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

IDAHO RIVERS UNITED, MORGAN and	)	
OLGA WRIGHT,	)	Case No. 1:15-cv-169-BLW
	)	
Plaintiffs,	)	<b>MEMORANDUM IN SUPPORT</b>
vs.	)	<b>OF MOTION TO INTERVENE AS</b>
	)	<b>DEFENDANTS BY IDAHO STATE</b>
DISTRICT RANGER JOE HUDSON in his	)	<b>BOARD OF LAND COMMISSIONERS</b>
official capacity, and UNITED STATES	)	<b>AND IDAHO DEPARTMENT OF LANDS</b>
FOREST SERVICE,	)	
	)	
Defendants.	)	
	)	

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The Idaho State Board of Land Commissioners (“Land Board”) and the Idaho Department of Lands (“IDL”), (referred to collectively herein as “Idaho”), file this memorandum in support of their motion to intervene pursuant to Fed. R. Civ. P. 24.

**INTRODUCTION**

Plaintiffs challenge the Defendant United States Forest Service’s (“USFS”) failure to require a permit for the use of Road 652 by the Idaho Department of Lands in connection with a

fire salvage timber project on a parcel of state public school endowment land Idaho has a substantial interest in this matter because Road 652 provides the only practicable access to the parcel. Without the ability to use Road 652 to conduct the salvage operations on the parcel, Idaho will be unable to protect that portion of the endowment *res* from spoliation due to decreased timber values, harmful erosion and insect infestation to healthy trees (both on and off the state parcel). Further, Idaho will be unable to proactively manage the parcel to protect its future value without commencing regeneration of new trees through reseedling. Idaho thus requests intervention as of right under Fed. R. Civ. P. 24(a) or, alternatively, permissive intervention under Fed. R. Civ. P. 24(b) to protect its interests.

### **ARGUMENT**

The United States upon admission of Idaho to the Union granted to the State the 16th and 36th sections of lands in every township “for the support of common schools.” Organic Act of the Territory of Idaho, 12 Stat. L. 808, ch. 117, § 4. Article IX, Section 8 of the Idaho Constitution imposes a fiduciary duty on the Land Board “to provide for the location, protection, sale or rental” of the school lands “in such manner as well as secure the maximum long term financial return” for the school children of Idaho. “The State’s endowment lands are part of a sacred trust reserved for the benefit of Idaho’s public schools and public institutions. The Board, which manages those endowment lands, is the epitomic public trustee.” *Wasden v. State Bd. of Land Comm’rs*, 153 Idaho 190, 195, 280 P.3d 693, 698 (2012).

The Board and IDL have a duty to protect and preserve the parcel of school endowment land that is accessed by Road 652, which borders Plaintiff Wrights’ private land, by way of an

easement granted to USFS. *Id.* ¶ 3 & Ex. A.<sup>\*</sup> The parcel was heavily timbered before the August 2014 Johnson Bar fire, which burned approximately 8,804 acres of land, including the timber on the state parcel. *Id.* ¶ 4.

As State Forester Groeschl explains, the parcel at issue consists of 245 acres lying within Section 16 of T32N, R7E in Idaho County. Groeschl Decl. ¶ 3 & Ex. A. Road 652 provides immediate access to the property. That road is accessed from Road 470 that runs to the north of the parcel, crosses the Selway River and intersects with a county road. *Id.*, Ex. A. The Land Board authorized a salvage sale on the parcel in February 2015, and IDL has scheduled an auction for the related timber contract for June 19, 2015. *Id.* ¶ 8 & Exs. I - K.

Time is of the essence in salvage logging because of the anticipated decline in value of the harvestable timber on the parcel, due both to fire damage and to insect infestations that are the result of fire damage; the potential for spread of fire-related insect infestations to surrounding healthy forest; the potential for damage caused by soil erosion on the parcel in the absence of clearing and reseedling; and the state interest in regenerating its forests for future use. Because this proceeding interferes with the Board's and IDL's ability to fulfill their fiduciary duty. Idaho seeks intervention to protect its interests by carrying the Land Board's salvage sale authorization.

## **I. IDAHO IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT**

Rule 24(a) provides:

Upon timely application 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.

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<sup>\*</sup> The State of Idaho owns the land over which Road 652 crosses the endowment parcel; *i.e.*, USFS has no easement or management authority with respect to such section of the road. Groeschl Decl. ¶ 3.

To determine whether an applicant may intervene as a matter of right, the court uses a four-part test: (1) whether the application is timely; (2) whether the applicant has asserted an interest relating to the property or transaction that is the subject of the action; (3) whether the applicant is situated such that disposition of the action without intervention may impair or impede its ability to protect that interest; and (4) whether the applicant's interest is not adequately protected by the existing parties. *Orange County v. Air Cal.*, 799 F.2d 535, 537 (9th Cir. 1986) (citations omitted). No difference exists in these standards with respect to the stage of the litigation. *E.g.*, *Wilderness Soc'y v. USFS*, 630 F.3d 1173, 1180 (9th Cir. 2011) (abandoning "federal defendant" rule in National Environmental Policy Act cases that imposed "a categorical prohibition on intervention on the merits, or liability phase"). Although the applicant has the burden of showing that the four elements are met, the requirements are broadly interpreted in favor of intervention. *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006).

#### **A. Timeliness**

Courts consider three factors in determining whether an intervention motion is timely: the stage of the proceeding, any prejudice to other parties, and the reason for and length of the delay. *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984). This case has only just begun; the complaint was filed a mere 28 days ago, with an answer not due from Defendants until 60 days after service. Fed. R. Civ. P. 12(a)(2). A return of service has not been filed as of this date. Under these circumstances, no plausible argument exists either that Idaho has delayed unreasonably in seeking intervention or that intervention will cause any delay in the orderly disposition of Plaintiffs' claim.

### **B. Significantly Protectable Interest**

Whether Idaho demonstrates a sufficient interest related to the subject of the current action depends upon establishing a significantly protectable interest that has some relationship with the claims at issue. *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996). Idaho has such an interest given the Land Board's and IDL's duty to protect and preserve state school endowment parcels for the long-term benefit of the common schools. This duty was imposed as a condition of statehood and broadened by the Idaho Constitution. *See, e.g., Idaho Watersheds Project v. State Bd. of Land Comm'rs*, 133 Idaho 64, 67, 982 P.2d 367, 370 (1999) ("Article IX, § 8 provides that the objective of sales and leases of state endowment lands is to 'secure the maximum long term financial return to the institution to which granted or to the state if not specifically granted.' This is in keeping with the Idaho Admission Bill admitting Idaho into the union, which provides that monies received from the sale or lease of school endowment lands 'shall be reserved for school purposes only.'"). Idaho has an interest in salvaging the timber and preventing further soil erosion and potential landslide activity on the parcel and in protecting against insect infestations drawn to fire-damaged forest. Preventing such harmful impacts is part and parcel of protecting the trust *res* for the benefit of its beneficiaries. The timber on the state parcel, finally, relates to "the subject of the action" (*Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001)) because, but for the proposed salvage sale, the lawsuit would not have been filed.

### **C. Potential Impairment**

The Court of Appeals in determining whether movant's interests are potentially impaired, "follow[s] the guidance of Rule 24 advisory committee notes that state that '[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he

should, as a general rule, be entitled to intervene.’” *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822. Idaho’s interests will be substantially impacted by this action.

State Forester Groeschl’s declaration, as summarized above, describes the negative impact on Idaho’s interest in maximizing the long financial return with particular regard for the timber on the state parcel described above. Grand fir trees on the parcel are currently experiencing Ambrosia beetle infestation and face the prospect of a Fir Engraver beetle infestation in the future. *Id.* ¶ 6. Many western red cedar trees have burned-out bases that likely will fall in the near future, thereby creating wild fire fuel. *Id.* Two other species, western white pine and Douglas fir, are at risk because of “weakened root systems, basal burning and exposed erosive soils.” *Id.* Delay in the timber salvage project additionally will retard reforestation efforts. *Id.* Timber on the state parcel in the burn area, in sum, must be harvested, and any delay in that harvest has substantial negative impacts to the endowment beneficiaries. *Id.*; *see also id.*, Ex. C at 5-6 (Pt. III.C.5).

The complaint suggests that Plaintiffs will seek preliminary injunctive relief against Defendants if IDL proceeds forward with the timber salvage project. Comp. Wherefore ¶ C. Although the precise nature of any injunction requested cannot be predicted with assurance, it is plain that the end purpose would be to disrupt Idaho’s project timetable and to make it impossible to complete the timber harvest activities this year. Plaintiffs’ claim, if successful, thus would substantially prejudice Idaho’s interests “in a practical sense.”

#### **D. Inadequate Representation**

The Ninth Circuit explained in *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003), that “[t]he burden on proposed intervenors in showing inadequate representation is minimal, and would be satisfied if they could demonstrate that representation of their interests ‘may be’

inadequate.” *Id.* at 1086 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). The Court then identified three factors that it considers in assessing the representational adequacy issue:

(1) [W]hether 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.

*Id.* There is, as well, “‘an assumption of adequacy when the government is acting *on behalf of a constituency that it represents*,’ which must be rebutted with a compelling showing.” *Citizens for Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 898 (9th Cir. 2011) (quoting *Arakaki*, 324 F.3d at 1086)) (emphasis added). Application of these factors establishes that Defendants do not adequately represent Idaho’s interests.

*First*, Defendants’ sole concern lies in establishing that they have no statutory or regulatory relationship to the salvage project; *i.e.*, that USFS has no duty to take an action through the permitting process with regard to the use of Road 652 by the project’s eventual purchaser. Defendants, in short, are legal strangers to the project. Consequently, in defending this lawsuit, they will not be “acting on behalf of constituency that [they] represent[]” but, instead, will be advancing their view concerning the proper interpretation and application of applicable federal statutes and regulations. In a preliminary injunction proceeding, to illustrate, Defendants neither could nor would claim irreparable injury from the detrimental effects on Idaho’s interests from the delay in initiating or completing the salvage project that an injunction presumably would cause. There is, for the same reason, no assurance that they will approach the remaining non-probability-of-success elements of preliminary injunction analysis—the balance of equities and the public interest—as Idaho will. *See K.W. ex rel. D.W. v. Armstrong*,

No. 14-35296, 2015 WL 35299727, at \*5 (9th Cir. June 6, 2015) (four-part preliminary injunction test). Thus, Defendants will not make all the arguments that Idaho will proffer.

*Second*, Idaho is uniquely positioned not only to explain the salvage project's need and operational detail but also to respond to Plaintiffs' allegations that it would be harmful. Paragraphs 61 through 64 of the complaint assert that the project's road construction will result in soil erosion, increase slope instability and create a visual eyesore of waste in a wild and scenic area. State Forester Groeschl's declaration addresses these allegations generally, while other IDL employees have extensive knowledge concerning the salvage project that contradicts Plaintiffs' claim of likely harm from the project's implementation. Defendants likely possess no corresponding knowledge. Indeed, the lack of such knowledge logically follows from the absence of any obligation on USFS to subject use of Road 652 to a federal permit. Idaho accordingly brings to this case something that Defendants lack: detailed knowledge of the activity that precipitated the dispute and the efforts made to ensure that it does not compromise the ability of the trust *res* to serve the long-term interests of its beneficiaries.

## II. ALTERNATIVELY, IDL IS ENTITLED TO PERMISSIVE INTERVENTION

Rule 24(b) provides:

### (b) Permissive Intervention.

(1) *In General.* On timely motion, the court may permit anyone to intervene who:

...

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) *By a Government Officer or Agency.* On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or



(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) *Delay or Prejudice.* In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

If not permitted to intervene as a matter of right, Idaho should be permitted to intervene because it satisfies the requirements of both Rule 24(b)(1) and Rule 24(b)(2), either of which is sufficient to permit Idaho's intervention, and intervention will not "unduly delay or prejudice the adjudication" of the claims under Rule 24(b)(3).

**A. Common Question Permissive Intervention**

Idaho seeks to conduct a salvage sale of timber this year to protect the endowment lands from insect infestations, to reduce the amount of fire fuel, to construct new or reconstruct existing culverts given the likelihood of increased run-off because of the Johnson Bar fire, and to begin regenerating timber on the parcel. As discussed above, time is of the essence to achieving these goals. Plaintiffs' claim that the salvage project's use of Road 652 as it crosses Plaintiff Wrights' property is subject to issuance of USFS permit directly threatens accomplishment of these goals. Idaho, like Defendants, denies any such permitting requirement exists. Also quite plain is that Plaintiffs have as a principal objective stopping the salvage project. Given this set of circumstances, no reasonable question exists that its defense shares a common question of law or fact with the main action.

That conclusion is buttressed through consideration of the discretionary factors examined by courts in determining whether a common question of law or fact exists:

"the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case[,] whether changes have occurred in the litigation so that intervention that was once denied should be reexamined, whether the intervenors' interests are adequately

represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.”

*Perry v. Schwarzenegger*, 630 F.3d 898, 905 (9th Cir. 2011) (quoting *Spangler v. Pasadena Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977)). Each of these factors has been addressed above, and each counsels allowing intervention.

## **B. Governmental Agency Permissive Intervention**

Rule 24(b)(2) permits government officers or agencies to intervene where a party’s claim affects administration of statutes or regulations that they are charged to implement. Its language permitting governmental intervention was added by amendment in 1946. *See* Fed. R. Civ. P. 24 (1946 Advisory Committee Notes). “[T]he whole thrust of the amendment is in the direction of allowing intervention liberally to governmental agencies and officers seeking to speak for the public interest.” 7C Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1912 (3d ed.) (Westlaw Database Apr. 2015). Applying Rule 24(b)(2) in *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967), the court reversed a district court’s denial of a state official’s intervention motion, explaining as follows:

It is a significant fact that the applicant for permissive intervention is a government official. Rule 24(b) was expressly amended in 1946 so as to permit intervention by a state or federal governmental official charged with administering a state statute or regulation on which any party relies for his claim or defense. The amendment was added to avoid exclusionary constructions where public officials seek permission to intervene, and the amendment in effect expands the concept of claim or defense insofar as intervention by a governmental officer or agency is concerned. It is perhaps more accurate to say that it considers the governmental application with a fresh and more hospitable approach.

*Id.* at 704-05 (internal quotations and citations omitted). Such a “fresh and more hospitable approach” is singularly appropriate here.

Idaho is charged with managing its endowment lands for the benefit of the endowment

beneficiaries. *See* Idaho Code § 58-403. The proposed salvage sale represents a quintessential example of Idaho's discharging this statutory responsibility. Plaintiffs' claims are a direct result of Idaho's proposed logging activity and provided the impetus for their challenge. Idaho should therefore be allowed to intervene pursuant to Rule 24(b)(2).

**C. Lack Of Delay**

Rule 24(b)(3) requires a court to consider whether the proposed intervention "will unduly delay or prejudice the adjudication of the original parties' rights." Idaho's intervention will not cause any undue delay or prejudice, as this action has just begun. Idaho agrees to work cooperatively with the other parties' counsel to achieve a prompt and fair resolution of this case.

**CONCLUSION**

For the foregoing reasons, Idaho respectfully requests that the Court grant its Motion to Intervene as a Defendant.

DATED this 16th day of June 2015.

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL

By:                     /s/                      
SHASTA KILMINSTER-HADLEY  
Deputy Attorney General

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 16th day of June, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following Persons:

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