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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

DEFENDERS OF WILDLIFE,

Plaintiff,

v.

SALLY JEWELL, Secretary, U.S. Department of the Interior, in her official capacity; DANIEL M. ASHE, U.S. Fish and Wildlife Service, in his official capacity,

Defendants.

Cause No. 9:14-CV-246-M-DLC

(Consolidated with 9:14-CV-247 and 9:14-CV-250)

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE ON BEHALF OF DEFENDANTS BY AMERICAN PETROLEUM INSTITUTE, MONTANA PETROLEUM ASSOCIATION, AND WESTERN ENERGY ALLIANCE

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INTRODUCTION

The American Petroleum Institute, Montana Petroleum Association, and Western Energy Alliance (collectively, "Intervenor-Applicants") move to intervene in this action consolidating three actions filed separately by: Defenders of Wildlife (9:14-cv-246-M-DLC); Center for Biological Diversity, *et al.* (9:14-cv-247-M-DLC); and WildEarth Guardians, *et al.* (9:14-cv-250-M-DLC) (collectively, "Plaintiffs") against Defendants Sally Jewell, Daniel M. Ashe, the U.S. Fish & Wildlife Service ("FWS" or "the Service"), and the Department of the Interior (collectively, "Federal Defendants"). Plaintiffs seek to overturn Federal Defendants' withdrawal of a proposal to list the North American wolverine as a threatened species under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, and a declaration that Federal Defendants' analysis was impermissible. 79 Fed. Reg. 47,522 (Aug. 13, 2014) ("Withdrawal Decision"). Plaintiffs in the *WildEarth Guardians* action also seek the vacatur of the Final Policy interpreting the phrase "significant portion of its range," 79 Fed. Reg. 37,578 (July 1, 2014) ("Final Policy"), and restoration of the wolverine's status as a candidate species under the ESA.

Intervenor-Applicants are trade associations that collectively represent all aspects of the oil and gas industry and have members that: (1) own, lease, or otherwise operate on, or adjacent to, land that FWS identifies as wolverine habitat; (2) operate facilities that emit greenhouse gases and produce products that emit

greenhouse gases when combusted, which, according to Plaintiffs, endanger wolverines. Milito Decl. (attached as Exhibit A), ¶ 3; Galt Decl. (attached as Exhibit B), ¶ 3; Sgamma Decl. (attached as Exhibit C), ¶ 3. Intervenor-Applicants move to intervene to protect their interest in: (1) avoiding the substantial operational costs and constraints that an unwarranted listing of the wolverine could have on members operating in wolverine habitat; (2) avoiding the costs and constraints that would occur by restoring wolverines to FWS's list of candidate species; (3) defending against Plaintiffs' position that the development and use of Intervenor-Applicants' members' products are illegally "taking" wolverines under the ESA; and (4) defending the Final Policy. *See, e.g., WildEarth Guardians v. Jewell*, No. 9:14-cv-00250-DLC, ECF No. 1, at ¶¶ 66, 75–81, 90–92; Center for Biological Diversity Comments (May 6, 2014), Docket No. FWS-R6-ES-2012-0107-12447, at 2–4; Western Environmental Law Center Comments (May 5, 2014), Docket No. FWS-R6-ES-2012-0107-12443, at 12–16.

BACKGROUND AND SUMMARY OF CASE

The Wolverine Population at Issue

Wolverines are found throughout "northern portions of Europe, Asia, and North America. The currently accepted taxonomy classifies wolverines worldwide as a single species, *Gulo gulo*, with two subspecies. Old World wolverines are found in

the Nordic counties of Europe, Russia, and Siberia . . . New World wolverines occur in North America." 78 Fed. Reg. 7,864, 7,866 (Feb. 4, 2013).

"The bulk of the range of North American wolverines is found in Canada and Alaska . . . ." 78 Fed. Reg. at 7,868. FWS estimates that there are between 15,089 and 18,967 wolverines in western Canada, and an uncertain number in eastern Canada. 78 Fed. Reg. at 7,869. The number of wolverines in Alaska is unknown, but they appear to exist at naturally low densities, and there is no evidence "to indicate that wolverine populations have been reduced in numbers or geographic range in Alaska." 78 Fed. Reg. at 7,869.

"The southern portion of the species' range extends into the contiguous United States, including high-elevation alpine portions of Washington, Idaho, Montana, Wyoming, California, and Colorado." 78 Fed. Reg. at 7,866–67. FWS considers wolverines in the contiguous United States to be a distinct population segment of the far larger North American subpopulation of the even larger worldwide population of wolverines. 75 Fed. Reg. 78,030 (Dec. 14, 2010). Importantly, FWS determined that wolverines in the contiguous United States were discrete because they differed from wolverines in Canada in population size, available habitat, and regulatory protections (75 Fed. Reg. at 78,040)—not based on a physical, physiological, ecological, behavioral, morphological, or genetic distinction. Thus, the contiguous U.S. distinct population segment, which is the population at issue in this action, is

delineated only by the international boundary between the United States and Canada. 75 Fed. Reg. at 78,040.[1]

Petitioning and Listing History

Plaintiff Center for Biological Diversity's first petition to list wolverines was largely based on alleged threats from trapping and human incursions into habitat, and did not even meet the ESA's very low "substantial information" standard, causing FWS to determine that listing the wolverine was not warranted. 60 Fed. Reg. 19,567 (Apr. 19, 1995). In 2000, several Plaintiffs filed another petition alleging threats from trapping, winter recreation, and development. 68 Fed. Reg. 60,112–15 (Oct. 21, 2003).

After FWS published a 90-day finding that the petition failed to present sufficient scientific and commercial information, 68 Fed. Reg. 60,112 (Oct. 21, 2003), four Plaintiffs then sued FWS officials. *See Defenders of Wildlife v. Kempthorne*, 9:05-cv-00099-DWM (D. Mont. Sept. 29, 2006). This Court agreed that FWS had misapplied the standard for evaluating whether "substantial evidence" was presented (not that wolverines must necessarily be listed), and ordered FWS to conduct a more comprehensive 12-month finding, stating that "[i]t does not mean that

[1] Many commenters, including American Petroleum Institute, dispute the Service's basis for determining that wolverines in the contiguous United States constitute a distinct population segment. *See* American Petroleum Institute Comments (Dec. 2, 2013), Docket No. FWS-R6-ES-2012-0107-12410, at 14–16. Intervenor-Applicants do not herein challenge this determination and affirmatively reserve the right to bring such claims in the future. Further, Intervenor-Applicants will likely argue that listing wolverines as threatened is not justified because wolverines in the United States are part of an exponentially larger and stable North American population.

the wolverine must be listed but it does mean that a closer look is required." *Defenders of Wildlife v. Kempthorne*, 9:05-cv-00099-DWM, at 19.

FWS published that 12-month finding in 2008, determining that listing was "not warranted" because wolverines in the contiguous United States were not a distinct population segment, and that the range in the contiguous United States did not constitute a significant portion of the range of the larger North American subspecies. 73 Fed. Reg. 12,929 (Mar. 11, 2008). Plaintiffs sued FWS again (*Defenders of Wildlife v. Kempthorne*, No. CV-08-139-M-DWM (Sept. 30, 2008)), and FWS agreed in a settlement to remand its 12-month finding, which led to dismissal of the case. 78 Fed. Reg. at 7,866.

On remand, FWS reversed its previous decision, determined that the wolverine in the contiguous United States was now a distinct population segment, that the segment warranted listing, but that listing was precluded by higher-priority listing actions. 75 Fed. Reg. 78,030. Importantly, FWS based its threat analysis not on the threats Plaintiffs had alleged, but on the surmised impacts of climate changes and the species' surmised response to potential climatological impacts decades into the future. 75 Fed. Reg. at 78,042. In fact, FWS found that recreation, infrastructure development, transportation corridor development, and trapping posed no *individual* threats to wolverines—they were only found to pose threats to wolverines in

conjunction with the surmised impacts of climate change decades into the future. 75 Fed. Reg. at 78,048–49.

The Service reevaluated wolverine status annually until, as part of a settlement with two of Plaintiffs, *Endangered Species Act Section 4 Deadline Litigation*, Misc. Action No. 10-377 (EGS), MDL Docket No. 2165 (D.D.C.), FWS agreed to publish a proposed listing or withdraw the 12-month finding by the end of the 2013 fiscal year. 78 Fed. Reg. at 7,866. Despite the statutory requirement to do so, FWS agreed that it would no longer consider whether listing wolverines may be warranted but precluded by higher priority species—a finding FWS made multiple times. 75 Fed. Reg. 78,030.

FWS published a proposed wolverine listing on February 4, 2014 (the "Proposed Rule"). 79 Fed. Reg. 7,864. FWS based its threat analysis almost exclusively on the species' surmised biological response to potential climatological impacts decades into the future. 78 Fed. Reg. at 7,880. The primary threats Plaintiffs alleged for nearly 20 years were dismissed by FWS as either non-existent or only threats when considered in conjunction with potential future climate change threats. 79 Fed. Reg. 47,522.

American Petroleum Institute submitted extensive comments detailing, *inter alia*, how the Proposed Rule was improperly based almost entirely on wolverines' hypothesized biological response to potential changes in climate and precipitation

that could not realistically be projected on the small spatial and long temporal scales FWS used in surmising that currently stable populations of wolverines would be threatened with extinction "in the foreseeable future." Milito Decl., ¶ 6; American Petroleum Institute Comments (Dec. 2, 2013), Docket No. FWS-R6-ES-2012-0107-12410, at 3–11. American Petroleum Institute also commented at length on the Service's improper designation of wolverines in the contiguous United States as a distinct population segment. Docket No. FWS-R6-ES-2012-0107-12410, at 14–16.

After issuing the Proposed Rule, FWS also obtained important new information regarding the importance of scale and techniques in evaluating uncertainty in climate assessments, and received from peer reviewers inquiries questioning some of the key premises of its proposal to list wolverines as threatened. *See* 79 Fed. Reg. at 47,522, 47,533. After considering more than 120,000 comments, holding three hearings, and compiling the input of the foremost experts, FWS withdrew the Proposed Rule finding that the projected future harms from climate change—the sole presumed threat on which it was based—were not as significant as believed at the time of its publication.

Plaintiffs ask that this Court remand FWS's duly promulgated final rule and ultimately seek reinstatement of the wolverine's status as a candidate species. *See Defenders of Wildlife v. Jewell*, No. 9:14-cv-00246-DLC, ECF No. 1; *Center for Biological Diversity v. Jewell*, No. 9:14-cv-00247-DLC, ECF No. 1; *WildEarth*

Guardians v. Jewell, No. 9:14-cv-00250-DLC, ECF No. 1. Plaintiffs base their challenge not on the threats they originally alleged throughout most of their decades of petitions and litigation, but on the relatively new rationale of presumed future threats to wolverines presented by climate change.

Interests of Intervenor-Applicants

FWS identified large portions of Montana, Wyoming, Colorado, Idaho, California, and Washington as within the current range of the contiguous United States distinct population segment of the wolverine and additionally found that reestablishment of populations may be possible in Utah and New Mexico. 78 Fed. Reg. at 7,867, 7,872. Intervenor-Applicants' members own, lease, and otherwise engage in oil and gas exploration, production, and transportation activities in many of these areas, including key areas in Colorado, Montana, and Wyoming. Milito Decl., ¶ 3; Galt Decl., ¶ 3; Sgamma Decl., ¶ 3. In fact, many of our nation's most productive oil and gas basins, such as the Powder River, Piceance, Uinta, and San Juan Basins, are located in areas FWS identified as wolverine habitat. Milito Decl., ¶ 4; Sgamma Decl., ¶ 4.

Because of their interest in the listing status of the wolverine, American Petroleum Institute, which shares several members in common with Montana Petroleum Association and Western Energy Alliance, participated in the rulemaking process through the submission of extensive written comments. Milito Decl., ¶¶ 2, 6;

Galt Decl., ¶ 2; Sgamma Decl., ¶ 2; *see* Docket No. FWS-R6-ES-2012-0107-12410. Separate from Intervenor-Applicants' interest in the Withdrawal Decision, Intervenor-Applicants have an interest in Plaintiffs' broader attack of the Final Policy, which would affect all future listings under the ESA. Milito Decl., ¶¶ 4–5; Galt Decl., ¶¶ 4–5; Sgamma Decl., ¶¶ 4–5. American Petroleum Institute also participated in the rulemaking process for the Final Policy by submitting written comments. Milito Decl., ¶ 7; American Petroleum Institute Comments (Mar. 7, 2012), Docket No. FWS-R9-ES-2011-0031-0418.

Had FWS finalized its Proposed Rule, Intervenor-Applicants' members operating in and around the areas identified as wolverine habitat by the Service would be adversely affected because listing under the ESA can constrain access to important lease sites, lead to increased permitting requirements and delays, and significantly increase the cost of operating on federal land and, often, private land. Milito Decl., ¶ 8; Galt Decl., ¶ 7; Sgamma Decl., ¶ 6. FWS identified the potential for these costs and constraints within its Proposed Rule. 78 Fed. Reg. at 7,886. Further, these operational constraints were specifically petitioned for by several of the Plaintiffs. *See, e.g.,* Center for Biological Diversity Comments (May 6, 2014), Docket No. FWS-R6-ES-2012-0107-12447, at 2–4; Friends of the Clearwater Comments (May 6, 2013), FWS-R6-ES-2012-0107-10320, at 5–6; Greater Yellowstone Coalition Comments (May 6, 2013), FWS-R6-ES-2012-0107-10290, at 13–15. Additionally,

as the ESA broadly prohibits "harm" to listed species, even routine and incidental activities like altering or driving through habitat can lead to potential "take" liability that could be enforced by FWS, or through citizen suits.

Further still, Intervenor-Applicants' members' facilities emit greenhouse gases and produce products that also emit greenhouse gases when combusted. Milito Decl., ¶ 3; Sgamma Decl., ¶ 3. Because FWS alleged in its Proposed Rule that greenhouse gases are the primary threat to the wolverine's future existence, Intervenor-Applicants' members may be affected if the wolverine is listed under the ESA. Milito Decl., ¶¶ 3, 8; Sgamma Decl., ¶¶ 3, 6. While the Proposed Rule noted that it "would not regulate greenhouse gas emissions" (78 Fed. Reg. at 7,887), it may not have protected Intervenor-Applicants' members from costly citizen suits under ESA Section 11(g), 16 U.S.C. § 1540(g), that greenhouse gas emissions resulted in an illegal take of a wolverine. Plaintiffs, in their complaints, repeatedly argued that climate change poses a threat to the wolverine. *See Defenders of Wildlife v. Jewell*, No. 9:14-cv-00246-DLC, ECF No. 1, ¶ 8; *Center for Biological Diversity v. Jewell*, No. 9:14-cv-00247-DLC, ECF No. 1, ¶¶ 46–53; *WildEarth Guardians v. Jewell*, No. 9:14-cv-00250-DLC, ECF No. 1, ¶¶ 75–81. As discussed below, because Intervenor-Applicants' members operate on Bureau of Land Management and U.S. Forest Service lands, Intervenor-Applicants' members also have an interest in the Withdrawal Decision because it eliminated the wolverine's status as a proposed or

candidate species, which both agencies can use as a basis to impose use and access restrictions.

ARGUMENT

I. INTERVENOR-APPLICANTS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 24(a)

Intervenor-Applicants are entitled to intervene as of right in this action pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. The U.S. Court of Appeals for the Ninth Circuit has developed a four-part test for intervention as of right: "(1) The party's motion must be timely; (2) the party must assert an interest relating to the property or transaction which is the subject of the action; (3) the party must be 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 party's interest must be inadequately represented by the other parties." *Freedom from Religion Foundation, Inc. v. Weber*, No. CV 12-19-M-DLC, 2012 WL 2050202 (D. Mont. May 31, 2012) (citing *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004); Fed. R. Civ. P. 24(a)); *Fresno County v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (citing Fed. R. Civ. P. 24(a)(2)); *see Wildlands CPR Inc. v. U.S. Forest Service*, No. CV 10-104-M-DWM, 2011 WL 578696, at *1 (D. Mont. Feb. 9, 2011) (applying the same four-part test). "Because Rule 24(a)(2) is construed

broadly in favor of intervention, the four-part test should also be construed broadly." *Wildlands CPR*, 2011 WL 578696, at *1.

Intervenor-Applicants satisfy all four parts of the test and are therefore entitled to intervene.

A. Intervenor-Applicants' Motion to Intervene is Timely

The Ninth Circuit has identified three features in a timely motion to intervene: (1) filing at an early stage of the proceedings; (2) no prejudice to the parties from the grant of intervention at that early stage; and (3) no disruption or delay in the proceedings attributable to the intervention. *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (citing *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996).

Here, all three features of a timely motion are met. It has been less than three months since the complaint was filed, and Federal Defendants filed their answers to the complaints less than three weeks ago. The Case Management Order governing the consolidation and schedule for substantive briefing of the actions was entered on December 18, 2014, and does not require cross-motions for summary judgment to be filed until April 10, 2015 (*Defenders of Wildlife v. Jewell*, No. 9:14-cv-00246-DLC, ECF No. 10). No substantive motions or rulings have yet been made.

The Case Management Order also provides that the Court can incorporate intervenors into the briefing schedule after motions for intervention are received.

Defenders of Wildlife v. Jewell, No. 9:14-cv-00246-DLC, ECF No. 10. Similarly, the proposed case management plan submitted to the Court by all parties requested that any intervenors on behalf of Federal Defendants be permitted to submit their briefs one week after Federal Defendants' briefs. *See* Joint Proposed Case Management Plan, ECF No. 7, at ¶ 7 (Dec. 15, 2014).

Even if the Court does not order intervenor briefing on the schedule proposed by the parties, Intervenor-Defendants are prepared to comply with whatever schedule the Court requires. As such, granting Intervenor-Defendants' Motion to Intervene will result in no disruption or delay in these proceedings.

B. Intervenor-Applicants Have Legally Protectable Interests That Would Be Affected by Plaintiffs' Suit

To intervene as a matter of right under Rule 24(a)(2), an applicant must claim an interest, the protection of which may, as a practical matter, be impaired or impeded if the lawsuit proceeds without the applicant. *Wilderness Society v. U.S. Forest Service*, 630 F.3d 1173, 1177 (9th Cir. 2011). To demonstrate a "significantly protectable interest," "a prospective intervenor must establish that (1) 'the interest [asserted] is protectable under some law,' and (2) there is a 'relationship between the legally protected interest and the claims at issue.'" *Northwest Forest Resource Council*, 82 F.3d at 837 (citing *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1494 (9th Cir. 1995) (quoting *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993)). The Ninth Circuit has "rejected the notion that Rule 24(a)(2)

requires a specific legal or equitable interest," and instead finds that the "interest" test is basically a threshold one rather than a determinative issue on the matter of intervention. *See Fresno County*, 622 F.2d at 438 (citing *Blake v. Pallan*, 554 F.2d 947, 952 (9th Cir. 1977); *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969)).

Intervenor-Applicants are entitled to protect the legal and economic interests of their member companies by intervening on their behalf. In the Ninth Circuit, a trade association may intervene on behalf of its members when: (1) members have sufficient legally protectable interests, (2) those interests are germane to the association's purposes, and (3) individual project proponents are not necessarily participants in the lawsuit. *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 822 n.3 (9th Cir. 2001) (citing *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977)). Intervenor-Applicants satisfy all three criteria: protecting members' interest in responsibly developing hydrocarbon resources and bringing them to market is a central part of Intervenor-Applicants' organizational purpose; because Intervenor-Applicants seek relief from Federal Defendants, individual landowner companies need not participate; and Intervenor-Applicants' members with leases, ownership interests, or that otherwise operate in wolverine range would have faced increased operational costs and constraints if Federal Defendants' Proposed Rule were finalized and wolverines were listed under the ESA. *See* Milito Decl., ¶¶ 2, 5, 8; Galt Decl., ¶¶ 2, 5, 7; Sgamma Decl., ¶¶ 2–3, 5,

6. In fact, Intervenor-Applicants' members already were affected by the wolverine's status as a candidate species, as noted above. Federal Defendants' Withdrawal Decision removed the wolverine from the list of candidate species and the potential for these increased operational costs and constraints, therefore protecting Intervenor-Applicants' members' interests. The relief requested in Plaintiffs' Complaints seeks to undo Federal Defendants' Withdrawal Decision, thus threatening Intervenor-Applicants' members' interests.

These interests are protected by the ESA's requirement that listings be based on the "best scientific and commercial data available," 16 U.S.C. § 1533(b)(1)(A), and only when mandated listing criteria under 16 U.S.C. § 1533(a)(1)(A)–(E). And these interest are further protected by the Administrative Procedure Act ("APA"), which affords potentially regulated entities like Intervenor-Applicants' members a rulemaking process that assures that regulations promulgated by agencies are not arbitrary and capricious, contrary to or outside the law, developed without regard to proper procedure, or unwarranted by the facts and evidence. 5 U.S.C. § 706.

This Circuit, in ruling on a motion to intervene in an ESA case, has previously found that when a "lawsuit would affect the use of real property owned by the intervenor," those interests are "squarely in the class of interests traditionally protected by law." *Southwest Center for Biological Diversity v. Berg*, 268 F.3d at 819 (quoting *Sierra Club v. United States EPA*, 995 F.2d 1478, 1483 (9th Cir. 1993)).

Similarly here, should the Plaintiffs prevail in obtaining a ruling that Federal Defendants' Withdrawal Decision was not supported by the Administrative Record, the potential listing of the wolverine threatens Intervenor-Applicants' members' property rights.

These ownership, lease rights, and operational interests in lands within the wolverine habitat would be negatively affected by potentially significant increases in costs, operational constraints, delays, and business uncertainties. Milito Decl., ¶ 8; Galt Decl., ¶ 7; Sgamma Decl., ¶ 6.

The ESA prohibits the "take" of any listed species, and the term "take" has been broadly construed, including the potentially expansive concept of "harm." 16 U.S.C. §§ 1538(a)(1)(B), 1532(19); 50 C.F.R. § 17.31(a). If the wolverine was to be listed under the ESA, members of Intervenor-Applicants may be prohibited from operating in the important oil and gas development areas and transmission corridors in and around the wolverine's habitat because normal industry operations potentially could cause incidental takes of wolverines. Milito Decl., ¶ 8; Galt Decl., ¶ 7; Sgamma Decl., ¶ 6. To avoid violating the ESA, the members of Intervenor-Applicants may need to apply for, and obtain, incidental take permits in order to conduct even routine operations. Milito Decl., ¶ 9; Galt Decl., ¶ 8; Sgamma Decl., ¶ 7. Even when such permits are granted, they often cause delay, generate administrative expenses, and contain operational restrictions or costly mitigation

measures. Milito Decl., ¶ 9; Galt Decl., ¶ 8; Sgamma Decl., ¶ 7. When such permits are not granted, Intervenor-Applicants' members may be effectively shut out from leased or owned parcels entirely. Milito Decl., ¶ 9; Galt Decl., ¶ 8; Sgamma Decl., ¶ 7. Further, federal actions that could impact the wolverine, such as leasing actions on federal land, would require time-consuming consultation under Section 7 of the ESA and could cut off access entirely to parcels of federal lands in wolverine habitat. Milito Decl., ¶ 8; Galt Decl., ¶ 7; Sgamma Decl., ¶ 6.

The Ninth Circuit has held that a non-speculative, economic interest may be sufficient to support a right to intervention. *Alisal Water Corp.*, 370 F.3d at 919. This economic interest was applied in this Circuit in holding that ranchers had a legally protected interest in FWS's listing determination for a particular plant species, where the ranchers were signatories to a candidate conservation agreement aimed at protecting that species. *Otter v. Salazar*, No. 1-11-cv-00358-CWD, 2012 WL 3257843, at *13 (D. Idaho Aug. 8, 2012) (citing *Alabama-Tombigee Rivers Coal v. Norton*, 338 F.3d 1244, 1254 (11th Cir. 2003) (holding that a coalition of businesses had standing to challenge a listing under the ESA based upon the finding that "[t]he listing adds another layer of concrete economic considerations that may be in tension with the members' pre-listing assumptions.")).

Intervenor-Applicants have a significant protectable interest in the outcome of this litigation that they have worked to protect throughout the rulemaking process and with this Motion to Intervene.

C. Disposition of This Action Would Impede Intervenor-Applicants' Ability to Protect Their Interests

To show impairment of interests for the purposes of Rule 24(a)(2), a proposed intervenor need show only that the disposition of an action "*may* as a practical matter" impede the intervenor's ability to protect its interests in the subject of the action. Fed. R. Civ. P. 23(a)(2) (emphasis added). The Ninth Circuit follows the guidance of the Rule 24 Advisory Committee that "'[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.'" *Southwest Center for Biological Diversity*, 268 F.3d at 822 (citing "Fed. R. Civ. P. 24 advisory committee's notes.").

Here, Plaintiffs request: (1) a declaration that the Withdrawal Decision violated the APA, the ESA, and the ESA's implementing regulations; and (2) remand of the Withdrawal Decision for further agency action consistent with the Plaintiffs' assertions regarding the "proper" analysis of the Administrative Record. *Defenders of Wildlife v. Jewell*, No. 9:14-cv-00246-DLC, ECF No. 1, at Prayer for Relief; *Center for Biological Diversity v. Jewell*, No. 9:14-cv-00247-DLC, ECF No. 1, ¶¶ 84–85; *WildEarth Guardians v. Jewell*, No. 9:14-cv-00250-DLC, ECF No. 1, ¶ 158. Additionally, Plaintiffs in *WildEarth Guardians* also requested that the wolverine be

reinstated as a candidate species and that the Court declare that FWS's Final Policy defining the phrase "significant portion of its range" violates the ESA and APA. *WildEarth Guardians v. Jewell*, No. 9:14-cv-00250-DLC, ECF No. 1, ¶ 158. Setting aside the Withdrawal Decision would reintroduce the risk of an ESA listing that would jeopardize Intervenor-Applicants' members' property and economic interests which had been eliminated by the Withdrawal Decision, and vacating the Final Policy would affect all listings under the ESA.

1. Restoration of Candidate Status Would Impede Intervenor-Applicants' Protection of Members' Interests

If the wolverine were to be restored to candidate species status, Federal agencies would be required to consult pursuant to ESA Section 7, 16 U.S.C. § 1536, for any action that may affect the wolverine.[2] The U.S. Forest Service and Bureau of Land Management, which manage the vast majority of wolverine habitat (*see* 78 Fed. Reg. at 7,882) including land leased by Intervenor-Applicants' members, also restrict lands to protect candidate species;[3] the Bureau of Land Management has already put in place restrictions for wolverines.[4]

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[2] *See* U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES CONSULTATION HANDBOOK 1–5 (Mar. 1998).

[3] *See, e.g.,* U.S. FOREST SERV., FOREST SERVICE MANUAL, Ch. 2670 (provisions on "sensitive species"); U.S. DEP'T OF INT. BUREAU OF LAND MGMT., BUREAU OF LAND MANAGEMENT MANUAL, Subj. 6840 ("Special Status Species Management").

[4] *See BLM and Cooperating Agencies Patrol Rochat Divide Area*, U.S. DEP'T OF INT. BUREAU OF LAND MGMT. PRESS RELEASE (Feb. 8, 2011), http://www.blm.gov/id/st/en/media_center/newsroom/2011/february/blm_and_cooperating.html (describing monitoring of recreational use and travel restrictions in place, in part, to protect wolverines).

2. Remand of the Withdrawal Decision Would Impede Intervenor-Applicants' Protection of Members' Interests

Even remand, without an order restoring the wolverine as a candidate species, will impede Intervenor-Applicants' ability to protect their members' interests. In *Western Watersheds Project v. U.S. Fish and Wildlife Service*, an analogous case involving a decision to not list and trade association intervenor-applicants representing land-access industries, the court found that the Court's inquiry into the effect of disposition of the action on the putative intervenors' interests must be a "'practical' one," and that plaintiffs' requested remand did not sever the putative intervenors' interests or the practical impact of the action on those interests. No. 4:CV 10-229-BLW, 2011 WL 2690430 at *2–*3 (D. Idaho July 9, 2011).

Any judicial declaration of deficiencies in FWS's analysis of the Administrative Record will necessarily guide and constrain FWS's future analyses of the same scientific information from the Administrative Record on potential threats to the wolverine—which creates additional risks to Intervenor-Applicants' members' property and economic interests, and limits their ability to protect those interests during the rulemaking process. *See WildEarth Guardians v. Jewell*, No. 2:14-cv-00833 JWS, Order (D. Ariz. Dec. 31, 2014), ECF No. 70, at 4 ("[A] ruling in favor of Plaintiff . . . could potentially constrain the Service in a subsequent administrative proceeding and make it reasonably likely to result in a listing of the [Gunnison's

prairie dog] as endangered or threatened, which would clearly impact the interests of the Proposed Intervenors").

Listing the wolverine under the ESA could also alter Intervenor-Applicants' members' expectations of viability for leases and operations within wolverine habitat. In *Otter*, in which ranchers intervened to protect a FWS decision not to list a species, the Court held that "the Ranchers have (or had) certain business expectations related to the viability of their operations" that have been altered due to the decision to list the species at issue. *Otter*, 2012 WL 3257843, at *12. Courts have also recognized impairment of interest where the relief sought would constrain intervenor-applicant members' use of private lands, and limit the amount of natural resources available. *See Seattle Audubon v. Sutherland*, No. CV 06-1608MJP, 2007 WL 130324, at *3 (W.D. Wash. Jan. 16, 2007). If the Withdrawal Decision is remanded, and Federal Defendants list the wolverine, Intervenor-Applicants' members could be subject to a wide array of land use restrictions, impairing the prospects and even the viability of their business operations in and around wolverine habitat.

3. Remand of the Final Policy Would Impede Intervenor-Applicants' Protection of Members' Interests

Vacatur of the Final Policy defining "significant portion of its range" would affect all listing actions under the ESA, because Plaintiffs are advocating for an interpretation of the phrase that could result in the range-wide listing of species based on impacts that are highly localized or which do not occur in present range. *See, e.g.*,

Docket No. FWS-R9-ES-2011-0031-0473 ("Group Comments"). Intervenor-Applicants have an interest in vacatur of a broadly applicable policy that would apply to all future listings because those listings will likely also impact important oil and gas regions.

For all these reasons, Intervenor-Applicants have protectable interests that would be negatively affected if the Withdrawal Decision is remanded.

D. Intervenor-Applicants' Interests are Not Adequately Represented by Existing Parties

The Ninth Circuit considers three factors in determining whether a would-be intervenor's interests are adequately represented by existing parties: (1) whether the interests of the proposed intervenor are so similar to those of an existing party such that the existing party will *undoubtedly* make all the would-be intervenor's legal arguments; (2) whether the present party is capable of and willing to make such arguments; and (3) whether the intervenor would not offer any necessary element that the other parties would neglect. *Blake*, 554 F.2d at 954–55 (emphasis added). "[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." *Southwest Center for Biological Diversity*, 268 F.3d at 823 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)).

Although Intervenor-Applicants propose to intervene on behalf of Federal Defendants,[5] no Federal Defendant represents the personal and specific interests of their members. *See Forest Conservation Council*, 66 F.3d at 1499. "[T]he government's 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 Service*, 573 F.3d 992, 996 (10th Cir. 2009)). This private interest/public interest distinction has justified intervention in many cases. *See, e.g., Citizens for Balanced Use*, 647 F.3d at 899; *Southwest Center for Biological Diversity*, 268 F.3d at 823–24; *Forest Conservation Council*, 66 F.3d at 1499; *WildEarth Guardians v. Salazar*, No. CV-09-574-PHX-FJM, 2009 WL 1798611, at *2 (D. Ariz. June 24, 2009).

Here, the distinction is conspicuous. Federal Defendants as regulators defend their rulemaking process. Intervenor-Applicants are seeking to protect the legal rights and economic interests of a regulated industry that would be substantially impaired if Plaintiffs prevail. Federal Defendants cannot be expected to adequately represent Intervenor-Applicants' members' financial and business interests, and property rights.

[5] As Intervenor-Applicants' and Plaintiffs' interests are directly adverse, Plaintiffs will not adequately represent Intervenor-Applicants' interests.

Indeed, in 2013, Federal Defendants published the Proposed Rule that reflected *precisely* the outcome that Plaintiffs are seeking. Federal Defendants were ultimately persuaded that the Proposed Rule reached erroneous conclusions based on the scientific critiques from a variety of stakeholders, including American Petroleum Institute. Even though Federal Defendants ultimately concluded that listing the wolverine was not warranted, they did so on a much narrower basis than those presented by American Petroleum Institute and others. In particular, Federal Defendants did not adopt a key argument presented by American Petroleum Institute that wolverines in the contiguous United States do not constitute a distinct population segment under the ESA. 79 Fed. Reg. at 47,530. If wolverines in the contiguous United States do not meet the standards for a distinct population segment, their listing status would be evaluated as simply the southernmost extent of an exponentially larger population extending throughout Western Canada and Alaska.

The Ninth Circuit held that a government defendant inadequately represented an intervenor-applicant in a directly analogous case wherein the government and the intervenor-applicant sought to defend the same congressional amendment, but the government planned to do so on a narrower basis than the intervenor-applicant. *California ex rel. Lockyer v. U.S.*, 450 F.3d 436 (9th Cir. 2006). As the Ninth Circuit concluded in the very similar circumstances in *Citizens for Balanced Use*, "[t]his represents more than a mere difference in litigation strategy, which might not

normally justify intervention, but rather demonstrates the fundamentally differing points of view between Applicants and the [government]." *Citizens for Balanced Use*, 647 F.3d at 899.

Indeed, the Ninth Circuit has frequently concluded that the "inadequacy of representation" prong was met based on substantially weaker showings of misalignment. In *Fresno County*, for example, the intervenor-applicants' interests were found to be inadequately represented where the intervenor-applicant showed that it would have appealed a preliminary injunction that the government did not. *Fresno County*, 622 F.2d 436. Similarly, in *Idaho Farm Bureau Federation v. Babbitt*, the Ninth Circuit found that a conservation group's interests in an ESA listing decision were not adequately represented by FWS because FWS had previously delayed the listing decision and only listed pursuant to a settlement with the conservation group. *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995); *see also Citizens for Balanced Use*, 647 F.3d at 900 (citing *Idaho Farm Bureau Federation*).

Federal Defendants do not represent the interests of an industry seeking to protect their property interests and avoid costly and unnecessary regulatory constraints in important development areas and Federal Defendants would not "undoubtedly" make all the arguments that Intervenor-Applicants would. Therefore,

Intervenor-Applicants' interests will not be adequately represented by the existing parties, and all elements of intervention by right under Fed. R. Civ. P. 24(a) are met.

II. IN THE ALTERNATIVE, INTERVENOR-APPLICANTS ARE ALSO ENTITLED TO PERMISSIVE INTERVENTION

Rule 24 contemplates two forms of intervention—intervention of right and permissive intervention—and a court may grant an intervenor's motion on either basis. *UAW, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965). Permissive intervention should be granted under Rule 24(b), which, in pertinent part, states:

> On timely motion, the court may permit anyone to intervene who: . . . (b) has a claim or defense that shares with the main action a common question of law or fact.

Fed. R. Civ. P. 24(b)(1). Permissive intervention requires: (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action. *Garza v. County of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1990). Intervenor-Applicants have established all three criteria.

Ordinarily, Ninth Circuit precedent requires a proposed intervenor to show independent grounds for jurisdiction. However, "the independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims." *Freedom From Religion Foundation, Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011) (citing 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY K KANE, FEDERAL PRACTICE &

PROCEDURE § 1917 (3rd ed. 2010) ("In federal-question cases there should be no problem of jurisdiction with regard to an intervening defendant")). Because this Court's jurisdiction is grounded in the federal law questions relating to the ESA and APA as raised by Plaintiffs, and because Intervenor-Applicants do not seek to raise any new claims, this prong of the test does not apply and Intervenor-Applicants need not prove independent grounds for jurisdiction.

Second, as previously demonstrated, Intervenor-Applicants' Motion to Intervene is timely and will not cause delay or prejudice the parties. *See* section I.A, *supra*.

Third, Intervenor-Applicants' interests in protecting their property rights and the Withdrawal Decision present issues common with Plaintiff's challenge to the Withdrawal Decision. "The determination of whether a 'common question' exists is liberally construed." *Silver v. Babbitt*, 166 F.R.D. 418, 433 (D. Ariz. 1994) (citing *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977)). When a would-be intervenor "may differ with respect to their arguments on the merits," permissive intervention is justified. *Modesto Irrigation District v. Gutierrez*, No. CIV-F-06-00453 OWW DLB, 2007 WL 164953, at *3 (E.D. Cal. Jan. 18, 2007). Intervenor-Applicants intervene on the same facts: the Withdrawal Decision and the supporting administrative record. Review of these will implicate the same questions of law—whether Federal Defendants' actions were arbitrary and capricious under the APA,

and whether they violated the ESA's listing requirements. Intervenor-Applicants' arguments may differ in style or scope, but the questions of law remain the same.

Absent intervention, Intervenor-Applicants will lack the opportunity to defend their members' interests. Moreover, as described above, the Parties will not be prejudiced by intervention, because the case is still in the earliest stage of proceedings and Intervenor-Applicants agree to abide by the Case Management Order. Intervenor-Applicants have therefore satisfied the requirements for permissive intervention, and this Court should accordingly grant Intervenor-Applicants' Motion to Intervene.

CONCLUSION

For the reasons set forth above, Intervenor-Applicants respectfully request that this Court grant Intervenor-Applicants' Motion to Intervene.

DATED this 3rd day of February, 2015.

BOONE KARLBERG P.C.

By _____
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Counsel for Intervenor-Applicants American Petroleum Institute, Montana Petroleum Association and Western Energy Alliance

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), the undersigned hereby certifies that this brief contains 6,313 words calculated by Microsoft Word, excluding the caption, Certificate of Service, Certificate of Compliance, Table of Contents, Table of Authorities and Exhibit Index. The undersigned also certifies that this brief is type written and double spaced, except for the quoted materials and footnotes, in 14-point font.

DATED this 3rd day of February, 2015.

BOONE KARLBERG P.C.

By _____
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CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of February, 2015, the foregoing *Memorandum in Support of Motion to Intervene on Behalf of Defendants by American Petroleum Institute, Montana Petroleum Association and Western Energy Alliance* was served by U.S. Mail upon the following counsel of record at their addresses as follows:

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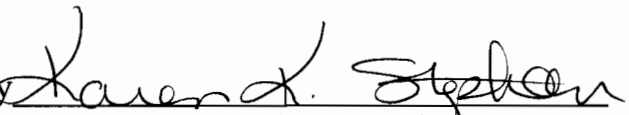
By 
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