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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, BUTTE DIVISION

ROCKY MOUNTAIN ELK FOUNDATION and PROPERTY AND ENVIRONMENTAL RESEARCH CENTER, Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR and U.S. FISH AND WILDLIFE SERVICE, Defendants, and CENTER FOR BIOLOGICAL DIVERSITY, (Proposed) Intervenor-Defendant.	Case No. 25-cv-00029-KLD BRIEF IN SUPPORT OF CENTER FOR BIOLOGICAL DIVERSITY'S MOTION TO INTERVENE

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INTRODUCTION

In this case, Plaintiffs Rocky Mountain Elk Foundation and the Property and Environment Research Center ("Plaintiffs") challenge Defendants U.S. Department of the Interior's ("DOI") and U.S. Fish and Wildlife Service's ("FWS") regulation automatically expanding protections to threatened species under section 4(d) of the Endangered Species Act (the "Blanket 4(d) Rule"). Pursuant to Federal Rule of Civil Procedure 24, the Center for Biological Diversity ("the Center") moves to intervene as a defendant.

The Center meets the criteria for intervention as of right because the motion is timely; the Center has a "significant protectable" interest in the Blanket 4(d) Rule and, more specifically, in protecting threatened species; the disposition of this matter will impair the Center's ability to protect those interests; and neither Plaintiffs nor Defendants adequately represent the Center's interests. *See* Fed. R. Civ. P. 24(a)(2). Alternatively, the Center seeks permissive intervention pursuant to Federal Rule of Civil Procedure 24(b).

LEGAL AND FACTUAL BACKGROUND

I. The ESA and the Adoption of the Blanket 4(d) Rule.

The Supreme Court has stated that the ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Passed by Congress in 1973, its

purpose is to provide "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," and "a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). Congress defined "conservation" under the ESA as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [act] are no longer necessary," *i.e.*, when the species have recovered and no longer need the protection of the ESA. *Id.* § 1532(3).

In broad strokes, the ESA seeks to protect and recover imperiled species and populations by listing them as threatened or endangered based on enumerated statutory factors, *id.* § 1533(a)(1)(A)-(E), using the "best scientific and commercial data available, *id.* § 1533(b). An endangered species is "any species which is in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6). A threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. *Id.* § 1532(20). FWS and the National Marine Fisheries Service ("NMFS" and collectively with FWS, the "Services") are the expert agencies tasked with implementing the ESA.

When granting the Services the authority to list threatened species, Congress recognized the need to take action to protect species before they are conclusively

headed for extinction. Accordingly, the definition of and analysis regarding a threatened species is necessarily forward looking and predictive—"[t]he purpose of creating a separate designation for species which are 'threatened', in addition to species which are 'endangered', was to try to 'regulate these animals before the danger becomes imminent while long-range action is begun.'" *Defs. of Wildlife v. Babbitt*, 958 F. Supp. 670, 680 (D.D.C. 1997) (quoting S. Rep. No. 307, 93d Cong. 1st Sess. 3 (1973). Indeed, the ESA's purpose is "not only to protect the last remaining members of the species but to take steps to insure that species which are likely to be threatened with extinction never reach the state of being presently endangered." *Defs. of Wildlife v. Norton*, 258 F.3d 1136, 1142 (9th Cir. 2001) ("*Defenders*") (quoting legislative history); *see also Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) (noting that the ESA is "concerned with protecting the future of the species, not merely the preservation of existing [animals]").

Once listed, species are afforded numerous protections. For example, ESA Section 4 requires the Services to designate areas that are "essential to the conservation of the species" as "critical habitat," and to develop and implement recovery plans. *Id.* § 1533(a)(3), (f); 1532(5). Section 7(a)(2) requires all federal agencies to consult with the Services to ensure their actions are not "likely to jeopardize the continued existence" of listed species or "result in the destruction or

adverse modification" of their critical habitat. *Id.* § 1536(a)(2). Thus, listing is the crucial first step in the ESA's system of species conservation and recovery. A species does not receive any protections under the ESA until it is listed as endangered or threatened. Without these protections, endangered and threatened species continue to decline toward extinction and become harder to conserve as their situations become more dire.

The ESA automatically provides certain protections to species listed as "endangered." For example, the listing of a species as endangered under the ESA triggers prohibitions under ESA section 9, *id.* § 1538, including the prohibition on the "take" of species, which is defined to include "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id*. § 1532(19); 50 C.F.R. § 17.3 (harm "means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering"). However, the ESA does not automatically extend the take provisions to species listed as threatened. 16 U.S.C. § 1538(a)(1).

But the ESA does provide an important mechanism by which the Services can extend the ESA's endangered species protections to species listed as threatened. ESA section 4(d) requires the Services to promulgate regulations necessary and advisable

to conserve species listed as threatened, including regulations prohibiting the take of threatened species. *Id.* § 1533(d). In 1975, two years after Congress enacted the ESA, FWS exercised its authority and responsibility under section 4(d) to extend the ESA section 9's prohibition on "take" to all threatened species. 50 C.F.R. § 17.31(a) (2018); Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,412, 44,425 (Sept. 26, 1975). This so-called "Blanket 4(d) Rule" presumptively applied ESA section 9's take prohibitions to threatened species unless FWS promulgated a species-specific rule that changed those protections. 50 C.F.R. § 17.31(a) (2018). "In short, the FWS . . . established a regime in which the prohibitions established for endangered species are extended automatically to all threatened species by a blanket rule and then withdrawn as appropriate, by special rule for particular species and by permit in particular situations." *Sweet Home Chapter of Cmtys. for a Great Or. v. Babbitt*, 1 F.3d 1, 5 (D.C. Cir. 1993)[1]; *see also id.* at 14–23 (upholding the Blanket 4(d) Rule against challenges that its promulgation was *ultra vires* and contrary to the ESA's plain language, and noting that even with the Blanket 4(d) Rule, FWS "maintained a two-tier" approach to listed

[1] The Court of Appeals later modified this decision on different grounds in response to a petition for rehearing. *See Sweet Home Chapter of Cmtys. for a Great Or. v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994). The Supreme Court reversed that modified decision. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995). This subsequent history did not affect the D.C. Circuit's opinion regarding FWS's Blanket 4(d) Rule.

species that allowed for different approaches to threatened and endangered species).

The Blanket 4(d) Rule provides invaluable protection to threatened species by providing them with full protection from take unless FWS promulgated a species-specific rule pursuant to ESA section 4(d). Declaration of Noah Greenwald ("Greenwald Dec.") ¶13. Nearly a quarter of currently listed threatened species currently lack a species-specific rule, instead relying on the blanket rule for protection from take. *Id.*

II. The Rescission and Reinstatement of the Blanket 4(d) Rule.

In 2018, FWS proposed to rescind the Blanket 4(d) Rule as part of the Trump Administration's efforts to eliminate allegedly "unnecessary regulatory burdens." *See* Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35,174, 35,174–78 (July 25, 2018); *see also* Exec. Order No. 13777, Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12,285 (Mar. 1, 2017). As discussed below, the Center strongly opposed this rescission and submitted comments in opposition to it. On August 12, 2019, FWS issued its final rule rescinding the Blanket 4(d) Rule.

The Center, along with other groups, filed a lawsuit in federal court challenging the rescission, as well as other ESA regulatory changes. *See Ctr. for Biological Diversity, et al. v. Bernhardt, et al.*, No. 4:19-cv-05206 (N.D. Cal. Aug. 21, 2019). After the Biden Administration entered office, the federal defendants

moved for a remand of the regulations rescinding the Blanket 4(d) Rule, and the court granted that motion. Order, *Ctr. for Biological Diversity*, No. 4:19-cv-05206 (N.D. Cal. July 5, 2022), ECF No. 165. FWS reinstated the Blanket 4(d) Rule in April 2024. Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 89 Fed. Reg. 23,919 (Apr. 5, 2024); *see also* 50 C.F.R. § 17.31(a) (2025). Plaintiffs challenge this reinstatement in this lawsuit.

ARGUMENT

I. Legal Standard

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

> On a timely motion, the court must permit anyone to intervene who . . . claims an interest relating 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.

Fed. R. Civ. P. 24(a)(2). Thus, to be granted intervention of right, the applicant must show four requirements are met: (1) the motion to intervene is "timely;" (2) the applicant has "a significant protectable interest relating to the property or transaction that is the subject of the action;" (3) the applicant is situated such "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 may not be adequately represented by the existing parties in the lawsuit. *Citizens for Balanced Use v. Mont.*

Wilderness Ass'n, 647 F.3d 893, 897 (9th Cir. 2011).

These four requirements "are broadly interpreted in favor of intervention." *Id*.; *see also Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006) ("[The Ninth Circuit] construe[s] Rule 24(a) liberally in favor of potential intervenors."); *United States v. City of Los Angeles*, 288 F.3d 391, 397–98 (9th Cir. 2002) ("A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." (citation omitted)). Under this test, courts should grant intervention to "as many apparently concerned persons as is compatible with efficiency and due process." *Cnty. of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (citation omitted).

Rule 24(b) also provides that a court may permit anyone to intervene who submits a timely motion and "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

II. The Center Is Entitled to Intervene.

The Center satisfies each of the four elements of the Rule 24(a) test and qualifies for intervention as of right. Alternatively, the Court should allow the Center to intervene under Rule 24(b).

A. The Center Satisfies the Test for Intervention as of Right.

The Court should grant the Center intervention as of right. The Center's motion to intervene is timely; it has a sufficiently protectable interest in the subject of this case; disposition of this matter may impair that interest; and no party adequately represents the Center's interests.

1. The Center's Motion to Intervene Is Timely.

The Ninth Circuit considers three criteria in determining whether a motion to intervene is timely: (1) "the stage of the proceeding;" (2) whether the existing parties would be prejudiced; and (3) the reason for any delay in moving to intervene. *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990).

The Center's motion to intervene is timely. Plaintiffs filed this case less than three weeks ago, Complaint for Declaratory and Injunctive Relief, ECF No. 1, and no substantial activities have occurred in the case since that time. Federal Defendants have not yet appeared or filed a responsive pleading. *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993), *abrogated on other grounds, Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (finding district court did not abuse its discretion in finding motion to intervene timely where defendant had not yet filed an answer). There is no case management schedule or plan yet. Therefore, no prejudice, delay, or inefficiency will result from the Center's intervention, and the Center's motion is timely. *See, e.g.*, *Citizens for Balanced Use*, 647 F.3d at 897

(holding a motion to intervene timely where it was made "less than three months after the complaint was filed and less than two weeks after the [agency] filed its answer to the complaint"); *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) (noting there was no prejudice to the parties because the motion to intervene came before the court made any substantive rulings).

2. The Center Has a Significant Protectable Interest in Threatened Species and the Blanket 4(d) Rule.

Second, the Center has "a significant protectable interest" in the challenged agency decision. *Citizens for Balanced Use*, 647 F.3d at 897. Whether an applicant demonstrates sufficient interest in a case "is a 'practical, threshold inquiry,'" and the applicant does not have to establish a "specific legal or equitable interest." *Id*. (citation omitted). The "applicant must establish that the interest is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue." *Id*.; *see also Wilderness Soc'y*, 630 F.3d at 1176 (same); *Cnty. of Fresno*, 622 F.2d at 438 ("[T]he 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." (citation omitted)). This "interest test" is not an exacting requirement; a proposed intervenor's interest is sufficient "if it will suffer a practical impairment of its interests as a result of the pending litigation." *Lockyer*, 450 F.3d at 441.

The Center has significant protectable interests in the Blanket 4(d) Rule, as

manifested by the Center's extensive efforts to list threatened species under the ESA and to use that law to advocate for strong protections for such species. The Center is a non-profit environmental organization that works to secure a future for animals and plants hovering on the brink of extinction, for the ecosystems they need to survive, and for a healthy, livable future. Greenwald Dec. ¶¶6–7. The Center's mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands and waters, and public health through creative media, science, policy, and the law. *Id.* at ¶7. As part of its mission, the Center works to enact, strengthen, and enforce the ESA, its regulations, its guidelines, and the species-specific decisions that protect endangered and threatened species and the ecosystems on which they depend, and it uses public education, advocacy, and litigation to enforce environmental laws. *Id.* at ¶8.

The Center routinely submits petitions to the Services to list species as endangered or threatened under the ESA, and advocates for the designation of critical habitat for listed species and for strong, science-based protections for species listed as "threatened." *Id.* at ¶10. As a result of the Center's work, over 700 species and nearly half a billion acres of critical habitat have been protected under the ESA. *Id.* In the last two years, for instance, the Center has submitted petitions to list the Sierra Nevada red fox, diamondback terrapin, saltmarsh sparrow, American horseshoe crab, and others. *Id.* at ¶11. The Center has also sued to obtain status

reviews for multiple species, including the southern bog turtle, striped newt, and the Rio Grande shiner. *Id.*

The Center has likewise sued the Services when they failed to act in a timely manner to list imperiled species as required by the ESA. *Id.* at ¶12. Currently, as a result of settlement agreements reached by the Center, FWS will have to determine whether 97 species warrant listing under the ESA and propose critical habitat for 72 species by the end of fiscal year 2029. *Id.* These activities demonstrate the Center's significant protectable interests in the Blanket 4(d) Rule because it is likely that at least some of these species will be listed as threatened and would benefit from the protections of the Blanket 4(d) Rule in the absence of a species-specific 4(d) rule. *Id.* at ¶¶12–13, 20–21. The Blanket 4(d) Rule would also allow FWS to list a species as threatened under the Rule, and only move to issue a more time-consuming and resource intensive species-specific 4(d) rule if necessary, helping ensure that FWS can list a species as threatened sooner rather than later in order to "insure that species which are likely to be threatened with extinction never reach the state of being presently endangered." *Defenders*, 258 F.3d at 1142. Numerous courts have allowed parties to intervene to defend their conservation interests. *See, e.g.*, *Alaska v. Nat'l Marine Fisheries Serv.*, No. 3:22-cv-00249-JMK, 2023 U.S. Dist. LEXIS 60255, at *8 (D. Alaska Apr. 5, 2023) (finding the Center had a legally protectable conservation interest in Arctic ringed seal's protection under the ESA); *Sagebrush*

Rebellion v. Watt, 713 F.2d 525, 528 (9th Cir. 1983) (similar).

Further, because of the Center's strong interest in ensuring the greatest possible protections for species, including threatened species, the Center has worked tirelessly to defend the Blanket 4(d) Rule in the past. Specifically, in 2018, when FWS proposed to repeal the then-operative Blanket 4(d) Rule as part of its and NMFS's larger efforts to rollback regulations implementing the ESA during the first Trump Administration, the Center commented on the proposed rescission, noting that it would eliminate critical protections for newly listed threatened species and have other unintended, negative consequences for such species. Final 4(d) Center Comments (Sept. 14, 2018), FWS-HQ-ES-2018-0007-60133[2]; *see also* Greenwald Dec. ¶14. The Center also worked as part of a coalition that delivered over 800,000 public comments in opposition. Greenwald Dec. ¶14. After FWS rescinded the Blanket 4(d) Rule, *see* 84 Fed. Reg. 44,753 (Aug. 27, 2019), the Center and its partners challenged that rescission and other 2019 ESA rollback regulations in federal court, arguing they violated the ESA as well as the Administrative Procedure Act ("APA") and the National Environmental Policy Act. *See* Complaint for Declaratory and Injunctive Relief, *Ctr. for Biological Diversity*, No. 4:19-cv-05206 (N.D. Cal. Aug. 21, 2019), ECF No. 1. The case (and others related to it) was

[2] *Available at* https://www.regulations.gov/ (Docket ID FWS-HQ-ES-2018-0007) (last visit Mar. 25, 2025).

eventually stayed after FWS (and NMFS) changed course under the Biden Administration and announced its intent to reinstate the Blanket 4(d) Rule and revise other portions of the 2019 ESA rollback regulations. Ultimately, the court remanded the 2019 ESA regulations and, on April 5, 2024, FWS reinstated the Blanket 4(d) Rule. 89 Fed. Reg. 23,919.[3]

Courts have recognized that "[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995); *see also Coal. of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 841 (10th Cir. 1996) (A party with a "persistent record of advocacy for [the environmental] protection[s]" adopted by an agency subsequently challenged in court has a "direct and substantial interest" sufficient "for the purpose of intervention as of right[.]"). This is precisely what the Center is seeking to do here. The Center has a significant protectable interest in the Blanket 4(d) Rule, and that interest is related to Plaintiffs' claims in this case, which ask the Court to find that Rule illegal.

[3] The Center commented in support of the proposed rule to reinstate the Blanket 4(d) Rule and restore many of the ESA's regulatory protections removed during the Trump Administration, and more than 21,000 Center supporters also submitted comments regarding the proposed changes. FWS-HQ-ES-2023-0018-106015 (Comment from Center for Biological Diversity) and FWS-HQ-ES-2023-0018-94669 (Mass mail campaign comment from Center for Biological Diversity), *available at* https://www.regulations.gov/ (Docket ID FWS-HQ-ES-2023-0018) (last visited Mar. 25, 2025); *see also* Greenwald Dec. ¶15.

3. A Ruling in Plaintiffs' Favor May Impair or Impede the Center's Ability to Protect its Interests.

An applicant for intervention as of right must be "so situated that disposing of the action *may* as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2) (emphasis added). In determining whether the action would impair an applicant's interests, courts look to the relief requested. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001). Whether there are other forums in which movants could seek to protect their interest is irrelevant. *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1199 (10th Cir. 2010) (stating that "the interest of a prospective defendant-intervenor may be impaired where a decision in the plaintiff's favor would return the issue to the administrative decision-making process, notwithstanding the prospective intervenor's ability to participate" in the new administrative process). Typically, after finding that a proposed intervenor has a significant protectable interest in the subject of the case, courts "have little difficulty concluding that the disposition of th[e] case may affect [that interest]." *See Lockyer*, 450 F.3d at 442; *see also City of Los Angeles*, 288 F.3d at 401 (noting third factor considers whether disposition of the action "'may' impair rights . . . rather than whether the [disposition] will 'necessarily' impair them" (citation omitted)).

As discussed above, the Center has a significant interest in the ongoing existence of the Blanket 4(d) Rule, and this interest is protectable under the ESA.

Plaintiffs ask this Court to declare that FWS violated the ESA and APA when it reinstated the Blanket 4(d) Rule, vacate the Rule, and enjoin FWS from implementing it. *See* Complaint, ECF No. 1, at 42 (Prayer for Relief). This Court should have little trouble determining that its decision on Plaintiffs' claims and the ultimate outcome of this case may impair or impede the Center's ability to protect its interest in the Blanket 4(d) Rule.

Absent the Blanket 4(d) Rule, newly listed threatened species will be afforded almost no protections under the Act unless FWS issues an individual species-specific rule specifying prohibited activities at the time of listing. 16 U.S.C. § 1533(d).[4] But even prior to recent extensive staffing and funding cuts, FWS's listing program already lacked the necessary funding and resources to complete its duties under the ESA, facing a backlog of more than 400 species awaiting consideration for protection. Greenwald Dec. ¶¶16, 21. Adding an additional duty to develop individual rules for threatened species will impede FWS's ability to make timely listing decisions and contribute to a backlog of species awaiting protection because

[4] During the five years when there was not a blanket 4(d) rule, FWS issued species-specific 4(d) rules for those species listed as threatened, but there is no guarantee that FWS under the second Trump administration will follow suit, particularly given recent extensive staffing and funding cuts. Greenwald Dec. ¶16. FWS has recently proposed several species as threatened, but these species await a final rule granting protection, and there are other species FWS is considering "reclassifying" from endangered to threatened. *Id*. at ¶¶17–19. The Center is concerned that, without a Blanket 4(d) Rule, these species will be listed or re-classified without a 4(d) rule, leaving them with little protection. *Id.*

of the extra work involved in developing a species-specific rule, resulting in even greater delays in listing the many imperiled species awaiting protection, ultimately placing the species at greater risk of extinction. *Id.* at ¶21. These delays will seriously frustrate the Center's efforts to achieve timely protections for these species, all of which the Center and its members have interests in protecting. *Id.* at ¶20–22. The Center will also have to submit extensive comments on proposed listing or reclassification decisions to ensure that species-specific 4(d) rules are sufficiently protective, something the Center would not have to focus on if the species were protected under the Blanket 4(d) Rule. *Id.* at ¶20.

The Ninth Circuit has long determined that conservation organizations such as the Center are entitled to intervene as of right where, as here, the litigation threatens harm to wildlife and other natural resource values that are important to the organization's mission, and where the organizations have worked to protect those values. *See, e.g.*, *Sagebrush Rebellion*, 713 F.2d at 528 (affirming the granting of intervention to the National Audubon Society and finding "no serious dispute" an adverse decision "would impair the society's interest in the preservation of birds and their habitats"). Here, vacatur and an injunction against implementation of the Blanket 4(d) Rule would indubitably threaten the wildlife and natural resource values the Center works to protect. As such, a ruling in Plaintiffs' favor would significantly impair or impede the Center's interests in protecting the Blanket 4(d)

Rule and, more broadly, in protecting threatened species.

4. The Existing Parties May Not Adequately Represent the Center's Interests.

To satisfy the fourth factor, the Center need only show "that the existing parties may not adequately represent [its] interest." *Citizens for Balanced Use*, 647 F.3d at 898; *see also Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). "The burden of showing inadequacy of representation is 'minimal' and satisfied if the applicant can demonstrate that representation of its interests 'may be' inadequate." *Citizens for Balanced Use*, 647 F.3d at 898 (citation omitted).

In evaluating this factor, the Ninth Circuit considers: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments;" (2) whether the present parties are "capable and willing to make such arguments;" and "(3) whether a proposed intervenor would offer any necessary elements to the proceedings that other parties would neglect." *Id*. (citation omitted). "The 'most important factor' . . . is 'how the [applicant's] interest compares with the interests of existing parties." *Id*. (citation omitted). In other words, "the focus should be on the 'subject of the action,' not just the particular issues before the court at the time of the motion." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823 (citation omitted).

Plaintiffs plainly do not represent the Center's interests, as the purpose of the lawsuit is to eliminate the Blanket 4(d) Rule, which the Center has a strong,

demonstrated interest in protecting. *See* Complaint, ECF No. 1, at 42 (Prayer for Relief asking the Court to vacate the Blanket 4(d) Rule and enjoin FWS from implementing it). Federal Defendants are likewise highly unlikely to adequately represent the Center's interests. Although the Ninth Circuit has stated that there is an assumption of adequacy of representation when the government is acting on behalf of a constituency that it represents, *Citizens for Balanced Use*, 647 F.3d at 898, the Supreme Court has recently cast doubt on any such presumption, stressing instead that this factor generally presents proposed intervenors "with only a minimal challenge." *Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 195 (2022). The Center easily satisfies this "minimal" burden here.

Federal Defendants are highly unlikely to make all the same arguments in defense of the Blanket 4(d) Rule that the Center will make, nor are they capable of or willing to making those arguments. Indeed, there is good reason to believe that Federal Defendants will not defend the Blanket 4(d) Rule. As noted above, FWS, under the previous Trump Administration, rescinded the Rule. It was not until the Biden Administration took office that FWS reconsidered the Trump Administration's rescission of the Rule and, ultimately, reinstated it. And the Trump FWS has already indicated that it may rescind the Rule again on its own accord. In a Secretarial Order issued only two weeks into the new Trump Administration, Secretary of Interior Burgum ordered his agency to prepare an action plan that, among other things,

includes "steps that, as appropriate, will be taken to suspend, revise, or rescind documents, including but not limited to" the Blanket 4(d) Rule. *See* Secretary of the Interior, Order No. 3418, Subject: Unleashing American Energy, at 3 (Feb. 3, 2025) (referring to 89 Fed. Reg. 23,919).[5]

Even if Federal Defendants did defend the Rule, the Center and Federal Defendants' interests are not "identical" and do not "overlap fully." *Berger*, 597 U.S. at 197, 199. Indeed, the Ninth Circuit has acknowledged that federal agencies must "'represent a broader view than the more, narrow, parochial interests'" of a proposed intervenor. *Ctr. for Biological Diversity v. Zinke*, No. CV-18-00047-TUC-JGZ, 2018 U.S. Dist. LEXIS 121402, at *11 (D. Ariz. July 18, 2018) (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated on other grounds by Wilderness Soc'y*, 630 F.3d at 1177–78, 1180); *see also John Doe No. 1 v. Glickman*, 256 F.3d 371, 381 (5th Cir. 2001) ("[A] governmental agency" may not adequately represent the interests of an animal welfare group "[g]iven . . . [the agency's] duty to represent the broad public interest[.]"); *Alaska,* 2023 U.S. Dist. LEXIS 60255, at **22–26 (finding federal agency would not adequately represent the Center's interests and granting motion to intervene as of right).[6] Here, given the recent history regarding the Blanket 4(d)

[5] *Available at* https://www.doi.gov/document-library/secretary-order/so-3418-unleashing-american-energy (last visited Mar. 21, 2025).

[6] In considering whether a federal agency may adequately represent a proposed

Rule, the recent DOI Secretarial Order, and the fact that Federal Defendants have broader interests to consider than the Center's narrow conservation focus, the Center has met the minimal burden of establishing that Federal Defendants will not adequately represent its interests.[7]

In sum, the Center "will bring a unique perspective to this lawsuit and add to the dialogue in a meaningful manner." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, No. CV-12-08176-PCT-SMM, 2016 U.S. Dist. LEXIS 90163, at *10 (D. Ariz. June 10, 2016). The Center's interests are not adequately represented by the existing parties to this case. The Court should grant the Center intervention as of right.

B. Alternatively, the Court Should Grant the Center's Request for Permissive Intervention.

If the Court denies intervention as of right, the Center requests in the alternative leave to intervene by permission under Rule 24(b). This rule permits intervention where an applicant's claim or defense poses questions of law or fact in

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intervenors' interests, courts have also found it relevant that federal defendants can change or shift their policy positions during litigation. *See Ctr. for Biological Diversity v. Zinke*, 2018 U.S. Dist. LEXIS 121402, at *11; *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 997 (10th Cir. 2009). Here, given the prior Trump FWS's recission of the Blanket 4(d) Rule, even if FWS did defend the Blanket 4(d) Rule initially, a shift during the litigation would be of heightened concern.

[7] Defenders of Wildlife, another conservation organization, has also filed a motion to intervene in this case. However, the question of whether Defenders may adequately represent the Center's interests is irrelevant because Defenders is not an existing party. *See* Fed. R. Civ. P. 24(a)(2) (the court must permit anyone to intervene who meets certain requirements "unless *existing parties* adequately represent that interest") (emphasis added).

common with the existing action and the application is timely and will not delay or prejudice the proceedings. Fed. R. Civ. P. 24(b)(1)(B), (b)(3). The test for permissive intervention imposes an even lower burden on movants than the test for intervention as of right because it eliminates the requirements relating to interests and adequacy of representation. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108–09 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc'y*, 630 F.3d at 1177–78, 1180.

The Center meets this test. As explained above, the Center has been extensively involved in efforts to protect the Blanket 4(d) Rule, and in general to maintain ESA protections for threatened species and has an important perspective to impart on this controversy. Moreover, the Center seeks to intervene only shortly after Plaintiffs filed this case and will abide by any scheduling order issued by the Court. The Center intends to respond directly to Plaintiffs' challenges to the lawfulness of Blanket 4(d) Rule—*i.e.*, the Center intends to assert defenses of law and fact in common with the existing action. *See, e.g.*, [Proposed] Answer of Intervenor-Defendant Center for Biological Diversity to Plaintiffs' Complaint at 25. In other words, granting the Center's motion will not delay this case or prejudice either Plaintiffs or Federal Defendants. Thus, the Center satisfies the standards for permissive intervention.

CONCLUSION

For the foregoing reasons, the Center has a right to intervene under Federal Rule of Civil Procedure 24(a) as a defendant in this case. In the alternative, the Court should permit the Center to intervene as a defendant pursuant to Rule 24(b).

Respectfully submitted this 26th day of March, 2025.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief is 5,534 words, excluding the caption, table of contents, table of authorities, index of exhibits, signature blocks, and certificate of compliance. Pursuant to Local Rule 7.1, a table of contents, and table of authorities are included in this brief.

Dated this 26th day of March, 2025.

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