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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION

ALLIANCE FOR THE WILD ROCKIES, et al.,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE, et al.,

Defendants,

and

PAYETTE FOREST COALITION, an unincorporated Idaho association, and ADAMS COUNTY, a political subdivision of the State of Idaho,

Proposed Defendant-Intervenors.

No. 1:19-cv-00445-BLW

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE BY PAYETTE FOREST COALITION AND ADAMS COUNTY

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I. INTRODUCTION AND BACKGROUND

The Payette Forest Coalition (Coalition or PFC) and Adams County respectfully move to intervene as defendant-intervenors in this case as of right under Fed. R. Civ. P.24(a) or permissively under Fed. R. Civ. P.24(b). This case concerns the Lost Creek-Boulder Creek Collaborative Forest Landscape Restoration Project on the Payette National Forest. Plaintiffs and federal defendants have not stated their positions on intervention.

The Coalition and County have substantial interests invested in this project. The Coalition is a collaborative group representing a very broad spectrum of forest stakeholders, ranging from Idaho's leading conservation groups, forest recreation advocates, the timber industry, local and community businesses, and local government and state government, including Adams County. Decl. of Rick Tholen ¶¶ 7-8. The Coalition has been deeply involved in project development since at least 2013. *Id.* ¶¶ 12-20, Exs. B-I. This included involvement in the first round of litigation which threatened to undermine years of collaborative effort, *id.* ¶ 24 and working with the Forest Service during remand. *Id.* ¶ 25. Undersigned counsel are being provided to the Coalition as part of members' commitment to collaboration. *Id.* ¶ 7. The Coalition believes this project "embodies the idea that better results—for the forest, its stakeholders, and local communities—can and should be achieved through collaborative efforts to find common ground and build partnerships among everyone who has a stake in forest management." *Id.* ¶ 22.

Two Coalition participants have also submitted declarations about the importance of the Coalition's work on Lost Creek-Boulder Creek. John Robison, Public Lands Director for Idaho Conservation League (ICL), describes the project and PFC as having the elements of a successful process, consistent with a "zone of agreement for forest restoration projects that have meaningful ecological, economic and social benefits and that avoid the mistakes of the past." Decl. of John

Robison ¶¶ 5-6, 11. Part of his support for the project stems from project design so that "the small and medium sized trees are targeted for non-commercial and commercial harvest and the larger diameter trees are retained, because of their ecological significance." *Id.* ¶ 14. This led to marking of trees "exactly as I would have done had I been on the marking crew." *Id.* Mr. Robison expresses concerns that if the project does not proceed, his and ICL's interests will be negatively affected by a near-certain future fire where "some of the remaining unique components of the ecosystem (legacy trees, white headed woodpeckers, bull trout) might be lost for a very long time." *Id.* ¶ 17. Including ICL, "[t]he members of the Payette Forest Coalition have shared goals, including healthy watersheds where problematic roads have been resurfaced or relocated, culverts are right-sized to allow for aquatic organism passage, and the remaining large trees are no longer surrounded by dense thickets of unnatural ladder fuels." *Id.* ¶ 14. Those shared goals are threatened by this litigation.

Adams County has also participated in the collaboration process and has been deeply involved in project planning. Decl. of Mike Paradis ¶¶ 23-26. The County has direct social, environmental, and economic interests in the project. It receives revenue from the sale of timber for schools and roads reflecting the fact that the Forest Service pays no property tax. *Id.* ¶¶ 5-22. The employment provided by forestry is a key source of family-wage jobs and support for the County's economy. The County also wishes to protect its interest in forest health and in ensuring that future fires are characteristic rather than catastrophic. *Id.* ¶¶ 26-28.

To protect their interests in the defense of the Lost Creek-Boulder Creek project, the County and Coalition now seek to intervene as defendants.

II. STANDARDS FOR INTERVENTION

A party may intervene as a matter of right where: (1) The motion is timely; (2) The applicant asserts an interest relating to the property or transaction which is the subject of the action; (3) The applicant is so situated that without intervention, 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 is not adequately represented by the existing parties. Fed. R. Civ. P. 24(a); *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (*en banc*). Rule 24(a)(2) "does not require a specific legal or equitable interest." *Id.* at 1179. Rather, "[i]t is generally enough that the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Id.* Moreover, an intervenor's interest in the litigation is sufficient for purposes of Rule 24 so long as "it will suffer a practical impairment of its interests as a result of the pending litigation." *Id.* The Ninth Circuit construes Rule 24(a) liberally in favor of potential intervenors. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). The court is "guided primarily by practical considerations, not technical distinctions." *Id.*

In *Wilderness Society*, the *en banc* Ninth Circuit abandoned its former "federal defendant rule" in NEPA litigation, which formerly had constrained third-party rights, as "inconsistent with the text of Rule 24(a)(2)." 630 F.3d at 1178. The *en banc* court further explained that "the 'federal defendant' rule mistakenly focuses on the underlying legal claim instead of the property or transaction that is the subject of the lawsuit" since "[n]o part of Rule 24(a)(2)'s prescription engrafts a limitation on intervention of right to parties liable to the plaintiffs on the same grounds as the defendants." *Id.* at 1178-79. It concluded that 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 (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir.2006)).

The court also may to grant permissive intervention to anyone who upon timely motion has a claim or defense that shares with the main action a common question of law or fact. Fed. R. Civ. P. 24(b). In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. *Id.*

III. ARGUMENT

A. Intervention as of right is appropriate.

Proposed intervenors meet the standards for intervention of right, as the motion is timely, they have a significantly protectable interest in the subject matter of the litigation, that interest will likely be impaired as a practical matter by the case, and the existing parties do not adequately represent their interests. Judge Lodge so held in the prior litigation. *All. for the Wild Rockies v. U.S. Forest Serv.*, No. 1:15-CV-00193-EJL, ECF No. 51, 2016 WL 7626528, at *2 (D. Idaho June 9, 2016) (2016 Intervention Order) (holding the County and Coalition are entitled to intervention as of right since "they are parties with something to lose if this Project is not allowed to go forward").

1. The motion is timely.

First, the Coalition and County's motion is timely. In determining whether a motion to intervene is timely, three factors are weighed: (1) the stage of the proceeding; (2) any prejudice to the other parties; and (3) the reason for and length of any delay. *United States v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002). A motion is generally considered timely if "made at an early stage of the proceedings, the parties would not have suffered prejudice from the grant of intervention at that early stage, and intervention would not cause disruption or delay in the proceedings." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). This motion is

timely as it is made at an early stage, before the filing of any dispositive motions. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (holding that a motion to intervene was timely when it "was filed at a very early stage, before any hearings or rulings on substantive matters"); 2016 Intervention Order at 3.

There is no prejudice to any existing party. Defendant-intervenors will abide by the existing schedule. The Coalition and County prepared the motion as soon as practicable after the filing of the case in light of the Coalition's nature as a consensus-driven organization, the complex approval process for all Coalition members and the current national health emergency. Decl. of Rick Tholen ¶ 31; Gen. Order No. 362 (D. Idaho Mar. 27, 2020); *cf. Carpenter*, 298 F.2d at 1125 (reversing denial of intervention where intervenors acted as soon as practicable under the circumstances).

2. The Coalition and County have significant protectable interests.

Second, the Coalition and County have interests that are related to the property or transaction that is subject to the action- the Lost Creek-Boulder Creek project. The Ninth Circuit liberally construes Rule 24(a), *see Greene v. United States*, 996 F.2d 973 (9th Cir. 1993), and has "rejected the notion that Rule 24(a)(2) requires a specific legal or equitable interest." *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980); *Wilderness Soc'y*, 630 F.3d at 1179. Rather, the interest test is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *County of Fresno*, 622 F.2d at 438 (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)).

Here the PFC and the County have a special interest in the litigation because of their role in developing the project through the collaborative process, including monitoring project implementation and participating in the remand. Tholen Decl. ¶¶ 12-25, Exs. B-I; Robison Decl. ¶¶ 14-18; Paradis Decl. ¶¶ 23-30. Without their input and action, the project would not have taken

shape the way it did. Nor would the project qualify for the special funding set aside for important landscape restoration projects like this one. The role of the County and Coalition in developing the project, and their interest and involvement in seeing it through, constitute a sufficient interest under Rule 24(a). Accordingly, Judge Lodge found the Coalition and County have "direct economic and environmental interests in the Project" such that if plaintiffs prevailed "the likely result would harm the proposed interveners' significantly protectable interest." 2016 Intervention Order at 3, 2016 WL 7626528 at *2. The County and the PFC should be allowed a continued seat at the table while the Court determines whether the refinements to the project on remand pass muster. The Ninth Circuit recognizes that a public interest group generally "is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n*, 58 F.3d at 1397. Similarly, a coalition and county should have a right to intervene in a challenge to the legality of a project they have been instrumental in developing.

The Coalition and the County have strong ecological, social, and economic interests in ensuring that the project moves forward and the thoughtful restoration planned actually occurs. The project includes important improvements in fish passage, will reduce the impacts of future fires on the ecosystem, and will support employment in rural Idaho. Paradis Decl. ¶ 21-29; Tholen Decl. ¶¶ 23-31; Robison Decl. ¶¶.

Wilderness Society teaches that a putative intervenor's interest need not be related to the statute under which a claim arises. *Wilderness Soc'y*, 630 F.3d at 1178. To the extent such a relation is necessary, the Coalition and County have it. The National Forest Management Act (NFMA) requires projects to be consistent with the governing Forest Plan. 16 U.S.C. § 1604(i); *All. for the Wild Rockies*, 907 F.3d at 1109-10. Plaintiffs' claims are based on the core contention that the project does not comply with the Forest Plan. ECF No. 1, Compl., ¶¶ 59-79. The Forest Plan

has a wide variety of resource management objectives, many of which support the interests of the Coalition and County. For example, the Forest Plan contains standards relating to management of wildlife, management for wildfire, and in management of timberlands within the Forest. Forest Plan at III-25 through III-31, III-38 through 43. The Coalition and County have interests in the interpretation of the Forest Plan and the interplay of the requirements of the Plan at the project level that are the basis for plaintiffs' challenge.

Finally, the County and PFC members Idaho Forest Group (IFG) and Evergreen Forest Products have direct economic stakes in the litigation. The County has an interest in jobs and taxes, as well as potential revenues that would take up the slack from the Secure Rural Schools program's scheduled expiration. Paradis Decl. ¶¶ 9-16. IFG and Evergreen's contract interest is one that courts have consistently recognized under Rule 24(a). *Ctr. For Biological Diversity v. Gould*, No. CV 1:15-01329-WBS-GSA, 2015 WL 6951295, at *2 (E.D. Cal. Nov. 10, 2015); *Sequoia ForestKeeper v. Watson*, No. 1:16-CV-1865 AWI JLT, 2017 WL 4310257, at *2 (E.D. Cal. Sept. 28, 2017); *Native Ecosystems Council v. Marten*, No. CV 18-87-M-DLC, 2018 WL 5620658, at *2 (D. Mont. Oct. 30, 2018).

3. Movants' interests would be affected by the litigation.

Regarding the third prong of the intervention test, "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, [they] should, as a general rule, be entitled to intervene." *Berg*, 268 F.3d at 822 (quoting Fed. R. Civ. P. 24 advisory committee's notes). Here, the relief requested by plaintiffs would have a legal and practical effect on the interests of proposed intervenors. Plaintiffs seek to halt the Lost Creek-Boulder Creek Project. Compl. at 14, ¶ 4. If the plaintiffs are successful, the practical effects on proposed intervenors is that the economic restoration, recreational, and environmental benefits from the project will not be

realized.

4. The existing parties do not adequately represent the Coalition and County.

Finally, proposed intervenors are not adequately represented in this case. An "applicant-intervenor's burden in showing inadequate representation is minimal: it is sufficient to show that representation may be inadequate." *Forest Conservation Council v. U.S. Forest Serv.,* 66 F.3d 1489, 1498 (9th Cir. 1995). A proposed intervenor is adequately represented only if "(1) the interests of the existing parties are such that they would undoubtedly make all of the non-party's arguments; (2) the existing parties are capable of and willing to make such arguments; and (3) the non-party would offer no necessary element to the proceeding that existing parties would neglect." *Southwest Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153-54 (9th Cir. 1998); *see also Friant Water Auth. v. Jewell*, No. 1:14–cv–000765–LJO–BAM, 2014 WL 5325352 at *5 (E.D. Cal. Oct. 17, 2014). The most important factor in assessing the adequacy of representation is "how the interest compares with the interests of existing parties." *Citizens for Balanced Use,* 647 F.3d at 898. Intervention is appropriate when the intervenor would "likely offer important elements to the proceedings that the existing parties would likely neglect." *Berg*, 268 F.3d at 823.

When the government is the lead defendant, its 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.'" *Citizens for Balanced Use,* 647 F.3d at 899 (quoting *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009)). "Inadequate representation is most likely to be found when the applicant asserts a personal interest that does not belong to the general public." *Forest Conservation Council*, 66 F.3d at 1499. Proposed intervenors will not be adequately represented by the plaintiffs, or by the federal defendants, the Forest Service and Fish and Wildlife Service. The plaintiffs want the project enjoined contrary to proposed

intervenors' interests. The federal defendants have broader public interests than proposed intervenors. *See Forest Conservation Council*, 66 F.3d at 1499 (holding that a federal agency "is required to represent a broader view than the more narrow, parochial interest of [proposed intervenors] the State of Arizona and Apache County."). The Ninth Circuit emphasized, reversing a denial of intervention in *Allied Concrete & Supply Co. v. Baker*, 904 F.3d 1053 (9th Cir. 2018), that a putative intervenor only needs to show its interests are "*potentially* more narrow than the public's at large," and that a government's "representation of those interests '*may have been* inadequate.'" *Id.* at 1068 (quoting *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998)) (first emphasis added; second emphasis in *Baker*). In sum, "'[i]ntervention of right does not require an absolute certainty that a party's interests will be impaired or that existing parties will not adequately represent its interests,' only that there may be a divergence of interests." *Klamath Siskiyou Wildlands Ctr. v. United States Bureau of Land Mgmt.*, No. 1:19-CV-02069-CL, 2020 WL 1052518, at *3 (D. Or. Mar. 4, 2020) (quoting *Citizens for Balanced Use*, 647 F.3d at 900).

Movants satisfy the above tests. The Coalition and County have specific social, economic, and ecological interests in this matter, interests that the federal defendants do not entirely share and cannot be expected to protect. *Berg*, 268 F.3d at 823 (holding that the interests of private concerns were not adequately represented by federal and municipal defendants in an ESA challenge to the City of San Diego's comprehensive land management plan). Although the Coalition and the County are broad-based and represent a broad spectrum of viewpoints, their interest is locally centered and necessarily narrower than that of the Federal Government. Tholen Decl. ¶ 32; Paradis Decl. ¶ 29; Robison Decl. ¶¶ 20-21.

The County and Coalition will also offer elements to the proceeding that other parties will

not. They bring unique perspectives on the ecological importance of the project, including their experience seeing how similar work kept the Mesa Fire from growing out of control. Tholen Decl. ¶¶ 28-30; Paradis Decl. ¶ 27; Robison Decl. ¶ 19 (noting "the thinning and prescribed fires helped diffuse the fire's energy and the result was a more ecologically appropriate mosaic of high, medium, low severity burns, along with patches that remained unburned."). As such, the Coalition and County have established that they are not adequately represented. *Cf. Desert Prot. Soc'y v. Bernhardt*, No. 2:19-CV-00198-TLN-CKD, 2020 WL 1307189, at *3 (E.D. Cal. Mar. 19, 2020) (granting intervention where movants would "likely present additional arguments and offer other necessary elements to the proceeding which would not be captured by the other parties").

For the foregoing reasons, proposed intervenors have a right to intervene to defend the Lost Creek-Boulder Creek Project.

B. Alternatively, the Court may grant permissive intervention.

District courts have broad discretion to grant permissive intervention. Fed. R. Civ. P. 24(b)(2). So long as an applicant's motion is timely and its "claim or defense and the main action have a question of law or fact in common," a court may grant permissive intervention. In *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2003), environmental groups were allowed to intervene under Rule 24(b) where they asserted "defenses of the Roadless Rule directly responsive to the claim for injunction," *id.* at 1110, along with "an interest in the use and enjoyment of roadless lands, and in the conservation of roadless lands, in the national forest lands subject to the Roadless Rule . . .." *Id.* at 1110-11. Permissive intervention "is readily permitted" when proposed intervenors demonstrate that "they have real economic stakes in the outcome and that the likelihood of future harm to their interest is significant." *Alabama v. U.S. Army Corps of Eng'rs*, 229 F.R.D. 669, 675 (N.D. Ala. 2005). And permissive intervention is especially appropriate when

"intervention will contribute to the equitable resolution of this case." *Kootenai Tribe*, 313 F.3d at 1111.

In *Kootenai Tribe*, a case involving a NEPA challenge to the Forest Service's Roadless Area Conservation Rule, environmental groups were allowed to intervene under Rule 24(b) where they asserted "defenses of the Roadless Rule directly responsive to the claim for injunction," *Id.* at 1110, along with "an interest in the use and enjoyment of roadless lands, and in the conservation of roadless lands, in the national forest lands subject to the Roadless Rule ...." *Id.* at 1110-11. Similarly, the Coalition and County seek to participate to defend the Forest Service project being challenged by plaintiffs. Also similar to the successful intervenors in *Kootenai Tribe*, proposed intervenors have an interest in the management of the lands subject to the complaint. Permissive intervention is therefore appropriate.

IV. CONCLUSION

Proposed defendant-intervenors Payette Forest Coalition and Adams County respectfully request that the Court grant their motion to intervene.

Respectfully submitted this 8th day of April, 2020.

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