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

**OREGON NATURAL DESERT ASS’N,**

Case No. 06-242-AA

Plaintiff,

v.

**PLAINTIFF’S RESPONSE TO  
STEENS MOUNTAIN LANDOWNER  
GROUP MOTION TO INTERVENE**

**DANA R. SHUFORD**, Burns District Manager,  
BLM, *et al.*,

Defendants.

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**INTRODUCTION**

The “Steens Mountain Landowner Group, Inc.” (“SMLG”) has moved this court to grant intervention in the above-titled case. ONDA hereby requests this court to deny the applicant’s Motion to Intervene, and instead issue an order granting the SMLG leave to intervene only as to the remedial phase of this litigation.

## **BACKGROUND**

In order to avoid duplicative briefing, ONDA respectfully refers the court to the “Background” section of its brief in response to Harney County’s motion to intervene. See Plaintiff’s Resp. to Harney County Motion to Intervene (Dkt # 47), at 2.

## **ARGUMENT**

### **I. THE SMLG IS NOT ENTITLED TO INTERVENE AS OF RIGHT DURING THE LIABILITY PHASE OF THE LITIGATION.**

The Ninth Circuit has established a four-part test to intervene as a matter of right under Federal Rule of Civil Procedure 24(a)(2), requiring an applicant for intervention as of right to 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; Petrol Stops Northwest v. Continental Oil Co., 647 F.2d 1005, 1010 n.5 (9th Cir. 1981).

In challenges such as this which allege that the federal government has failed to comply with non-discretionary duties under federal statutes like NEPA and FLPMA, 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; 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 SMLG requests full intervention during both the liability and remedies phases of this litigation, yet does not cite to or discuss this binding Ninth Circuit precedent. See SMLG Br. at 7–15 (never citing or discussing “none but a federal defendant” rule). This court should deny the SMLG’s request in its entirety, and allow the Group instead to intervene only during the remedial phase of the case.

**A. Timeliness.**

ONDA does not contest the timeliness of the SMLG’s motion, except to note that ONDA already has filed a motion for partial summary judgment (Dkt # 17). However, as was the case with Harney County’s motion, the SMLG does not satisfy any of the other three requirements for intervention as of right.

**B. The SMLG Fails to Establish a “Significant Protectable Interest.”**

To establish a significant protectable interest in ONDA’s action, 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). The rule in the Ninth Circuit is clear: When the claims in an environmental case go only to the government’s compliance or non-compliance with its legal duties, the federal government is the only proper defendant in the liability phase of the case. See Kootenai Tribe, 313 F.3d at 1108 (“As a general rule, the federal government is the only proper defendant in an action to compel compliance with NEPA”) (internal quotes omitted). The rule is “based on the premise that private parties do not have a ‘significantly protectable

interest’ in NEPA compliance actions”—the rationale being that NEPA and other environmental laws require action only by the government, and therefore only the government can be liable under those laws. Id. (quoting Wetlands Action Network, 222 F.3d at 1114).

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 other environmental laws that regulate 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); Friends of the Wild Swan v. U.S. Fish & Wildlife Serv., 896 F. Supp. 1025 (D. Or. 1995) (holding same for Endangered Species Act); High Sierra Hikers Ass’n v. Powell, 150 F. Supp.2d 1023, 1028 (N.D. Cal. 2001) (holding same for Wilderness Act); Riverhawks v. Zapeda, Civ. No. 01-3035-AA, slip order at 6–8 (D. Or. Aug. 23, 2001) (holding same for Wild and Scenic Rivers Act, NFMA, and NEPA)<sup>1</sup>; Ore. Natural Desert Ass’n v. Bureau of Land Mgmt., No. 03-1017-JE, slip order at 3 (D. Or. Mar. 22, 2004) (holding same for FLPMA and Taylor Grazing Act).<sup>2</sup>

In this case, the statutory provisions that form the basis of ONDA’s claims—NEPA, FLPMA, PRIA, the Taylor Grazing Act, and the Steens Act—regulate only the action of the federal government. See Complaint at ¶¶ 45, 51, 54, 58–59, 62, 65, 69–72, 75–76. The provisions in dispute do not impose any duties, rights, or obligations on private parties, including the SMLG or its members; nor do the claims implicate private lands. As this court explained in

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<sup>1</sup> The Riverhawks opinion is attached to ONDA’s memorandum responding to Harney County’s intervention motion. See Dkt # 47 (Attachment A).

<sup>2</sup> This Mar. 22, 2004 order is attached to this memorandum as Attachment B (sequentially lettered following Attachment A from brief responding to Harney County intervention request). The court’s July 2, 2004 order in that same case, referred to later in this brief, is attached as Attachment C.

Riverhawks with respect to the Wild and Scenic Rivers Act—and after reviewing the Ninth Circuit’s application of the rule in cases alleging NEPA and NFMA claims: “The same reasoning applies to plaintiffs’ claims brought under [the Wild and Scenic Rivers Act]. WSRA requires agencies to protect and enhance wild rivers; it does not require or regulate actions by private parties.” Riverhawks, No. 01-3035-AA, slip order at 8. The District of Idaho, in a similar case where grazing permit holders attempted to intervene, has explained why the “none but a federal defendant” rule makes sense from a practical perspective:

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 v. U.S. Forest Serv., 2005 WL 3244253, \*1 (D. Idaho 2005)

(limiting grazing permit holders’ intervention to remedies phase only, in case involving NEPA, NFMA, and Sawtooth Organic Act).

The “none but a federal defendant” rule applies with equal relevance to the Steens Act. As described in more detail in ONDA’s memorandum in support of its motion for partial summary judgment on Claim Six, Congress enacted the Steens Act in 2000 to protect Steens Mountain in southeast Oregon. See Memo in Support of Motion for Partial Summ. J. (Dkt # 19), at 3–4. The Act designates a number of special management areas on Steens Mountain, including the Cooperative Management and Protection Area (“CMPA”). 16 U.S.C. § 460nnn-11. The purpose of the CMPA “is to conserve, protect, and manage the long-term ecological integrity of

Steens Mountain for future and present generations.” Id. § 460nnn-12(a).<sup>3</sup>

Nothing in the Steens Act requires or regulates actions by private parties. See, e.g., id. § 460nnn-21 (“Management authorities and purposes,” directing Secretary of the Interior to undertake certain management of CMPA). Even the land exchanges, which are not at issue in this action, are on a willing buyer-willing seller basis. See id. § 460nnn-101 to -105. Most importantly, the *only* Steens Act provision at issue in this action—the BLM’s duty to prepare a management plan for the CMPA no later than October 30, 2004—is directed solely at the Secretary and the BLM. Id. § 460nnn-21(b). The SMLG suggests a number of times that the Steens Act somehow mandates that the SMLG or its members be involved in any federal litigation involving the Act. See SMLG Br. at 3, 4, 5–6, 12, 17, 18 (alleging members are “intended beneficiaries” under Act, that Act provides “statutory guarantee of participation in developing the management plan for the CMPA,” and that litigation without SMLG would “eviscerate[]” a “primary tenant [sic]” of the Act). But while the Steens Act certainly encourages cooperative planning and management of Steens Mountain, nothing under 16 U.S.C. § 460nnn-21(b) or § 460nnn-22(a), the management plan and Transportation plan provisions at issue in this action, requires or regulates actions by the SMLG or its members.

Furthermore, the SMLG asserts two interrelated interests in its briefing and supporting materials: economic interests based on its members’ businesses and an interest in access to private property. See SMLG Br. at 10–11. Neither of these is a “significant protectable interest”

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<sup>3</sup> The SMLG confuses this point by alleging the “objectives” for the CMPA are co-equal with the CMPA’s “purpose.” SMLG Br. at 12. The Steens Act is clear, however, that the one and only purpose of the CMPA concerns protecting the “long-term ecological integrity” of Steens Mountain. 16 U.S.C. § 460nnn-12(a); cf. id. § 460nnn-12(b) (stating five objectives).

under Ninth Circuit law.<sup>4</sup> First, the SMLG’s economic interests do not qualify as a “significant protectable interest.” 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)). In fact, a “non-speculative, economic interest may be sufficient to support a right of intervention” *only* when the interest is “concrete and related to the underlying subject matter of the action.” Alisal, 370 F.3d at 919–20 (citing Arakaki v. Cayetano, 324 F.3d 1078, 1088 (9th Cir. 2003); So. Cal. Edison Co., 307 F.3d at 803; Greene v. United States, 996 F.2d 973, 976 (9th Cir. 1993)).

Here, the SMLG’s predominant economic interests include the use of public land within the CMPA for commercial livestock grazing and recreation businesses, coupled with concern over private property values. The SMLG refers to these economic interests on nearly every page of its supporting memorandum. See SMLG Br. at 3, 4, 5, 6, 10, 11, 13, 14 (members’ “livelihoods are based on livestock grazing and commercial recreational uses” within CMPA; they rely on public lands to “sustain their businesses as they have insufficient private lands to sustain their herds”; businesses rely on access to private property; and, “[i]f access is diminished . . . the value of SMLG members’ property will be substantially diminished”). See also SMLG Br. at 4 (articulating “interests” as: “Proposed-Intervenor must be granted full party status to not only protect its economic interests but also to ensure that Plaintiff and BLM do not compromise

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<sup>4</sup> Note that Fresno County v. Andrus, 622 F.2d 436 (9th Cir. 1980), on which the SMLG relies in this portion of its brief, SMLG Br. at 12, has specifically been rejected by subsequent Ninth Circuit decisions. Churchill County, 150 F.3d at 1083 (“Whatever exception *County of Fresno* represents, however, has been limited by later decisions to the remedial phase of a trial.”) (citing Forest Cons. Council, 66 F.3d at 1499 n.11); Wetlands Action Network, 222 F.3d at 1114.

the intent and goals of the Steens Act.”); Hammond Decl. at ¶¶ 6, 17, 18, 20–22, 25 (primarily focusing on economic interests, stating many, if not all, SMLG members rely on “commercial grazing” and “commercial recreation” as their “primary source of income” and that potential relief in lawsuit could effect operating costs and potential profits of ranch, as well as property value).

Because the decision to issue a grazing permit is solely at the discretion of the BLM, 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<sup>5</sup>, the SMLG’s members’ economic interests based on federally issued grazing permits is not a “significant protectable interest.” This is analogous to the type of interest the Ninth Circuit has described as “based upon a bare expectation” insufficient to serve as a “significant protectable interest.” See Forest Cons. Council, 66 F.3d at 1494 (citing Sierra Club v. United States EPA, 995 F.2d 1478, 1482 (9th Cir. 1993)). Courts have applied this reasoning specifically in the context of federal grazing permits. See, e.g., Western Watersheds Project, 2005 WL 3244253, \*2; Southwest Ctr. for Biol. Diversity v. U.S. Forest Serv., 82 F.Supp.2d 1070, 1074 (D. Ariz. 2000) (grazing association intervention limited to remedial phase); Ore. Natural Desert Ass’n v. Bureau of Land Mgmt., No. 03-1017-JE (D. Or. filed July 29, 2003) (orders dated Mar. 22, 2004 and July 2, 2004, denying grazing association intervention unless case reached remedial phase).

This reasoning applies with equal force to individuals holding various “special recreation

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<sup>5</sup> See also Osborne v. United States, 145 F.2d 892, 896 (9th Cir. 1944) (“it has always been the intention and policy of the government to regard the use of its public lands for stock grazing . . . as a privilege which is withdrawable at any time for any use by the sovereign without the payment of compensation”); Public Lands Council v. Babbitt, 529 U.S. 728, 735 (2000) (noting that conditions placed on permits reflect the “leasehold nature of grazing privileges”; that Congress has “made the grant of grazing privileges discretionary”; and that the federal government “retained the power to modify, fail to renew, or cancel a permit or lease for various reasons”).

permits” which allow them to conduct private commercial operations on the public lands. Yriarte Decl. at ¶ 3; John Witzel Decl. at ¶ 2; Cindy Witzel Decl. at ¶ 2. See Riverhawks, slip op. at 8 (status as special use permit holders, operating tours and other commercial activities in wild and scenic river corridor, did not establish protectable interest in NEPA action: “The fact that [applicant-intervenors] hold special use permits does not create a protectable interest in the Forest Service’s compliance with WSRA, because WSRA does not regulate the actions of the permit holders.”) (citing Wetlands Action Network, 222 F.3d at 1114). Thus, the SMLG’s economic interest in ensuring its members’ commercial operations relying on federally-permitted use of the public lands remain unchanged, is not at issue unless and until this action reaches the remedial phase.

Similarly, access to private property is not at issue, nor under threat in this action. The SMLG’s members own land within and adjacent to Steens Mountain’s Cooperative Management and Protection Area and in some cases access their property across public land. SMLG Br. at 3. The SMLG claims that if ONDA “prevails in its claims, the practical outcome is that access to private land, grazing, and recreational uses would be restricted and constrained.” Id. at 13; see also id. at 5 (alleging “Plaintiff’s challenges place at risk route of access to private lands” and that “[t]he outcome of these proceedings could restrict SMLG’s members[’] access to their lands, resulting in significant harm to their interests and diminution in property value”).

These statements are simply wrong. None of the statutory provisions at issue or the relief requested in this lawsuit affect the rights of private individuals to access their private lands. See Compl. at ¶¶ 44–78, A–H. Although ONDA would like to see obsolete routes within the CMPA or routes which cause resource damage closed (via a public process), it fully supports “grandfathering” historic uses for private access purposes. *ONDA has not, and will not, ask that*

*any route be closed as part of any potential injunctive relief in this action.* See Compl. at F (referring to activities such as grazing and off-highway vehicle use, but not to access to private property). As explained in the Complaint and in ONDA’s partial summary judgment motion (Dkt # 19, memo in support), this action targets the BLM’s failure or refusal to comply with specific non-discretionary duties under federal law, such as the agency’s obligation to take a “hard look” at the impacts of its planning decision on the wilderness resource, or the duty to have completed a Transportation Plan no later than October 31, 2004. Not a single claim in this action targets access to private property.

Therefore, the SMLG’s assertion that ONDA’s claims, or this court’s legal rulings, will somehow “restrict” or “constrain” access to private property is well beyond the scope of the Complaint and only serves to cloud the issues before this court. In fact, the SMLG itself correctly notes that the Steens Act expressly provides that the Secretary shall provide “reasonable access” to private inholdings in the CMPA, see 16 U.S.C. § 460nnn-22(e)(1), and that nothing in the Act terminates “any valid existing right-of-way” in the CMPA. Id. § 460nnn-22(e)(2). See also 43 C.F.R. § 36.10 (procedures for BLM to provide access to private inholdings). Finally, if for example this court agrees with ONDA that the BLM failed to prepare the statutorily-required Transportation Plan, and orders the agency to complete the plan by a date certain deadline, the SMLG members, along with ONDA and other members of the public, would be free to take part in whatever level of public participation the BLM offers during that process. See, e.g., ONDA Ex. 5 (BLM letter pledging to involve “all stakeholders” and the public in transportation planning process).<sup>6</sup> As a result, the SMLG does not have a “significant protectable interest” in whether the BLM violated NEPA, FLPMA, PRIA, the Taylor Grazing Act, and the Steens Act,

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<sup>6</sup> Attached to ONDA’s Memo in Support of Motion for Partial Summary Judgment (Dkt # 19).

when the agency issued a Record of Decision adopting the Andrews-Steens Resource Management Plan.<sup>7</sup>

Although the “none but a federal defendant” rule precludes the SMLG from intervening during the liability phase of this litigation, in this particular instance, ONDA does not oppose any the SMLG’s participation as an intervenor during the remedial phase, should this action reach such phase. This is the approach many courts have taken in recognition that only during the remedial phase do private parties finally have an interest that may be impacted by potential injunctive relief. For example, the District of Idaho, in response to grazing permit holders’ requests for intervention, has explained:

[O]nce the Forest Service has been found to have violated its statutory duties, the Court takes over to impose a remedy. And the Court needs to hear from the affected parties, including the livestock producers. This analysis illustrates the principled basis for differentiating between liability and remedies in allowing intervention in these types of cases.

Western Watersheds Project, 2005 WL 3244253, at \*2. See also Southwest Ctr. for Biol.

Diversity, 82 F.Supp.2d at 1074 (“In addition to following clear Ninth Circuit precedent . . . structuring limited intervention makes great practical sense. The heart of this legal battle is

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<sup>7</sup> The SMLG also claims a general interest in recreational pursuits such as “riding horses, picnics, and the aesthetic beauties of” Steens Mountain, as well as protection of natural resources and wildlife. SMLG Br. at 6; see also, e.g., Hammond Decl. at ¶ 19 (citing “desire to preserve the environment and natural beauty” of the area). Despite scattered references to these types of interests, the SMLG’s brief and supporting declarations are otherwise almost wholly devoted to discussing economic and access issues. In any event, the SMLG’s “environmental” interests are far too generalized to be a “significant protectable interest” under the Ninth Circuit’s articulation of the requirement. See, e.g., Alisal, 370 F.3d at 920 (“[i]t is well settled beyond peradventure . . . that an undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right”) (quoting Public Serv. Comp. of New Hampshire v. Patch, 136 F.3d 197, 205 (1st Cir. 1998)). In fact, the SMLG’s very mission statement—which is only provided in the declaration of its chairperson—is itself too generalized to support intervention. See Hammond Decl. at ¶ 3 (“The SMLG’s mission is to provide a united voice for private landowners on the [BLM’s] implementation of the Steens Act and management of the CMPA.”).

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 this litigation.”); Forest Cons. Council, 66 F.3d at 1499 & n.11. In short, the SMLG has no recognized “significant protectable interest” in ONDA’s claims concerning the BLM’s statutory duties under NEPA, FLPMA and other federal laws. Accordingly, any intervention should be limited to the remedial phase of this action.

**C. Disposition of the Liability Phase of this Litigation Will Not Impair or Impede the SMLG’s Ability to Protect its 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. As already noted, the SMLG’s interests in this lawsuit predominantly concern economic and access issues—and are solely with respect to the remedial phase of this litigation. See, e.g., SMLG Br. at 3, 4, 5, 6, 10, 11, 13, 14; Hammond Decl. at ¶¶ 6, 17, 18, 20–22, 25 (referring to economic viability of commercial grazing and recreation businesses, “financial impacts on these businesses,” and property values); Hammond Decl. at ¶¶ 7, 15–17, 21, 23–25 (all describing access issue). The possibility of such injunctive relief, however, is purely speculative at this stage of the proceedings. Moreover, the possibility of injunctive relief restricting access to private property is nonexistent because no part of ONDA’s pleadings seeks such a result, nor do any of ONDA’s eight claims target or implicate access to private property. The SMLG’s members’ ability to protect their commercial interests only becomes a material consideration once the liability phase of this case is resolved. Western Watersheds Project, 2005 WL 3244253, at \*2. Those interests are contingent upon the outcome of this litigation on the merits, and do not arise unless and until the court determines that the BLM is violating NEPA, FLPMA and other

federal laws. See also, e.g., SMLG Br. at 12–13 (admitting that in order to obtain the new or supplemental NEPA process ONDA has asked for in its Complaint, “Plaintiff must [first] obtain a legal ruling” on the merits). Participation in this case during the remedial phase would allow individuals holding grazing or other special use permits to protect their stated interests.

**D. The SMLG’s Interests are Adequately Represented by the BLM During the Liability Phase of this Litigation**

The SMLG also fails the fourth requirement for intervention as of right because the BLM will adequately represent the SMLG’s interests during the liability phase of this case. During the liability phase, the SMLG has the same interest as the BLM and any other member of the public: an interest in assuring that the Federal Defendants have complied with all applicable federal laws. Indeed, the SMLG’s very mission is “to provide a united voice for private landowners on the [BLM’s] *implementation of the Steens Act and management of the CMPA.*” Hammond Decl. at ¶ 3 (emphasis added). The Ninth Circuit has explained that there generally is a presumption of adequate representation when the representative is a governmental body or officer charged by law with representing the interests of the public. Forest Cons. Council, 66 F.3d at 1499; see also Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 838 (9th Cir. 1996) (“Where an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises.”). In the liability phase of this case, there is no reason to believe the BLM will not defend the legality of its actions. See BLM Answer (Dkt # 26). Only during the remedial phase of the litigation is there a possibility that the interests of the BLM—which will still include the public interest in agency compliance with environmental laws—and the interests of the SMLG—to maintain their public lands grazing and special use permit privileges without modification—will diverge.

## II. THE SMLG IS NOT ENTITLED TO PERMISSIVE INTERVENTION.

Alternatively, the SMLG argues permissive intervention under Rule 24(b)(2) is appropriate in this case. SMLG Br. at 16–17. Although the SMLG may intervene as of right in the remedial phase of this case, it fails to meet the requirements for permissive intervention. This court has broad discretion in granting or denying permissive intervention; however, an applicant 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 (citing Northwest Forest Res. Council, 82 F.3d 825). 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 applicant’s claims, with respect to the liability phase of the litigation. The SMLG has not even attempted to argue that the court has an independent basis for jurisdiction over its claims. See SMLG Br. at 16–17. The SMLG emphasizes throughout its brief, as well as in each of the declarations filed in support of its motion, that its interests in this case are primarily economic and/or in maintaining access to private property located within the CMPA. See, e.g., Renie Decl. at ¶¶ 8–11, 13 (referring to impacts to “economic viability of our property,” impact on business, profitability and potential property lessees, and to “preferential tax designation”); Stroemple Decl. at ¶¶ 3–6, 8–12 (discussing access to private inholdings within or adjacent to CMPA). But because the predicate for any impact to the SMLG or its members—a finding that the BLM violated NEPA, FLPMA and other federal environmental laws when it adopted the Andrews-Steens RMP, and therefore may be required to modify grazing or other management practices—is still speculative, any claim from the SMLG would be

unripe. 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 SMLG.

As to the requirement that there be a common question of law or fact, the argument presented above with respect to the SMLG's 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 the BLM has complied with NEPA, FLPMA and other federal statutes. Only the BLM can be held liable under these federal laws, and only the BLM can be ordered to comply with the statutory provisions at issue. Thus, the SMLG fails to demonstrate that any legal position it might advance concerning ONDA's claims is any different than the BLM's. 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.

### **III. THE COURT SHOULD ALLOW INTERVENTION SOLELY IN THE REMEDIAL PHASE OF THIS LITIGATION.**

The SMLG has failed to show that it meets three prongs of the required test for intervention as of right, and has also failed to demonstrate it is entitled to permissive intervention. Accordingly, the court should deny the SMLG's request and instead allow the applicant to intervene as to the remedial phase of the litigation. Under Rule 24(b)(2), the court, in exercising its discretion with respect to intervention, is to consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." In this case, there is no reason to believe the BLM will not adequately defend its land use planning and other actions taken pursuant to the federal laws at issue in this case. 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]").

Most importantly, as was the case with Harney County's intervention request, the SMLG's economic and other stated interests simply are not relevant to this court's determination of the merits of this case. None of the SMLG's stated interests will aid this court in resolving the actual claims at issue in the lawsuit—whether the BLM is liable for violations of NEPA, FLPMA, PRIA, the Taylor Grazing Act, and the Steens Act. As a result, because these interests may only become relevant if this litigation reaches the remedial phase, allowing the SMLG to intervene and participate during the liability phase would be duplicative and threaten efficient resolution of liability issues in this litigation.

### **CONCLUSION**

For the foregoing reasons, ONDA respectfully asks the court to deny the SMLG's motion to intervene as to the liability phase of this case, and instead allow the SMLG to intervene only as to the remedies phase if the litigation reaches such phase.

DATED this 25th day of May, 2006.

Respectfully Submitted,

s/ Peter M. Lacy

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Peter M. Lacy (OSB # 01322)  
Oregon Natural Desert Association

Of Attorneys for Plaintiffs