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

**OREGON NATURAL DESERT ASS’N and
CENTER FOR BIOLOGICAL DIVERSITY**

Case No. 06-946-KI

Plaintiffs,

V.

D. ROBERT LOHN, Regional Administrator,
Nat’l Marine Fisheries Serv., *et al.*

**PLAINTIFFS’ RESPONSE TO
ROBERT L. BROOKS, ET AL.
MOTION TO INTERVENE**

Defendants.

INTRODUCTION

Robert L. Brooks, *et al.* (“applicants”), have moved this court to grant intervention in this action. Because applicants have not demonstrated that they meet the requirements for

intervention, Plaintiffs oppose that motion and respectfully request this court to deny the applicants' Motion to Intervene.

BACKGROUND

Plaintiffs Oregon Natural Desert Association and Center for Biological Diversity (hereinafter "ONDA") challenge the adequacy of three biological opinions ("BiOps") issued by the National Marine Fisheries Service ("NMFS") and the U.S. Fish and Wildlife Service ("FWS"). The consultation processes concern annual livestock grazing authorizations (not term grazing permits) on the Malheur National Forest. See Ore. Natural Desert Ass'n v. U.S. Forest Serv., 312 F.Supp.2d 1337, 1340–41 (D. Or. 2004) (explaining, in a challenge to Forest Service grazing decisions, Forest Service's separate decisionmaking processes for administering grazing, involving forest plan, permits, allotment management plans, and annual authorizations); Ore. Natural Desert Ass'n v. U.S. Forest Serv., -- F.3d --, 2006 WL 2691392, at *1 (9th Cir. 2006) (explaining same). Specifically, ONDA alleges that the Defendants, through the BiOps, have failed to insure that the proposed grazing activities are not likely to result in the destruction or adverse modification of designated steelhead critical habitat; failed to insure that the projects are not likely to jeopardize the continued existence of steelhead and bull trout; and issued inadequate Incidental Take Statements. All of the claims spring from Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536. As relief, ONDA requests that the court declare that the challenged BiOps are in violation of the law, hold unlawful and set aside the challenged BiOps, and order Defendants to rescind the challenged BiOps and consult again to issue valid BiOps. Compl. (Dkt # 1) at ¶¶ A–C.

The applicants hold grazing permits issued by the Forest Service. Importantly, ONDA has not challenged any action on the part of the Forest Service. The applicants' Memorandum

and declarations in support of their Motion for Intervention erroneously imply that ONDA seeks the revocation of term grazing permits. See, e.g., Treve Peterson Decl. at ¶ 5 (“If the Plaintiffs are successful in overturning those biological opinions, Rocky Bluff Ranch’s grazing permits may be revoked . . .”). But ONDA requests no relief regarding revocation of permits, and could not request such relief from Defendants NMFS and FWS, which do not issue the permits.

ARGUMENT

I. THE APPLICANTS ARE NOT ENTITLED TO INTERVENE AS OF RIGHT IN THIS ACTION.

The Ninth Circuit has established a four-part test for intervention as a matter of right under Federal Rule of Civil Procedure 24(a)(2). An applicant must demonstrate that:

(1) it has a significant protectable interest relating to the property or a transaction that is the subject matter of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant’s interest.

United States v. Alisal Water Corp., 370 F.3d 915, 919 (9th Cir. 2004) (citing United States v. City of Los Angeles, 288 F.3d 391, 397 (9th Cir. 2002)); Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1107–1108 (9th Cir. 2002). The burden is on the applicant to establish that all the requirements for intervention are satisfied. Alisal, 370 F.3d at 919.

In challenges such as this which allege that the federal government has failed to comply with non-discretionary duties under federal statutes, the Ninth Circuit has established a bright line rule limiting intervention as of right to “none but a federal defendant.” See Kootenai Tribe, 313 F.3d at 1108. The applicants do not cite to or discuss this binding Ninth Circuit rule. See Applicants Br. at 1–6.

The Ninth Circuit has applied the “none but a federal defendant” rule most extensively to NEPA. See, e.g., Wetlands Action Network v. U.S. Army Corps of Eng’rs, 222 F.3d 1105, 1114

(9th Cir. 2000) (“Because a private party cannot violate NEPA, it cannot be a defendant in a NEPA compliance action.”); Churchill County v. Babbitt, 150 F.3d 1072, 1082 (9th Cir. 1998) (“A private party cannot ‘comply’ with NEPA, and, therefore, a private party cannot be a defendant in a NEPA compliance action.”); Forest Cons. Council v. U.S. Forest Serv., 66 F.3d 1489, 1499 n.11 (9th Cir. 1995) (“no one but the federal government can be a defendant”). The rationale of the rule also applies squarely to an ESA Section 7 action, and several district courts have applied the rule to the ESA. See, e.g., Friends of the Wild Swan v. U.S. Fish & Wildlife Serv., 896 F. Supp. 1025 (D. Or. 1995). As explained below, the “none but a federal defendant” rule bars applicants’ Motion to Intervene in this case.

A. Timeliness.

ONDA does not contest the timeliness of the motion. However, applicants do not satisfy any of the other three requirements for intervention as of right.

B. The Applicants Fail to Establish a “Significant Protectable Interest.”

To establish a significant protectable interest, the applicant must: (1) assert an interest protected under some law, and (2) show that there is a relationship between their legally protected interest and the plaintiff’s claims. Alisal, 370 F.3d at 919; Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998).

First, the applicants’ interest does not qualify as a significant protectable interest because of the nature of their interest, grazing permits. See Peterson Decl. ¶¶ 2, 4, 5 (claiming interest based on holding a legal interest in grazing permits). The Ninth Circuit has made clear that “pure economic expectancy is not a legally protected interest for purposes of intervention.” Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep’t of Agric., 143 Fed. Appx. 751, 753 (9th Cir. 2005) (citing Alisal, 370 F.3d at 920; So. Cal. Edison Co. v. Lynch, 307

F.3d 794, 803 (9th Cir. 2002)). Instead, “an economic interest must be concrete and related to the underlying subject matter of the action.” Alisal, 370 F.3d at 919–20 (citations omitted). See also Sierra Club v. EPA, 995 F.2d 1478, 1482 (9th Cir. 1993) (explaining that loggers were denied intervention in a previous case because their interests were only “an economic interest based upon a bare expectation”)

Because the decision to issue a grazing permit is solely at the discretion of the Forest Service, and because those federally-issued permits convey no “right, title, or interest, or estate in or to the public lands,” 43 U.S.C. § 315b, the applicants’ economic interest based on federally-issued grazing permits is not a significant protectable one. Instead, it is an “expectation” insufficient to serve as a significant protectable interest. See Sierra Club, 995 F.2d at 1482 (9th Cir. 1993). The District of Oregon has specifically applied this reasoning to federal grazing permits. See Ore. Natural Desert Ass’n v. Shuford, Civ. No. 06-242-AA, slip op. at 19 (D. Or. Sept. 7, 2006) (“because the decision to issue grazing permits is discretionary by the BLM, and because those federally-issued permits convey no ‘right, title, or interest, or estate in or to the public lands,’ [applicant-intervenor’s] economic interests based on federally issued grazing permits are not a ‘significant protectable interest.’”) (Attached for the court’s convenience as Attachment A).

Second, under the “none but a federal defendant” rule, the applicants’ interest lacks the requisite relationship to ONDA’s claims. The rationale behind the rule is that NEPA and other environmental laws require action only by the government, and therefore only the government can be held liable under those laws. Kootenai Tribe at 1108. The Ninth Circuit and its district courts, including the District of Oregon, have applied the “none but a federal defendant” rule consistently in cases alleging similar claims against the government under the gamut of

environmental laws that regulate only agency action. See, e.g., Forest Cons. Council, 66 F.3d at 1495 (only appropriate defendant is federal government in action alleging National Forest Management Act (“NFMA”) violations); Shuford, No. 06-242-AA, slip op. at 10-11 (holding same for case involving claims under NEPA, Federal Land Policy and Management Act, Public Rangelands Improvement Act, Taylor Grazing Act, and Steens Mountain Cooperative Management and Protection Act of 2000); Ore. Natural Desert Ass’n v. Bureau of Land Mgmt., No. 03-1017-JE, slip op. at 3 (D. Or. Mar. 22, 2004) (holding same for Federal Land Management and Policy Act and Taylor Grazing Act) (Attachment B); High Sierra Hikers Ass’n v. Powell, 150 F. Supp.2d 1023, 1028 (N.D. Cal. 2001) (holding same for Wilderness Act).

District courts in the Ninth Circuit, including the District of Oregon, have also applied the rule to the ESA. This makes sense because, with the notable exception of the Section 9 “take” prohibition, 16 U.S.C. § 1538, the ESA regulates only the actions of the federal government. Certainly Section 7, the only section at play in this action, does not impose any duties, rights, or obligations on private parties, including applicants. Rather, Section 7 “imposes substantive and procedural requirements on ‘each Federal agency’ with regard to ‘any action authorized, funded, or carried out by such agency.’ 16 U.S.C. § 1536(a)(2). Each agency must ‘insure’ that such actions are ‘not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.’ Id.” Defenders of Wildlife v. EPA, 420 F.3d 946, 950–51 (9th Cir. 2005).

The District of Oregon most recently applied the rule to the ESA in Oregon Natural Desert Association v. U.S. Forest Service, No. 04-3096-CO, slip op. at 7 (D. Or. Apr. 28, 2005) (holding that “[t]his case does not differ significantly from other government compliance actions in which courts have held the government is the only proper defendant” in case brought under

the ESA, NMFA, and NEPA) (Attachment C). Another Oregon district court applied the rule to the ESA in Friends of the Wild Swan v. U.S. Fish & Wildlife Service, 896 F. Supp. 1025 (D. Or. 1995). Holders of Forest Service timber sale contracts sought to intervene in the case, which involved a challenge of the FWS’s decision not to list bull trout as a threatened or endangered species. Id. at 1026. The court first reviewed “the role of the district court regarding challenges to decisions under the ESA”—namely, that the court must satisfy itself that the decisions are not arbitrary and capricious, by determining whether the agency “considered the relevant factors and articulated a rational connection between the facts found and the choice made,” as reflected by the record in existence at the time of the decision. Id. (internal quotations omitted). In light of this standard of review, the court held that “[b]ecause the Intervenors[] merely seek to interject their interests and concerns, outside of the administrative record, in defense of the USFWS’s decision, they do not have legally protectable interests at this stage in the litigation.” Id. Likewise, the applicants here appear to seek intervention for the sole purpose of interjecting their private grazing concerns into the action, which have no relevance to the Defendants’ compliance with Section 7. See, e.g., Applicants Br. at 5 (claiming that Defendants lack an “on-the-ground” position” on defending the BiOps and the grazing permits, unlike applicants).

In another case applying the rule to the ESA, Southwest Center for Biological Diversity v. U.S. Forest Service, plaintiffs challenged the Forest Service’s failure to consult under Section 7 prior to issuing grazing permits. 82 F.Supp.2d at 1071. When individuals holding grazing permits attempted to intervene, the court denied intervention as to the merits phase of the action. The court extended the “none but a federal defendant” rule to the ESA after noting that NEPA and the ESA are fundamentally similar in that “[u]nder both Acts, federal agencies are required to perform an analysis of the environmental impact of proposed actions.” Id. at 1074. The court

concluded that “[t]he heart of this legal battle is whether the Forest Service has performed its duty to consult in connection with the issuance of certain grazing permits. Because only the Forest Service can ‘comply’ with this duty, only the Forest Service can and should be a defendant for the liability phase of the litigation.” *Id.* That analysis concerning application of the “none but a federal defendant” rule to Section 7 applies with equal force in this action, which only targets Section 7 obligations imposed on NMFS and FWS.

Because of the nature of the applicants’ interest and because the federal government is the only proper defendant in an ESA Section 7 case, the applicants have no significant protectable interest in this action.

C. Disposition of This Action Will Not Impair or Impede the Applicants’ Ability to Protect their Interests.

The third requirement for intervention as of right is that an applicant must be situated so that disposition of the action may impair or impede the applicant’s interests. *Alisal*, 370 F.3d at 919. This part of the test evaluates whether separate or subsequent proceedings can afford the proposed intervenor adequate protection of its alleged interests such that intervention in the current matter is not warranted. *See California ex rel. Lockyer v. U.S.*, 450 F.3d 436, 442 (9th Cir. 2006) (“Even if this lawsuit would *affect* the proposed intervenors’ interests, their interests might not be *impaired* if they have ‘other means’ to protect them.”) (emphasis in original, citation omitted). To meet this requirement, proposed intervenors must show that their interest will be affected by the outcome of the action. *See State of Montana v. U.S. EPA*, 137 F.3d 1135, 1141–42 (9th Cir. 1998) (affirming district court’s denial of intervention where the outcome of the suit would “have no immediate or any foreseeable, demonstrable effect upon proposed intervenors.”) This factor also is not met.

Applicants have failed to meet their burden of explaining why their interests will be directly affected by this litigation, which simply seeks compliance with Section 7. Alisal, 370 F.3d at 919. Applicants briefly speculate that “[i]f those biological opinions are found to be legally inadequate, Applicants’ access to the grazing lands may be severely restricted or eliminated entirely.” Applicants Br. at 4. They specify no portions of the complaint that attack access to grazing lands. They do not explain why they would not be able to protect their interests in future consultation processes. Accordingly, applicants have failed to establish that this action will impair their interests.

D. The Applicants’ Interests are Adequately Represented by the Federal Defendants During the Liability Phase of this Litigation

The applicants have failed to show that representation of their interests is inadequate. The Ninth Circuit looks at three factors to determine whether an applicant’s interests will be adequately represented by existing parties: “(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.” Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003).

The prospective intervenor bears the burden of demonstrating that the existing parties may not adequately represent its interests. Sagebrush Rebellion v. Watt, 713 F.2d 525, 528 (9th Cir. 1983). “When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. If the applicant’s interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation.” Arikaki, 324 F.3d at 1086 (internal citations omitted). Mere “differences in litigation strategy,” id., or “minor differences in opinion” do not

demonstrate inadequacy of representation. Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 838 (9th Cir. 1996).

Here, the applicants and Defendants both seek the same result, to uphold the BiOps, and there is no reason to believe Defendants will not vigorously defend the legality of their actions. See Answer (Dkt # 6). Cf. Kootenai Tribe, 313 F.3d at 1111 (where federal government “declined to defend fully from the outset, suggesting that the government itself saw problems [with the challenged federal action]”). Especially in the liability phase of the action, the applicants’ interest is identical to Defendants’: an interest in establishing that Defendants have complied with all applicable federal laws.

Here, the applicants fail to make the requisite “compelling showing” that Defendants will not adequately represent their interests. The applicants do not cite to the Ninth Circuit’s three factors or explain how or if they meet them. Applicants Br. at 5. Instead, they provide two vague arguments, unsupported by fact: “Applicants have a stronger interest than Federal Defendants” and Defendants lack an ““on-the-ground’ position on defending the biological opinions and the grazing permits.” Applicants Br. at 5. These allegations are wholly insufficient to overcome the presumption of adequacy. There is no relevant “on-the-ground position” regarding whether biological opinions comply with Section 7 of the ESA in a record review case. The applicants establish, at most, a different motive than Defendants, which is insufficient to show that applicants are inadequately represented. See Oregon Envtl. Council v. Ore. Dept. of Envtl. Quality, 775 F.Supp. 353, 359 (D. Or. 1991) (“The interest of a putative intervenor is not inadequately represented by a party to a lawsuit simply because the party to the lawsuit has a motive to litigate that is different from the motive to litigate of the intervenor.”) Because the perspectives asserted by applicants are not relevant to this action, applicants have failed to

overcome the presumption that the government will adequately represent their interests in this action.

E. The Applicants Should Not be Permitted to Intervene in the Remedies Phase of the Action.

In some of the cases applying the “none but a federal defendant” rule, courts permit applicant-intervenors to intervene if and when the case reaches the remedies stage. This typically occurs when the prospective intervenor has established an interest that could potentially be harmed by the plaintiff’s requested relief. For example, in Forest Conservation Council, the court permitted intervention at the remedies stage, noting that applicant-intervenors had established an interest in whether forest management activities should be enjoined pending the Defendant Forest Service’s compliance with the law. Forest Cons. Council, 66 F.2d at 1499. Likewise, in Western Watersheds Project v. U.S. Forest Service, a challenge to Forest Service grazing activities, the court limited grazing permit holders’ intervention to the remedies phase. 2005 WL 3244253, *1 (D. Idaho 2005). There, the plaintiff sought an injunction that would directly harm the grazers:

It is true that if this Court finds that the Forest Service failed to comply with its statutory duties, one remedial option available to the Court is to enjoin grazing under the grazing permits issued to the livestock producers. If that remedy is selected, it is likely that the livestock producers will suffer substantial harm because no other grazing grounds are readily available.

Id. In the past, ONDA has not opposed permit holders’ intervention in the remedies phase in cases where it has asked for injunctive relief that may directly affect grazing interests. See, e.g., ONDA v. Forest Serv., No. 04-3096-CO, slip op. at 7 (order granting permit holders intervention in remedies phase, noting that plaintiffs did not oppose).

This case is distinct in that the applicants have failed to establish that ONDA’s requested relief would adversely affect their interests. Again, ONDA is not challenging the grazing

permits, nor does it request injunctive relief halting grazing. Indeed, it could not request such relief in an action against Defendants NMFS and FWS. The role of NMFS and FWS under Section 7 is to provide an opinion on whether an action agency's proposed actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2).

The applicants simply assert that "should the biological opinions be overturned, applicants will suffer serious financial losses" without explaining why or how. Applicants Br. at 1. They repeatedly misconstrue the case by implying that the grazing permits are at issue. See, e.g., id. at 1 ("Applicants seek admission to this case as defendants to protect their grazing permits"), 5 ("Applicants have a stronger interest . . . in defending their grazing permits"; "Federal Defendants cannot adequately . . . represent Applicants' interests defending their grazing permits"); Treve Peterson Decl. at ¶ 5 ("If the Plaintiffs are successful in overturning those biological opinions, Rocky Bluff Ranch's grazing permits may be revoked . . ."). Again, the challenged BiOps involve Section 7 consultation concerning annual grazing authorizations, not over the 10-year term grazing permits. Under these circumstances, applicants have failed to establish that intervention should be granted at any stage of this action.

II. THE APPLICANTS ARE NOT ENTITLED TO PERMISSIVE INTERVENTION.

Alternatively, the applicants seek permissive intervention under Rule 24(b)(2). Applicants Br. at 6. The applicants also fail to meet the requirements for permissive intervention. This court has broad discretion in granting or denying permissive intervention; however, an applicant for permissive intervention must show that: (1) its motion is timely; (2) it shares a common question of law or fact with the main action; and (3) the court has an independent basis

for jurisdiction over the applicant's claims. Donnelly, 159 F.3d at 412. Even if an applicant satisfies the threshold criteria, the court still retains discretion to deny permissive intervention.

Id.

In this case, the court need look no further than whether there is an independent basis for jurisdiction over the applicants' claims. The applicants do not cite to the Ninth Circuit test for permissive intervention, nor do they argue that the court has an independent basis for jurisdiction over its claims. Applicants Br. at 6. The applicants assert that their interests are economic. But because the predicate for the alleged impact to the applicants—a finding that the Defendants' BiOp decisions violate the law—is still speculative, any claim would be unripe. (And, as discussed above, even a finding that the BiOps violate the ESA would have no impact on the applicants' term grazing permits.) In the absence of actual and imminent injury, there is no case or controversy here and the court would not have jurisdiction to hear any claims from the applicants.

As to the requirement that there be a common question of law or fact, the argument presented above with respect to the applicants' motion to intervene as of right applies with equal force to the request for permissive intervention. The only issue in the liability phase of this litigation is whether Defendants have complied with the Section 7 of the Endangered Species Act. Only Federal Defendants can be held liable under Section 7. Thus, the applicants fail to demonstrate that any legal position they might advance concerning ONDA's claims is any different than Defendants'. If "the would be intervenor's claim or defense contains no question of law or fact that is raised also by the main action, intervention under Rule 24(b)(2) must be denied." Kootenai Tribe, 313 F.3d at 1111.

Finally, preventing permit holders from intervening, particularly in the liability phase, makes sense. As the District of Idaho explained:

If proposed intervenors were allowed to address liability issues under these circumstances, an absurd result could follow. For example, if the Forest Service concedes inadequacies in its management of the Forest or in its preparation of an EIS/ROD, the intervenors could argue to the contrary. That would give intervenors a measure of control over the direction of the litigation, which could translate down the line into a measure of control over Forest management because litigation often sets boundaries for management. Yet the Forest Service is the exclusive steward of the Forests. The steward must make the final call on whether to defend its own conduct, and, if so, how that defense will be made.

Western Watersheds Project, 2005 WL 3244253 at *1. And in this case that reasoning logically extends to the remedial phase as well because applicants have failed to establish how the relief potentially at issue will impact the applicants' term grazing permits issued by the Forest Service. Thus, applicants have not met the requirements for permissive intervention.

CONCLUSION

For the foregoing reasons, ONDA respectfully asks the court to deny the applicants' motion to intervene.

DATED this 3rd day of November, 2006.

Respectfully Submitted,

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