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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CARPENTERS INDUSTRIAL COUNCIL, AMERICAN FOREST RESOURCE COUNCIL, SWANSON GROUP, INC., ROUGH & READY LUMBER CO., and PERPETUA FORESTS COMPANY, Plaintiffs, and SEATTLE AUDUBON SOCIETY, NATIONAL CENTER FOR CONSERVATION SCIENCE AND POLICY, OREGON WILD, KLAMATH-SISKIYOU WILDLANDS CENTER, THE WILDERNESS SOCIETY, SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, ENVIRONMENTAL PROTECTION INFORMATION CENTER, CONSERVATION NW, AUDUBON SOCIETY OF PORTLAND, NATIONAL AUDUBON SOCIETY, CASCADIA WILDLANDS PROJECT, AMERICAN LANDS ALLIANCE, KLAMATH FOREST ALLIANCE,	Case No. 1:08-cv-01409-EGS

PLAINTIFF-INTERVENOR-APPLICANTS' MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT

CONSERVATION CONGRESS, AMERICAN BIRD CONSERVANCY, UMPQUA WATERSHEDS, and GIFFORD-PINCHOT TASK FORCE,	)
Plaintiff-Intervenor-Applicants,	)
vs.	)
DIRK KEMPTHORNE, Secretary of Interior, and U.S. FISH AND WILDLIFE SERVICE,	)
Defendants.	)

PLAINTIFF-INTERVENOR-APPLICANTS'
MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT

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TABLE OF CONTENTS

Earthjustice
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TABLE OF AUTHORITIES

CASES

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

STATUTES

REGULATIONS

MISCELLANEOUS

Earthjustice
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MOTION TO INTERVENE

Pursuant to Federal Rule of Civil Procedure 24(a), plaintiff-intervenor-applicants Seattle Audubon Society, National Center for Conservation Science and Policy, Oregon Wild, Klamath-Siskiyou Wildlands Center, The Wilderness Society, Sierra Club, Center for Biological Diversity, Environmental Protection Information Center, Conservation NW, Audubon Society of Portland, National Audubon Society, Cascadia Wildlands Project, American Lands Alliance, Klamath Forest Alliance, Conservation Congress, American Bird Conservancy, Umpqua Watersheds, and Gifford-Pinchot Task Force (collectively "Seattle Audubon") respectfully move this Court for leave to intervene as of right in the above-titled action. In the alternative, applicants move for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b). Counsel for applicants has conferred with counsel for plaintiffs Carpenters Industrial Council et al. ("CIC") and counsel for the federal defendants, the United States Fish and Wildlife Service ("FWS" or "Service"). Counsel for CIC and counsel for the federal defendants have stated that they will take no position on this motion. Pursuant to LCvR7(j), applicants lodge with this motion both applicants' complaint and answer (Exhibits A and B).

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

INTRODUCTION AND BACKGROUND

This case is the latest chapter in the long-running battle over protection of the northern spotted owl, a species protected under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-44, in 1990. Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (June 26, 1990) (codified at 50 C.F.R. § 17.11(h)). Northern spotted owls are typically associated with old growth forests of northern California, the Pacific Northwest, and southern British Columbia. FWS originally designated critical habitat for the owl in 1992, protecting owl habitat on 6,887,000 acres of federal forest land in California, Oregon, and Washington.

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Determination of Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1,796 (Jan. 15, 1992) (codified at 50 C.F.R. § 17.11(h); § 17.95(b)).

In 2008, however, as part of a settlement of an earlier timber industry lawsuit brought by many of the plaintiffs here, FWS revised the designation of owl critical habitat, reducing the amount of protected habitat by 1,574,700 acres. Revised Designation of Critical Habitat for the Northern Spotted Owl, 73 Fed. Reg. 47,326 (Aug. 13, 2008).

Not satisfied with this reduction, plaintiffs CIC challenge the final revised designation of owl critical habitat as legally flawed. As remedy for alleged legal violations, CIC seeks to compel FWS to issue a new final rule designating critical habitat for the northern spotted owl under the ESA, and to conduct an analysis of the environmental impacts of the designation of northern spotted owl critical habitat under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(e). In general, CIC's claims challenge FWS's revisions to critical habitat as too protective and over-inclusive of owl habitat.

Plaintiff-intervenor-applicants Seattle Audubon also seek to challenge the final rule revising critical habitat for the northern spotted owl, but for its failure to protect enough habitat for the northern spotted owl. Seattle Audubon additionally seeks to challenge the Final Recovery Plan for the Northern Spotted Owl (May 13, 2008) upon which the revised designation of critical habitat is based. Because Seattle Audubon challenges the same final agency action as CIC (Revised Designation of Critical Habitat) and the integrally related Final Owl Recovery Plan, intervention pursuant to Fed. R. Civ. P. 24(a) and (b) should be granted.

Seattle Audubon has lodged its complaint-in-intervention challenging both the revisions to critical habitat and the final owl recovery plan as Exhibit A. As Seattle Audubon also believes that several of CIC's claims against the revised owl critical habitat designation are wrong, Seattle

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Audubon has lodged an answer-in-intervention as Exhibit B, addressing two of plaintiffs' seven claims in its Amended Complaint: plaintiffs' fifth claim, that the Service was required to document the areas occupied by the northern spotted owl; and plaintiffs' seventh claim, that the Service was required to exclude O & C lands from critical habitat.[1]

APPLICANTS

All of the plaintiff-intervenor-applicants have played an active role in protecting the northern spotted owl and its habitat in the Pacific Northwest for well over a decade, and each applicant has a strong interest in the outcome of this case. Applicants and their members have been in the forefront of protecting the northern spotted owl through habitat restoration, participation in the administrative process, litigation, and public education. All of the applicants submitted comments on the proposed critical habitat revisions and/or the draft owl recovery plan; many have previously been plaintiffs and/or defendant-intervenors in litigation over protections for northern spotted owls and their habitat. See Exhibit A, Complaint ¶¶ 8A-R (Nov. 24, 2008).

Each applicant is a conservation organization with members who use and enjoy the "spotted owl forests" in Washington, Oregon, and California that provide habitat for the owl for recreational, scientific, aesthetic, and conservational purposes. Applicants and their members derive – or, but for the imperiled status of the northern spotted owl, would derive – recreational, economic, scientific, aesthetic, and spiritual benefits from the existence in the wild of the northern spotted owl. The future enjoyment of these benefits by applicants and their members

[1] Seattle Audubon presents claims that arise under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Pursuant to ESA § 11, 16 U.S.C. § 1540(g), by letter dated November 21, 2008, Seattle Audubon has also notified FWS of certain ESA violations. Seattle Audubon expects to seek leave to amend its complaint to add ESA claims against the federal defendants after the required notice period elapses.

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Seattle, WA 98104
(206) 343-7340

will be irreparably harmed by the actions of FWS in issuing the revised designation of owl critical habitat and final owl recovery plan.

Because each applicant meets the four requirements for intervention as of right as plaintiffs under Fed. R. Civ. P. 24(a) or, alternatively, the broad standard for permissive intervention under Rule 24(b), applicants respectfully request the Court for leave to intervene as plaintiffs in this case.

Additionally, because CIC challenges the same final agency action as applicants, but for different reasons, and seeks a dramatically different result, applicants will be irreparably harmed if CIC prevails in this case. Because each applicant meets the four requirements for intervention as of right as defendants under Fed. R. Civ. P. 24(a) or, alternatively, the broad standard for permissive intervention under Rule 24(b), applicants respectfully request the Court for leave to intervene as limited defendants in this case.

ARGUMENT

I. SEATTLE AUDUBON IS ENTITLED TO INTERVENE AS OF RIGHT.

The Federal Rules of Civil Procedure provide the following:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). This 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

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test. See Fed. R. Civ. P. 24, advisory committee's note. In the present case, applicants satisfy each of the elements for intervention under Rule 24(a).

A. Seattle Audubon's Motion for Intervention 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. & Tel. Co., 642 F.2d 1285, 1295 (D.C. Cir. 1980)). Seattle Audubon's motion to intervene is timely because the present case is in its early stages. CIC's original complaint was filed on August 13, 2008, and FWS answered on October 20, 2008. CIC has since filed an unopposed motion for leave to file an amended complaint (Oct. 24, 2008), which was granted on October 27, 2008. FWS answered the amended complaint on November 7, 2008. The Court has ordered the parties to meet and confer by December 12, 2008, with a meet and confer statement due December 19, 2008. Seattle Audubon has offered to meet and confer with the parties in accordance with that schedule. To further facilitate the timely resolution of this case, Seattle Audubon has lodged its complaint (Exhibit A) and answer to first amended complaint (Exhibit B) with this motion to intervene. Granting Seattle Audubon's motion to intervene will not delay the course of this litigation.

B. Applicants Have an 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. This "interest test" is not a rigid standard; rather, it is "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Nuesse v.

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Camp, 385 F.2d 694, 700 (D.C. Cir. 1967); see also Friends of Animals v. Kempthorne, 452 F. Supp. 2d 64, 69 (D.D.C. 2006). Indeed, a proposed intervenor need not have a specific legal or equitable interest in jeopardy but need only show a "protectable interest of sufficient magnitude to warrant inclusion in the action." Smith v. Pangilinan, 651 F.2d 1320, 1324 (9th Cir. 1981); see also Friends of Animals, 452 F. Supp. 2d at 69 ("[P]roposed intervenors of right 'need only an interest in the litigation—not a cause of action or permission to sue.'") (citation omitted).

Here, all of the applicants are conservation organizations with the mission of promoting the preservation and restoration of imperiled species, including specifically the northern spotted owl and the protection of the old-growth forests that comprise its critical habitat. Applicants' sustained efforts to protect the northern spotted owl reflect the profound interest of their members in preventing the northern spotted owl from sliding into extinction.

Specifically, Seattle Audubon is challenging the same Revised Designation of Critical Habitat for the Northern Spotted Owl as is already being challenged by CIC, albeit for different reasons. It makes legal and logical sense to grant Seattle Audubon's motion to intervene where the challenged action is identical, the federal defendant is the same, and the administrative record will be the same. Indeed, were Seattle Audubon to bring its critical habitat challenge separately, a motion to transfer venue and/or relate the cases would be most likely. "'To permit a situation in which two cases involving … the same issues are simultaneously pending in different District Courts leads to the wastefulness of tim[e], energy and money that § 1404(a) was designed to prevent.'" Reiffin v. Microsoft Corp., 104 F. Supp. 2d 48, 58 (D.D.C. 2000) (quoting Upjohn Co. v. General Accident Ins. Co., 581 F. Supp. 432, 435 (D.D.C.1984). As for Seattle Audubon's challenge to the final recovery plan, that challenge is directly intertwined with the

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critical habitat issues, as the revised critical habitat designation relies on the final owl recovery plan to support its decisions.

C. Seattle Audubon's Interests in the Northern Spotted Owl May Be Impaired by This Litigation.

An applicant for intervention as of right 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." Fed. R. Civ. P. 24(a) (emphasis added). Applying this impairment requirement, the Court should "'look[] to the 'practical consequences' of denying intervention . . . ." Fund for Animals v. Norton, 322 F.3d 728, 735 (D.C. Cir. 2003). Such an inquiry "'is not limited to consequences of a strictly legal nature.'" Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1498 (9th Cir 1995) (quoting Natural Res. Defense Council v. Nuclear Regulatory Comm'n, 578 F.2d 1341, 1345 (10th Cir. 1978)).

In this suit, CIC seeks to further reduce the already inadequate critical habitat designation for the northern spotted owl. Such a result would irreparably harm the applicants' interests by frustrating years of effort applicants have spent working to protect the species. See, e.g., Natural Res. Defense 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). Furthermore, if CIC succeeds in further reducing the owl's critical habitat, the species may suffer additional declines in its abundance, productivity and diversity along with additional harm to its habitat. Such additional declines and habitat degradation deprive applicants of the opportunity to enjoy the northern spotted owl in its native habitat and increase the risk of the species' complete extinction. See, e.g., Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1398 (9th Cir. 1995) (decision to remove species from endangered species list impairs conservation groups' interest in preservation); Sagebrush Rebellion, 713 F.2d at 528 ("An adverse decision in this suit would

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impair the society's interest in the preservation of birds and their habitats.). Similarly, if CIC succeeds in reducing the northern spotted owl's critical habitat protections, applicants' interests in recreational opportunities related to the northern spotted owl will suffer irreparable damage. These injuries plainly satisfy Rule 24(a)'s impairment-of-interest requirement.

D. Neither of the Existing Parties Will Adequately Represent Applicants' Interests.

Finally, an applicant for intervention as a matter of right must show that its interests may not be adequately represented by the existing parties to the litigation. This requirement is "not onerous" and is satisfied if the applicant shows that the representation of its interests "may be" inadequate. Fund For Animals v. Norton, 322 F.3d 728, 735 (D.C. Cir. 2003) (quoting Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972); 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 American Tel. & Tel. Co., 642 F.2d at 1293). The D.C. Circuit has "often concluded that governmental entities do not adequately represent the interest of aspiring intervenors." Fund For Animals, 322 F.3d at 736 (citing Natural Res. Defense Council v. Costle, 561 F.2d 904, 912-13 (D.C. Cir. 1977); Smuck v. Hobson, 408 F.2d 175, 181 (D.C. Cir. 1989)); see also Friends of Animals, 452 F. Supp. 2d 64.

Here, neither CIC nor FWS adequately represents Seattle Audubon's interests. CIC's interests are directly adverse to those of Seattle Audubon. CIC seeks to reduce the critical habitat for the northern spotted owl, while applicants seek to increase protected critical habitat. CIC simply does not represent applicants' interests.

FWS's interests are also directly adverse to those of Seattle Audubon. FWS promulgated the revised critical habitat designation and recovery plan that Seattle Audubon challenges as violating the law and failing to ensure conservation of the owl. Additionally, FWS's

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longstanding reluctance to adequately protect the northern spotted owl highlights the risk that it will not present a vigorous defense to CIC's claims or will enter a settlement that reduces ESA protections for the owl even further. See, e.g., Western Council of Industrial Workers v. Secretary of Interior, No. 02-6100-AA (D. Or.) (FWS settled timber industry suit over owl protected status and designated critical habitat). Accordingly, given the minimal showing necessary to find inadequate representation, the Court should grant Seattle Audubon's motion to intervene as of right as both plaintiffs and defendants.

II. SEATTLE AUDUBON SATISFIES THE STANDARD FOR PERMISSIVE INTERVENTION.

As detailed above, Seattle Audubon meets the requirements for intervention as of right under Rule 24(a). However, if this Court denies intervention as of right, applicants request the Court for leave to intervene under Rule 24(b). Permissive intervention is appropriate when an applicant's timely claim or 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)).

Here, Seattle Audubon meets the Rule 24(b) standard. Applicants have a significant interest in the use and enjoyment of the northern spotted owl and its habitat. Because this case is in its early stages, Seattle Audubon's intervention will not cause any undue delay or prejudice to the existing parties. Given the importance of the issues involved in this case, the stake applicants have in the northern spotted owl, and the early stage of the litigation, the Court should allow permissive intervention.

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CONCLUSION

For the reasons set forth above, Seattle Audubon et al. respectfully requests that the Court grant them intervention as of right or, in the alternative, permissive intervention. Seattle Audubon has lodged its complaint-in-intervention and answer with this motion to intervene.

Respectfully submitted this 24th day of November, 2008.

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