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

NORTHERN CHEYENNE TRIBE, SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY and NATIONAL PARKS CONSERVATION ASSOCIATION, Plaintiffs, vs. RYAN ZINKE, Secretary of the Interior; GREG SHEEHAN, Acting Director of the U.S. Fish and Wildlife Service;	Case No. 9:17-cv-00119-DLC **STATE OF WYOMING'S MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE**

HILARY COOLEY, Grizzly Bear Recovery Coordinator; and U.S. FISH AND WILDLIFE SERVICE,

Defendants.

The State of Wyoming has moved for leave to intervene in the above-captioned case as a matter of right under Federal Rule of Civil Procedure 24(a)(2) or, in the alternative, permissively under Federal Rule of Civil Procedure 24(b). Wyoming offers this memorandum in support of its motion.

INTRODUCTION

In this case, the Northern Cheyenne Tribe and a number of interest groups (collectively, the Interest Groups) seek to overturn the Service's decision to remove the Greater Yellowstone Ecosystem grizzly bear from the list of threatened and endangered species. If the Interest Groups succeed, no entity, including the federal government, will be more affected than the State of Wyoming. The vast majority of the Greater Yellowstone Ecosystem and the associated Distinct Population Segment (DPS) is located within Wyoming's borders. Wyoming is home to more delisted grizzly bears than any other state in the Greater Yellowstone Ecosystem. And Wyoming currently manages more grizzly bears in the Greater Yellowstone Ecosystem than any other entity.

The State's motion is timely. The State has significant protectable interests in this case. Disposition of this case in the Interest Groups' favor would impair Wyoming's interests. And the federal defendants cannot adequately represent Wyoming's unique, sovereign interests. Accordingly, this Court should grant the State's motion.

ARGUMENT

I. The State of Wyoming is entitled to intervene as a matter of right.

Federal Rule of Civil Procedure 24(a)(2) governs intervention as a matter of right. An applicant seeking to intervene as of right must show the following: (1) the motion is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest. *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc) (quoting *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993)). In evaluating these factors, courts are required to take all well-pleaded, non-conclusory allegations in the motion to intervene as true absent "sham, frivolity or other objections." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001).

The United States Court of Appeals for the Ninth Circuit normally interprets Federal Rule of Civil Procedure 24(a)(2) "broadly in favor of proposed intervenors" because "'[a] liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to courts.'" *Wilderness Soc'y*, 630 F.3d at 1179 (quoting *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 397–98 (9th Cir. 2002)). This Court is guided by "practical and equitable" considerations. *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1148 (9th Cir. 2010); *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (construing "Rule 24(a) liberally in favor of potential intervenors").

Wyoming satisfies all four requirements for intervention as of right: (1) the State's motion is timely because the case is in its early stages and allowing Wyoming to join the action will not cause prejudice or delay; (2) Wyoming has significant protectable interests in this case; (3) disposition of this case in the Interest Groups' favor would impair Wyoming's interests; and (4) the federal defendants cannot adequately represent Wyoming's unique, sovereign interests.

a. Wyoming's motion is timely.

Courts use three factors to assess the timeliness of a motion to intervene: (1) the stage of the proceeding when intervention is sought; (2) the prejudice to the parties if intervention is permitted; and (3) the reasons for and length of any delay. *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). Of the three

factors, prejudice is the most important for determining timeliness. *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984).

In this action, Wyoming satisfies the three timeliness factors for intervention as of right. First, this case is in its earliest stages. The federal defendants have not yet lodged the administrative record on which this case will be decided, and the Court has not set a briefing schedule. Second, Wyoming's participation will not prejudice any of the other parties, because Wyoming's participation will not delay resolution of the case. Finally, Wyoming did not unreasonably delay filing this motion. Wyoming became aware of the suit on the day that it was filed and moved expeditiously to intervene. Accordingly, Wyoming's motion is timely.

b. Wyoming has a significant protectable interest.

Wyoming has a "significant protectable interest relating to the property or transaction that is the subject of the action[.]" *Wilderness Soc'y*, 630 F.3d at 1177. "Rule 24(a)(2) does not require a specific legal or equitable interest[.]" *Id.* at 1179 (citing *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980)). Rather, the interest test is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Id.* (quotation omitted). "[A] prospective intervenor's asserted interest need not be protected by the statute under which the litigation is brought to qualify as 'significantly protectable' under Rule 24(a)(2)." *Id.* (citing *Sierra Club*, 995 F.2d

at 1481, 1484). "[I]t is generally enough that the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Id.* (quotation omitted).

Indeed, the interest of a proposed intervenor may be impaired simply because "a decision in the plaintiff's favor would return the issue to the administrative decision-making process." *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1199 (10th Cir. 2010). And although proposed intervenors could vindicate their rights in that administrative decision-making process, "it is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation." *Natural Res. Defense Council v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 2013). "[E]specially in administrative law cases, questions of 'convenience' are clearly relevant." *Id.*

Wyoming has a number of significant, legally-protectable interests at stake in this litigation. For the purposes of this memorandum, the State will limit its discussion to the following: (1) geography; (2) participation; and (3) state wildlife management. These three factors each independently provide ample evidence of Wyoming's significant interest in this litigation.

The easiest way to understand Wyoming's interest in defending the Service's delisting rule is to consider the geography involved. The vast majority of the DPS at issue in this case is located within Wyoming's borders. *See, e.g.*, 82 Fed. Reg. 30502,

30504 (June 30, 2017) (Figure 1). The same can be said about the Primary Conservation Area, the Demographic Monitoring Area, and suitable grizzly bear habitat. *Id.* The same can also be said about the sheer number of grizzly bears in the DPS, the vast majority of which live in Wyoming. *See* Wyoming Grizzly Bear Management Plan (May 11, 2016) at 39.[1] Therefore, if the Interest Groups prevail in this case and the bear is relisted, the greatest impact will be felt within Wyoming's borders. This alone is sufficient to justify Wyoming's involvement in this case.

Unsurprisingly, given these geographic and population-based realities, Wyoming has long participated with the federal government, the states of Idaho and Montana, and numerous other parties in the management of grizzly bears in the Greater Yellowstone Ecosystem. Indeed, Wyoming was involved in grizzly bear management before the Service even listed the species in 1975. *See* 82 Fed. Reg. at 30508. When the Service created the Interagency Grizzly Bear Study Team in 1973, Wyoming was an inaugural member, and the State continues to participate as a key member of that team today. *Id.* Wyoming is also a member of the Interagency Grizzly Bear Committee and the Yellowstone Ecosystem Subcommittee, both established in 1983 and critical to the successful recovery of the grizzly bear in the

[1] Available at https://wgfd.wyo.gov/WGFD/media/content/PDF/Wildlife/Large%20Carnivore/GB-Mgmt-Plan-Approved-5-11-2016.pdf.

Greater Yellowstone Ecosystem. *Id.* And upon delisting, Wyoming became an inaugural member of the Yellowstone Grizzly Bear Coordinating Committee. *Id.*

Wyoming was also a "participating state" in the Service's grizzly bear delisting effort. *Id.* at 30502. This led to Wyoming's participation in developing the Conservation Strategy and the Tri-State Memorandum of Agreement that will guide grizzly bear management going forward in the Greater Yellowstone Ecosystem. *Id.* at 30508. It was Wyoming's regulatory mechanisms, along with those of Idaho and Montana, that allowed the Service to delist the grizzly bear in the Greater Yellowstone Ecosystem. *See id.* at 30502, 30531, 30535. And Wyoming's investment in the grizzly bear's recovery goes beyond the time and effort expended by various state agencies and their employees. It is also financial. For example, from 2010 to 2014, Wyoming spent over $9 million on its grizzly bear program. Wyoming Game and Fish Department, Annual Reports (2010-2014).[2] In sum, Wyoming's demonstrated commitment to the recovery of the grizzly bear shows the State's significant interest in this species and this case.

But perhaps most telling of all is Wyoming's role in the management of the grizzly bear in the Greater Yellowstone Ecosystem. The State has a significant interest in exercising its sovereign authority over wildlife within its borders. The

[2] Available at https://wgfd.wyo.gov/Wildlife-in-Wyoming/More-Wildlife/LargeCarnivore/Grizzly-Bear-Management.

State's interest in exercising sovereign authority over wildlife is federally recognized – each state has "broad trustee and police powers over wild animals" living within its borders. *See Kleppe v. New Mexico*, 426 US. 529, 545 (1976). A State's regulatory interest over wildlife living within its borders is substantial. *See Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 390 (1978). The State has "the power and duty to protect, preserve, and nurture the wild game" living within its borders. *O'Brien v. State*, 711 P.2d 1144, 1149 (Wyo. 1986).

Now that the grizzly bear is no longer a "threatened" species in the Greater Yellowstone Ecosystem, Wyoming has the responsibility to manage grizzly bears located within the state's borders. *See, e.g., id.* at 30530. If the Interest Groups are successful in their suit, the grizzly bear will return to "threatened" status, and Wyoming will lose management control over the species, despite the fact that the grizzly bear is "recovered" in the DPS. This loss of regulatory authority over a species located within the borders of Wyoming would represent a significant loss both to the regulatory agencies involved and to Wyoming's citizens. Accordingly, Wyoming has a significant interest in the instant litigation.

It is common practice for courts to grant intervenor status to a state when the case centers around a species located in that state. To name just a few examples, this Court granted intervenor status to the State of Wyoming in the recent wolverine listing litigation. *See Defenders of Wildlife v. Jewell*, 176 F. Supp. 3d 975, 997 (D.

Mont. 2016). This Court also granted the State of Wyoming intervenor status in litigation involving the northern Rocky Mountain gray wolf. *See Defenders of Wildlife v. Hall*, 807 F. Supp. 2d 972 (D. Mont. 2011). Other examples abound, such as the State of Alaska's intervention in the Polar Bear listing litigation and the State of Texas's intervention in a case involving endangered antelope. *See Ctr. for Biological Diversity v. Salazar*, 794 F. Supp. 2d 65 (D.D.C. 2011); *see Safari Club Int'l v. Jewell*, 960 F. Supp. 2d 17 (D.D.C. 2013). And, when various interest groups challenged the Service's decision to delist the Greater Yellowstone Ecosystem grizzly bear in 2007, this Court granted Wyoming's motion to intervene. *Greater Yellowstone Coalition v. Servheen*, Case No. 07-cv-134-DWM (Dkt. No. 27). This Court should also grant Wyoming's motion to intervene in the instant litigation.

c. The Interest Groups' challenge threatens to impair Wyoming's interests.

"[A] prospective intervenor 'has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation.'" *Wilderness Soc'y*, 630 F.3d at 1179 (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)). To satisfy the "practical impairment" requirement, the applicant need only show that the disposition of the action **may** impair its protectable interest. *City of Los Angeles*, 288 F.3d at 401. And "the interest of a prospective defendant-intervenor may be impaired where a decision in the plaintiff's favor would return the issue to the administrative decision-making

process, notwithstanding the prospective intervenor's ability to participate in formulating any revised rule or plan." *WildEarth Guardians* 604 F.3d at 1199.

The Interest Groups ask this Court to permanently enjoin the federal government from "taking any actions to effect the delisting of the GYE grizzly bears." (Dkt. No. 1 at 33). As discussed above, this would significantly impact Wyoming's interests. If, on the other hand, this Court upholds the Secretary's decision, Wyoming will not be exposed to these risks of injury. Because the Interest Groups' success in this action would concretely harm the State of Wyoming, and because that harm will be avoided if the federal action is upheld, Wyoming has met the "impairment" requirement for intervention.

d. The federal defendants cannot adequately represent Wyoming's interests.

When examining the final criterion for intervention as of right, adequacy of representation, courts consider the following: (1) whether a present party 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 intervenor would offer any necessary elements to the proceedings that other parties would neglect. *City of Los Angeles*, 288 F. 3d at 398 (citation omitted). "However, the burden of showing inadequacy is 'minimal,' and the applicant need only show that representation of its interests by existing parties 'may be' inadequate." *Sw. Ctr. for*

Biological Diversity, 268 F.3d at 822–23 (citations omitted). Wyoming meets this minimal burden.

The federal defendants cannot adequately represent Wyoming's sovereign interests. While the federal defendants have a duty to represent the interests of the general public across the United States, states have a variety of differing interests. The federal government has no duty to represent the personal or economic interests of a single group or state. *See Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) (finding that the federal government is "required to represent a broader view than the more narrow, parochial interests" of a proposed state or county intervenor), *abrogated on other grounds by Wilderness Soc'y*, 630 F.3d at 1173, 1177–78, 1180. Accordingly, the federal defendants cannot adequately represent Wyoming's interests.

Indeed, courts have found that federal agencies cannot adequately represent other interests in lawsuits challenging federal decision-making. *See e.g. Nat'l Farm Lines v. ICC*, 564 F.2d 381, 384 (10th Cir. 1977) (noting that it is impossible for the government to adequately protect both the public interest and the private interests of the petitioners in intervention); *Sierra Club v. Espy*, 18 F.3d 1202, 1207-08 (5th Cir. 1994) (finding that the government did not adequately represent the interests of timber purchasers). Similarly, the federal government cannot adequately represent the narrower interests of non-federal governmental entities in environmental

litigation challenging federal action. *See e.g., Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1256 (11th Cir. 2002) (holding that federal defendant did not adequately represent state's interest in interstate waters because federal agency had no independent stake in how much water reached state seeking intervention). Moreover, "[i]nadequate representation is most likely to be found when the applicant asserts a personal interest that does not belong to the general public." 3B Moore's Federal Practice, ¶ 24.07[4] at 24-78 (2d ed. 1995).

To be certain, Wyoming and the federal government have a basic common interest in seeing that the Secretary's delisting decision is upheld. From this common ground, however, differences emerge. In attempting to protect its interests, the Bureau will defend the Secretary's decision. But in many respects, the agency can go no further. Wyoming is uniquely capable of explaining to the Court how any potential ruling will affect the State. Wyoming is also uniquely capable of explaining to the Court how Wyoming's regulatory mechanisms have, and will, protect the grizzly bear. In short, the federal government cannot adequately represent Wyoming's interests. Accordingly, Wyoming has met the requirements of this element for intervention.

II. In the alternative, the Court should grant Wyoming permission to intervene.

In the event this Court does not grant intervention as a matter of right, the Court should permit Wyoming to intervene in this matter pursuant to Federal Rule

of Civil Procedure 24(b)(1)(B), which provides: "On timely motion, the court may permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact." If the applicant satisfies this requirement, "it is then discretionary with the court whether to allow intervention." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc'y*, 630 F.3d at 1173, 1177–78, 1180.

As explained above, Wyoming's motion is timely and will not delay these proceedings. Under the second factor, an applicant for permissive intervention satisfies the "common question" requirement where it will assert defenses that squarely respond to the claims asserted by the Interest Groupsin their complaint. *Kootenai Tribe of Idaho*, 313 F.3d at 1111. Here, Wyoming contests the Interest Groups' claim that the federal government violated the law when it delisted the grizzly bear. This direct response to the Interest Groups' claims satisfies the "common question" requirement for permissive intervention. *Kootenai Tribe of Idaho*, 313 F.3d at 1110 (finding intervenor defendants alleged common questions of law and fact by raising defenses "directly responsive" to plaintiff's claims). Accordingly, because Wyoming's timely participation will address the issues of law and fact in this case, it meets the criteria for permissive intervention. Wyoming requests permission to intervene in order to represent its important and unique interests in this action.

CONCLUSION

For the foregoing reasons, the State of Wyoming respectfully requests that this Court grant the State's motion to intervene.

Dated this 11th day of October, 2017.

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CERTIFICATE OF SERVICE

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I hereby certify that, on October 11, 2017, a copy of the foregoing document was served on the following persons by the following means:

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