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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

DEFENDERS OF WILDLIFE, et al., Plaintiffs, -vs- SALLY JEWELL, Secretary, U.S. Department of the Interior, in her official capacity; DANIEL M. ASHE, Director, U.S. Fish and Wildlife Service, in his official capacity, Defendants.	**CV 14-246-M-DLC** (Consolidated with Case Nos. 14-247-M-DLC and 14-250-M-DLC) MEMORANDUM BRIEF IN SUPPORT OF GOVERNOR C.L. "BUTCH" OTTER'S MOTION TO INTERVENE

I. INTRODUCTION

C.L. "Butch" Otter, Governor of the state of Idaho ("State"), submits this memorandum in support of his motion to intervene in the present action as Defendant-Intervenor. Plaintiffs in this action are challenging the U.S. Fish and Wildlife Service's ("Defendant" or "Service") decision to withdraw the proposed rule to list the North American wolverine ("wolverine") as a threatened species under the Endangered Species Act ("ESA").

Governor Otter, on behalf of the State, respectfully requests that this Court grant him Defendant-Intervenor status in order to help defend the Service's final decision to not list the wolverine as threatened. The State has a number of interests that are separate and distinct from Defendant's that would be inadequately represented without intervention. Primarily, the state of Idaho has a sovereign interest in managing all wildlife within its borders, and the outcome of this case threatens that very sovereignty. In addition, listing wolverines in Idaho would have economic and societal impacts on those communities that exist near the species' habitat. With these interests in mind, Governor Otter requests to intervene as a defendant in this litigation as a matter of right under Fed. R. Civ. P. 24(a), or, in the alternative, to intervene permissively under Fed. R. Civ. P. 24(b).

II. BACKGROUND

As Chief Executive, the Governor of Idaho is charged with ensuring that the

laws of the State are faithfully executed. IDAHO CONST. art. IV, § 5; IDAHO CODE § 67-802. The Governor's Office of Species Conservation ("OSC") is statutorily tasked with coordinating State activities and negotiating agreements with federal agencies concerning candidate, threatened, and endangered species under the ESA. Miller Decl. ¶¶ 4, 5; *see also* IDAHO CODE § 67-818. Furthermore, "all wildlife, including all wild animals, wild birds, and fish, within the state of Idaho, is … property of the state." IDAHO CODE § 36-103(a). The Idaho Department of Fish and Game ("IDFG") is the agency tasked with managing State species. Gould Decl. ¶ 5.

Since the 1960s, the State has been heavily involved with wolverine management and monitoring. Gould Decl. ¶ 7. The State, through IDFG, has participated in a number of conservation efforts including collaborative research projects, telemetry studies, surveys, and DNA collection, just to name a few. Gould Decl. ¶ 8. From the time the State took an active role in management, there has been an increase in wolverine distribution throughout Idaho. *See* Miller Decl. ¶ 8. Currently, Idaho has some of the strongest, intact habitat in the western United States, and the statewide distribution is believed to mirror the species' distribution prior to European settlement. Gould Dec. ¶¶ 11, 12. Again, all of this has occurred under State management.

The state of Idaho has also been involved in all of the federal processes

related to the wolverine population in Idaho and, in this particular case, submitted comments on a number of occasions following the Service's proposal to list the wolverine in 2013. *Id.* ¶¶ 14, 15; Miller Decl. ¶¶ 9, 10; *see generally* Threatened Status for the Distinct Population Segment of the North American Wolverine, 78 Fed. Reg. 7864 (Feb. 4, 2013) ("Proposed Rule"). The State's comments were critical of the Proposed Rule for a number of reasons. Primarily, the State was concerned with the Service's plan to list the wolverine based solely on the projected threat of climate change on wolverine habitat. Miller Decl. ¶¶ 11, 12. OSC and IDFG expressed these concerns, and others, to the Service multiple times following publication of the Proposed Rule.

After receiving similar comments from other states and peer reviewers and convening a wolverine science panel workshop, the Service reevaluated their climate data. Based on the best available scientific information, the Service determined that "the effects of climate change [are not] likely to place the wolverine [population] in danger of extinction in the foreseeable future." Threatened Status for the Distinct Population Segment of the North American Wolverine, 79 Fed. Reg. 47522, 47536 (Aug. 13, 2014). The Service's final decision appropriately concluded that the best available science did not support listing the wolverine as threatened in the contiguous United States. Miller Decl. ¶¶ 13, 14. Governor Otter now seeks intervention in order to protect Idaho's interests

and defend the Service's final decision.

III. LEGAL STANDARD

An interested party may be permitted to intervene as of right pursuant to Fed. R. Civ. P. 24(a) or permissively under Fed. R. Civ. P. 24(b). Traditionally, Rule 24 is construed liberally in favor of the applicants for intervention, so long as all the elements for intervention have been met. *Chamness v. Bowen*, 722 F.3d 1110, 1121 (9th Cir. 2013). When considering a motion for intervention, courts accept as true all "well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion." *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001).

IV. ARGUMENT

A. Governor Otter Should be Permitted to Intervene as of Right under Rule 24(a).

An applicant who seeks to intervene as of right under Rule 24(a) must show that: (1) The motion is timely; (2) the applicant has a significant protectable interest related to the property or transaction that is the subject matter of the litigation; (3) disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest is inadequately represented by the parties. *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). Courts, when analyzing

motions for intervention under Rule 24(a), are guided by practical and equitable considerations, as opposed to technical distinctions. *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003); *Berg*, 268 F.3d at 818. Allowing intervention can "prevent or simplify future litigation involving related issues," while also allowing "an additional interested party to express its views before the court." *Greene v. U.S.*, 996 F.2d 973, 980 (9th Cir. 1993).

1. The Governor's Motion is Timely.

When analyzing whether a motion to intervene is timely, courts consider "(1) the stage of the proceedings; (2) whether the parties would be prejudiced; and (3) the reason for any delay in moving to intervene." *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836-37 (9th Cir. 1996). Plaintiffs in this case filed their complaint on October 13, 2014, and Defendants recently filed their answer on January 16, 2015, only a few weeks prior to the Governor submitting his motion to intervene and supporting documents. Pls.' Compl., ECF No. 1; Def.'s Answer, ECF No. 11. At this time, the Court has not made any dispositive rulings and Governor Otter is willing to adhere to the Case Management Order issued by Judge Christensen. ECF No. 10. Intervention at this stage of the proceedings will not prejudice the original parties.

2. Governor Otter has Significant Protectable Interests Related to the Subject Matter of this Action.

An applicant for intervention must show some significant protectable interest. *Greene*, 996 F.2d at 976. However, this is only a practical, threshold question and the applicant does not need to establish specific legal or equitable interests. *Id.* Intervention as of right under 24(a)(2) generally requires that the "interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *The Wilderness Soc'y v. U.S. Forest Service*, 630 F.3d 1173, 1179 (9th Cir. 2011) (internal citation omitted). The Ninth Circuit further refined this notion by holding that a sufficient protectable interest exists, for purposes of intervention, if the applicant will "suffer a practical impairment of its interests as a result of the pending litigation." *Id.* Nonetheless, an economic interest must be more than a "bare expectation," often related to real or personal property rights. *Berg*, 268 F.3d at 820.

Wolverines in Idaho are property of the State. As Chief Executive, Governor Otter has a legally protectable interest in the State's wildlife and will suffer a practical impairment if the Plaintiffs are granted the remedy they seek. Through the efforts of IDFG and OSC, Idaho has taken proactive measures to ensure that wolverines continue to thrive under State management. Idaho was the first state to develop its own wolverine management plan providing short and long-term goals

for the conservation of wolverines in Idaho. MANAGEMENT PLAN FOR THE CONSERVATION OF WOLVERINE IN IDAHO, IDAHO DEPT. OF FISH AND GAME v (2014); Gould Decl. ¶ 10. In pursuit of these efforts, Idaho spent over $100,000 in 2014 alone. *Id.* ¶ 8. It follows that a listing would severely undermine all that the State has done over the last several decades in the name of wolverine conservation.

In addition to the proactive steps taken to conserve wolverines in Idaho, the State, through various agencies, has invested hundreds of hours attending public meetings and drafting and reviewing comments; as well as coordinating with the relevant federal agencies, local counties, and non-governmental entities; all in the name of wolverine. *See* Miller Decl. ¶ 9. Again, these steps were taken in order to preclude the need to list the species and these efforts would be to no avail if Plaintiffs are granted the relief they seek.

Furthermore, the State has significant economic interests tied to the outcome of this case that go well beyond "bare expectations." The state of Idaho is comprised of over 60% federal land, and 88% of the wolverine habitat within the State is managed by the U.S. Forest Service. Gould Decl. ¶ 11. A significant part of Idaho's economy, especially in rural communities, is dependent on access to and the use of federal lands. *See* Miller Decl. ¶ 14. Undoubtedly, a listing would impact, *inter alia*, local employment, recreation, tourism, and any State or private property interests associated with these federally managed lands.

The foregoing illustrates the Governor's significant protectable interests related to the subject matter at issue in this case. Therefore, Governor Otter satisfies the second requirement for intervention under Rule 24(a)(2).

3. As a Practical Matter, the Outcome of this Case would Impair the Governor's Ability to Protect the State's Interests.

The third requirement under a motion to intervene as of right is satisfied if the applicant would be affected, as practical matter, by the outcome of the case. *Berg*, 268 F.3d at 822. After finding that a proposed-intervenor has significant protectable interests, courts typically have "little difficulty concluding that the disposition of the case may, as a practical matter, affect [those interests]." *Citizens for Balanced Use v. Montana Wilderness Ass'n.*, 647 F.3d 893, 898 (9th Cir. 2011). As previously stated, the Governor has a number of significant protectable interests, and it follows logically that the outcome of this case will affect those interests.

An adverse decision would impair and impede the State's sovereign interest in managing wolverines located within Idaho's borders. And, a listing would have a detrimental effect on Idaho's economy, especially in smaller communities that depend on their proximity to public lands. In part because of the potential negative impacts associated with a listing, the State submitted comments that were heavily referenced by the Service in their decision not to list the wolverine. Therefore,

Plaintiffs' request to vacate the Service's withdrawal of the proposed rule, as a practical matter, would affect the Governor's aforementioned protectable interests.

4. The Existing Parties do not Adequately Represent the Governor's Interests.

The burden of showing that the current representation is inadequate is minimal. *Nw. Forest Res. Council*, 83 F.3d at 838. It is sufficient for the proposed-intervenor to demonstrate that the representation "may be inadequate." *Id.* To establish whether the applicant's interests are adequately represented, courts often look to determine if "(1) the interests of a present party to the suit are such that it will undoubtedly make all of the intervenor's arguments; (2) the present party is capable of and willing to make such arguments; and (3) the intervenor would not offer any necessary element to the proceedings that the other parties would neglect." *Fresno Cnty v. Andrus*, 622 F.2d 436, 439 (9th Cir. 1980).

The Service, as the federal Defendant, will likely not make all the same arguments as Governor Otter, especially if arguing remedies. The Service is the federal agency tasked with developing rules and regulations in accordance with the ESA and APA and ensuring that the statutory provisions, along with the supplemental rules and regulations, are enforced. The Service will defend their decision to withdraw the Proposed Rule to the extent it relates to their procedural and substantive compliance with the ESA and APA. While the Service is required to consider public and private interests during the rulemaking process, they will not

represent state and local interests during litigation.

On the other hand, Governor Otter, as Chief Executive, has a broad interest in all activities occurring on lands within the State, regardless of who holds title. The Governor also has unique concerns relate to the potential economic impacts this case may have statewide. The citizens and various interests within the state of Idaho are the ones that will suffer the real effects from an adverse ruling; whereas, the Service will only be required to vacate their final decision and start the procedural process over again.

Finally, the Governor would provide helpful elements to the proceedings, including the State's role leading up to the withdrawal of the Proposed Rule and its sovereign interest in managing the wolverine population. Additionally, since the State's interests are unique and heavily implicated, Governor Otter should be included when formulating a remedy, if any. Should the Service agree to negotiate settlement terms, there is no guarantee that the Service will do so with the interests of the state of Idaho in mind. With such divergent interests, the Service is not capable of adequately making arguments on behalf of the Governor and the state of Idaho.

The overarching purpose of intervention is to allow interested parties an opportunity to meaningfully participate in a lawsuit that has potential to impact their unique interests. Here, Governor Otter has a number of unique interests,

which are distinguishable from the Service's. Therefore, Governor Otter should be allowed to intervene as of right under Rule 24(a).

B. In the Alternative, Governor Otter should be allowed to Intervene Permissively under Rule 24(b).

A court may also grant permissive intervention under Rule 24(b) if the proposed-intervenor meets the following conditions: "(1) the movant must show an independent ground for jurisdiction; (2) the motion must be timely; and (3) the movant's claim or defense and the main action must have a question of law and fact in common." *Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989). The analysis for permissive intervention focuses on the interests of the existing parties. Courts will often consider whether intervention will unduly delay or prejudice the original parties' rights, as well as the potential effect on judicial economy. *Id.* at 530-31.

If the Governor does not meet the requirements necessary to intervene as of right, this Court should exercise its broad discretion and allow the Governor to intervene permissively under Rule 24(b). The first requirement under Rule 24(b), independent jurisdiction, is satisfied because this case involves judicial review of a proposed federal administrative rule published according to the requirements under the ESA and APA. Review of such an action provides the District Court with federal question jurisdiction pursuant to 28 U.S.C. § 1331.

The second requirement for permissive intervention, timeliness, has also been satisfied as set forth in the Governor's argument requesting intervention as of

right, *supra*. To reiterate briefly, the motion is timely because the Court has not rendered any substantive decisions on the merits, the administrative record was just filed, and the Defendant only submitted their answer a few weeks prior. The Governor has provided this memorandum, along with his motion and answer, and is prepared to participate in this litigation on schedule with Defendant.

Finally, many of the Governor's defenses, issues, and facts are likely similar to the ones raised by the Service, except Governor Otter seeks to intervene in order to defend the State's unique interests and aid in the judicious and equitable resolution to this case. The Governor satisfies the requirements for permissive intervention, and; therefore, the Court should exercise its discretion in favor of granting intervention.

V. CONCLUSION

Governor Otter should be allowed to intervene in this case in order to protect his unique interests and defend against Plaintiffs' numerous claims, including their request that the Service vacate their August 13, 2014, decision to withdraw the Proposed Rule. The Governor has met the requirements for intervention as a matter of right and requests that this court grant his motion pursuant to Fed. R. Civ. P. 24(a). In the alternative, the Governor requests that this Court exercise its broad discretion and grant his motion to intervene permissively in accordance with Fed. R. Civ. P. 24(b).

DATED this 20th day of February, 2015.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing support brief complies with the word limit of L.R. 7.1(d)(2)(A), in that it is less that 6500 words as calculated by Microsoft Word 2010, is double spaced and in a 14-pt font except for quoted material and footnotes.

Gwen Berard
Gwen Berard, Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of February, 2015, a copy of the foregoing was served upon the following by Mail, Express Mail, Hand-Delivery, Fax, or Federal Express:

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