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IN THE 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 DEFENDERS OF WILDLIFE, (Proposed) Intervenor-Defendant.	CV 25-29-BU-KLD **BRIEF IN SUPPORT OF DEFENDERS OF WILDLIFE'S MOTION TO INTERVENE**

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INTRODUCTION

Defenders of Wildlife (Defenders) meets the requirements to intervene as a defendant as of right—or, in the alternative, by permission of the Court—to protect its interests in defending the regulation Plaintiffs challenge. Fed. R. Civ. P. 24(a), (b).

Defenders' motion is timely; Defenders and its members have significant protectable interests in the regulation that may be impaired by this litigation; and Federal Defendants do not adequately represent these interests. Moreover, Defenders' defense and the main action have a question of law or fact in common.

At issue is the U.S. Fish and Wildlife Service's (Service) "blanket 4(d) rule," 50 C.F.R. § 17.31(a). This rule provides automatic protections against unauthorized "take" and commerce for species the agency lists as threatened under the Endangered Species Act (ESA). Between 1975 and 2019, when it was rescinded during the first Trump administration, the blanket 4(d) rule protected hundreds of threatened species, from piping plovers to southern sea otters. Plaintiffs seek to have the blanket

4(d) rule, reinstated in 2024 during the Biden administration, *Regulations Pertaining to Endangered and Threatened Wildlife and Plants*, 89 Fed. Reg. 23919 (Apr. 5, 2024), declared unlawful and vacated and the Service enjoined from enforcing it.

Defenders is a non-profit conservation organization that advocates on behalf of its members to conserve imperiled species, including threatened species, and their habitats. Defenders relies on the Service's blanket 4(d) rule to ensure that threatened species and their habitats receive timely, comprehensive statutory protections. These protections are vital to protecting threatened species from further population declines and habitat losses and to recovering them fully to the point of no longer requiring the ESA's protections, as Congress intended.

Defenders vigorously opposed the first Trump administration's proposal to rescind the Service's blanket 4(d) rule. Likewise, it vigorously supported the Biden administration's 2023 proposal to reinstate the blanket 4(d) rule. Defenders and its members' interests are at risk of being significantly impaired if Plaintiffs succeed.

Defenders seeks to intervene to defend its significantly protectable interests in the blanket 4(d) rule.

BACKGROUND

Enacted in 1973, the ESA protects species listed as endangered or threatened. 16 U.S.C. §§ 1531—1544. Its express purpose is to conserve listed species and their habitats to the point that the statute's protections are no longer necessary. *Id.* § 1531(b) (purposes); § 1532(3) (defining conserve). All federal agencies—including the Service—have a mandatory duty to conserve listed species. *Id.* § 1531(c). The ESA is the premier species conservation statute worldwide, with a track record of having saved from extinction more than 95 percent of U.S. species ever listed and putting hundreds on the road to recovery.

Yet humanity faces a global biodiversity crisis, with approximately one million species at risk of extinction worldwide. Over one-third of U.S. plant and animal species are at risk of extinction because of ongoing habitat loss, climate change, pollution, and invasive species. For the Service to achieve the ESA's purpose of preventing extinction and recovering species, it must robustly implement the law.

When the Service lists a species as endangered, that species automatically receives all the section 9 protections against unauthorized "take" and unauthorized commerce. *Id.* § 1538(a)(1) (wildlife); § 1538(a)(2) (plants). Species listed as threatened receive these protections only if covered by a regulation promulgated pursuant to section 4(d). *Id.* § 1533(d). Section 4(d) imposes one mandatory and one discretionary duty on the Service:

> Whenever any species is listed as a threatened species . . . the Secretary *shall* issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary *may* by regulation prohibit with respect to any threatened species any act prohibited by [section 9].

Id. (emphasis added).

For more than four decades, from 1975 (for wildlife) and 1979 (for plants) to 2019, the blanket 4(d) rule gave the Service the discretion to extend section 9 protections to threatened species by default. The Service maintained its discretion to promulgate species-specific 4(d) rules as appropriate. *Reclassification of American Alligator and other Amendments*, 40 Fed. Reg. 44412 (Sept. 26, 1975) (4(d) rule for wildlife); 42 Fed. Reg. 32374 (June 24, 1977) (4(d) rule for plants). By prohibiting

by default unauthorized take of threatened species, including harm, harassment, and killing by any person, as well as unauthorized commerce, the blanket 4(d) rule protected hundreds of threatened species.

In 2018, the Service—under the direction of the first Trump administration—proposed to rescind the 4(d) rule, *Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants*, 83 Fed. Reg. 35174 (July 25, 2018). It finalized the rescission the next year. *Regulations for Prohibitions to Threatened Wildlife and Plants,* 84 Fed. Reg. 44753 (Aug. 27, 2019). The final rule eliminated the blanket 4(d) rule for threatened species listed from September 26, 2019, forward, *id.* Defenders strongly opposed the proposed rule.

In 2023, the Service—under the direction of the Biden administration—proposed reinstating the blanket 4(d) rule, *Regulations Pertaining to Endangered and Threatened Wildlife and Plants*, 88 Fed. Reg. 40742 (June 22, 2023). It finalized the reinstatement the next year. *Regulations Pertaining to Endangered and Threatened Wildlife and Plants*, 89 Fed. Reg. 23919 (Apr. 5, 2024). Defenders strongly supported

the proposed rule as supported by the ESA's text, purpose, and legislative history and by sound biological reasoning. Under the 2024 blanket 4(d) rule, the Service regained access to this important tool for ensuring timely, comprehensive protections for threatened species.

The second Trump administration has again targeted the blanket 4(d) rule for suspension, revision, or rescission. Ex. 2, Declaration of Michael Senatore, ¶¶ 25–26.

Plaintiffs Rocky Mountain Elk Foundation and the Property and Environment Research Center ask this Court to declare the 2024 blanket 4(d) rule unlawful under the ESA and Administrative Procedure Act and to vacate it and enjoin its enforcement.

ARGUMENT

This Court should grant Defenders' motion to intervene as a defendant. Rule 24(a) directs courts to grant the right to intervene to any party that:

> 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). Further, Rule 24(b) authorizes this Court to permit intervention by any party that "has a claim or defense that shares with the main action a common question of law or fact." *Id.* 24(b)(1)(B). Defenders satisfies the standards for intervention as of right and by permission.

I. DEFENDERS IS ENTITLED TO INTERVENE AS OF RIGHT

Courts within the Ninth Circuit apply a four-factor test for intervention as of right:

> (1) the 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 practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Cal. ex rel. Lockyer v. United States, 450 F.3d 436, 440 (9th Cir. 2006). Courts evaluating intervention "interpret these requirements broadly in favor of intervention" and are "guided primarily by practical considerations, not technical distinctions." *W. Watersheds Project v. Haaland*, 22 F.4th 828, 835 (9th Cir. 2022) (quotation marks omitted). Defenders' request meets all four factors.

A. Defenders' Motion to Intervene Is Timely

At the outset, this motion is timely. Courts examine three factors to determine timeliness: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996).

Where parties seek to intervene at the outset of litigation before defendants file an answer, the Ninth Circuit considers timeliness to be "undisputed." *Sierra Club v. Env't Prot. Agency*, 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). The Ninth Circuit has described intervention in the early stages of litigation as exhibiting the "traditional features of a timely motion," inherently avoiding disruption and delay and prejudice to other parties. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011).

Here, less than one week has passed since Plaintiffs filed their complaint and the first two timeliness factors are easily met. Counsel for Federal Defendants have neither entered an appearance nor filed a responsive pleading. No case management plan has been established.

Defenders' intervention will not prejudice the existing parties. Because Defenders has moved to intervene so quickly, the third timeliness factor is irrelevant.

B. Defenders and Its Members Have Significant Protectable Interests in the Blanket 4(d) Rule

Defenders and its members have significant protectable interests in the conservation of threatened species through the timely application of ESA section 9 protective measures via the blanket 4(d) rule. Defenders' motion meets the second factor for intervention as of right.

The second factor "requires that the asserted interest be protectable under some law and that there exist a relationship between the legally protected interest and the claims at issue." *Cal. Dep't of Toxic Substances Control v. Jim Dobbas, Inc.*, 54 F.4th 1078, 1088 (9th Cir. 2022) (quotation marks omitted). This is a "practical, threshold inquiry"; prospective interveners are not required to establish a "specific legal or equitable interest." *Citizens for Balanced Use*, 647 F.3d at 897 (quotations omitted). This requirement merely sets a "practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process"

rather than a rigid standard. *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (quotations omitted).

"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). Courts regularly find that conservation groups have protectable interests in actions challenging conservation measures. *See, e.g.*, *id.* at 1397–98 (finding conservation groups had protectable interest in a challenge to listing species as endangered that the groups had advocated for); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527–28 (9th Cir. 1983) (finding National Audubon Society had a protectable interest in lawsuit challenging establishment of a conservation area that the group had supported).

Defenders and its members have a significant protectable interest in the blanket 4(d) rule Plaintiffs seek to invalidate. Protecting endangered and threatened species and their habitats is central to Defenders' and its members' interests. Senatore Dec. ¶¶ 4–5, 19.

The blanket 4(d) rule is an invaluable tool allowing the Service to protect threatened species in a timely and efficient manner. Defenders regularly petitions the Service to list species as threatened or endangered and to apply section 9 protections via the blanket 4(d) rule if it determines threatened listing is appropriate. *Id.* ¶ 6.

Defenders has relied on the Service's application of the blanket 4(d) rule to provide timely, comprehensive protections to a long list of threatened species such as the piping plover, marbled murrelet, northern spotted owl, red knot *rufa*, Florida manatee, and southern sea otter. *Id.* ¶ 9. Where the Service had failed to apply the blanket 4(d) rule and has instead issued species-specific 4(d) rules, Defenders has filed comments opposing inadequate proposed 4(d) rules and has challenged such rules in court. *Id.* ¶¶ 10–11.

Defenders' and its members' interests have been harmed where the Service or NOAA Fisheries has failed to issue timely or adequate 4(d) rules for threatened species and the species have suffered further declines. For example, NOAA Fisheries has never had a blanket 4(d) rule and does not always issue species-specific 4(d) rules with

threatened listings. In 2015, Defenders submitted petitions to NOAA Fisheries to list the oceanic whitetip shark and giant manta ray. In 2018, the agency listed the species as threatened but refused to issue 4(d) rules for either one. *Id.* ¶¶ 12–13. In 2024, the agency belatedly identified that both species need 4(d) regulations because of continuing declines, caused in part by U.S. fisheries bycatch. To date, NOAA Fisheries has failed to finalize such 4(d) rules. *Id.* ¶ 14.

Defenders invested significant staff time in the public processes opposing the 2019 regulation rescinding the blanket 4(d) rule and supporting the 2024 regulation reinstating it. *Id.* ¶¶ 16–18. If Plaintiffs succeed in invaliding the blanket 4(d) rule, Defenders' and its members' interests are likely to suffer. *Id.* ¶ 20. Defenders has established its significant protectable interest for intervention purposes.

C. Defenders' Interests in the Blanket 4(d) Rule May Be Impaired by This Litigation

Defenders' intervention is necessary to protect its and its members' interests in conserving threatened species through the blanket 4(d) rule, meeting the third intervention factor.

Under Rule 24(a), prospective intervenors need only show that they are "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). A prospective intervenor need not show that impairment is "an absolute certainty." *Citizens for Balanced Use*, 647 F.3d at 900. Rather, it need only show that its interests "will suffer a practical impairment of its interests as a result of the pending litigation." *Wilderness Soc'y*, 630 F.3d at 1179 (quotations omitted). The focus on practical impairment means "the court is not limited to consequences of a strictly legal nature." *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995) (quotations omitted), *abrogated on other grounds by Wilderness Soc'y*, 630 F.3d at 1177–78, 1180. The Ninth Circuit interprets this factor liberally in favor of intervention. *See, e.g.*, *Sagebrush Rebellion*, 713 F.2d at 527–28. Once an interest is established, courts typically have "little difficulty concluding" that a lawsuit may affect that interest. *Lockyer*, 450 F.3d at 442.

If Plaintiffs obtain the remedy they seek, they will eviscerate an essential tool for conserving threatened species. The blanket 4(d) rule allows for protective measures well within the Service's authority to apply by default at the time of listing. Timely protections are vital for threatened species that by definition are "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20) (definition of "threatened species").

As discussed above, Plaintiffs' success would harm Defenders' protectable interest stemming from its advocacy on its members' behalf in support of the blanket 4(d) rule. Intervention is appropriate to protect these interests. *See e.g.*, *Citizens for Balanced Use*, 647 F.3d at 898; *Sagebrush Rebellion*, 713 F.2d at 528.

Additionally, this lawsuit presents significant risks to Defenders' members' protectable interests in threatened species that benefit from the blanket 4(d) rule, such as the Florida manatee. Senatore Dec. ¶ 21. When the Service downlisted the West Indian manatee (including the

Florida manatee) from endangered to threatened in 2017, it applied the blanket 4(d) rule, protecting these interests. *Id.* ¶ 22.

The Service recently proposed reclassifying the West Indian manatee into two subspecies, and to list the Florida manatee as a threatened species covered by the blanket 4(d) rule. Plaintiffs' success in this lawsuit would threaten these interests by risking the lapse of section 9 protections for the Florida manatee. *Id.* ¶¶ 23–24. This further establishes Defenders' sufficient interest for intervention. *See Sagebrush Rebellion*, 713 F.2d at 526–28 (finding "environmental, conservation and wildlife interests" to be sufficient interests for intervention as a matter of right); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–63 (1992) ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.")

D. Existing Parties Do Not Adequately Represent the Interests of Defenders or Its Members

Defenders is entitled to intervene as of right because the existing parties are unlikely to represent its interests adequately, satisfying the fourth factor.

In evaluating the adequacy of representation, courts consider "(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 party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Citizens for Balanced Use*, 647 F.3d at 898 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)) (emphasis added). The inadequate representation factor requires a showing that representation "may be" inadequate; "the burden of making this showing is minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see also Sagebrush Rebellion*, 713 F.2d at 528.

Defenders and its members have a unique interest in the blanket 4(d) rule not shared by the existing parties. Defenders' interests are directly at odds with Plaintiffs', which seek declaratory, statutory, and injunctive relief to vitiate the blanket 4(d) rule.

Federal Defendants do not adequately represent Defenders' interests in defending the blanket 4(d) rule. Although there is a

presumption that the government "adequately represents its citizens when the applicant shares the same interest," *Arakaki*, 324 F.3d at 1086, that presumption is not absolute. Indeed, courts have "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003). The government's and individual entities' interests are not identical "just because both entities occupy the same posture in the litigation." *Citizens for Balanced Use*, 647 F.3d at 899 (quotation omitted).

Here, Federal Defendants are highly unlikely to represent Defenders' interests adequately. During the first Trump administration, the Service rescinded the blanket 4(d) rule. Under the Biden administration, the Service reinstated it. But in Secretarial Order 3418 implementing President Trump's Executive Order 14154, "Unleashing American Energy," Interior Secretary Burgum has identified the blanket 4(d) rule as one regulation to be suspended, revised, or rescinded. Senatore Dec. ¶¶ 25–26.

Although Federal Defendants have not yet filed a responsive pleading, the history of the blanket 4(d) rule in the previous two administrations coupled with the Interior Secretary's current directive that it be suspended, revised, or rescinded amply demonstrate that Defenders cannot rely on Federal Defendants to represent its interests.

II. DEFENDERS QUALIFIES FOR PERMISSIVE INTERVENTION

Defenders qualifies for permissive intervention under Rule 24(b). Courts may allow a party to intervene on a timely motion where the party asserts "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b); *see also Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2002) (restating Fed. R. Civ. P 24(b)), *abrogated in part on other grounds by Wilderness Soc'y*, 630 F.3d at 1180.

Defenders' early intervention risks no prejudice or delay. Defenders will respond directly to Plaintiffs' challenge to the blanket 4(d) rule. *See Kootenai Tribe*, 313 F.3d at 1110 (finding movants "satisfied the literal requirements of Rule 24(b)" by "assert[ing] defenses

of [the challenged action] directly responsive to the claims for injunction asserted by plaintiffs."); *see also* Proposed Answer.

CONCLUSION

Defenders respectfully requests that this Court grant its motion.

Respectfully submitted this 14th day of March, 2025,

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that the foregoing document is printed with a proportionally spaced Century Schoolbook text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 3272words, excluding the caption, tables, and certificate of compliance.

Dated this 14th day of March, 2025.

/s/Timothy M. Bechtold