UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

FEDERAL FOREST RESOURCE COALITION; AMERICAN FOREST RESOURCE COUNCIL; BLUE RIBBON COALITION; CALIFORNIA ASSOCIATION OF 4 WHEEL DRIVE CLUBS; PUBLIC LANDS COUNCIL; NATIONAL CATTLEMEN'S BEEF ASSOCIATION; AMERICAN SHEEP INDUSTRY ASSOCIATION; ALASKA FOREST ASSOCIATION; RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC.; MINNESOTA FOREST INDUSTRIES, INC.; MINNESOTA TIMBER PRODUCERS ASSOCIATION; CALIFORNIA FORESTRY ASSOCIATION; and MONTANA WOOD PRODUCTS ASSOCIATION, Plaintiffs, vs. TOM VILSACK; and UNITED STATES FOREST SERVICE, Defendants, and KLAMATH-SISKIYOU WILDLANDS CENTER; and OREGON WILD, Defendants-Intervenors-Applicants.	)	Case No. 1:12-cv-1333

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

INTRODUCTION AND BACKGROUND

The challenge to the 2012 National Forest Management Act Planning Rule, brought by a coalition of industry groups and trade associations, is the most recent round of litigation surrounding planning of land management activities on our national forests. Congress enacted the National Forest Management Act (NFMA) in 1976. National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476). NFMA requires the United States Department of Agriculture (USDA), through the United States Forest Service (USFS or Forest Service), to promulgate regulations that establish the process for developing and revising forest plans, and include the guidelines and standards NFMA prescribes. 16 U.S.C. § 1604(g).

The regulations must include, among other things, procedures to insure that forest plans are prepared in accordance with NEPA; guidelines that require identification of the suitability of lands for resource management; guidelines that provide for diversity of plant and animal communities based on the suitability and capability of the specific land area; guidelines to insure that timber is harvested from national forest lands only where soil, slope and watershed conditions are not irreversibly damaged, and protection is provided for streams and other bodies of water from detrimental changes in water temperatures and sediment; and guidelines insuring that the agency will allow damaging logging called "clearcutting" only if certain conditions exist. Id.

In 1979, the USDA and USFS first promulgated regulations implementing the procedures required by the statute. 44 Fed. Reg. 53928 (Sept. 17, 1979). The 1979 Rule was accompanied by an environmental impact statement (EIS) that analyzed the impact of the regulations. See Citizens for Better Forestry v. U.S. Dept. of Agriculture, 341 F.3d 961, 966 (9th Cir. 2003) ("Citizens I"). After convening a Committee of Scientists to obtain its advice, USDA revised the

regulations in 1982. 47 Fed. Reg. 43026 (Sept. 30, 1982). The 1982 Rule "set out a comprehensive approach to forest management, implementing the statutory directive." Id. The 1982 Rule governs promulgation of forest plans, and also applies to site-specific projects. Id.

In April 1995, USDA published a proposed rule to amend the 1982 regulations, but never finalized it. Id. at 967. In June, 1996, USDA prepared a one-page "biological assessment" for its "effort to revise and streamline land and resource management planning procedures for the National Forest System." According to that biological assessment, over 280 threatened or endangered species live within the national forests. In December, 1997, the Secretary of Agriculture convened a "Committee of Scientists" to review the NFMA planning process, and offer recommendations, which it did in March 1999. Id.; see 16 U.S.C. § 1604(h)(1) (scientific committee to aid in promulgation of regulations).

On October 5, 1999, USDA published a proposed rule to revise the 1982 Rule. Citizens I, 341 F.3d at 967. Unlike previous draft rules, the 1999 proposed rule did not include an analysis of environmental impacts, and USDA did not solicit comments on it. Id. In November 2000, USDA published the 2000 Rule. 65 Fed. Reg. 67513 (Nov. 9, 2000). As the Ninth Circuit later noted, the 2000 Rule substantially modified the 1982 Rule. Citizens I, 341 F.3d at 967. The 2000 Rule eliminated "minimum management requirements" from the 1982 Rule: it weakened the species "viability" requirement by providing that plan decisions affecting species diversity must provide only for ecological conditions that provide a high likelihood that those conditions are capable of supporting over time the viability of species; and it eliminated requiring development of regional guides that maintain consistency in forest management. Id.

Several conservation groups, including Proposed Defendants-Intervenors, challenged the 2000 Rule. Citizens I, 341 F.3d at 961. While that case was pending, USDA expressed concerns

about provisions of the 2000 Rule, and issued an "interim rule" to extend the date by which changes to forest plans were required to comply with the 2000 Rule. Id. at 968; see also 66 Fed. Reg. 27,552 (May 17, 2001). During the interim period, USDA allowed forests to choose between the 1982 Rule and the 2000 Rule when amending or revising forest plans. Id.

In 2003, the Ninth Circuit ruled that USDA violated NEPA when it promulgated the 2000 Rule. Citizens I, 341 F.3d at 970-71. USDA then extended the transition period for site-specific projects in an "interim" rule, 68 Fed. Reg. 53,294 (September 10, 2003), which extended the date for when site-specific projects must comply with the 2000 Rule until new regulations were adopted, and issued an "interpretative" rule. 69 Fed. Reg. 58,055 (Sept. 29, 2004). The latter stated that because of the transition provision in the 2000 Rule, the 1982 Rule was no longer in effect, at least for site-specific projects. 69 Fed. Reg. at 58,057, App. B to Sec. 219.35. Under USDA's interpretation that only the transition provision of the 2000 Rule was in effect for projects, the only regulatory requirement for projects throughout all national forests was that that the responsible Forest Service official "consider" (but not necessarily use or apply) the "best available science." 36 C.F.R. § 219.35(a) (2000).

In January 2005, USDA withdrew the 2000 Rule and published a 2005 Rule. 70 Fed. Reg. 1022-23 (Jan. 5, 2005). Proposed Defendants-Intervenors, as well as other conservation groups, filed suit to challenge the 2005 Rule. In March, 2007, the District Court of the Northern District of California held that USDA violated the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Administrative Procedure Act (APA) when it promulgated the 2005 Rule, and enjoined USDA from implementing it. Citizens for Better Forestry v. U.S. Dept. of Agriculture, 481 F.Supp.2d 1059 (N.D. Cal. 2007) ("Citizens II"). The district court ruled that the 2005 Rule may have a significant impact on the environment, and

may affect species listed under the ESA, and ordered USDA to conduct further analysis of the impacts of the rule pursuant to NEPA and the ESA. Id. at 1085-90, 1085-97, 1100.

In August 2007, USDA issued a draft EIS for a new proposed rule. 72 Fed. Reg. 48,514-15 (Aug. 23, 2007). The draft EIS stated that the new rule would have "no effect" on the environment. USDA also prepared a brief "biological assessment" to assess the potential impacts of the 2008 Rule on species designated as threatened and endangered under the ESA, and stated that the 2008 Rule would have "no effect" on any of them. In February, 2008, USDA issued a final EIS, repeating that that the proposed rule would have no effect on the environment, AR 296, and in April, 2008, issued a Record of Decision adopting the 2008 Rule. 73 Fed. Reg. 21468 (April 21, 2008).

In 2008, proposed Defendants-Intervenors and other conservation groups filed suit to challenge the 2008 Rule, alleging that USDA violated NEPA by preparing a deficient EIS to accompany the rule, and violated the ESA by failing to consult with the expert consulting agency on the rule. The plaintiffs in that litigation sought an order setting aside the 2008 Rule, and reinstating the 1982 Rule. In June 2009, the district court granted Citizens' motion for summary judgment, ruling that USDA violated NEPA and the ESA when it promulgated the 2008 Rule. Citizens for Better Forestry v .U.S Dep't of Agriculture, 632 F.Supp.2d 968, 980-82 (N.D. Cal. 2009) ("Citizens III"). The district court vacated the 2008 Rule, and stated that USDA "may choose whether to reinstate the 2000 Rule or, instead, to reinstate the 1982 Rule." Id. at 982.

USDA and the Forest Service engaged in another round of rulemaking. After conducting numerous field meetings and roundtables with interested stakeholders, the Forest Service promulgated a new draft planning rule in early February 2011, 76 Fed. Reg. 8480 (Feb. 14, 2011), which was accompanied by a draft EIS. A biological opinion was also prepared for the

new planning rule. Correcting previous errors, USDA and the Forest Service accepted comment on the proposed rule. In April 2012, USDA and the Forest Service released a final EIS and planning rule. 77 Fed. Reg. 21,162 (April 9, 2012). Proposed Defendants-Intervenors participated throughout this rulemaking process. Declaration of Joseph Vaile, ¶ 16; Declaration of Doug Heiken, ¶¶ 3-5.

PROPOSED DEFENDANTS-INTERVENORS

Proposed Defendants-Intervenors have played an active role in the NFMA rulemaking process – as well as the implementation of those rules in the site-specific forest management process – for over 12 years. Consequently, proposed Defendants-Intervenors have a strong interest in the outcome of this case. They and their members have been in the forefront of protecting national forests and the fish and wildlife that rely on them through habitat restoration, participation in the administrative process, litigation, and public education.

Proposed Defendants-Intervenors have a particular interest in the national forests in the Pacific Northwest. See Vaile Dec. ¶¶ 6-18; Heiken Dec. ¶¶ 6-34. Proposed Defendants-Intervenors have members who reside near, visit, or otherwise use and enjoy the various national forests in a variety of ways, including recreation, hunting and fishing, wildlife viewing and education, and aesthetic and spiritual enjoyment. Id. The past, present, and future enjoyment of these benefits by Proposed Defendants-Intervenors and their members will be irreparably harmed by Plaintiffs' requests for relief. Id.

Klamath-Siskiyou Wildlands Center ("KS Wild") is a non-profit organization incorporated in Oregon with offices in Ashland and Williams, Oregon. Vaile Decl. ¶ 2. KS Wild has 2,000 members, with most members concentrated in southern Oregon and northern California. KS Wild is dedicated to preserving the unique biological diversity of the Klamath-Siskiyou region in southwest Oregon and northwest California. KS Wild monitors federal public

lands to ensure that management activities comply with relevant federal laws, including environmental laws. One focus of KS Wild's work is enforcing the Northwest Forest Plan, the 1994 ecosystem management plan which put both the Forest Service and Bureau of Land Management under an overarching management scheme intended to maintain old forests and habitat connectivity in the Pacific Northwest.

Oregon Wild is a non-profit corporation organized under the laws of the State of Oregon. Oregon Wild is headquartered in Portland, Oregon, with field offices in Eugene and Bend. Oregon Wild has approximately 4,500 individual and organizational members. Oregon Wild's mission is to protect and restore Oregon's wild lands, wildlife, and water as an enduring legacy. See generally, Heiken Declaration. Oregon Wild's primary goals include permanent protection of roadless areas and mature and old-growth forests. Oregon Wild has a long history of involvement in the planning efforts that led to the landmark Northwest Forest Plan. Oregon Wild has engaged in extensive efforts to enforce the Northwest Forest Plan and protect older forests and watersheds from the effects of logging and road building.

Because each proposed Defendant-Intervenor meets the four requirements for intervention as of right as defendants under Fed. R. Civ. P. 24(a) or, alternatively, the broad standard for permissive intervention under Rule 24(b), Proposed Defendants-Intervenors respectfully request the Court for leave to intervene as defendants in this case.

ARGUMENT

I. PROPOSED DEFENDANTS-INTERVENORS ARE ENTITLED TO INTERVENE AS OF RIGHT.

The Federal Rules of Civil Procedure provide the following:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition may as a practical matter impair or impede the applicant's ability to protect that

> interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). This Court uses a four-part test to evaluate motions to intervene: "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." SEC v. Prudential Sec. Inc., 136 F.3d 153, 156 (D.C. Cir. 1998). Practical considerations guide courts in applying this test. See Fed. R. Civ. P. 24, Advisory Committee's note. While "the D.C. Circuit has taken a liberal approach to intervention," Wilderness Society v. Babbitt, 104 F. Supp. 2d 10, 18 (D.D.C. 2000), in this Circuit, Proposed Defendants-Intervenors must demonstrate Article III standing. Mova Pharmaceutical Corp. v. Shalala, 140 F.3d 1060, 1074 (D.C. Cir. 1998). In this case, Proposed Defendants-Intervenors satisfy each of the elements for intervention under Rule 24(a).

A. Proposed Defendants-Intervenors' Motion for Intervention Is Timely.

In determining whether an intervention motion is timely, this Court should consider "'all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case.'" United States v. British American Tobacco Australia Serv., 437 F.3d 1235, 1238 (D.C. Cir. 2006) (quoting United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1295 (D.C. Cir. 1980)). Proposed Defendants-Intervenors' motion to intervene is timely because the present case is in its early stages. Plaintiffs' complaint was filed on August 13, 2012, and Federal Defendants' response is not due until October 15, 2012. No motions other than to appear pro hac vice have been filed. To further facilitate timely resolution of this case, Proposed Defendants-Intervenors have lodged their proposed answer to the complaint (Exhibit A) with this motion to

intervene. Granting Proposed Defendants-Intervenors' motion to intervene will not delay the course of this litigation nor prejudice any party; this motion to intervene is timely.

B. Proposed Defendants-Intervenors Have an Interest in the Subject Matter of This Action.

Rule 24(a) requires an applicant for intervention to possess an interest relating to the property or transaction that is the subject matter of the litigation. This "interest test" is not a rigid standard; rather, it is "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967); see also Friends of Animals v. Kempthorne, 452 F. Supp. 2d 64, 69 (D.D.C. 2006). Indeed, a proposed intervenor need not have a specific legal or equitable interest in jeopardy but need only show a "protectable interest of sufficient magnitude to warrant inclusion in the action." Smith v. Pangilinan, 651 F.2d 1320, 1324 (9th Cir. 1981); see also Friends of Animals, 452 F. Supp. 2d at 69 ("[P]roposed intervenors of right 'need only an interest in the litigation—not a cause of action or permission to sue.'")(citation omitted).

Here, Proposed Defendants-Intervenors are conservation groups with the mission of ensuring responsible forest management on the forests in the Pacific Northwest. See Vaile Dec., ¶ 16; Heiken Dec., ¶¶ 3-5. If Plaintiffs' requests for relief are granted, Proposed Defendants-Intervenors would suffer an injury-in-fact due to the lack of science-based forest management decisions, and the lack of a holistic or "ecosystem" management focus in Forest Service planning decisions. See Vaile Decl.; ¶¶ 17-18; Heiken Decl. ¶¶ 2-34; Friends of the Earth Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183 (2000) ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity") (citations omitted)). Such injury could be redressed through Proposed Defendants-Intervenors'

participation in this case, where they intend to explain the damage Plaintiffs' request could cause to the environment and to the law, which may prevent Plaintiffs' request for relief from being granted. In addition, the stare decisis effect of a ruling in Plaintiffs' favor could cause harm to Proposed Defendants-Intervenors' interests in protecting forests. See Nuesse v. Camp, 385 F.2d at 702.

C. Proposed Defendants-Intervenors' Interests in Science-Based Forest Management and Ecosystem Management May Be Impaired by This Litigation.

An applicant for intervention as of right must be "so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." Fed. R. Civ. P. 24(a) (emphasis added). Applying this impairment requirement, the Court should "'look[] to the 'practical consequences' of denying intervention…." Fund for Animals v. Norton, 322 F.3d 728, 735 (D.C. Cir. 2003). Such an inquiry "'is not limited to consequences of a strictly legal nature.'" Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1498 (9th Cir 1995) (quoting Natural Res. Defense Council v. Nuclear Regulatory Comm'n, 578 F.2d 1341, 1345 (10th Cir. 1978)).

In this suit, Plaintiffs seek to preclude the Forest Service from integrating science, ecological sustainability, and the provision of ecological services such as clean water and air, climate regulation, and botanical storehouses into forest planning. See generally Complaint. Such a result would irreparably harm Proposed Defendants-Intervenors' interests, by precluding the type of science-based ecosystem management they have spent decades attempting to implement on the national forests in the Pacific Northwest and beyond. See, e.g., Natural Res. Defense Council v. EPA, 99 F.R.D. 607, 609 (D.D.C. 1983) (granting intervention as of right to industry groups in a FACA case that could "nullify" the group's efforts). In particular, Proposed Defendants-Intervenors have worked within the framework of the Northwest Forest Plan – the

first science-based ecosystem management plan implemented in the nation – to ensure sustainable management of federal public forests in the Pacific Northwest for future generations, a result that would be put at risk should this Court grant Plaintiffs' request for relief.

Courts have found sufficient impairment to sustain intervention for conservation groups like this. See, e.g., Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1398 (9th Cir. 1995) (decision to remove species from endangered species list impairs conservation groups' interest in preservation); Sagebrush Rebellion v. Watt, 713 F.2d 525, 528 (9th Cir. 1983) ("An adverse decision in this suit would impair the society's interest in the preservation of birds and their habitats."); Douglas Timber Operators v. Salazar, No. 09-1704-JR (D.D.C. 2009) (granting intervention to conservation group that challenged agency action plaintiffs sought to reinstate). Because Proposed Defendants-Intervenors are so situated that the disposition of this action may, as a practical matter, impair their ability to protect their interests in publically-owned forest land, Proposed Defendants-Intervenors plainly satisfy Rule 24(a)'s impairment-of-interest requirement.

D. Neither of the Existing Parties Will Adequately Represent Proposed Defendants-Intervenors' Interests.

An applicant to intervene as a matter of right must show that its interests may not be adequately represented by the existing parties. This requirement is "not onerous" and is satisfied if the applicant shows that the representation of its interests "may be" inadequate. Fund For Animals v. Norton, 322 F.3d 728, 735 (D.C. Cir. 2003) (quoting Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972); Dimond v. District of Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986)). Indeed, an applicant "'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee[.]'" Fund For Animals, 322 F.3d at 735 (quoting American Tel. & Tel. Co., 642 F.2d at 1293). The D.C. Circuit has

"often concluded that governmental entities do not adequately represent the interest of aspiring intervenors." Fund For Animals, 322 F.3d at 736 (citing Natural Res. Defense Council v. Costle, 561 F.2d 904, 912-13 (D.C. Cir. 1977); Smuck v. Hobson, 408 F.2d 175, 181 (D.C. Cir. 1989)); see also Friends of Animals, 452 F. Supp. 2d 64.

Here, neither Plaintiffs nor Federal Defendants adequately represents Proposed Defendants-Intervenors' interests. Plaintiffs' interests are adverse to those of Proposed Defendants-Intervenors. Plaintiffs seek to invalidate the 2012 Planning Rule, and preclude the Forest Service from implementing a Rule that requires considering science and ecosystem management in the forest planning process. Plaintiffs also seek to require the Forest Service to turn a blind eye to scientific advancements and new threats to our national forests, such as climate change and unmanaged recreation. On the other hand, Proposed Defendants-Intervenors seek to ensure science-based sustainable management of our national forests, balanced with other statutory obligations. Plaintiffs do not represent Proposed Defendants-Intervenors' interests.

Federal Defendants' interests may also be adverse to Proposed Defendants-Intervenors'. See People for the Ethical Treatment of Animals v. Babbitt, 151 F.R.D. 6 (D.D.C. 1993) (government's mandate to design and enforce an entire regulatory system precludes it from adequately representing one party's interest in it). Federal Defendants' longstanding reluctance to craft an adequate Planning Rule, as evidenced by Proposed Defendants-Intervenors' challenges to earlier iterations of the Rule, highlights the risk that they will not present a vigorous defense to Plaintiffs' claims, or may settle in a way that commits the Forest Service to a new planning process without the benefit of science or holistic ecosystem management. See, e.g., AFRC v. Clarke, No. 94-1031-TPJ (D.D.C. 2003) (settlement agreement between the Bush Administration and timber interests attempting to eviscerate ecosystem management of Pacific

Northwest forests). Accordingly, given the minimal showing necessary to find inadequate representation, the Court should grant Proposed Defendants-Intervenors' motion to intervene as of right as defendants.

II. PROPOSED DEFENDANTS-INTERVENORS SATISFY THE STANDARD FOR PERMISSIVE INTERVENTION.

If this Court denies intervention as of right, Proposed Defendants-Intervenors respectfully request that the Court allow them to intervene under Rule 24(b). Permissive intervention is appropriate when an applicant's timely claim or defense "shares a question of law or fact in common with the underlying action and if the intervention will not unduly delay or prejudice the rights of the original parties." Acree v. Republic of Iraq, 370 F.3d 41, 49 (D.C. Cir. 2004) (citing Fed. R. Civ. P. 24(b)).

Here, Proposed Defendants-Intervenors meet the Rule 24(b) standard. Proposed Defendants-Intervenors have a significant interest in the use and enjoyment of the national forests in the Pacific Northwest, and nationally. Proposed Defendants-Intervenors also have an interest in science-based ecosystem management and planning, and the role of public forests in providing healthy ecosystem services, such as mitigating for climate change, clean air and water, and balanced recreational opportunities. Because this case is in its early stages, intervention will not cause any undue delay or prejudice to the existing parties. Given the importance of the issues involved in this case, the stake Proposed Defendants-Intervenors have in protecting forests in the Pacific Northwest and elsewhere, the Court should allow permissive intervention.

CONCLUSION

For the reasons set forth above, Klamath-Siskiyou Wildlands Center and Oregon Wild respectfully request that this Court grant them intervention as of right or, in the alternative, permissive intervention. They have lodged their proposed answer with the motion to intervene.

Respectfully submitted this 10th day of September, 2012.

/s/ Matt Kenna .

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CERTIFICATE OF SERVICE

I hereby certify that on September 10th 2012, I filed a copy of this document electronically through the Court's CM/ECF system, which caused the following parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic Filing:

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