

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO
Darrell G. Early
Chief, Natural Resources Division
Owen H. Moroney
Deputy Attorneys General
600 S. Walnut Street
P.O. Box 25
Boise, ID 83707
Telephone: (208) 334-3715
Fax: (208) 334-4885
owen.moroney@idfg.idaho.gov

Attorneys for Intervenor-Defendant State of Idaho by and through the Office of Species Conservation and the Idaho Fish and Game Commission

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

CENTER FOR BIOLOGICAL)
DIVERSITY, et al.,)
)
Plaintiffs,)
)
v.)
)
SCOTT DE LA VEGA, et al.,)
)
Defendants.)

Lead Case No.
CV 20-181-DWM

Member Case No.
CV 20-183-M-DWM

WILDEARTH GUARDIANS, ET AL.,)
)
Plaintiffs,)
)
v.)
)
SCOTT DE LA VEGA, et al.,)
)
Defendants.)

**MEMORANDUM IN SUPPORT OF
MOTION TO INTERVENE AS
DEFENDANT BY INTERVENOR-
APPLICANT STATE OF IDAHO**

INTRODUCTION

The State of Idaho, by and through the Idaho Governor's Office of Species Conservation (OSC) and the Idaho Fish and Game Commission (Commission), submits this memorandum in support of the State's motion to intervene in the present action as a Defendant-Intervenor. The State requests that this Court grant it Defendant-Intervenor status to defend the United States Fish and Wildlife Service's (Service) final decision to withdraw the proposed rule to list a distinct population segment (DPS) of the North American wolverine as threatened. *See* 85 Fed. Reg. 64,618 (Oct. 13, 2020).

The State has significant interests that are separate and distinct from the federal Defendants that would be inadequately represented without intervention. Foremost among these is Idaho's sovereign interest in managing all wildlife within the borders of the State, and the resolution of this case may threaten that sovereignty.

Additionally, an invalidation of the Service's decision to withdraw the proposed rule to list wolverine results in the reinstatement of wolverine as a "proposed species." Reinstatement of the "proposed species" category does not invoke Endangered Species Act protections directly. However, federal land management agency regulations and policy do use this category in directing federal agency planning and actions. *See e.g.*, 36 C.F.R. § 219.6(b)(5) (direction of

assessment for forest plan development or revision includes proposed and candidate species); 36 C.F.R. § 219.9 (2)(b) and 36 C.F.R. §219.12 and (direction for “species-specific” planning includes determinations for conservation and monitoring of proposed and candidate species); *see also* 36 C.F.R. §219.12 (defined terms including “Proposed species”); *see generally*, Bureau of Land Management Manual 6840 – Special Status Species Management (2008)(“establishes policy for management of species listed or proposed for listing pursuant to the Endangered Species Act...”).

Reinstatement of wolverine as proposed species has the potential to re-prioritize federal land management agency planning and affect environmental assessment of individual project actions. This outcome would likely force federal conservation resources away from those the State would prioritize based on biological need. It would also likely result in unnecessary administrative burdens or limitations on federal land management actions, with potential for significant economic and societal impacts on communities that exist in or near affected federal lands.

As such, the State of Idaho 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).

BACKGROUND

In Idaho, “[a]ll wildlife, including all wild animals, wild birds, and fish, within the State of Idaho, is the property of the state of Idaho.” Idaho Code § 36-103(a). Currently, Idaho has some of the strongest, intact wolverine habitat in the western United States, and the statewide distribution is believed to be comparable to the species’ distribution prior to European settlement. Declaration of Toby Boudreau at 8, 9 (hereinafter Boudreau Decl.). Over the years, the State has engaged in significant wolverine conservation efforts with objectives of updating the species status and distribution to avoid unnecessary ESA protections and maintain state-led management authority in Idaho. *See generally* Boudreau Decl.; and Declaration of Joshua Uriarte (hereinafter (Uriarte Decl.)). The Idaho Department of Fish and Game (IDFG) and OSC have been the main drivers of these efforts. Boudreau Decl. at 5. IDFG, under supervision of the Commission, is the agency primarily responsible for wildlife management in the State. *See* Idaho Code § 36-102 and § 36-104. OSC is dedicated to planning, coordinating, and implementing actions within the State of Idaho that will preserve, protect, and restore species categorized as candidate, threatened, endangered, or proposed to be listed under the Endangered Species Act (ESA) while taking into consideration the State’s economic vitality and values. *See* Idaho Code § 67-818.

Since the 1960s, Idaho has been heavily involved with wolverine management and monitoring. *See generally* Boudreau Decl. The State, through IDFG, has participated in numerous conservation efforts including collaborative research projects, telemetry studies, surveys, and DNA collection, among others. Boudreau Decl. at 8-13. In 2014, IDFG published the Management Plan for the Conservation of Wolverines in Idaho to guide leadership of conservation efforts at the State and local level. The Plan advances communication and collaboration among wildlife and land managers and various constituencies to ensure the long-term persistence of wolverine populations in Idaho. Management Plan for the Conservation of Wolverines in Idaho, Idaho Dept. of Fish and Game (2014) available at <https://idfg.idaho.gov/old-web/docs/wildlife/planWolverine.pdf>. Idaho was also a participant in the recent Multi-State Wolverine Occupancy Survey to better understand the extent of the occupancy and distribution of this elusive creature. Paul M. Lukacs et al. 2020, Wolverine Occupancy, Spatial Distribution, and Monitoring Design, *Wildlife Management*, vol. 34, no. 5, pp 841-851.

In addition to these conservation and monitoring efforts, Idaho has also been actively involved in the Service's process related to wolverine populations and habitat in Idaho. Boudreau Decl. at 11. Related to this case in particular, Idaho submitted comments on several separate occasions since the Service reopened the proposed rule in 2016. *Id.*; and Uriarte Decl. at 6. Since the reopening, comments

were submitted by Idaho on both the proposed rule and the Species Status Assessment for wolverine. *Id.* These comments, among other things, emphasized that wolverines currently occur in most, if not all, their historic habitat in Idaho, that wolverine do not qualify as a DPS under the Service's DPS policy, and that it has been recognized that a lower 48 listing is inappropriate for ESA assessment of populations that occur only in narrow portions of the contiguous 48 states at the southern periphery of more extensive ranges in Canada and Alaska. *Id.*

All of these efforts were undertaken by the State specifically to prioritize conservation resources, avoid an unnecessary ESA listing, and maintain state-led management authority in Idaho. Boudreau Decl. at 13, 14; and Uriarte Decl. at 6, 7. The Service's final decision again appropriately concluded that the best available science did not support listing the wolverine as threatened in the contiguous United States. The State now seeks intervention to protect Idaho's unique interests and defend the Service's final decision.

ARGUMENT

A. Idaho is Entitled to Intervene as a Matter of Right

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides for a party's intervention in a case as a matter of right when that party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the

movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). In determining whether an applicant for intervention satisfies the criteria of Rule 24(a)(2), Courts apply the following four-part test:

(1) the application for intervention must be timely; (2) the applicant must have a "significantly protectable" interest relating to the property or transaction that 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 the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit.

Southwest Ctr. For Biological Diversity v. Berg, 268 F.3d, 817 (9th Cir. 2001). In general, the Court construes Rule 24(a) liberally in favor of potential intervenors.

Id. at 818; *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir.

1995). In addition to mandating broad construction, review is "guided primarily by practical considerations, not technical distinctions." *Southwest Ctr. For Biological Diversity*, 58 F.3d at 818.

1. Idaho' Motion to Intervene is Timely

In determining whether a motion is timely, courts consider three factors: (1) the stage of the proceeding; (2) the prejudice to the other parties; and (3) the reason for and length of any delay that might be caused by intervention. *League of United Latin American Citizens v Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) (citing *County of Orange v. Air California*, 799 f.2d 535, 537 (9th Cir. 1986).

Additionally, when considering the timeliness element of intervention “courts consider whether there have been actual proceedings of substance on the merits in the underlying action.” *CEP Emery Tech Investors v. JPMorgan Chase Bank*, No. 09-04409-SBA, 2010 WL 1460263 at *8 (N.D. Cal. Apr. 12, 2010) (citing *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996).

Here, the case is still in its early stages and no substantive proceedings have yet occurred. Federal Defendants have not yet filed their answer and the administrative record is also yet to be filed. Further, at this time, the Court has not considered any substantive issues and made no dispositive rulings. Lastly, the State agrees to abide by whatever briefing or other schedules that may be established by this Court. Given the early stages of this litigation, intervention at this time will not prejudice existing parties and is timely within the meaning of Fed. R. Civ. P. 24(a).

2. Idaho Has significantly protectable interests in the subject matter of this litigation

When considering whether a proposed-intervenor has significantly protectable interests, “it 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.” *Wilderness Society v. United States Forest Service*, 630 F.3d 1173, 1179 (9th Cir. 2011)(citing *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993)) This notion was further refined by the Ninth Circuit, holding that a sufficient protectable interest exists, for purpose of intervention, if the applicant

will “suffer a practical impairment of its interests as a result of the pending litigation.” *Id.*

Idaho undisputedly has significant and protectable interest in the management of wolverines, which occupy and whose habitat occurs in many parts of the State. As described above, all wildlife in Idaho, including wolverines, are the property of the State. Idaho Code § 36-103(a). The Commission is established pursuant to law and has supervision, management, and control power over IDFG, the State of Idaho’s wildlife agency. Idaho Code § 36-102. IDFG is an executive agency of the State of Idaho established in accordance with Section 20, Article IV of the Constitution of the State of Idaho. I.C. § 36-101. The Commission is charged with administering State of Idaho wildlife policy and resources through a flexible and fact-based, scientific approach to wildlife management. I.C. § 36-103(b). The Commission has given wolverines “protected” status under state rules. IDAPA 13.01.06.200.01.h.

A state’s interest in protecting the wildlife within its borders is a widely recognized basis for intervention. *See United States v. Oregon*, 745 f.2d 550, 553 (9th Cir. 1984) (granting Idaho intervention in litigation addressing fishing on Columbia River given “Idaho’s legitimate interest in the anadromous fish runs which are the subject of this litigation”). The broad trustee power that states possess to manage fish and wildlife is recognized in federal land management

statutes acknowledging states' traditional roles in managing fish and wildlife when there is not federal preemption. See 16 U.S.C. 480 (National Forest System Organic Administration Act); 16 U.S.C. 528 (Multiple Use-Sustained Yield Act); 43 U.S.C. 1732 (Federal Land Policy and Management Act); 16 U.S.C. 670h (Sikes Act). Furthermore, the power to conserve and manage wildlife is one included in Idaho's police powers under the 10th amendment to the Constitution of the United States. U.S. Const. amend X ; and *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 391 (1978) quoting *Lacoste v. Dept. of Conservation*, 263 U.S. 545, 552 (1924) (“[p]rotection of the wildlife of the State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection”).

Through the efforts of IDFG and OSC, in coordination with partners and stakeholders, Idaho has taken proactive measures and committed significant resources to ensure that wolverines continue to thrive under State management. *See generally* Boudreau Decl. For instance, IDFG expenditures related to wolverine conservation and management over the past five years total \$773,688, averaging \$154,738 per year. *Id.* at 10. Two recent examples of these efforts and resources include the development and implementation of Idaho's Management Plan for the Conservation of Wolverine in Idaho, and Idaho's participation in the Multi-State Wolverine Occupancy Survey. *See* Management Plan for the Conservation of

Wolverines in Idaho, Idaho Dept. of Fish and *Game* (2014) *available at* <https://idfg.idaho.gov/old-web/docs/wildlife/planWolverine.pdf>.; and Paul M. Lukacs et al. 2020, Wolverine Occupancy, Spatial Distribution, and Monitoring Design, *Wildlife Management*, vol. 34, no. 5, pp 841-851.

In addition to Idaho's wildlife ownership and management interests, significant economic interests within the State are linked to the outcome of this case. 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. Management Plan for the Conservation of Wolverines in Idaho, Idaho Dept. of Fish and *Game* (2014) *available at* <https://idfg.idaho.gov/old-web/docs/wildlife/planWolverine.pdf>. A significant part of Idaho's economy, particularly rural economies, is dependent on access to and use of federal lands. Uriarte Decl. at 8, 9. While Idaho is over 60% federal lands, at a county and local level, the percentage of federal ownership can be considerably higher. Uriarte Decl. at 8. As such, a significant portion of Idaho's economic interests are tied to access and use of public lands for economically beneficial activities like recreation, timber harvest, mining, and grazing, among other things. *Id.*

As described above, federal land management agencies have regulations and policies that impose restrictions on their planning efforts and actions that may affect a "proposed species." Uriarte Decl. at 11. While these restrictions are not as

stringent as those for ESA listed species, there is no question that a ruling reinstating wolverine as a “proposed species” would impact local employment, recreation, tourism, and State and private property interest associated with the management of those federal lands, *inter alia*. Uriarte Decl. at 8.

All of this clearly demonstrates that Idaho possesses interests in this case protectable under both Idaho Code and the U.S Constitution. The outcome of this case has significant potential to affect Idaho’s protectable interests in ongoing and future efforts to manage wolverine within the State as well as the State’s economic interests. As such, it is clear that Idaho has significantly protectable interests in the subject matter of this litigation for purposes of intervention under Fed. R. Civ. P. 24(a).

3. As a practical Matter, Idaho’s interests may be impaired by the disposition of this litigation

When considering this factor, “if 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. *Southwest Ctr. For Biological Diversity*, 268 F.3d at 822. Additionally, when courts analyzing this factor find that an intervenor-applicant has significant protectable interests in the subject matter of the litigation, they have “little difficulty concluding that the disposition of the case may, as a practical matter, affect [them]. *Citizens for Balanced Use v. Montana Wilderness Ass’n.*, 647 F.3d 893, 898 (9th Cir. 2011). As described in the previous section, the

State has a number of significantly protectable interests related to this case and it is indisputable that the disposition of this case will affect those interests.

Should the relief requested by Plaintiffs be granted, it would reinstate wolverine as a “proposed species” under the ESA and subject Idaho to the accompanying restrictions associated with federal land management agencies’ regulations and policies related to that categorization. This outcome would impair Idaho’s interests in a number of ways. Primarily, an adverse decision would inhibit the State’s sovereign interest in its ability to manage and regulate its wildlife and undermine the significant efforts and resources that Idaho has committed in order to keep wolverine under State management authority. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (“States have important interests in regulating wildlife and natural resources within their borders”).

Additionally, local citizens and businesses within the State and local counties will be practically affected by a decision favorable to Plaintiffs. Uriarte Decl. at 8, 9. Such a decision would also practically affect state and private lands. Uriarte Decl. at 8. Therefore, Plaintiff’s request to vacate the withdrawal of the proposed rule would, as a practical matter, affect the State’s aforementioned protectable interests.

4. Idaho’s interests are not adequately represented by the other parties

In determining whether a proposed intervenor’s interests will be adequately represented by an existing party, the Court considers: “(1) whether the interest of a

present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be-intervenor would offer any necessary elements to the proceeds that other parties would neglect." *Southwest Ctr. For Biological Diversity*, 268 F.3d at 822. "[T]he burden of showing inadequacy is 'minimal', and the applicant need only show that representation of its interests by existing parties 'may be' inadequate." *Id.* (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)).

Given the tensions inherent in the state-federal relationship, the Court cannot apply the normal "assumption of adequacy when the government is acting on behalf of a constituency that it represents." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). Courts have "repeatedly recognized that it is on its face impossible for a government agency to carry the task of protecting the public's interests and the private interests of a prospective intervenor." *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1200 (10th Cir. 2010)(internal quotations omitted). Both generally and in the context of wolverine management specifically, Idaho, as a sovereign government, is not part of any constituency represented by the federal agency defendants. At the very least, Idaho's perspective may vary considerably from the federal government due to the vastly different burdens and responsibilities each government bears with regard to wildlife

management. *See Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (an important factor in “assessing the adequacy of the Interior Secretary’s representation” was whether “the intervenor offers a perspective which differs materially from that of the present parties to this litigation”). Federal defendants represent the public at large and cannot be expected to make the same arguments as proposed intervenors, nor would they likely be capable or willing to make such arguments as they relate to Idaho’s specific perspective and rights.

Lastly, the State’s participation in this lawsuit will provide helpful elements to the proceedings, including a unique perspective of the Service’s reasons for the withdrawal of the Proposed Rule that rely on Idaho’s actions and scientific information, and elements related to Idaho’s specific sovereign interest in managing the wolverine population. These Idaho-specific elements are extremely unlikely to be adequately represented by any other party, satisfying the final requirement of Fed. R. Civ. P. 24(a)

B. Alternatively, Idaho should be permitted to Intervene Permissively pursuant to FRCP 24(b).

If the court does not grant the State of Idaho intervention as a matter of right, the court should exercise its discretion and allow the State to intervene permissively under Fed. R. Civ. P. 24(b). A court may allow a party to intervene permissively 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 first requirement under Rule 24(b) of independent ground for jurisdiction is met here because this case involves judicial review of the Service's decision to withdraw a proposed listing rule according to the requirements of the ESA and Administrative Procedure Act. Review of such an action provides this court with federal question jurisdiction pursuant to 28 U.S.C. §1331.

The second requirement for permissive intervention, timeliness, has also be satisfied as set forth in the State's argument for intervention as a matter of right, *supra*. As a brief summary, this motion is timely because no substantive proceedings have occurred, the Defendant's answer has not yet been filed, nor has the administrative record been filed. Due to the early stages of the proceedings, none of the parties will be prejudiced by allowing the State of Idaho to intervene at this time. The State agrees to abide by whatever briefing or other schedules that may be established by this Court.

Lastly, the State of Idaho meets the common question requirements of Rule 24(b). A "common question" can exist where an intervenor asserts claims or defenses "directly responsive" or "squarely respond" to the claims made by the plaintiff in the main action. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094,

1110-11 (9th Cir. 2002). Here, Idaho intends to defend the Service's decision not to list wolverine by directly responding and squarely addressing challenges plaintiffs have made to the final rule. Many of the State's defenses, issues, and facts are likely similar to the ones to be raised by the Service, except the State seeks to intervene to defend the State's unique interests and aid in the judicious and equitable resolution to this case. The State of Idaho satisfies all requirements for permissive intervention under Rule 24(b), and therefore the Court should exercise its discretion in favor of granting intervention.

CONCLUSION

The State of Idaho should be allowed to intervene in this case to protect its unique interests. Idaho has met the requirements for intervention as a matter of right and requests that this court grant its motion pursuant to Fed. R. Civ. P. 24(a). In the alternative, Idaho requests that this Court exercise its discretion and grant its motion to intervene permissively in accordance with Fed. R. Civ. P. 24(b).

RESPECTFULLY SUBMITTED this 12th day of March 2021.

HON. LAWRENCE G. WASDEN
Attorney General

DARRELL EARLY
Chief of Natural Resources Division

A handwritten signature in black ink, appearing to read "Owen Moroney", written over a horizontal line.

OWEN MORONEY
Deputy Attorney General
600 S. Walnut Street
P.O. Box 25
Boise, ID 83707
owen.moroney@idfg.idaho.gov

Certificate of Compliance

I certify that the foregoing support brief complies with the 6500 word limit of L.R. 7.1(d)(2)(A), in that it consists of 3,671 words as calculated by Microsoft Word, excluding the parts of the brief exempted by the rule; and with L.R. 1.5(a), in that it is double spaced except for quoted material and footnotes, and typewritten in 14 point font size.

DATED this 12th day of March 2021.

A handwritten signature in black ink, appearing to read "Owen Moroney", written over a horizontal line.

Owen Moroney
Deputy Attorney General
600 S. Walnut Street
P.O. Box 25
Boise, ID 83707
owen.moroney@idfg.idaho.gov

CERTIFICATE OF SERVICE

I hereby certify that, on March 12, 2021, a copy of the foregoing document was served on the following persons by the following means:

CM/ECF
 Hand Delivery
 Mail
 Overnight Delivery Service
 Fax
 E-Mail

Amanda Dalmendray Galvan
Earthjustice Legal Defense Fund
313 East Main Street
Bozeman, MT 59715
agalvan@earthjustice.org

Matthew Kellogg Bishop
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
bishop@westernlaw.org

Timothy J. Preso
Earthjustice Legal Defense Fund
313 East Main Street
Bozeman, MT 59715
tpreso@earthjustice.org

Kamela A. Caschette
U.S. Department of Justice
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044-7611
kamela.caschette@usdoj.gov

John R. Mellgren
Western Environmental Law Center
120 Shelton McMURPHEY Blvd.
Ste. 340
Eugene, OR 97401
mellgren@westernlaw.org


OWEN MORONEY