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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

WESTERN WATERSHEDS PROJECT,
WILDEARTH GUARDIANS, CENTER FOR
BIOLOGICAL DIVERSITY, and PRAIRIE
HILLS AUDUBON SOCIETY,

Plaintiffs,

vs.

DAVID BERNHARDT, Acting Secretary of
Interior; JOSEPH R. BALASH, Assistant
Secretary of Interior; BUREAU OF LAND
MANAGEMENT; and U.S. FOREST SERVICE,

Defendants,

and

GOVERNOR GARY R. HERBERT, STATE OF
UTAH, and STATE OF UTAH SCHOOL AND
INSTITUTIONAL TRUST LANDS
ADMINISTRATION,

[Proposed] Intervenor-Defendants.

Case No. 1:16-cv-83-BLW

**MEMORANDUM IN SUPPORT
OF MOTION TO INTERVENE**

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Gary R. Herbert, Governor of the State of Utah, the State of Utah, and the State of Utah School and Institutional Trust lands Administration (collectively “Utah”) submit this memorandum supporting their motion to intervene as defendants in this case.

Introduction

Utah seeks to intervene in this action for the limited purpose of procedurally and substantially opposing (1) Plaintiffs’ Motion for Leave to File First Supplemental Complaint (Dkt. No. 118) and (2) the merits of, and relief sought in, that complaint if leave is granted.

Utah has dedicated countless hours and significant financial resources to the conservation of the Greater Sage-Grouse (“sage-grouse”) whose federal habitat is found in isolated patches in counties around the State. The Bureau of Land Management (“BLM”) manages 2.1 million acres of surface, priority habitat in the State and another 1.3 million acres of priority habitat above the BLM-administered federal mineral estate.¹ BLM’s current management of this habitat closely aligns with Utah’s management of the species’ habitat. Plaintiffs seek to undo the BLM’s 2019 Sage-Grouse Plan and related management decisions and revert to the policies of the prior Administration that Utah is challenging in federal court in Utah.

Because Utah meets the requirements for intervention as of right under Fed. R. Civ. P. 24(a) or, alternatively, the broad standard for permissive intervention under Rule 24(b), Utah respectfully requests the Court grant it leave to intervene as defendants in this case.

¹ Bureau of Land Mgmt., Dep’t of the Interior, Record of Decision and Approved Utah Greater Sage-Grouse Resource Mgmt. Plan Amend. 2 (2019) (available at <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage¤tPageId=153126>). (“2019 Sage-Grouse Plan”).

The Proposed Intervenor

Gary R. Herbert is the Governor of the State of Utah. The Utah Constitution vests in Governor Herbert the executive power of the state and requires him to see that the laws are fully executed. Utah Const. art. VII, sec. 1.

The State of Utah, through the Utah Division of Wildlife Resources, is a sovereign natural resources trustee and custodian of all wildlife within the State, including sage-grouse, and it has a statutory mandate to “protect, propagate, manage, conserve, and distribute protected wildlife” throughout the State. Utah Code Ann. § 23-14-1(2)(a) (West 2019). Utah has a sovereign interest in managing sage-grouse to provide both conservation of the species and sustained use of its habitat for the benefit of the people of Utah. *Id.* at (2)(a), (b).

The State of Utah School and Institutional Trust Lands Administration (“SITLA”) is an independent state agency responsible for managing and developing Utah state trust lands for the exclusive benefit of Utah’s schools and other designated beneficiaries. Utah Code Ann. §§ 53C-1-102, 201 (West 2019). SITLA-managed state trust lands include parcels granted by Congress at the time of statehood from which revenue is generated through oil, gas, and mineral leases; rents and royalties; real estate development and sales; and surface estate sales, leases, and easements, to support state institutions including public schools and other beneficiary institutions. *Id.* at § 53C-1-102. Because State lands are intermingled with Federal lands, Utah trust lands have been included within Priority Habitat Management Areas for sage-grouse in the Utah land use plan amendments.

Factual and Procedural Background

In March 2010, the U.S. Fish and Wildlife Service issued a finding that the sage-grouse warranted inclusion in the Endangered Species Act’s (“ESA”) threatened or endangered species

list but that it was precluded from being listed by higher-priority listing proposals. 75 Fed. Reg. 13910-14014 (Mar. 23, 2010).

In response to the “warranted but precluded” finding, the BLM and the U.S. Forest Service initiated efforts to promulgate sage-grouse-centric amendments to existing land use plans in eleven western states including Utah. In December of 2011, the Secretary of the Interior invited western governors to develop state-specific management plans, citing the success of the BLM’s adoption of a Wyoming plan as an example. Dec’l. of Kathleen B. Clarke in Supp. of Mot. to Intervene (“Clarke Dec’l.”), Ex. A, ¶ 3.

Spurred by this promise and to help avoid a future ESA listing, Governor Herbert, asked his Public Lands Policy Coordinating Office (“PLPCO”) to consult with local sage-grouse working groups, conservationists, and other stakeholders, as well as state and local elected officials to develop recommendations and policies to aid the State of Utah with its plan. Clarke Dec’l., Ex. A, ¶ 4. In February 2013, the Governor authorized Utah’s Conservation Plan for Greater Sage-Grouse in Utah (“Utah Conservation Plan”). As a result of the Utah Conservation Plan and similar efforts across the West, and conservation efforts of federal agencies, the Fish and Wildlife Service determined that listing sage-grouse under the ESA was not warranted. *Id.*; 80 Fed. Reg. 59858-942 (Oct. 2, 2015).

Over the past thirteen years, the Utah Legislature has authorized and appropriated millions of dollars in support of the Utah Conservation Plan. Clarke Dec’l. Ex. A, ¶ 7. Between 2006 and 2014, Utah averaged a minimum of \$5 million in annual investment in sage-grouse habitat improvements. *Id.* Since 2015, through the Watershed Restoration Initiative, the State has directed an annual average of \$7.6 million be spent on sage-grouse habitat restoration projects throughout the State. *Id.* Despite the State’s enormous efforts, in September of 2015,

BLM issued a Record of Decision amending fourteen land use plans in Utah.² 80 Fed. Reg. 57633-35 (Sept. 24, 2015) (“2015 Sage-Grouse Plan”).

The 2015 Sage-Grouse Plan limited or eliminated nearly all but the most casual activities in sage-grouse habitat on BLM surface lands and above federal minerals in Utah. *Id.* at 5. Because this plan differed from Utah’s Conservation Plan, the result has been inconsistencies between state and federal management practices leading to injury to the State and specifically to SITLA lands. *Id.* These injuries to the State’s sovereign interests caused the Governor, the State, and SITLA to sue the BLM and Forest Service in 2016 in federal district court in Utah to enjoin implementation of the 2015 Sage-Grouse Plan. *Herbert, et al. v. Jewell, et al.*, Case No. 2:16-cv-101-DAK, Dkt. No. 2 (D. Utah, filed Feb. 4, 2016)³; Clarke Dec’l., Ex. A, ¶ 5.

In 2017, Governor Herbert ordered State officials to coordinate with stakeholders to review the 2013 Utah Conservation Plan to ensure that Utah’s conservation efforts continued to incorporate the best available science, data, and knowledge. As a result, the 2013 plan was revised and updated in 2019 with the goal of protecting, maintaining, and increasing sage-grouse populations and habitats within habitat management areas. The 2019 Utah Conservation Plan includes eleven Sage-Grouse Management Areas that manage over 7.5 million acres that are home to 94 percent of Utah’s sage-grouse population. Clarke Dec’l., Ex. A, ¶ 6. The State’s management strategies include, but are not limited to:

- Identifying the highest-priority sage-grouse habitats and migration corridors and protect at least 5,000 of those acres annually through conservation easements, or other mechanisms.

² The U.S. Forest Service also amended land use plans in Utah. However, the Forest Service plans are not at issue in Plaintiffs’ first supplemental complaint.

³ The case has been stayed since July 13, 2017 to allow the current Administration to develop its own policy toward sage-grouse habitat management culminating in the 2019 Sage-Grouse Plan at issue in this litigation. *Id.*, Dkt. No. 117.

- Improving and increase sage-grouse seasonal habitats by 75,000 acres each year including riparian and mesic habitats.
- Monitoring sage-grouse population trends annually and, if necessary, implement adaptive management responses to ensure that priority populations remain viable and stable.
- Coordinating with local, state and federal firefighting jurisdictions to include sage-grouse habitats as a priority during pre-fire attack planning and suppression, second only to the protection of human life and property.
- Funding, supporting, and implementing critical research that supports the implementation of Utah's Conservation Plan.

Id.

Also in 2017, BLM issued a Notice of Intent to amend the 2015 Sage-Grouse Plan to bring it in alignment with Utah's Conservation Plan and related strategies. 82 Fed. Reg. 47248-49 (Oct. 11, 2017); 2019 Sage-Grouse Plan (Letter from Edwin L. Roberson, State Director Bureau of Land Management, to "Dear Reader" at 1 (March 14, 2019)).

BLM State Director Roberson signed the 2019 Sage-Grouse Plan Record of Decision on March 14, 2019. *Id.* The 2019 Sage-Grouse Plan amended the 2015 Sage-Grouse Plan by implementing key management decisions including:

- Removing the designation of general habitat management areas from the 2015 plan and associated management actions affecting 448,600 acres.
- Removing 181,000 acres of designated Sagebrush Focal Areas and associated management restrictions and redesignating this acreage as priority habitat.
- Adding exceptions to management restrictions if a project is in a non-habitat and would not have indirect impacts to adjacent seasonal habitat.
- Adjusting mitigation standards to comport with BLM's interpretation of controlling federal law.
- Allowing exceedances to disturbance caps in situations where doing so would improve the habitat.
- Applying the best available local science to sage-grouse habitat objectives.
- Modifying travel management actions in key areas, subject to future cultural surveys.

- Requiring adaptive management responses to be linked to causal factors and to include a review of monitoring data and reversal if the sage-grouse population recovers.

2019 Sage-Grouse Plan at 3-4.

On March 27, 2019, Plaintiffs filed their motion seeking permission to file a supplemental complaint challenging the BLM's 2019 Sage-Grouse Plan and accompanying Final Environmental Impact Statement and BLM's decision to not withdraw public lands from location and entry under the federal mining laws. Plaintiffs also seek declaratory judgment on BLM's interpretation of its statutory duties related to compensatory mitigation. First Suppl. Compl. (Dkt. No. 118) at 49-50. Plaintiffs intend to seek a preliminary injunction of the BLM's 2019 Sage-Grouse Plan for Utah. *Id.* at 2.

Utah previously participated in this litigation as amici curiae supporting the Federal Defendants' motion to sever and transfer the non-Idaho portions of the case to other states including Utah. Dkt. Nos. 62, 86. In March of 2017, the Court denied that motion. Dkt. No. 86.

Argument

Rule 24 of the Federal Rules of Civil Procedure provides two means by which an applicant may intervene in an action: intervention as a matter of right governed by subsection (a), and permissive intervention governed by subsection (b). As discussed below, the proposed Intervenor-Defendants satisfy both standards.

I. Intervention of Right.

Fed. R. Civ. P. 24(a)(2) governs intervention of right and provides, in relevant part:

On timely motion, the court must permit anyone to intervene who . . . claims an interest related to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The Ninth Circuit provided direction on the Court's application of this standard in the *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001) ("*Berg*"). Generally, the Court must construe the rule liberally in favor of intervention. *Id.* at 818. Additionally, the Court's evaluation is "guided primarily by practical considerations," not technical distinctions. *Id.* Nevertheless, the applicant for intervention has the burden of showing that each of the four elements enunciated in *Berg*, 268 F.3d at 817 is met:

- (1) the application for intervention must be timely;
- (2) the applicant must have a 'significantly protectable' interest related to the property or transaction that is the subject of the action;
- (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and
- (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit.

United States v. Howell, Case No. 3:16-cv-00164-BLW, 2018 WL 4500134 at *1 (D. Idaho Sept. 19, 2018) (citation omitted).

Here, Utah is entitled to intervene of right because its motion is timely, it has significant, protectable interests that could be impaired by the disposition of this action, and the Federal Defendants and existing Intervenors cannot adequately represent Utah's interests.

A. Utah's Motion to Intervene is Timely.

Three factors determine whether a motion to intervene is timely: (1) stage of the proceeding; (2) prejudice to other parties; and (3) reason for, and length of delay. *Sec. and Exch. Comm'n v. Muroff*, Case No. 1:17-cv-00180-EJL, 2018 WL 7108114 at *5 (D. Idaho Dec. 4, 2018) (citation omitted).

The motion to intervene is timely. Plaintiffs' motion for leave to file a proposed first supplemental complaint (Dkt. No. 118) was filed March 27, 2019. Upon learning of this filing,

the Governor's Office and Utah legislative leaders immediately conferred. By seeking intervention now, Utah avoids prejudicing the other parties or disrupting the Court's management of the case. Utah has not sought to intervene prior to this time, having participated only as amici curiae in support of transferring the Utah portion of the case to Utah federal district court. However, Plaintiffs' proposed supplemental complaint significantly threatens the alignment of the 2019 Sage-Grouse Plan with the Utah Conservation Plan, thus compelling Utah to intervene at this juncture. *See, e.g., Clarke Dec'l, Ex. A, passim.*

B. Utah has Significant Protectable Interests in This Action.

Intervention of right requires the proposed intervenor to demonstrate a significant protectable interest in the proceedings before the court. This factor is often considered together with the third intervention factor that considers whether the applicant's interest could be impaired by the court's determination. *See, e.g., W. Watersheds Project v. U.S. Fish and Wildlife Serv.*, No. 4:CV 10-229-BLW, 2011 WL 2690430 at *3 (D. Idaho July 9, 2011). In considering both factors, the court follows “practical and equitable considerations and construe[s] the Rule broadly in favor of proposed intervenors.” *Id.*, citing *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011); *see also W. Watersheds Project v. Zinke.*, Case No. 1:18-cv-00187-REB, 2018 WL 6816048 at *2 (D. Idaho Dec. 27, 2018).

“An applicant has a ‘significant protectable interest’ in an action if (1) it asserts an interest that is protected under some law, and (2) there is a ‘relationship’ between its legally protected interest and the plaintiff’s claims.” *Sec. and Exch. Comm’n*, 2018 WL 7108114 at *5 (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002)). “The ‘interest’ test is not a clear-cut or a bright-line rule, because ‘[n]o specific legal or equitable interest need be established.’” *Id.* (citation is omitted). “Rather, it ‘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.* (quoting *Cty. of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980).

Utah has significant protectable interests in this action. As cited above, Utah’s interests are protected by its Constitution and statutory provisions authorizing the Governor and the Utah Division of Wildlife Resources to conserve sage-grouse and its habitat. The Federal Land Policy and Management Act (“FLPMA”) affirms that Congress did not usurp Utah’s primacy over management of its resident wildlife. 43 U.S.C. § 1732(b) (“[N]othing in this Act shall . . . diminish[] . . . the responsibility and authority of the States for management of fish and resident wildlife.”). Utah’s complaint for declaratory and injunctive relief filed in the U.S. District Court for the District of Utah sets forth the myriad federal statutes that protect its interests in sage-grouse and their habitat. *See Herbert, et al. v. Jewell, et al.*, Case No. 2:16-cv-101-DAK, Dkt. No. 2 (D. Utah, filed Feb. 4, 2016).

As a practical matter, the State of Utah, though PLPCO and the Division of Wildlife Resources, has expended millions of dollars each year since 2006 in an annual investment in sage-grouse habitat improvements. From Fiscal Year 2014 to the present, the Utah Division of Wildlife Resources has spent an average of almost \$500,000 a year in personnel costs related to efforts to monitor and manage sage-grouse and sage-grouse habitat throughout the State. Further, an average of over \$300,000 a year has been spent by PLPCO and other state agencies to manage state and federal sage-grouse plan development and implementation. Clarke Decl., Ex. A, ¶ 8. Governor Herbert has personally invested time and energy in sage-grouse management efforts and directed PLPCO to expend countless hours and resources to coordinate state governmental entities to develop and implement the comprehensive Utah Conservation Plan for sage-grouse. *Id.*

Utah has a significant interest in seeing that its sage-grouse plan is implemented by state agencies through state rules and permits. Clarke Dec'l., Ex. A, ¶ 9. To the extent that the 2019 Sage-Grouse Plan more closely aligns with the State's Conservation Plan, Utah seeks to maintain that alignment and resist Plaintiffs' efforts to undo that alignment by enjoining the 2019 Sage-Grouse Plan. The State's further interest in its ability to manage sage-grouse and in the consistency of the 2019 Sage-Grouse Plan and the Utah Conservation Plan is further detailed in Governor Herbert's review of the 2019 Sage-Grouse Plan pursuant to FLPMA, 43 U.S.C. § 1712(c)(9); 2019 Sage-Grouse Plan at 9-10.

The State also coordinated extensively with the BLM in development of the 2019 Sage-Grouse Plan. Clarke Decl., ¶ 10. SITLA's interests in the 2019 Sage-Grouse Plan arise from over one-half million acres of SITLA lands containing sage-grouse habitat within BLM's priority habitat. *Id.*

Utah's legally protected interests are strongly related to Plaintiffs' claims. If the relief requested in Plaintiffs' supplemental complaint is granted, it would negatively impact the ability of the State, the Governor, and SITLA to fulfill their duties as described above. Those negative economic impacts also negatively affect the local economies and state tax revenue. Clarke Dec'l., Ex. A, ¶ 11. Negative economic impacts are sufficient to meet the "significantly protectable" factor. *Alliance for the Wild Rockies v. U.S. Forest Serv.*, No. 1:15-CV-00193-EJL, 2016 WL 7626528 at *2 (D. Idaho June 9, 2016).

The applicant has a protectable interest when "the resolution of the plaintiff's claims actually will affect the applicant." *Perez v. Idaho Falls Sch. Dist. No. 91*, Case No. 4:15-cv-00019-BLW, 2016 WL 1032790 at *3 (D. Idaho Mar. 15, 2016) (citation omitted). Thus, Utah has significant, direct, and legally protectable interests in the 2019 Sage-Grouse Plan that is at issue in the Plaintiffs' supplemental complaint.

C. Utah's Interests in BLM's Decisions Since 2015 Will Be Impaired of the Court Rules in Favor of the Plaintiffs.

The third intervention factor—practical impairment of interests—is met through a showing that Utah's interests are directly contrary to Plaintiffs' interests, as evidenced by Plaintiffs' motion to file a supplemental complaint (Dkt. No. 118). *Alliance for the Wild Rockies*, 2016 WL 7626528 at *2.

As noted above, Utah is simultaneously prosecuting its interest in the State's conservation of sage-grouse in litigation in the Federal District Court in Utah in which Utah challenges the validity of the 2015 Sage-Grouse Plan affecting Utah. Plaintiffs' supplemental complaint could impair or impede Utah's ability to proceed with its District of Utah case. For this reason, Utah previously filed its amici curiae brief seeking to sever the Utah portions of this case and send those issues to the federal court in Utah. Dkt. No. 62. If Utah were not permitted to intervene here, then Utah "would not have an opportunity to educate the Court regarding their relative interests in the on-going and related litigation [in Utah] and how those interests might be impacted" by the Court's rulings in this case. *Sec. and Exch. Comm'n*, 2018 WL 7108114 at *5 (intervention permitted in Idaho action where intervenors sought limited intervention due to potential impacts on litigation filed in Idaho and Washington State). Here, Utah seeks limited intervention to oppose Plaintiffs' attempt to enjoin BLM's decisions since the 2015 Sage-Grouse Plan that include the elimination of Sagebrush Focal Areas, relaxation of the previous Administration's overly restrictive compensatory mitigation policy, and creation of the 2019 Sage-Grouse Plan that aligns with the State's Conservation Plan.

In a recent decision of this Court, the State of Wyoming was found to have sufficient interests that could suffer practical impairment as a result of the pending litigation. *W. Watersheds Project v. Zinke*, Case No.: 1:18-cv-00187-REB, 2018 WL 3997259 at *2 (D. Idaho Aug. 21, 2018), *modified*, 2019 WL 321398 (Jan. 23, 2019). There, Western Watersheds Project

and the Center for Biological Diversity, two of the four plaintiffs in this action, challenged the current Administration's oil and gas leasing program on public lands due to alleged adverse impacts to sage-grouse habitat and populations. Citing Wyoming's extensive efforts to implement its own, coordinated conservation efforts and the economic needs of its citizens, this Court found that Wyoming's interests could suffer practical impairment if it were not allowed to intervene. *Id.* As set forth in PLPCO Director Clarke's declaration, Utah has similarly undertaken extensive efforts to ensure successful implementation of the 2019 Utah Conservation Plan in a manner that balances conservation of the species and its habitat against the economic needs of Utahns and tax revenues to the State Treasury. Clarke Decl., Ex. A, ¶¶ 4, 5, 7, 8. Thus, for similar reasons, Plaintiffs' claims, if successful, would impair Utah's interests.

Moreover, Utah's ultimate objective is to protect the sovereignty of the State and specifically its management of Utah's fish and wildlife. Clarke Decl., Ex. A, ¶ 12. Here, that sovereignty is respected by BLM's decision to more closely align the 2019 Sage-Grouse Plan with the State's Conservation Plan and the State's consequent ability to manage its wildlife and lands and promote the State's economy and the welfare of its citizens. Utah's interests are directly contrary to those of Plaintiffs, leaving Utah unable to protect their interests that are directly at issue in the case if intervention is denied. *Alliance for the Wild Rockies*, 2016 WL 7626528 at *2. Thus, Utah demonstrates significant protectable interests that could be impaired by the outcome of this case.

D. Utah's Interests Cannot be Adequately Represented by Existing Parties.

In determining the final intervention factor—adequacy of existing representation—a court considers (1) whether the present parties will undoubtedly make all of the intervenor's arguments, (2) whether the present parties are capable and willing to make those arguments, and (3) whether the intervenor would offer any necessary elements to the proceedings that the other

parties would neglect. *W. Watersheds Project*, 2018 WL 3997259 at *3 (citing *Berg*, 268 F.3d at 822).

Utah's burden in showing inadequacy of representation is minimal. *U.S. v. Howell*, 2018 WL 4500134 at *3-*4 (citation omitted). It is satisfied if Utah demonstrates that representation of its interests by existing defendants "*may be inadequate.*" *Id.* (citation omitted) (emphasis added by the citing court). Intervention should be granted unless the Court is persuaded that Utah's interests are demonstrably represented by existing parties. This high bar causes courts to resolve doubts in favor of intervention. 7C Charles Allen Wright et al., *FED. PRAC. AND PROC.* § 1909 (3d ed. 2017). Where Utah and the other defendants share the same ultimate objective, a presumption of adequacy applies that is rebuttable by a compelling showing to the contrary. *U.S. v. Howell*, 2018 WL 4500134 at *3.

This Court found that the State of Wyoming met this element of intervention in the litigation on oil and gas leasing due in part to the Federal Defendants' duty to represent the interests of the public but lack of duty to represent non-federal governmental entities like Wyoming. *W. Watersheds Project*, 2018 WL 3997259 at *3. The Court recognized that the Federal Defendants and Wyoming had similar interests in upholding the federal agencies' decisions but it "[could not] be said that the Federal Defendants will 'undoubtedly' make Wyoming's . . . arguments . . . , and not with the same level of urgency and priority." *Id.* Wyoming thus met the minimal requisite showing of inadequacy under this prong of the intervention test. Indeed, Wyoming also enjoys intervenor status in this case. Dkt. Entry Order No. 84.

The focus of Utah's intervention is to protect the State's interest in the alignment of the 2019 Sage-Grouse Plan with the State's Conservation Plan. The contrast between the Plaintiffs' objectives and those of Utah are clear as evidenced by the Plaintiffs' motion to supplement their

complaint. An order granting relief based on that complaint would significantly affect the State's interests in its management of sage-grouse and its habitat, which is sufficient to make a compelling case for intervention. *W. Watersheds Project v. Salazar*, No. 4:08-CV-516-BLW, 2012 WL 32714 at *2 (D. Idaho Jan. 6, 2012).

1. Neither the Federal Defendants nor existing Intervenor will make all of Utah's arguments.

As explained above, Utah's interests extend to all 2.5 million surface acres as well as the 1.5 million acres above the federal mineral estate of sage-grouse habitat managed by the Federal Defendants. 2019 Sage Grouse Plan (Robison Letter at 1.) Utah's interests include its 711,000 acres of SITLA and state lands containing sage-grouse habitat and the entire sage-grouse population in Utah for which Utah is the trustee. Clarke Dec'l., Ex. A, ¶ 13; 43 U.S.C. § 1732(b). Further, over 2.5 million acres of private lands are impacted by BLM's habitat designations in Utah. Clarke Dec'l., Ex. A, ¶ 13. The Federal Defendants' ultimate objective, on the other hand, is necessarily limited to the habitat it manages and the policy objectives of the BLM. The existing Intervenor represent the State of Wyoming, ranching and oil and gas industries, and electric utilities, respectively, none of which can represent Utah's sovereign interests. Thus, it is doubtful, at best, that they will make Utah's arguments.

2. The Federal Defendants and existing Intervenor are incapable and not necessarily willing to make such arguments.

As argued above, the Federal Defendants and existing Intervenor would not be competent to address the State's interests. Additionally, at such time as the Plaintiffs seek injunctive relief, the Court will balance the equities among the existing parties and determine the public interest. The Federal Defendants and existing Intervenor will be incapable of articulating Utah's equities as a result of a possible injunction or the State's interest in protecting the interests of Utah citizens. Finally, Utah protects many different public interests that are not identical to

the Federal, Wyoming, regulated utility, or private sector interests, thus satisfying this element of the test for inadequate representation. *W. Watersheds Project v. U.S. Forest Serv.*, No. 1:15-CV-00218-REB, 2015 WL 7451169 at *2 (D. Idaho Nov. 23, 2015), citing *Citizens for Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 899 (9th Cir. 2011) (“[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.’”); *Clearwater Cty., Idaho v. U.S. Forest Serv.*, No. 3:13-CV-519-EJL, 2016 WL 1698265 at *2 (D. Idaho Apr. 27, 2016).

3. Utah would offer necessary elements to the proceedings that the other parties would neglect.

Utah would vigorously defend against Plaintiffs’ supplemental complaint on behalf of all the citizens of Utah to protect the State’s interests in this litigation. Additionally, Utah’s executive branch experience would assist the Court in understanding the broader implications of the case on Utah laws and governance, thus demonstrating their interests may not be adequately represented by the Federal Defendants and existing Intervenors. *W. Watersheds Project*, 2015 WL 7451169 at *2. The Federal Defendants and existing Intervenors lack Utah’s specialized knowledge of the State’s lengthy and expensive engagement in sage-grouse conservation and the State’s experience in working with the Federal Defendants on cross-jurisdictional sage-grouse conservation. *Animal Legal Def. Fund v. Otter*, 300 F.R.D. 461, 465 (D. Idaho 2014). Only Utah could articulate its unique approach to sage-grouse management in response to the State’s geography of deep canyons, steep cliffs, and deserts that effectively isolate the sage-grouse habitat in patches across the State. This knowledge would provide invaluable context for the State’s interest in BLM’s 2019 Sage-Grouse Plan.

For the reasons stated above, this Court should allow Utah to intervene of right because the motion is timely, Utah has significant protectable interests in its sage-grouse plan and that of

BLM that would be impaired if the Federal Defendants lose the case, and neither Plaintiffs, nor the Federal Defendants, nor existing Intervenors can adequately represent Utah's interests.

II. In the Alternative, Permissive Intervention Should be Granted.

In the event this Court does not grant intervention of right, Utah should be permitted to intervene in this matter pursuant to Fed. R. Civ. P. 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.

Permissive intervention may be granted where “(1) there is an independent ground for jurisdiction; (2) the motion is timely; and (3) the movant's claim or defense and the main action must have a common question of the law or fact in common.” *Amanatullah v. U.S. Life Ins. Co.*, Case No. 4:15-cv-00056-EJL, 2017 WL 2906045 at *1 (D. Idaho June 29, 2017) (citation omitted). Additionally, the court will consider whether intervention will unduly delay or prejudice the original parties and whether the movant's interests are adequately represented by existing parties. *Id.*

Utah easily satisfies each of these requirements. An independent ground for jurisdiction exists through the federal question doctrine, 28 U.S.C. § 1331, augmented through supplemental jurisdiction under 28 U.S.C. § 1367. As explained in the argument for intervention of right, the motion is timely and will not delay proceedings or otherwise prejudice existing parties. Utah will comply with any briefing schedule set by the Court. Utah will also abide by the conditions imposed by the Court on existing Intervenors (Dkt. No. 84). Utah explained, above, why the existing parties cannot adequately represent its interests. The common questions for the Court will be the factual and legal bases supporting the Federal Defendants' and Utah's answers or other dispositive motion that may be filed. Information and argument provided by Utah will squarely address these factual and legal questions.

Additionally, where a party seeks to intervene only for a limited purpose, “the showing of commonality is reduced and it is not necessary to demonstrate an independent basis for jurisdiction.” *Sec. Exch. Comm’n*, 2018 WL 7108114 at *6 (citation omitted). Here, Utah seeks to intervene for the limited purpose of opposing Plaintiffs’ procedural and substantive efforts to challenge BLM’s post-2015 sage-grouse decisions. Utah is not intervening to support the 2015 Sage-Grouse Plan and, indeed, has filed litigation in the District of Utah challenging that Plan.

Therefore, (1) an independent ground for jurisdiction exists, assuming such ground is needed in a limited intervention, (2) Utah meets the reduced showing of commonality of law and facts, and (3) Utah’s motion to intervene is timely. Utah meets the criteria for permissive intervention. Further, there is also no prospect that the sought-after intervention will cause undue delay or prejudice especially where, as here, Utah is willing to abide by the Court’s restrictions on existing intervenors.

Alternatively, the Court may permit Utah to intervene under Fed. R. Civ. P. 24(b)(2) where the Governor and SITLA administer State statutes that are interdependent with the federal statutes at issue in the Plaintiffs’ proposed supplemental complaint. In *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967), a Wisconsin state bank sued the United States Comptroller of Currency seeking declaratory and injunctive relief to prevent the Comptroller from approving an application of a national bank to open a branch in the vicinity of the state bank’s office. The Wisconsin Banking Commissioner sought intervention which was denied by the district court. The D.C. Circuit Court of Appeals reversed, finding that intervention was appropriate, in part, based upon Fed. R. Civ. P. 24(b)(2).

The district court had concluded that Rule 24(b)(2) was inapplicable because the litigation was not an interpretation of a state law being administered by the federal defendant. The circuit court overturned the district court’s “excessively narrow” ruling. *Id.* at 705. The

circuit court determined that the district court’s denial of intervention ignored the “‘intimacy of the relationship between and interdependency of the Federal and State statutes.’” *Id.* (citation omitted). The court noted that the federal statute at issue reflected a pervasive policy of coordination with the state and that the federal statute’s interpretation was dependent on the state’s policy and legislation. *Id.* The circuit court concluded that “permissive intervention is available when sought because an aspect of the public interest with which [the state official] is officially concerned is involved in the litigation.” *Id.* at 706. *See also Blake v. Pallan*, 554 F.2d 947, 953 (9th Cir. 1977) (“A state official has a sufficient interest in adjudications which will directly affect his own duties and powers under the state laws.”).

Similarly here, Plaintiffs’ reliance on FLPMA to support its supplemental complaint is significantly interdependent with the State’s statutes governing conservation of sage-grouse and its habitat in Utah. Also, FLPMA “reflects a pervasive policy of coordination” with the State’s interests. *Id.* at 705; *see, e.g.*, 43 U.S.C. § 1732(b) declaring that FLPMA does not diminish the State’s responsibility or authority for the management of sage-grouse and 43 U.S.C. § 1712(c)(9) requiring Federal Defendants to seek and consider the Governor’s opinions on the consistency of BLM’s 2019 Sage-Grouse Plan with the 2019 Utah Conservation Plan. Consequently, Fed. R. Civ. P. 24(b)(2) provides an alternate ground upon which the Court may permit Utah to intervene in this action.

Conclusion

For the foregoing reasons, the Court should grant Utah’s motion and order its intervention in this action (1) as a matter of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure or, in the alternative, (2) permissively pursuant to Rule 24(b).

Respectfully submitted this 24th day of April, 2019.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that on the 24th day of April, 2019, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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