Rule of Civil Procedure 24(a)(2), "a stranger to a lawsuit may intervene 'of right' where . . . letting the lawsuit proceed without that person could imperil some cognizable interest of his." *In re Volkswagen "Clean Diesel" Mktg., Sales Prac., & Prod. Liab. Litig.*, 894 F.3d 1030, 1037 (9th Cir. 2018). The Ninth Circuit uses a four-part test to determine if Rule 24(a)(2) is satisfied:

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Wilderness Soc'y v. USFS, 630 F.3d 1173, 1177 (9th Cir. 2011). "In evaluating whether Rule 24(a)(2)'s requirements are met, [courts] normally . . . construe the Rule broadly in favor of proposed intervenors," since "a liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *Id.* at 1179 (citation omitted).

A. Applicants' Motion To Intervene Is Timely.

Applicants' motion is timely under the three-factor test used in this Circuit. "Timeliness is determined by the totality of the circumstances facing would-be intervenors, with a focus on three primary factors: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Smith v. L.A.*

Unified Sch. Dist., 830 F.3d 843, 854 (9th Cir. 2016) (citation omitted). Each of these factors weighs in favor of Applicants' motion.

The first factor—the stage of proceedings—favors intervention. The litigation here is in its early stages—Federal Defendants have not produced the administrative record and none of the merits have been adjudicated or are even scheduled for adjudication. Since the Court's decision denying the Motion to Dismiss earlier this year, the litigation has not meaningfully proceeded, and indeed has been stayed for eight months while BLM and USFS revised the 2015 Plans. ECF No. 48 at 2. Where litigation has been stayed for similar periods, courts have easily found that timeliness is not a bar to intervention. *See, e.g.*, *Abdurahman v. Alltran Fin., LP*, 330 F.R.D. 276, 280 (S.D. Cal. 2018) (motion was timely a year after complaint where, "because of the parties' deadline extensions, mediation, and agreement to stay proceedings, the case [was] still in its early stages" and "discovery remain[ed] open and no substantive motion deadlines ha[d] passed") *Cf. Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007) (citation omitted) (noting that "mere lapse of time, without more, is not necessarily a bar to intervention" even where years have passed prior to application). Permitting intervention at this point would not inject new issues into the proceedings or cause any disruption or delay.

Nor would intervention impose any prejudice on the existing parties—"the most important consideration in deciding whether a motion for intervention is untimely." *Smith*, 830 F.3d at 857. The existing parties have been biding their time as they decide whether or how to proceed with the litigation until "the Forest Service issues its final [Records of Decision] and new Plan Amendments." ECF No. 46 at 3; *see also* ECF No. 48 at 3. The Forest Service still has not issued its final Record of Decision, such that, by their own admission, the existing parties are merely awaiting the information they deem necessary to further proceedings. Permitting

Applicants to intervene at this point, while the existing parties are in stasis, would impose no prejudice. *See Day*, 505 F.3d at 965 (intervention granted because it would not "create delay by injecting new issues into the litigation, but instead will ensure that our determination of an already existing issue is not insulated from review simply due to the posture of the parties") (citation omitted).

Importantly, "the only prejudice that is relevant" to the Court's inquiry is the prejudice, if any, resulting from the applicant's delay, i.e., "not from the fact that including another party in the case might make resolution more difficult." *Smith*, 830 F.3d at 857 (citation omitted). There is no such prejudice here, since Applicants' earlier participation would not have meaningfully changed the litigation to-date: "[t]he practical result of [Applicants'] intervention"—i.e., opposing Plaintiffs' requests for relief—"would have occurred whenever the [Applicants'] joined the proceedings." *Day*, 505 F.3d at 965. *See also Kamakahi v. Am. Soc'y for Reprod. Med.*, No. 11-CV-01781-JCS, 2015 WL 1926312, at *4 (N.D. Cal. Apr. 27, 2015) ("[t]he actual work that will need to be done as a result of intervention is almost entirely the same work that would have been required if Proposed Intervenors had intervened earlier, or even if they had been parties from the outset").

In any event, Applicants have good reason to seek intervention at this stage of proceedings. To begin, Applicants had no need to intervene earlier, since Federal Defendants capably sought to dismiss these proceedings on the ground that the CRA bars judicial review of their compliance with any applicable requirement to submit the 2015 Plans to Congress. Applicants agree with this position and—with respect for the Court's conclusion to the contrary—had every expectation that Federal Defendants would prevail. Now that the Court has

resolved the Motion to Dismiss in Plaintiffs' favor, Applicants will bring significantly different interests, arguments, and expertise to the merits and (any) remedies phases of this litigation.

On that score, it bears noting that Federal Defendants have only recently clarified that they, like Plaintiffs, seek to unwind the agency actions at issue. When this case was filed, Federal Defendants had not finally determined whether to amend the 2015 Plans, and it was only with BLM's decision to amend the 2015 Plans, in spring of 2019, that Federal Defendants unequivocally made clear they would not adequately represent Applicants' interest in maintaining existing protections for the sage-grouse. Now that Federal Defendants have clarified their intention *and* the litigation is poised to enter the merits phase, Applicants must act to protect their interests. *See Officers for Just. v. Civ. Serv. Comm'n of City & Cty. of S.F.*, 934 F.2d 1092, 1095 (9th Cir. 1991) (intervention allowed ten years after consent decree because existing party changed its position on interpretation of important provision); *United States v. State of Or.*, 745 F.2d 550, 552 (9th Cir. 1984) ("change of circumstance" warrants determining that request for intervention was timely). This case has been stayed for virtually the entirety of time since BLM finalized its rollbacks, rendering the span between that decision and the filing of the instant motion non-prejudicial to the existing parties.

B. Applicants Have Substantial Interests Related To The Subject Of The Action.

"An applicant seeking intervention is held to have a significant protectable interest in an action if (1) the applicant asserts an interest that is protected under some law, and (2) there is a relationship between the applicant's legally protected interest and the plaintiff's claims." *United States v. Sprint Comm., Inc.*, 855 F.3d 985, 991 (9th Cir. 2017) (citation omitted). The applicant "need not show that the interest he asserts is one that is protected by statute under which litigation is brought[:] [i]t is enough that the interest is protectable under any statute." *United*

States v. Alisal Water Corp., 370 F.3d 915, 919 (9th Cir. 2004) (citation omitted). At bottom, the interest test "directs courts to make a practical, threshold inquiry, and is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *In re Est. of Ferdinand E. Marcos Hum. Rts. Litig.*, 536 F.3d 980, 984–85 (9th Cir. 2008) (citation omitted).

As applied to Applicants, this inquiry is not a close call. Applicants' members have a well-established interest in both the sage-grouse itself and the habitat in which it resides—these members derive aesthetic and recreational enjoyment from observing the sage-grouse and hunting, fishing, hiking, and camping on the public lands protected by the 2015 management plan revisions. *See* Rutledge Decl. ¶¶ 10-11; Gehrke Decl. ¶¶ 14-17. Such interests are protected by multiple environmental statutes, including, for example, FLPMA, NFMA, and NEPA. *See Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (citing cases and holding that "Applicants have a significant protectable interest in conserving and enjoying the wilderness character of the [a]rea [at issue], which rests on the provisions of [law] invoked in this case").

There is also a direct relationship between Applicants' interests and Plaintiffs' claims. If Plaintiffs obtain their requested relief, the Federal Defendants would be enjoined from implementing the 2015 land use plans binding both BLM and USFS. *See* ECF No. 1 at 18; ECF No. 33 at 11. Such an injunction would immediately strip protections from millions of acres of public lands, freeing Defendants to approve energy development, construction of transmission lines, grazing, and other activities without safeguards for sage-grouse habitat. Those approvals, in turn, would degrade the pristine habitat enjoyed by Applicants' members and accelerate both the decline in sage-grouse numbers and the contraction of the species' range. Under these

circumstances, there is no reasonable argument that this matter lacks a direct connection with Applicants' interests. *See Citizens for Balanced Use*, 647 F.3d at 897; *accord W. Watersheds Project v. USFS*, No. 09-CV-0629-E-BLW, 2010 WL 1816254, at *2 (D. Idaho May 4, 2010) ("Because [the applicant's] ultimate goal is to reduce grazing, the outcome of this lawsuit could have a direct impact on the proposed intervenors.").

C. A Decision In This Suit May, As A Practical Matter, Impede Or Impair Applicants' Ability To Protect Their Interests.

"If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." Fed. R. Civ. P. 24(a)(3) advisory committee's note to 1966 amendment. As set forth above, there is a direct link between Applicants' interests and the subject matter of this suit, such that a decision in this matter would impair those interests—i.e., protections for the sage-grouse and its habitat—by immediately stripping those protections. If Applicants are unable to participate in the suit, they will have no capacity to contest Plaintiffs' requested declaratory and injunctive relief or to participate in subsequent proceedings that might lift the injunction. "Under similar circumstances, having found that [the applicant] ha[d] a significant protectable interest, [the Ninth Circuit] [has] had little difficulty concluding that the disposition of the case may, as a practical matter, affect it." *Citizens for Balanced Use*, 647 F.3d at 898.

D. Applicants' Interests Are Not Adequately Represented By The Existing Parties To This Suit.

Finally, Applicants meet the fourth requirement for intervention as of right, because Federal Defendants will not adequately represent Applicants' interest in maintaining the protections of the 2015 Plans, a conclusion that is undeniable given that that Federal Defendants no longer support those Plans as a matter of policy. *Id.*

Applicants' burden as to the adequacy of representation showing is "'minimal' and satisfied if [they] can demonstrate that representation of [their] interests 'may be' inadequate." *Id.* (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). Courts examine three factors in considering the adequacy of representation: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Id*. The "most important factor" in assessing the adequacy of representation is "how the interest compares with the interests of existing parties." *Id*. If an applicant for intervention and an existing party share the same ultimate objective, a presumption of adequacy of representation arises. *Id*. To rebut the presumption, an applicant must make a "compelling showing" of inadequacy of representation. *Id*. (quoting *Arakaki*, 324 F.3d at 1086). And when the government is acting on behalf of a constituency that it represents, there is a rebuttable presumption of adequacy of representation. *Id*.

The Federal Defendants' change in policy following the finalization of the 2015 Plans makes plain that they do not "share the same ultimate objective" as Applicants. *Id.* (citation omitted). Applicants support full and continued implementation of the 2015 Plans. *See* Rutledge Decl. ¶¶ 16, 18-20; Gehrke Decl. ¶¶ 23-24. Conversely, Federal Defendants now seek to loosen protections in the public lands subject to the Plans, leaving no doubt that they do not share the same "ultimate objective" as Applicants.[1] In similar cases, courts readily find that putative

[1] That Plaintiffs' legal theory relates only to the compliance of the 2015 Plans with the CRA—and not the merits of the Plans' environmental protections—does not change this conclusion, because in assessing adequacy of representation, "the focus should be on the 'subject of the action,' not just the particular issues before the court at the time of the motion." *Sw. Ctr.*

intervenor-defendants' interests are not adequately represented. *See, e.g.*, *Citizens for Balanced Use*, 647 F.3d at 899 (finding applicant-intervenor had made compelling showing of inadequacy where government defendant had only "reluctantly" adopted the restrictions favorable to applicant's interests after applicant brought an action to compel those measures, *and* the defendant sought to overturn the associated district court decision); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1398 (9th Cir. 1995) (affirming grant of intervention as of right where defendant was unlikely to defend its own decision or argue on behalf of proposed intervenors because defendant had only issued the challenged administrative finding to satisfy settlement agreement with proposed intervenors).

This rule has particular force where Plaintiffs seek sweeping injunctive relief. Because Federal Defendants "must [rep]resent the broad public interest," they are by definition *not* charged "with a duty to represent [Applicants'] interests in defending against the issuance of an injunction." *See Forest Conservation Council v. USFS*, 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated on other grounds by Wilderness Soc'y*, 630 F.3d 1173.[2] So too here: should this litigation reach the remedy stage or if the parties pursue settlement, Applicants will seek to retain the environmental protections of the 2015 Plans to the greatest extent possible. Given

for Biological Diversity v. Berg, 268 F.3d 810, 823 (9th Cir. 2001) (quoting *Sagebrush Rebellion*, 713 F.2d 525, 528 (9th Cir. 1983)).

[2] *Wilderness Society v. USFS* abrogated *Forest Conservation Council* only insofar as the latter case was one of several Ninth Circuit decisions that had categorically denied applications for intervention of right by private parties in NEPA cases. *Wilderness Soc'y*, 630 F.3d at 1178. Following *Wilderness Society*, "[a] putative intervenor will generally demonstrate a sufficient interest for intervention of right in a NEPA action, as in all cases, if it will suffer a practical impairment of its interests as a result of the pending litigation." *Id.* at 1180. For the reasons set forth above, Applicants have satisfied that showing in this case, where their interests are protected by (among other statutes) NEPA and FLPMA. *See supra* at 11-13.

Federal Defendants' abandonment of the 2015 Plans, those parties are likely to differ from Applicants on the question of "whether all . . . management activities in . . . [sage-grouse] habitat should be enjoined pending the [government's] compliance" with the CRA. *Id.* at 1499. [3]

Relatedly, to the extent that the Federal Defendants' litigation decisions flow from resource constraints and competing policy priorities, it is reasonable to expect BLM and USFS will not prioritize the defense of the 2015 Plans, a consideration that further weighs in favor of Applicants' motion. *See W. Watersheds Project v. Salazar*, No. 4:08-CV-435-BLW, 2011 WL 4431813, at *3 (D. Idaho Sept. 22, 2011) (intervention warranted because agency defendant had an incentive "to focus its efforts on protecting certain decisions at the risk of losing others," and the associated priorities "may be directly contrary to the interests" of putative intervenors).

Moreover, Applicants have expertise in the sage-grouse habitat subject to the Plans and the environmental consequences of the habitat's destruction. *See* Rutledge Decl. ¶¶ 5-9, 12-13, 18; Gehrke Decl. ¶¶ 3-5, 8-13, 18-21, 25-26. They will bring this expertise to the litigation, in conjunction with their unique (at least in this case) position that maintaining a well-protected sage-grouse habitat is an ecological imperative. This is a quintessential "necessary element[] to the proceeding that other parties would neglect." *Citizens for Balanced Use*, 647 F.3d at 898; *see also W. Watersheds Project v. USFS*, No. 1:15-CV-00218-REB, 2015 WL 7451169, at *2 (D.

[3] The rule also holds special force where, as here, the agency officials charged with defending federal action have ascertainable ties with parties seeking to nullify that action. *Compare, e.g.*, *Sagebrush Rebellion*, 713 F.2d at 528 (granting intervention as of right where defendant Secretary of the Interior previously led the organization representing the plaintiffs in the underlying action) *with* Scott Bronstein et al., *15 Times Former Clients of the Acting Interior Secretary Got Favorable Decisions*, CNN (Mar. 5, 2019), https://www.cnn.com/2019/03/05/politics/david-bernhardt-interior-oil-and-gas/index.html (documenting lobbying of Secretary Bernhardt by his former client, the Independent Petroleum Association of America, to roll back sage-grouse protections).

Idaho Nov. 23, 2015) (intervention permitted in part based on putative intervenors' "first-hand knowledge" and "insights that the existing parties lack").

Ultimately, each of the aforementioned considerations reflects the truism that Applicants' interest in appropriate protections for the sage-grouse "represents more than a mere difference in litigation strategy . . . but rather demonstrates the fundamentally differing points of view between Applicants and the [federal agencies] on the litigation as a whole." *Citizens for Balanced Use*, 647 F.3d at 899 (citing *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 444-45 (9th Cir. 2006)). Because "the government's representation of the public interest may not be identical to the individual parochial interest" of Applicants—even though both entities arguably "occupy the same posture in the litigation"—the Court should grant Applicants leave to intervene as of right. *Id.* (citation omitted). *See W. Watersheds Project v. USFS*, 2015 WL 7451169, at *2 ("the Forest Service is charged with protecting many different interests, and those other interests may not run exactly parallel to, or fully account for, the interests of the proposed Defendant-Intervenors").

II. Alternatively, Applicants Should Be Granted Permissive Intervention Under Federal Rule of Civil Procedure 24(b).

If the Court determines that Applicants are not entitled to intervene as of right under Federal Rule 24(a)(2), it should nonetheless grant Applicants' motion under the less demanding test of Federal Rule 24(b)(1)(B), which allows a court to grant permissive intervention under "where the applicant shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th

Cir. 2009) (citation omitted).[4] When applying this standard, courts may also consider issues including:

> the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case . . . , whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

Perry v. Schwarzenegger, 630 F.3d 898, 905 (9th Cir. 2011).

For reasons similar to those justifying intervention of right under Federal Rule 24(a)(2), Applicants are deserving of permissive intervention. First, Applicants' motion is timely. As set forth above, granting Applicants' motion will in no way prejudice the existing parties, who have themselves sought to delay even the *commencement* of merits proceedings for several months. *See Lands Council v. McNair*, No. 06-CV-0425-EJL, 2006 WL 8446634, at *2 (D. Idaho Nov. 16, 2006) (permissive intervention was "timely such that the intervention would not delay nor prejudice either existing party"). The timing of Applicants' motion is also appropriate considering that stay and recent developments whereby (1) the Court denied Federal Defendants' Motion to Dismiss, opening the possibility of wide-ranging motion practice on merits and remedy, and; (2) Federal Defendants unequivocally signaled that they would join Plaintiffs in

[4] In this case, the Court need not consider whether Applicants possess independent grounds for standing, since the Court has already rejected Federal Defendants' Motion to Dismiss and determined that, at least at this stage, Plaintiffs have adequately invoked federal question jurisdiction. "The jurisdictional requirement [for permissive intervention] . . . prevents the enlargement of federal jurisdiction . . . only where a proposed intervenor [in diversity suits] seeks to bring new state-law claims." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011). Accordingly, "the independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims." *Id.* Such is the case here.

seeking to decimate protections for the sage-grouse and its habitat. Only in the past months did these circumstances necessitate Applicants' motion. *See supra* at 10-11.

Second, Applicants have demonstrated common questions of law and fact. This inquiry is markedly less demanding than the requirement of Rule 24(a)(2) that a putative intervenor demonstrate a "significant protectable interest" in the action, and indeed renders "close scrutiny" of the Applicants' interest "especially inappropriate." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108-09 (9th Cir. 2002), *abrogated by Wilderness Soc'y*, 630 F.3d 1173 (citation omitted).[5] The Court therefore need not look beyond Plaintiffs' "asserted . . . interest in the use and enjoyment of . . . [public] lands," which tracks the legal and factual focus of all proceedings to date and which "precisely" satisfies the final requirement of Rule 24(b)(1)(B). *Id.* at 1111.

Third, any remaining discretionary factors weigh in favor of granting Applicants' motion. There is no doubting Applicants' longstanding and sincere interest in the subject matter of this case or the standing of their members to defend the 2015 Plans. Conversely, there is every indication that Federal Defendants are incapable of adequately representing Applicants' interests and that Applicants, distinct from Plaintiffs and Federal Defendants, will bring unique expertise and perspectives to this litigation. Applicants are therefore deserving of permissive intervention in this matter, just as they should be permitted to intervene as of right. *Perry*, 630 at 905.

CONCLUSION

For the reasons set forth above, the Court should grant Applicants' Motion to Intervene.

DATED this December 20th, 2019.

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[5] *Kootenai Tribe* was among the cases abrogated in part by *Wilderness Society*, which rejected *per se* denial of motions to intervene by private parties in NEPA actions. *See supra* at 15 n.2. The Ninth Circuit has not abrogated *Kootenai Tribe's* discussion of permissive intervention.

Respectfully submitted,

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