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19 **UNITED STATES DISTRICT COURT**
20 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

21 PEOPLE OF THE STATE OF
22 CALIFORNIA, *ex rel.* BILL LOCKYER,
23 ATTORNEY GENERAL; STATE OF
24 NEW MEXICO, *ex rel.* PATRICIA A.
25 MADRID, ATTORNEY GENERAL;
26 STATE OF OREGON, by and through
THEODORE KULONGOSKI,
GOVERNOR,

Plaintiffs,

STATE OF WASHINGTON, by and
through CHRISTINE O. GREGOIRE,
GOVERNOR,

Intervenor,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE; MIKE JOHANNIS,
Secretary of the Department of
Agriculture; MARK REY, Under
Secretary for Natural Resources and
Environment of the Department of
Agriculture; UNITED STATES FOREST
SERVICE; DALE BOSWORTH, Chief
of the United States Forest Service,

Defendants.

NO. 05-03508-EDL

**MEMORANDUM IN SUPPORT
OF MOTION TO INTERVENE
IN ROADLESS RULE
CHALLENGE**

(Administrative Procedure Act,
5 U.S.C. § 701 *et seq.*; National
Environmental Policy Act,
43 U.S.C. § 4321 *et seq.*)

1 The State of Washington submits the following memorandum in support of its motion
2 for leave to intervene as a Plaintiff. Plaintiffs do not oppose this motion. Defendants do not
3 oppose this motion provided Washington does not raise new issues or otherwise delay the
4 litigation of this matter, which it will not.

5 For the reasons that follow, this motion should be granted.

6 I. INTRODUCTION

7 In January 2001, following publication of an Environmental Impact Statement (EIS)
8 under the National Environmental Policy Act (NEPA) and an extensive public process that
9 generated more than two million comments, the United States Forest Service (USFS) adopted
10 what is commonly referred to as the "Roadless Rule." This rule generally prohibited timber
11 harvest and road construction in Inventoried Roadless Areas (IRAs) within the National Forest
12 System. In 2005, without further NEPA review, the USFS adopted a rule that purportedly
13 repealed the Roadless Rule and put in its place a process whereby individual states may
14 petition the USFS for state-specific protections for lands within IRAs. This case involves a
15 challenge by California, Oregon and New Mexico (Plaintiff States) to the 2005 Rule. The
16 Plaintiff States allege violations of the NEPA and the federal Administrative Procedure Act
17 (APA) in the adoption of the 2005 Rule.

18 The state of Washington is home to approximately 9.2 million acres of National Forest,
19 approximately one-fifth of the state's total land mass. Declaration of Washington State
20 Governor Christine O. Gregoire ¶ 2. This includes roughly 2 million acres classified as IRAs.
21 *Id.* ¶ 2. Washington has a significant interest in the management of the IRAs, as activities in
22 these areas have the potential to impact the state's natural resources, specifically species
23 protected under federal and state law and water quality in waters downstream from the IRAs.
24 Washington's citizens expressed these concerns in the enormous number of comments they
25 submitted in favor of the adoption of the 2001 Roadless Rule. Of approximately 80,000
26 comments submitted, 96% favored the adoption of the rule. *Id.* ¶ 3. The attached declarations

1 demonstrate that road construction and timber harvest in the IRAs in Washington forests are
2 likely to have significant impacts on fish, wildlife, and water resources in Washington.
3 Because the outcome of this litigation will undoubtedly affect Washington's ability to protect
4 these resources, Washington seeks to join the litigation as a party. *Id.* ¶¶ 4, 13.

5 Washington has attempted to address the potential impacts of the 2005 Rule outside of
6 the courtroom by filing a petition for rulemaking with the USFS requesting the adoption of an
7 expedited petition process. *Id.* ¶ 11. In order to facilitate its effort to work with federal
8 officials to develop a workable mechanism for protecting IRAs in Washington, the state did
9 not join this litigation while its petition was pending. *Id.* ¶ 11. However, USFS has now
10 formally rejected Washington's petition. *Id.* ¶ 11. As its efforts to resolve this matter
11 informally have not succeeded, Washington now seeks to participate as a party to this case. *Id.*
12 ¶ 13.

13 **A. The 2005 rule has the potential to adversely impact fish, wildlife, and water**
14 **quality in Washington.**

15 As noted above, Washington is home to approximately 2 million acres of National
16 Forest classified as IRAs protected from road building and timber harvest under the 2001
17 Roadless Rule. Approximately 716,000 acres are immediately open to road construction and
18 timber harvest under the 2005 rule. *See* 2000 Final Environmental Impact Statement "Forest
19 Service Roadless Area Conservation," Vol. 1, A-4. The remaining acres are currently
20 protected under existing forest plans, but since the repeal of the Roadless Rule, those forest
21 plans may be amended to allow additional road construction and timber harvest in IRAs.

22 Under Washington law, the state is the owner of fish, shellfish, and wildlife within the
23 state. Declaration of Jeff Koenings ¶ 4. The Washington Department of Fish and Wildlife
24 (WDFW) is charged with the protection, perpetuation, and management of the state's fish and
25 wildlife resources. *Id.* ¶ 4. Washington's National Forests provide habitat to a number of
26 species listed as threatened or endangered under the federal Endangered Species Act (ESA)

1 and state endangered species laws. *Id.* ¶ 5. Several listed salmonid ESUs spend part of their
2 life cycle in streams on National Forest land or depend on water that originates in those
3 streams. *Id.* ¶ 6. Declaration of Stephen Bernath ¶ 6. It is a matter of established science that
4 timber harvest and road construction are likely to adversely impact salmon habitat. Koenings
5 Declaration ¶ 7. Washington's interest in these fish stems not only from the fact that they are a
6 state-owned resource, but from the enormous investment the state has made in their recovery.
7 See *id.* ¶ 8.

8 Federally-listed and State-listed upland wildlife species also use habitat that is located
9 in or affected by activities in the IRAs. *Id.* ¶ 9. These include the northern spotted owl, the
10 marbled murrelet, the Canada lynx, the gray wolf, the woodland caribou, the bald eagle, the
11 western gray squirrel, the pacific fisher, and the grizzly bear. *Id.* ¶ 9. Road construction and
12 timber harvest is likely to adversely affect these species through the direct removal of their
13 habitat, fragmentation of the remaining habitat, and unfortunate encounters with humans and
14 their vehicles. *Id.* ¶ 9. Again, Washington's interest in these animals is not limited to an
15 ownership interest. The state has invested significant resources in efforts to recover all of these
16 species. *Id.* ¶¶ 8, 10. Washington thus has a strong interest in maintaining the protections
17 guaranteed by the 2001 Roadless Rule for habitat on which these species depend.

18 The quality of water originating from National Forests is also of concern to
19 Washington. Impacts to water quality result from the historically poor maintenance of existing
20 roads in the National Forests. Declaration of Stephen Bernath ¶ 6. Poorly maintained roads
21 are frequently washed out during the long rainy season in the Pacific Northwest, resulting in
22 the deposition of sediments into forest streams, including streams that provide habitat to ESA-
23 listed fish. *Id.* ¶ 6. Washington has attempted to work with the Forest Service to resolve water
24 quality issues arising from poor road maintenance. *Id.* ¶ 6. However, budget cuts have
25 prevented the Forest Service from implementing agreed upon maintenance measures on
26 existing roads. *Id.* ¶ 6. Given USFS's historic failure to maintain existing roads, Washington

1 is concerned that construction of new roads in National Forests will simply add to existing
2 water quality problems. *Id.* ¶ 6.

3 **B. Washington has attempted to obtain protection for the IRAs through an APA
4 petition.**

5 The state's concerns regarding the 2005 rule include: (1) that in order to obtain
6 protections similar to those that were a matter of federal law in the 2001 Roadless Rule, the
7 state must expend considerable resources preparing and supporting a petition to the USFS, and
8 (2) after expending those resources the outcome of the process is still uncertain. Gregoire
9 Declaration ¶ 7. To address that concern, on November 1, 2005, the Governor filed a petition
10 with the USFS requesting the adoption of a rule that would provide for an expedited process
11 whereby states could request state-specific application of the 2001 Roadless Rule protections
12 without going through the resource-intensive state-specific petition and rulemaking process
13 contemplated by the 2005 Rule. *Id.* ¶ 11. On February 1, 2006, the USFS formally rejected
14 Washington's petition for rulemaking. *Id.* ¶ 11.

15 **II. WASHINGTON IS ENTITLED TO INTERVENE
16 IN THIS CASE AS A MATTER OF RIGHT**

17 **A. Standard for intervention as a matter of right.**

18 F. R. Civ. P. 24(a)(2) provides a party the right to intervene in an action:

19 When the applicant claims an interest relating to the property or transaction
20 which is the subject of the action and the applicant is so situated that the
21 disposition of the action may as a practical matter impair or impede the
22 applicant's ability to protect that interest, unless the applicant's interest is
23 adequately represented by existing parties.

24 The Ninth Circuit Court of Appeals utilizes a four-part test to determine whether an
25 applicant should be permitted to intervene as a matter of right under Rule 24(a)(2): 1) the
26 motion must be timely; 2) the applicant must claim a "significantly protectable" interest
relating to the property or transaction which is the subject of the action; 3) the applicant must
be so situated that the disposition of the action may, as a practicable matter, impair or impede
the applicant's ability to protect that interest; and 4) the applicant's interest must be

1 inadequately represented by the parties to the action. *United States v. Alisal Water Corp.*, 370
2 F.3d 915, 919 (9th Cir. 2004).

3 The foregoing elements are to be interpreted broadly in favor of intervention. *Nat'l*
4 *Wildlife Fed'n v. U. S. Army Corps of Eng'r*, 188 F.R.D. 381, 385 (D. Ore. 1999).
5 Washington's motion readily meets each one of these factors:

6 **B. Washington's motion is timely.**

7 In deciding whether a motion for intervention is timely, the court considers the
8 following factors: 1) the stage of the proceeding at the time of the motion, 2) prejudice to
9 other parties, 3) reason for and length of the delay. All three of these factors weigh in favor of
10 Washington's motion. First, this motion is made prior to any briefing on the merits of the case.
11 Thus far, the defendants have filed their answer and there is a schedule set for summary
12 judgment motions. A motion for intervention at this stage in the proceedings, before any
13 substantive matters have been heard, is clearly timely. *See, e.g., Idaho Farm Bureau*
14 *Federation v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995).

15 Second, Washington's intervention would in no way prejudice the other parties.
16 Intervention at this point would not affect any party's ability to present its case. Washington
17 would enter the case with the expectation of conforming to the existing summary judgment
18 schedule and joining in the brief filed by the existing Plaintiff States.

19 Finally, the six month delay between the commencement of this litigation and
20 Washington's motion is entirely reasonable. Washington has monitored the litigation since its
21 commencement, has been aware of the court's schedule for proceedings on the merits and is
22 moving to intervene at this point in consideration of that schedule. The primary reason for
23 Washington not seeking to intervene sooner is that the state opted to attempt to resolve its
24 concerns outside of the courtroom before resorting to litigation. Gregoire Declaration ¶ 11.
25 This is certainly a valid reason for delaying filing a motion to intervene where no prejudice or
26 delay will result from intervention.

1 **C. Washington has a “significantly protectable” interest relating to the issues in this**
2 **case.**

3 The Ninth Circuit’s test for whether an applicant for intervention has a “significantly
4 protectable” interest relating to the subject of the litigation is lenient. The court requires only a
5 threshold showing of a general interest: “[i]t is generally enough that the interest is protectable
6 under some law, and that there is a relationship between the legally protected interest and the
7 claims at issue.” *Sierra Club v. U.S.E.P.A.*, 995 F.2d 1478, 1484 (9th Cir. 1993). *See also*
8 *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993). Washington clearly has an interest
9 in ensuring that proper environmental review and administrative processes are conducted in
10 relation to federal actions that affect the state’s natural resources.

11 As stated above, National Forests comprise approximately one-fifth of Washington’s
12 total land mass. IRAs constitute approximately 23% of those National Forests. Activities on
13 those IRAs clearly have an impact on a number of species whose continued existence is
14 threatened or endangered, and who depend on forest habitat and clean water for their survival.
15 Having invested enormous resources in the recovery of listed salmon in particular, Washington
16 has a strong interest in ensuring that decisions regarding the management of the IRAs are made
17 with the benefit of adequate environmental review and a rational, informed administrative
18 process. This interest is clearly related to the issues in this case: the adequacy of NEPA
19 analysis for the 2005 Rule, and USFS compliance with the federal APA.

20 **D. Washington’s interests will be impaired by a ruling against the State Plaintiffs in**
21 **this case.**

22 As noted above, Washington has a strong interest in ensuring that the Forest Service’s
23 decision to repeal the 2001 Roadless Rule and to replace it with the 2005 state petition rule is
24 informed by adequate information regarding the environmental impacts of that decision, and is
25 consistent with federal administrative law. A ruling against the plaintiffs in this case would
26 clearly impair its interest, both in a legal and practical sense. The 2005 Rule, which was
adopted with no environmental review regarding its specific impacts and contrary to the

1 requirements of the federal APA, would be allowed to stand. Washington's natural resources,
2 as discussed above, would be placed at risk from harm due to logging and road building
3 activities and continued inadequate road maintenance in its IRAs.

4 **E. Washington's interests in this case are not adequately represented by the existing
5 parties.**

6 Regarding this portion of the test for intervention as a matter of right, the Ninth Circuit
7 Court of Appeals has stated that:

8 The prospective intervenor bears the burden of demonstrating that the existing
9 parties may not adequately represent its interest. However, the burden of
10 showing inadequacy is 'minimal,' and the applicant need only show that
11 representation of its interests by existing parties 'may be' inadequate.

12 *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822-23 (9th Cir. 2001).

13 In determining whether representation by the existing parties may be inadequate, the
14 court considers the case as a whole, not just the specific issues before it at the time of the
15 motion for intervention. *Id.* at 823. The court considers whether the existing parties will
16 undoubtedly make all of the intervenor's arguments, whether those existing parties are capable
17 of and willing to make such arguments, and whether "the intervenor offers a necessary element
18 to the proceedings that would be neglected." *Sagebrush Rebellion Inc. v. Watt*, 713 F.2d 525,
19 528 (9th Cir. 1983).

20 While Washington's interests in this matter are certainly similar to those of the other
21 three Plaintiff States, they are not identical. Each state is a unique political entity, with its own
22 political motivations that may lead it to advocate certain positions and refrain from advocating
23 others. No other state is in a position to adequately represent Washington's interests. For
24 example, the other states are not familiar with the facts about the specific species, water
25 resource, and economic concerns unique to Washington that give rise to Washington's interest
26 in this case. The Plaintiff States and Washington intend to jointly file a motion for summary
judgment on the court's schedule, but there is no guarantee that each plaintiff state will take

1 exactly the same position as every other plaintiff state on every issue that may arise as this case
2 proceeds in this court, and if necessary, on appeal.

3 In addition, Washington is in a unique position to provide argument on the affirmative
4 defenses raised by the federal defendants in their answer, specifically the defenses regarding
5 ripeness and standing. These affirmative defenses may require responses that include factual
6 allegations unique to each state.

7 In summary, Washington's motion easily meets the Ninth Circuit's test for determining
8 whether a party has a right to intervene under FRCP 24(a). The court should therefore grant
9 this motion.

10 **III. IN THE ALTERNATIVE, THIS COURT SHOULD EXERCISE**
11 **ITS DISCRETION UNDER FRCP 24(B) TO GRANT**
12 **WASHINGTON PERMISSION TO INTERVENE**

13 Rule 24(b) provides, in relevant part, that:

14 Upon timely application anyone may be permitted to intervene in an action . . .
15 (2) when an applicant's claim or defense and the main action have a question of
16 law or fact in common. . . . In exercising its discretion the court shall consider
17 whether the intervention will unduly delay or prejudice the adjudication of the
18 rights of the original parties.

19 As discussed in Section II. B. above, Washington's motion is timely and will not result
20 in any delay in these proceedings. Washington's claims are the same as those of the Plaintiff
21 States. *See* Complaint in Intervention. Should Washington's motion to intervene be denied,
22 Washington would have the option of filing its own lawsuit in another federal district court
23 challenging the 2005 Rule. Such a lawsuit would likely include the same claims raised here.
24 Granting Washington's motion to join this case will conserve judicial resources, and facilitate
25 the efficient resolution of the issues in this case.

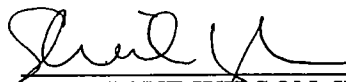
26 **IV. CONCLUSION**

The outcome of this litigation will undoubtedly impact Washington's ability to
protect its natural resources and its interest in ensuring that decisions impacting those
resources are the result of a rational, informed process. Intervention in this case will allow

1 Washington to address the issues presented in its Complaint in Intervention in a manner that
2 conserves judicial resources and does not delay proceedings in this case or otherwise
3 prejudice the existing parties. For these reasons, Washington respectfully requests that this
4 court grant its motion to intervene.

5 DATED this 21st day of February, 2006.

6
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