UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA CATTLEMEN'S ASSOCIATION, *et al.*,	
Plaintiffs,	Case No: 1:17-cv-01536-TNM
v.	
RYAN ZINKE, *et al*.,	**MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT**
Defendants,	
and	
CENTER FOR BIOLOGICAL DIVERSITY, CENTRAL SIERRA ENVIRONMENTAL RESOURCE CENTER, and WESTERN WATERSHEDS PROJECT,	
Defendant-Intervenor-Applicants.	

MOTION TO INTERVENE

Pursuant to Federal Rule of Civil Procedure 24 and LcvR 7, the Center for Biological Diversity, Central Sierra Environmental Resource Center, and the Western Watersheds Project (collectively, "Applicant-Intervenors") hereby respectfully move this Court for leave to intervene as of right as Defendant-Intervenors in this case, or, in the alternative, for permissive intervention.

Pursuant to LcvR 7(m), counsel for Applicant-Intervenors conferred with counsel for Plaintiffs California Cattlemen's Association, et al. and counsel for Defendants U.S. Fish and Wildlife Service, et al. Plaintiffs do not oppose this motion; Federal Defendants will reserve their position until after they have reviewed the motion. Pursuant to LCvR 7(j), Applicant-Intervenors lodge their Proposed Answer with this motion. Exhibit A.

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

INTRODUCTION

Applicant-Intervenors the Center for Biological Diversity ("Center"), Central Sierra Environmental Resource Center ("CSERC"), and the Western Watersheds Project ("WWP") submit this Memorandum in Support of their Motion to Intervene as Defendant-Intervenors. This case concerns habitat designated as "critical" for the conservation of the Sierra Nevada yellow-legged frog, the northern distinct population segment ("DPS") of the mountain yellow-legged frog, and the Yosemite toad (collectively, "Sierra frogs"), three highly threatened amphibian species living at high elevations in the Sierra Nevada. Applicant-Intervenors seek to defend the final rule designating critical habitat for the Sierra frogs under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, which Plaintiffs challenge in this litigation. 81 Fed. Reg. 59046 (Aug. 26, 2016) ("2016 Critical Habitat Rule").

Applicant-Intervenors have a strong interest in conserving the Sierra frogs and have been active in seeking their full protection under the ESA. Their actions spurred the endangered listing of the Sierra Nevada yellow-legged frog and northern DPS of mountain yellow-legged frog and the threatened listing of Yosemite toad in 2014, as well as the designation of critical habitat at

issue in this case in 2016. 79 Fed. Reg. 24256 (April 29, 2014); 81 Fed. Reg. 59046. Applicant-Intervenors continue to advocate on behalf of the Sierra frogs, such as by actively participating in the management and planning processes for National Parks and National Forests in the Sierra frogs' range, and ensuring that the Humboldt-Toiyabe National Forest complies with the ESA and considers impacts to the Sierra frogs before authorizing livestock grazing. Declaration of Jeffrey K. Miller ("Miller Decl.") ¶ 11; Declaration of John Buckley ("Buckley Decl.") ¶ 5; Declaration of Michael J. Connor ("Connor Decl.") ¶ 5.

Applicant-Intervenors readily meet the test under Federal Rule of Civil Procedure 24(a) for intervention as of right, because: (1) their application is timely; (2) they have legally protected interests in the action; (3) the action threatens to impair their interests; and (4) none of the existing parties adequately represent the would-be intervenor's interests. Fed. R. Civ. P. 24(a); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003).

As established below, intervention is timely because Plaintiffs recently filed the case, which is in the early stages. Applicant-Intervenors also have a legally cognizable interest in the fate of the Sierra frogs, as evidenced by their active involvement in protection of this species over many years, as well as their members' interests in these frogs. Additionally, this lawsuit has the potential to prejudice their interests in conserving the Sierra frogs because Plaintiffs seek to invalidate their critical habitat that is essential to the species' survival and recovery. Finally, the interests of the Applicant-Intervenors are not adequately represented by Plaintiffs or the Federal Defendants, who protected the Sierra frogs under the ESA and designated and protected their critical habitat only after successful litigation brought by the Center.

LEGAL FRAMEWORK

Protection under the Endangered Species Act

This case concerns protection of the Sierra Nevada yellow-legged frog, the northern DPS of the mountain yellow-legged frog, and the Yosemite toad under the ESA, a law enacted by Congress to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(b). "The plain intent of Congress in enacting this statute was to halt

and reverse the trend towards species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

The ESA requires the Secretary of Interior, through the U.S. Fish and Wildlife Service ("FWS"), to determine whether any species is "endangered" or "threatened." Once a species is protected under the ESA, an array of statutory protections applies. For example, Section 7 requires all federal agencies to "insure" that their actions neither "jeopardize the continued existence" of any protected species nor "result in the destruction or adverse modification" of its critical habitat." 16 U.S.C. § 1536(a)(2). In addition, the harming or "take" of protected species is generally prohibited. *Id.* §§ 1532(19), 1538(a); 50 C.F.R. §§ 17.21(c), 17.31(a). Section 4(f) requires FWS to develop recovery plans for listed species, which identify actions necessary to save endangered species from extinction and eventually remove their protection under the ESA. 16 U.S.C. § 1533(f).

Designation of Critical Habitat under the ESA

The ESA requires FWS "to the maximum extent prudent and determinable" to designate critical habitat for listed species. *Id.* §§ 1533(a)(3), (b)(6)(C); 50 C.F.R. § 424.12. Critical habitat is defined as those "specific areas within the geographic areas occupied by the species, at the time it is listed … on which are found those physical or biological features [that are] (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). FWS may also designate "specific areas outside of the geographical area occupied by the species at the time it is listed … upon a determination by the Secretary that such areas are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii).

When designating critical habitat, FWS focuses on the principal physical or biological "features" within the defined area that are essential to the species' conservation. 50 C.F.R. § 424.12(b). These features that support the life-history needs of a species and may be a single habitat characteristic or a more complex combination of characteristics. *Id.* § 424.02. They may include but are not limited to: water characteristics, soil type, geological features, vegetation,

sites, and prey. *Id*. These features may include characteristics that support ephemeral or dynamic habitats. *Id.*

When promulgating a final rule designating critical habitat for a listed species, FWS must rely on the best scientific data available and take into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. 16 U.S.C. § 1533(b)(2). When a critical habitat decision is not made contemporaneously with the listing decision, FWS has 12 months from the date of listing to designate the critical habitat. *Id*. §1533(b)(6)(C)(ii); 50 C.F.R § 424.17(b)(2).

FACTUAL AND PROCEDURAL HISTORY

Applicant-Intervenors

The Center is a non-profit 501(c)(3) organization with field offices throughout the United States, including Arizona, New Mexico, California, Colorado, Idaho, Nevada, Oregon, Washington, Minnesota, Vermont, Florida, and Washington, D.C. Miller Decl. ¶ 2. The Center works through science, law, and creative media to secure a future for all species, great or small, hovering on the brink of extinction. *Id*. The Center has more than 61,000 members and over 1.5 million online supporters. *Id*. The Center and its members are concerned with the conservation of imperiled species, including the Sierra frogs, and the effective implementation of the ESA. *Id.*

CSERC is a non-profit 501(c)(3) organization with more than 750 members. Buckley Decl. ¶ 2. CSERC's members primarily reside in Tuolumne County and Calaveras County in Central California. *Id.* CSERC was formed in 1990 to identify threats to the environment in the central region of the Sierra Nevada; to research workable, balanced solutions to those environmental problems; to raise public awareness about those threats; and to advocate on behalf of the solutions. *Id.* CSERC and its members are concerned with defending the water, wildlife, and wild places of the Northern Yosemite region, including the Sierra frogs and their habitats. *Id.*

WWP is a non-profit 501(c)(3) organization headquartered in Haley, Idaho. Declaration of George Wuerthner ("Wuerthner Decl.") ¶ 12. WWP has offices in several western states, including Nevada and California. *Id*. WWP was founded in 1993 to protect and restore western

watersheds and wildlife through education, public policy initiatives, and litigation. *Id*. WWP has over 5,000 members and supporters who are located throughout the West and the United States, including California. *Id*. WWP and its members have a longstanding interest in the protection of western public lands and their biodiversity, including the Sierra frogs and their habitat. *Id*. at ¶ 13-14.

Natural History of the Sierra Frogs

Sierra Nevada yellow-legged frogs and mountain yellow-legged frogs inhabit the lakes, ponds, marshes, meadows, and streams, at elevations from 4,500 to 12,000 feet in the montane regions of the Sierra Nevada mountain range. 79 Fed. Reg. at 24259. The Sierra Nevada yellow-legged frog is found in the northern portion of the Sierra Nevada in California and Nevada and the northern DPS of mountain yellow-legged frog is found only in California, in the western and southern portion of the Sierra Nevada. *Id.* at 24257. These frogs are highly aquatic and generally not found more than 3.3 feet (one meter) from water, although they have been documented to travel up to 2.05 miles (3.3 kilometers) along streams in a single season. *Id.* at 24260.

The Sierra Nevada yellow-legged frog and mountain yellow-legged frog were historically abundant and ubiquitous across many of the higher elevations within the Sierra Nevada, but have disappeared from a large portion of their historical range. *Id.* at 24260-61. The current distribution of these two species is almost entirely on federal public lands managed by the United States Forest Service and the National Park Service. *Id.* at 24261. Local population-level changes for the Sierra Nevada yellow-legged frog and mountain yellow-legged frog were first noticed in the early 1900s although they were still abundant at many sites, and population losses continued between the 1960s and 1990s, and have continued in recent decades. *Id.* at 24282-83. Both species are primarily threatened by introduced fish, livestock grazing, and pathogens, which are likely to be exacerbated by widespread changes associated with climate change and the current small population sizes in many areas. *Id.* at 24282-84.

Yosemite toads historically ranged in the Sierra Nevada from the Blue Lakes region north of Ebbets Pass (Alpine County) to south of the Evolution Lake area (Fresno County), and

spanned sites ranging from 4,790 to 11,910 feet in elevation. *Id.* at 24286. While the extent of the toad's range continues to be about the same, within that range, its habitat has been degraded and may be decreasing in area. *Id*. Population declines are thought to have occurred range-wide for the Yosemite toad. *Id.* at 24288.

Yosemite toads are associated with wet meadows and spend the majority of their lives in upland habitats adjacent to breeding meadows, often relying on moist upland areas such as seeps and springs as important non-breeding summer habitat. *Id.* at 24285. However, Yosemite toad adults use terrestrial habitats extensively and move an average of 902 feet (275 meters) from their breeding meadows, and can move farther than 0.63 miles (1 kilometer). *Id.* Because Yosemite toads rely heavily on shallow, ephemeral water, they may be more sensitive to minor changes in habitat. *Id.* at 24288. Yosemite toads are threatened by the legacy effects of historic land management practices, such as livestock grazing, fire management, timber management and associated roads. *Id.* at 24299. The toads are also threatened by disease and climate change. *Id.*

Protection of the Sierra Frogs under the ESA

In 2000, the Center filed a formal petition to list the Sierra Nevada DPS of the mountain yellow-legged frog under the ESA.[1] 78 Fed. Reg. 24472 (April 25, 2013). In response to litigation from the Center, FWS published a 12-month petition finding in 2003 in which it determined that the overall magnitude of threats to the frog was high and that the overall immediacy of those threats was imminent. 68 Fed. Reg. 2283, 2303 (January 16, 2003). However, FWS concluded at that time that although listing under the ESA was warranted, it was precluded by higher priority actions, and thus it added the frog to FWS's list of species that are candidates for listing. *Id* at 2283. The Center challenged this finding in court and sought to

[1] The mountain yellow-legged frog as it was originally described in this petition was later taxonomically split, and is now officially recognized as two separate species within the mountain yellow-legged frog "species complex" that are subjects of this case: the northern DPS of the mountain yellow-legged frog (*Rana muscosa*) and Sierra Nevada yellow-legged frog (*Rana sierrae*). 78 Fed. Reg. 24472, 24474.

compel FWS to proceed with listing. 78 Fed. Reg. at 24473. In this round of litigation the Ninth Circuit concluded in 2006 that FWS's 12-month finding did not meet the requirements of the ESA. *Id.* at 24474. In response, FWS revised its 12-month finding in 2007 to include a discussion of its underlying rationale and data evaluation, but maintained its previous "warranted-but-precluded" finding and the status of the frog as a candidate for listing. *Id.*

The Center also filed a separate formal petition to list the Yosemite toad under the ESA in 2000. *Id.* at 24474. In response to litigation from the Center, FWS published a 12-month listing determination in 2002 in which it found that the toad had declined in distribution and abundance; however, FWS determined that listing the toad under the ESA was "warranted, but precluded" by higher-priority listing actions. 67 Fed. Reg. 75834 (Dec. 10, 2002).

Litigation from the Center led to an enforceable settlement agreement requiring FWS to submit proposed listing determinations on all three species of Sierra frogs to the Federal Register by September 30, 2013, and final listing decisions one year later. Accordingly, FWS proposed to list the Sierra Nevada yellow-legged frog and northern DPS mountain yellow-legged frog as endangered and Yosemite toad as threatened under the ESA in April 2013. 78 Fed. Reg. 24472. At the same time, FWS proposed critical habitat for the Sierra frogs, including approximately 1.1 million acres for Sierra Nevada yellow-legged frog, 221,498 acres for northern DPS mountain yellow-legged frog, and 750,926 acres for Yosemite toad. 78 Fed. Reg 24516 (April 25, 2013).

One year later, FWS finalized the listings of the Sierra Nevada yellow-legged frog and the northern DPS of mountain yellow-legged frog as endangered species, and the Yosemite toad as a threatened species. 79 Fed. Reg. 24256. In 2016, FWS finalized the critical habitat designations for the Sierra frogs, including approximately 1.08 million acres for Sierra Nevada yellow-legged frog, 221,498 acres for northern DPS mountain yellow-legged frog, and 750,926 acres for Yosemite toad. 81 Fed. Reg. 59046. All of the critical habitat units or subunits are considered to be occupied by the respective species. *Id.* Because there is significant overlap in the critical habitat designations for these three species, the total amount of area protected as critical habitat is approximately 1.8 million acres. *Id.*

Applicant-Intervenors' Ongoing Efforts to Protect the Frogs and Their Critical Habitat

In addition to the listing petitions under the ESA discussed above, the Center filed a formal petition to list all populations of the mountain yellow-legged frog under the California Endangered Species Act, which spurred the California Fish & Game Commission to add the Sierra Nevada yellow-legged frog and mountain yellow-legged frog to its list in 2012. Miller Decl. ¶ 11.

The Center has also mounted several campaigns to promote conservation and recovery efforts for the Sierra frogs. *Id.* For example, the Center worked to change the state of California's trout stocking policies, which resulted in cessation of the introduction of invasive fish to the high Sierra lakes and streams, as well as removal of non-native trout from hundreds of water bodies in the range of the Sierra frogs. *Id.* The Center's pesticides reduction campaign works to limit application of harmful pesticides which drift into the Sierra frogs' habitats. *Id.* In addition, the Center has worked to reform livestock grazing practices in National Forests within the Sierra frogs' range and to rein in off-road vehicle damage to Yosemite toad habitat. *Id.*

WWP advocates on behalf of the Sierra frogs and their habitat with comment letters to federal agencies, including comments to the U.S. Forest Service in its forest plan revision process for the Inyo, Sequoia, and Sierra National Forests, as well as comments on site-specific projects. Connor Decl. ¶ 14. CSERC also regularly participates in planning processes for Yosemite National Park and the Stanislaus National Forest. Buckley Decl. ¶ 5.

CSERC regularly conducts field monitoring to search for amphibians such as the Sierra frogs and observe potential livestock impacts to meadows, streams, lakes and forest areas that make up the habitat of the Sierra frogs. *Id*. at ¶ 7. CSERC frequently reports observations of the Sierra Nevada yellow-legged frog and Yosemite toad to U.S. Forest Service biologists. *Id.* at ¶ 9 CSERC and its members also conduct restoration projects in the Stanislaus National Forest in cooperation with U.S. Forest Service personnel, including meadow restoration and stream bank rehabilitation. *Id.* at ¶ 4.

The Center and WWP submitted comments on the proposed ESA listings and proposed critical habitat for the Sierra frogs. Miller Decl. ¶ 11; Connor Decl. ¶¶ 15-16. CSERC's executive director attended hearings on the proposed listing and critical habitats designations for the Sierra frogs and testified on CSERC's behalf. Buckley Decl. ¶¶ 12-14.

ARGUMENT

I. APPLICANT-INTERVENORS ARE ENTITLED TO INTERVENE AS OF RIGHT.

Federal Rule of Civil Procedure 24(a)(2) provides as follows:

> On timely motion, the court must permit anyone to intervene who … claims an interest relating to the property or transaction which 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). The Court uses a four-part test to evaluate motions to intervene: "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998). Practical considerations guide courts in applying this test. *See* Fed. R. Civ. P. 24, advisory committee notes; *see Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972) (providing that "the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard").

The Court should grant this Motion because Applicant-Intervenors meet the standard set forth in Federal Rules of Civil Procedure Rule 24(a)(2) and all four prongs of the D.C. Circuit's test for intervention, as explained below. Applicant-Intervenors have been timely and have shown an legally protectable interest in the continued existence of Sierra frogs and their critical habitat that may be impaired by this lawsuit, and that their interests are not adequately represented by the existing parties.

A. The Motion to Intervene is Timely.

In determining whether an intervention motion is timely, this Court should consider "'all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case.'" *United States v. British American Tobacco Australia Serv.*, 437 F.3d 1235, 1238 (D.C. Cir. 2006)(quoting *United States v. American Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980)).

Applicant-Intervenors' motion to intervene is timely because the present case is in its early stages. Only four months have elapsed since this suit was filed. ECF No. 1. No hearings have occurred, the record has not been submitted, and no discovery has been taken. Defendants responded to the Complaint with a Motion to Dismiss filed on November 22, 2017. ECF No. 11. The Court has ordered Plaintiffs to file their opposition to the Motion to Dismiss on or before January 19, 2018 and Defendants to file their reply on or before February 9, 2018. Min. Order (Dec. 11, 2017).

Granting this motion to intervene would not prejudice any party because, if intervention is granted, Applicant-Intervenors will comply with all court-ordered briefing schedules. As such, Granting Applicant-Intervenors' motion will not delay the course of this litigation. Applicant-Intervenors seek intervention, as discussed below and in the attached declarations, to protect their own organizational interests and their members' interests and to preserve the Sierra frogs' designated critical habitat. By allowing intervention, the rights of the Applicant-Intervenors—who have long advocated for conservation of the Sierra frogs and their habitat—will be represented and preserved.

B. Applicant-Intervenors Have a Protectable Interest in the Subject Matter of This Action.

Rule 24(a) requires an applicant for intervention to possess an interest relating to the property or transaction that is the subject matter of the litigation. Here, Applicant-Intervenors are conservation organizations with the missions of preserving and restoring imperiled species and

the habitats on which they depend—including the Sierra frogs and their critical habitat. As such, Applicant-Intervenors are concerned individuals with a clear interest in the 2016 Critical Habitat Rule challenged by Plaintiffs in this case. Because Rule 24(a)'s interests test is not a rigid standard, but rather "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process[,]" *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967), this Court should grant Applicant-Intervenors' motion to intervene. *See also Friends of Animals*, 452 F. Supp. 2d at 69 ("proposed intervenors of right need only an interest in the litigation—not a cause of action or permission to sue") (quotation marks and citation omitted); *Smith v. Pangilinan*, 651 F.2d 1320, 1324 (9th Cir. 1981) (finding that a proposed intervenor need not have a specific legal or equitable interest in jeopardy but simply a "protectable interest of sufficient magnitude to warrant inclusion in the action").

As is apparent from this procedural history, Applicant-Intervenors and their members have clear and legally cognizable interests in this action. Their advocacy, including legal advocacy, compelled FWS to protect the Sierra frogs and their critical habitat in the first instance. The Center's mission is the protection of imperiled species such as the Sierra frogs and their habitat. Miller Decl ¶ 2. CSERC's mission is to defend the water, wildlife, and wild places of the Northern Yosemite region of the Central Sierra Nevada. Buckley Decl. ¶ 2. And the protection and restoration of western watersheds and wildlife is WWP's mission. Wuerthner Decl. ¶ 12. Furthermore, Applicant-Intervenors and their members and staff have significant professional and personal interests in the Sierra frogs, their habitat, and their protection. *See generally* Miller Dec.; Buckley Decl.; Wuerthner Decl.; Connor Decl.

Such long-standing interests in the protection of Sierra frogs provide a sufficient basis for intervention in this case. *See, e.g., Coal. of Arizona/New Mexico Counties for Stable Econ. Growth v. Dep't of the Interior*, 100 F.3d 837, 841-44 (10th Cir. 1996) (individual's involvement with a species through his activities as a photographer, amateur biologist, naturalist, and conservation advocate amounted to sufficient interest for purpose of intervention in litigation covering a species' protection under the ESA); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d

1392, 1397 (9th Cir. 1995) ("[a] public interest group is entitles as a matter of right to intervene in an action challenging the legality of a measure it had supported."); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-528 (9th Cir. 1983) (environmental groups' "environmental, conservation and wildlife interests" were sufficient for intervention as a matter of right).

C. This Action Threatens to Impair Applicant-Intervenors' Interests.

Rule 24(a)'s "impairment" requirement concerns whether, as a practical matter, the denial of intervention will impede the prospective intervenor's ability to protect its interests in the subject of the action. Fed. R. Civ. P. 24(a)(2). As the Advisory Committee Notes to Rule 24(a) explain, "[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." Fed. R. Civ. P. 24(a) advisory comm. nn. (1966). The D.C. Circuit further emphasizes that in considering the impairment requirement, the Court should "look[] to the 'practical consequences' of denying intervention . . . ." *Fund for Animals*, 322 F.3d at 735 (internal quotation marks omitted).

The disposition of Plaintiffs' claim has the potential to impair the interests of Applicant-Intervenors. Their interests in the Sierra frogs would be directly and adversely affected by the relief Plaintiffs seek: vacating the final rule designating critical habitat for the Sierra frogs. If Plaintiffs succeed, the Sierra frogs would lose essential protections under the ESA, which were the result of years of advocacy by Applicant-Intervenors. *See, e.g., Natural Res. Def. Council v. EPA*, 99 F.R.D. 607, 609 (D.D.C 1983) (granting intervention as of right to industry groups in a FACA case that could "nullify" the group's efforts).

Courts have repeatedly found such impairment to sustain intervention for environmental groups in lawsuits such as this. In *Idaho Farm Bureau Federation*, the Ninth Circuit Court of Appeals held that a disposition of an action that might result in the delisting of the endangered Bruneau Springs snail "would impair [intervenor's] ability to protect their interest in the Springs Snail and its habitat." 58 F.3d at 1398; *see also Sagebrush Rebellion*, 713 F.2d at 528 ("[a]n adverse decision in this suit would impair the society's interest in the preservation of birds and their habitats"). In *Coalition of Arizona/New Mexico Counties for Stable Economic Growth*, the

Tenth Circuit Court of Appeals held that intervenor's interest in the protection of the Mexican spotted-owl would, "as a practical matter," be impaired by a ruling in favor of the plaintiffs to delist the owl "by the stare decisis effect of the district court's decision, not to mention the direct effect of a possible permanent injunction." 100 F.3d at 844; *see also Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) (holding that timber trade associations could intervene in lawsuit challenging the legality of certain logging practices because "an adverse resolution of the action would impair their ability to protect their interest" because of "stare decisis effect of the district court's judgement").

Further, the members and staff of Applicant-Intervenors would be harmed both professionally and personally if the Sierra frogs' habitat is no longer protected under the ESA as critical habitat. Miller Decl. ¶¶ 12-15; Buckley Decl. ¶ 16; Wuerthner Decl. ¶ 21; Connor Decl. ¶¶ 17, 20. In addition, if the Applicant-Intervenors are not allowed to intervene in this action, their ability to carry out their missions will be significantly impaired. Miller Decl. ¶ 16; Buckley Decl. ¶ 17; Wuerthner Decl. ¶ 22.

Because Applicant-Intervenors are so situated that the disposition of this action may as a practical matter impair their ability to protect their interests in the Sierra frogs, Applicant-Intervenors satisfy the third requirement of intervention of right.

D. Applicant-Intervenors' Interests Are Not Adequately Represented by the Existing Parties.

The fourth factor, the requirement to show that an applicant's interests may not be adequately represented by the existing parties to the litigation, is "not onerous" and is satisfied if the applicant shows that the representation of its interests "may be" inadequate. *Fund for Animals*, 322 F.3d at 735 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); *see also Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986)). Indeed, a petitioner "'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee[.]'" *Fund for Animals*, 322 F.3d at 735 (quoting *United*

States v. American Tel. & Tel. Co., 642 F.2d 1285, 1293 (D.C. Cir. 1980)). Here, Applicant-Intervenors meet the minimal burden of showing inadequate representation.

First, Plaintiffs interests are diametrically opposed to Applicant-Intervenors' interests. Plaintiffs' seek to strip the Sierra frogs of the protections that Applicant-Intervenors worked for years to achieve. Indeed, FWS does not adequately represent Applicant-Intervenors' interests because, as discussed above, Applicant-Intervenors had to sue FWS to get the protections in place in the first instance, which demonstrates a divergence in interests and priorities. *See, e.g., Idaho Farm Bureau Fed'n*, 59 F.3d at 1398 ("FWS was unlikely to argue on behalf of [applicants], the very organizations that compelled FWS to make a final decision by filing a lawsuit. FWS would not have adequately represented [applicant's] interests."); *County of Fresno v. Andrus*, 622 F.2d 436, 439 (9th Cir. 1980) ("[T]here is further reason to doubt that the Department [of the Interior] will fully protect [the applicant's] interest … in light of the fact that the Department began its rulemaking only reluctantly after [the applicant] brought a law suit against it."). The failure of FWS to advocate for full and fair protection of the Sierra frogs in the past indicates that FWS may not adequately represent the Center's interests in the future.

Moreover, the D.C. Circuit has recognized that governmental representation of private intervenors may be inadequate because the government must represent the public interest, not the interests of the private entity. *Fund for Animals*, 322 F.3d at 736 (citing *Natural Res. Def Council v. Costle*, 561 F.2d 904, 912-13 (D.C. Cir. 1977)). The federal government's mandate to enforce an entire regulatory system precludes it from adequately representing one party's interest in it. *People for the Ethical Treatment of Animals v. Babbitt*, 151 F.R.D. 6 (D.D.C. 1993); *see Dimond*, 792 F.2d at 192-93 (finding an agency "would be shirking its duty were it to advance [an individual's] narrower interest at the expense of its representation of the general public interest").

Although Federal Defendants are currently putting up a defense through the recent filing of a motion to dismiss (ECF No. 11), there is no guarantee that Defendants will present a vigorous defense throughout the course of litigation. Yet, even when there "may be a partial

congruence of interests, that does not guarantee the adequacy of representation." *Fund for Animals*, 322 F.3d at 736-37 (granting intervention where federal defendant and movant's interests "might diverge during the course of litigation"). Applicant-Intervenors seek to intervene to protect against a possible settlement of litigation that may include concessions from Defendants that would be adverse to Applicant-Intervenors' interest that the Sierra frogs' critical habitat remains fully protected under the ESA.

For all these reasons, this Court should grant intervention as of right to Applicant-Intervenors pursuant to Rule 24(a).

II. IN THE ALTERNATIVE, PERMISSIVE INTERVENTION IS WARRANTED.

Should this Court find that Applicant-Intervenors are not entitled to intervene as of right under Rule 24(a), they respectfully request that this Court grant permission to intervene pursuant to Federal Rule of Civil Procedure 24(b). Permissive intervention is appropriate when an applicant's timely defense "shares a question of law or fact in common with the underlying action and if the intervention will not unduly delay or prejudice the rights of the original parties." *Acree v. Republic of Iraq*, 370 F.3d 41, 49 (D.C. Cir 2004) (citing Fed. R. Civ. P. 24(b)).

Applicant-Intervenors meet these requirements. This Court has jurisdiction over Applicant-Intervenors and their defenses under 28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 702 (the APA) as they all involve issues of federal law in defending against Plaintiffs' claims. As discussed above in the context of intervention of right, the intervention application is timely and existing parties will not be prejudiced because of intervention in this early phase of the proceeding. Lastly, Applicant-Intervenors' legal defenses share common questions of law and fact with Plaintiffs' claims because they concern the exact matters raised by Plaintiffs regarding to the protection of the Sierra frogs' critical habitat under the ESA.

III. APPLICANT-INTERVENORS HAVE STANDING TO INTERVENE AS DEFENDANTS.

To the extent standing is required to intervene in this case, *Town of Chester v. Laroe Estates*, 137 S. Ct. 1645 (2017), Applicant-Intervenors have standing based on their organizational interests in protections for the Sierra frogs and associational standing on behalf of their members' interests in observing the rare frogs and recreating in their habitats; interests that would be injured if Plaintiffs are successful in vacating the frogs' critical habitat rule.[2]

Standing requires a showing of: (1) injury in fact; (2) a causal relationship between the injury and the challenged action, such that the injury can be fairly traced to the challenged action; and (3) the likelihood that a favorable decision will redress the injury. *Natural Res. Def. Council v. EPA*, 489 F.3d 1364, 1370 (D.C. Cir. 2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

An organization has associational standing "if (1) at least one of its members would have standing to sue in his own right; (2) the interest it seeks to protect is germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the member to participate in the lawsuit." *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 182 (D.C. Cir. 2017) (quoting *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013)). For Applicant-Intervenors, the question is whether plaintiffs seek relief that would harm the

[2] The Supreme Court's decision in *Town of Chester v. Laroe Estates*, 137 S. Ct. 1645 (2017), calls into question the D.C. Circuit's requirement that defendant intervenors must show standing. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731–32 (D.C. Cir. 2003). In *Town of Chester*, the Supreme Court held that a would-be intervenor must have standing to seek relief different than that sought by a party with standing. 137 S. Ct. at 1651. The Court assumed that Laroe Estates (the would-be plaintiff-intervenor) did not have standing, *id.* at 1650 n.2, and remanded the case to the Second Circuit Court of Appeals to determine whether Laroe sought different relief than the plaintiff, *id.* at 1652. If all intervenors—regardless of the relief sought—must have standing, the question the Court remanded would be immaterial. Indeed, the Court recognized this by acknowledging that the "resolution" of Laroe's standing might not "become[] necessary on remand." *Id.* at 1650 n.2. The only way to square *Town of Chester*'s clear holding with its disposition is to recognize that intervenors do not need standing if they seek the same relief as a party with standing. Thus, if Federal Defendants defend this suit, Conservation Groups do not need standing to defend it as well. The D.C. Circuit has not yet addressed this issue in a binding opinion.

defendant-intervenors' members. If so, causation and redressability "rationally follow[]." *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015).

The standing requirement is closely related to Rule 24(a)'s interest requirement. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (any person who satisfies Rule 24(a) will also meet Article III's standing requirement); *United States v. Philip Morris USA, Inc.*, 566 F.3d at 1146 (by demonstrating Article III standing, intervenors "adduce a sufficient interest" under Rule 24(a)(2)). Standing for at least one applicant supports a grant of intervention to all co-applicants filing together. *See, e.g., Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (granting intervention to all co-applicants based on a finding for one named intervenor-applicant).

Applicant-Intervenors' members are "injured-in-fact," *see Natural Res. Def. Council*, 489 F.3d at 1370 (citing *Lujan*, 504 U.S. at 560), because they have concrete recreational, aesthetic, and professional interests in the streams, forests, land, wildlife, and other habitat components protected by the Sierra frogs' currently designated critical habitat, as discussed above and in the attached declarations. *See, e.g.*, Miller Decl. ¶¶ 3-6, 13-15; Buckley Decl. ¶¶ 3-7, 16; Wuerthner Decl. ¶¶ 7-11, 21; Connor Decl. ¶¶ 8-9, 17-18. Applicant-Intervenors' members use and enjoy waters, forests, wildlife, and natural areas that the current critical habitat designation protects and that will be harmed if Plaintiffs succeed in their efforts to remand, or enjoin and vacate, the Sierra frogs' critical habitat designation. *See, e.g.*, Miller Decl. ¶¶ 13-15; Buckley Decl. ¶¶ 3-8; Wuerthner Decl. ¶¶ 15-21; Connor Decl. ¶¶ 18-23. If Plaintiffs receive the relief requested, it will diminish Applicant-Intervenors' members' ability to recreate, and their ability to view and appreciate the Sierra frogs. *See, e.g.*, Miller Decl. ¶¶ 13-15; Buckley Decl. ¶¶ 3-4, 16; Wuerthner Decl. ¶ 21; Connor Decl. ¶¶ 20-22.

Next, the causal connection between Plaintiffs' requested relief and Applicant-Intervenors' interests is direct. Applicant-Intervenors' members' interests in protecting and enjoying the Sierra frogs are directly linked to Plaintiffs' requested relief that the Court set aside the 2016 Critical Habitat Rule. As such, Applicant-Intervenors' members' injuries are "fairly

traceable" to the relief Plaintiffs seek and thereby satisfy this element of standing. Miller Decl. ¶¶ 13-15; Buckley Decl. ¶ 16; Connor Decl. ¶ 17-22.

Finally, this Court can "redress" Applicant-Intervenors' members' injuries by ruling against Plaintiffs and rejecting their challenges to the 2016 Critical Habitat Rule. *See id.* Therefore, Applicant-Intervenors' members have Article III standing in their own right. *See, e.g.*, *Natural Res. Def. Council*, 489 F.3d at 1371 (finding standing where organization's members "use or live in areas affected" by the action at issue "and are persons for whom the aesthetic and recreational values of the area" would be lessened as a result of the action) (quotations omitted).[3]

Furthermore, Applicant-Intervenors have organizational standing, separate and apart from their members, due to their concrete, institutional interests in the subject matter of this action, the harm Plaintiffs' suit causes or is likely to cause to Applicant-Intervenors' interests, and this Court's authority to redress this harm by denying relief to Plaintiffs. *Cf. Friends of Animals v. Salazar*, 626 F. Supp. 2d 102, 113 (D.D.C. 2009) ("A plaintiff suffers an organizational injury if the alleged violation 'perceptibly impair[s]' its ability to carry out its activities.") (citing cases).

As part of their core missions, Applicant-Intervenors expend resources and engage in frequent activities to gather information on, to educate the public about, and to protect the interests of their members regarding Sierra frogs conservation, including advocating for the protection of the Sierra frogs under the ESA and designation of their critical habitat. Miller Decl. ¶¶ 2-4, 11, 16; Buckley Decl. ¶¶ 5-10, 17; Wuerthner Decl. ¶ 14; Connor Decl. ¶¶ 14-16. If one of the focal points of this advocacy—the habitat now protected by the 2016 Critical Habitat Rule—is eliminated as Plaintiffs request, it would irreparably compromise Applicant-Intervenors' missions. *Id.* It would also force Applicant-Intervenors to commit more time,

[3] In addition, because protecting these interests is germane to Applicant-Intervenors' organizational missions, *see, e.g.*, Miller Decl. ¶¶ 2; Buckley Decl. ¶¶ 2; Wuerthner Decl. ¶¶ 12-13, and neither the claim asserted nor the relief requested requires that an individual member participate in the lawsuit, Applicant-Intervenors have associational standing. *See Natural Res. Def. Council v. EPA*, 489 F.3d at 1370 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977)).

resources, and effort into reestablishing the protections currently provided by the 2016 Critical Habitat Rule. *Id.* Applicant-Intervenors seek to avoid the harm to their organizations' ability to fulfill their core missions that the diminishment or elimination of the currently designated critical habitat would cause.

In summary, because a ruling in favor of Plaintiffs would eliminate a critical and important protection for the Sierra frogs, the Applicant-Intervenors have standing as well as the requisite interest in intervening as defendants in the present case.

CONCLUSION

For the reasons set forth above, Applicant-Intervenors respectfully request that this Court grant their motion to intervene as of right or, in the alternative, permissive intervention. If granted intervention, Applicant-Intervenors will submit consolidated briefing according to the schedule imposed by the Court or the local rules.

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Respectfully submitted,

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