UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

HARNEY SOIL AND WATER CONSERVATION DISTRICT,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al*.,

Defendants, and

OREGON NATURAL DESERT ASSOCIATION, 50 SW Bond St., Suite 4, Bend, OR 97702,

Applicant in Intervention/Defendant.

Case No. 1:16-cv-02400-EGS

MOTION TO INTERVENE

The Oregon Natural Desert Association ("ONDA"), a non-profit conservation organization, moves for intervention as of right on behalf of the Federal Defendants (hereafter "Interior"), pursuant to Federal Rule of Civil Procedure 24(a). In the alternative, ONDA moves for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b).

Counsel for ONDA has contacted counsel for the plaintiff, the Harney Soil and Water Conservation District ("SWCD"), and counsel for the Federal defendants, the United States Department of the Interior. Counsel for Federal defendants stated the United States Department of the Interior will reserve taking a position until after ONDA has filed this motion. Counsel for SWCD stated the plaintiff will oppose this motion. ONDA lodges a proposed answer with this motion, which should be filed by the Clerk if the Court grants this motion. *See* LCvR 7(j).

Because ONDA meets the four requirements for intervention as of right under Rule 24(a) or, alternatively, the broad standard for permissive intervention under Rule 24(b), and has standing, ONDA respectfully requests the Court for leave to intervene as a defendant in this case.

INTRODUCTION

In September 2015, the Bureau of Land Management ("BLM") unveiled a series of sweeping plans to protect the Greater sage-grouse (*Centrocerus urophasianus*) and its sagebrush habitats on public lands across the West, including Oregon, which provides about 20% of this iconic and imperiled bird's remaining range. The new federal plans represent an important step forward for sage-grouse conservation. This is clear from the steady stream of lawsuits filed over the course of the past year by industry groups and state and county governments hostile to the conservation of the grouse and its remaining habitats.[1] In all of these lawsuits, as is the case here, the plaintiffs ask the courts to enjoin implementation of and vacate the BLM's sage-grouse plans—which would leave the bird unprotected save for scattershot, inconsistent, and generally far weaker state plans.

[1] *See W. Exploration, LLC v. U.S. Dep't of the Interior*, No. 3:15-cv-491 (D. Nev. filed Sept. 23, 2015); *Otter v. Jewell*, No. 1:15-cv-1566 (D.D.C. filed Sept. 25, 2015); *Wyo. Stock Growers Ass'n v. U.S. Dep't of Interior*, No. 2:15-cv-181 (D. Wyo. filed Oct. 14, 2015) and *Wyo. Coalition of Local Gov'ts v. U.S. Dep't of Interior*, No. 2:16-cv-41 (D. Wyo. filed Mar. 1, 2016); *Herbert v. Jewell*, No. 2:16-cv-101 (D. Utah filed Feb. 4, 2016); *Am. Exploration & Mining Ass'n v. U.S. Dep't of the Interior*, No. 16-cv-737 (D.D.C. filed Apr. 19, 2016); *W. Energy Alliance v. U.S. Dep't of Interior*, No. 16-cv-112 (D.N.D. filed May 12, 2016).

This Court dismissed *Otter v. Jewell* for lack of standing by order dated Jan. 5, 2017 (No. 15-1566, Dkt # 67). While this Court and the District Court for the District of Idaho denied government motions to sever and transfer claims in some of the cases, the District Court for the District of North Dakota severed and transferred to other courts (Nevada, Utah, and D.C. District Courts) all parts of the Western Energy Alliance's complaint that were not related to North Dakota. *See W. Energy Alliance*, No. 16-112, Order (Dkt # 48) (Dec. 19, 2016).

Until recently, Oregon was the only state whose Greater sage-grouse Approved Resource Management Plan Amendment ("ARMPA") was not subject to any direct challenge in federal court. Among other reasons, BLM's sage-grouse plan for Oregon resulted in large measure from the collaborative work undertaken by the Governor of Oregon's Sage Grouse Conservation Partnership ("SageCon"). *See* Declaration of Dr. Craig Miller, M.D. (filed herewith) ¶ 22. Expressly supporting community sustainability in central and eastern Oregon into the future, the SageCon group sought to coordinate federal, state, and local efforts to address the multiple threats to sage-grouse across the eastern Oregon sagebrush landscape. *Id*. A broad cross-section of stakeholders including state and local governments, ranchers, landowners, conservation groups and others, worked to create a plan that most felt was an important first step in the difficult task of saving the Greater sage-grouse from extinction. *Id*.

As Oregon's only conservation organization dedicated exclusively to protecting eastern Oregon's native deserts, ONDA has long been committed to addressing the plight of the Greater sage-grouse, a bird whose survival has been recognized by scientists as a harbinger for that of literally hundreds of other sagebrush "obligate" species dependent upon the West's sagebrush habitats. *See* Miller Decl. ¶¶ 9, 13–16. ONDA is concerned that if the Court were to grant SWCD's requested relief and vacate BLM's sage-grouse plan for Oregon, the Greater sage-grouse and the vast, sagebrush habitats it relies upon for survival from one year to the next would be vulnerable to extirpation given the urgency of this imperiled bird's conservation status. *See* Miller Decl. ¶¶ 23–26.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 24(a),

> [o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and

> is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2); *see also Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) ("A district court must grant a timely motion to intervene that seeks to protect an interest that might be impaired by the action and that is not adequately represented by the parties."). The D.C. Circuit reads Rule 24(a) as requiring four distinct showings before a party may intervene as a matter of right: "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008) (internal quotation marks omitted) (quoting *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998)). In addition, the D.C. Circuit has held that "intervenors must demonstrate Article III standing." *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013).[2]

Under Federal Rule of Civil Procedure 24(b), this Court may grant permissive intervention for anyone who files a timely motion and "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In exercising its discretion to permit intervention, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). "It

[2] Note that this Court has repeatedly found that "the standing inquiry is repetitive in the case of intervention as of right because an intervenor who satisfies Rule 24(a) will also have Article III standing." *Akiachak Native Cmty. v. Dep't of Interior*, 584 F. Supp. 2d 1, 7 (D.D.C. 2008) (citing *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003)); *see also Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 13 n.5 (D.D.C. 2010) ("In most instances, the standing inquiry will fold into the underlying inquiry under Rule 24(a): generally speaking, when a putative intervenor has a 'legally protected' interest under Rule 24(a), it will also meet constitutional standing requirements, and vice versa.").

remains . . . an open question in this circuit whether Article III standing is required for permissive intervention." *In re Endangered Species Act Section 4 Deadline Litig*., 704 F.3d 972, 980 (D.C. Cir. 2013).

ARGUMENT

I. ONDA IS ENTITLED TO INTERVENE AS OF RIGHT

A. ONDA's Motion is Timely

In determining timeliness, "courts should take into account (a) the time elapsed since the inception of the action, (b) the probability of prejudice to those already party to the proceedings, (c) the purpose for which intervention is sought, and (d) the need for intervention as a means for preserving the putative intervenor's rights." *Wildearth Guardians*, 272 F.R.D. at 12. Here, ONDA's motion to intervene is timely because this case is in its early stages. The case was filed on December 7, 2016 (Dkt # 1). The Court granted the Department of the Interior's unopposed motion seeking an extension of time to file its answer, which is now due on April 24, 2017. *See* Minute Order of 02/15/17. The Court has not yet set deadlines for production of the administrative record or filing dispositive motions. The Court ordered the parties to show cause by April 7, 2017, why this case should not be consolidated with *American Exploration & Mining Assoc. v. Jewell, et al.*, Civil Action No. 16-737. *See* Minute Order of 03/21/17. Granting this motion will not delay the case. *See Roane*, 741 F.3d at 151 ("the requirement of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties"). Because granting ONDA's motion to intervene will not delay the case nor prejudice any party in the case, this motion is timely.

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B. ONDA Has an Interest in the Subject Matter of this Action

The D.C. Circuit has explained that the "putative intervenor must have a 'legally protected' interest in the action." *Wildearth*, 272 F.R.D. at 12 (quoting *Karsner*, 532 F.3d at 885). "The test operates in large part as a 'practical guide,' with the aim of disposing of disputes with as many concerned parties as may be compatible with efficiency and due process." *Id*. at 12–13 (quoting *United States v. Morten*, 730 F. Supp. 2d 11, 16 (D.D.C. 2010)).

The plaintiff in this case, SWCD, challenges BLM's Record of Decision ("ROD") and ARMPA for the Great Basin Region, Including the Greater Sage-Grouse Sub-Regions of Idaho and Southwestern Montana, Nevada and Northeastern California, Oregon, and Utah, 80 Fed. Reg. 57,633 (Sept. 24, 2015), and in particular the ARMPA for Oregon. Complaint (Dkt # 1) ("Introduction"). SWCD seeks an order from the Court "holding unlawful, enjoining implementation of, and vacating" the ROD, the Oregon ARMPA, and the underlying Final Environmental Impact Statement ("FEIS") that BLM prepared pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–61. Complaint ¶ 99.

ONDA and its members have a keen interest in the challenged plan that protects Greater sage-grouse and the lands that these imperiled birds require for survival in Oregon. *See* Miller Decl. ¶¶ 13–23. Oregon sage-grouse populations and sagebrush habitats comprise nearly 20% of the range wide distribution of the species. *Id*. ¶ 18. For most of its 30 years since it was founded in 1987, and particularly over the course of the past decade, ONDA has worked to conserve and protect sage-grouse populations and the sagebrush steppe landscapes that this iconic bird needs to survive. *See id*. ¶¶ 11–14, 19. For members like Dr. Miller, the sage-grouse and the vast sagebrush ecosystem in which it lives are deeply important parts of what he treasures about the

public lands throughout eastern Oregon's high desert, including in Harney County. *See id*. ¶¶ 3–7, 11.

The sagebrush ecosystem on which sage-grouse depend is among the most vulnerable in North America, with loss and fragmentation of sagebrush threatening the bird's prospects for survival. 12-Month Findings for Petitions to List the Greater Sage-Grouse (*Centrocerus urophasianus*) as Threatened or Endangered, 75 Fed. Reg. 13,910, 13,916, 13,923, 13,957 (Mar. 23, 2010). The sage-grouse is in danger of extinction from fragmentation and loss of its sagebrush habitat and increasing isolation of populations due to human activities, including livestock grazing, energy development and transmission, and ever-expanding motorized transportation networks. 12-Month Findings on a Petition to List Greater Sage-Grouse (*Centrocerus urophasianus*) as an Endangered or Threatened Species, 80 Fed. Reg. 59,858, 59,871, 59,887 (Oct. 2, 2015).

ONDA, its staff, and its members specifically advocated "for a strong, science-based, landscape-level approach to conserving the Greater sage-grouse and the sagebrush ecosystem and for timely completion and implementation of the [Oregon ARMPA]." Miller Decl. ¶ 21. As noted above, BLM's sage-grouse plan for Oregon resulted in large measure from collaborative work undertaken by the Governor of Oregon's "Sage Grouse Conservation Partnership." *Id*. ¶ 22. That partnership included a "broad cross-section of stakeholders including state and local governments, ranchers, landowners, conservation groups, and others." *Id*. As a leader in sagebrush conservation issues in Oregon, and the only conservation group dedicated exclusively to protecting and restoring Oregon's native high deserts, ONDA participated extensively in that process. *See id*. ¶¶ 9, 22.

In ONDA's view, the federal sage-grouse plans, including the Oregon ARMPA, set up a consistent framework for conservation of sage-grouse habitat across the West. *Id*. ¶ 23. The measures set out in the ARMPA will also help protect "important roadless areas and wildlands that ONDA has worked for decades to defend—places essential not just for their human environmental values but also for preserving unfragmented sagebrush landscapes critical to the survival of the sage-grouse." *Id*. Based on ONDA's long-time advocacy and leadership on sage-grouse issues in Oregon, its interest in the kind of science-based, landscape-level conservation in the Oregon ARMPA, and its keen interest in protecting the Greater sage-grouse and its habitat in Oregon, ONDA meets the "interest" test for intervention in this case.

C. ONDA's Interests May Be Impaired by This Litigation

In determining whether an applicant's interests will be impaired, courts in this circuit look to the "practical consequences" that the applicant may suffer if intervention is denied. *See Natural Res. Def. Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977); *Am. Horse Prot. Ass'n, Inc. v. Veneman*, 200 F.R.D. 153, 158 (D.D.C. 2001).

SWCD here challenges BLM's sage-grouse ARMPA for Oregon, which ONDA sought to get enacted. Setting aside the plan would harm ONDA's interests by frustrating years of effort working to get this plan in place to begin the long and demanding task of recovering the sage-grouse and its sagebrush habitat in Oregon and beyond. Ensuring the survival and recovery of the Greater sage-grouse has been at the core of ONDA's mission and on-the-ground work for years. *See* Miller Decl. ¶¶ 14, 18–23. As. Dr. Miller explains, "[i]nvalidating or otherwise interfering with implementation of the plan would increase the risk to the Greater sage-grouse that led the U.S. Fish & Wildlife Service to determine that the species warranted protection under the Endangered Species Act absent changes to land use planning and management." *Id*. ¶ 24

(referencing 75 Fed. Reg. 13,910). "Halting implementation of the plan would also prevent conservation of habitat for hundreds of other species that rely upon these same lands." *Id*. "As a result," Dr. Miller continues, "my use and enjoyment of these public lands, and that of my fellow ONDA members, would be at risk." *Id*.

Because disposition of this action may, as a practical matter, impair ONDA's ability to protect its interests, ONDA satisfies the Rule 24(a) impairment-of-interest requirement.

D. Existing Parties Will Not Adequately Represent ONDA's Interests

The Supreme Court has explained that the adequate representation "requirement of [Rule 24(a)] is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *see also Fund for Animals v. Norton*, 322 F.3d 728, 735–36 (D.C. Cir. 2003). Similarly, the D.C. Circuit has described this requirement as "not onerous." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986); *see also United States v. AT&T*, 642 F.2d 1285, 1293 (D.C. Cir. 1980) (stating that an applicant "'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee'" (quoting 7A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1909 (1st ed. 1972))).

Although the intervenor and the government entity involved in the litigation frequently may agree on a legal position or course of action, the D.C. Circuit nonetheless "often [has] concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals*, 322 F.3d at 736. This is primarily because the government entity's overarching "obligation is to represent the interests of the American people," while the intervenor's obligation is to represent its own interests. *Id*.

Here, ONDA's interests overlap with the Department of the Interior's interests to an extent. However, the government could take positions not fully protective of the sage-grouse due to its duty to protect all interests and to follow a variety of environmental and natural resource laws that govern not only imperiled species but also multiple-use management of the public lands. *See, e,g,*, Miller Decl. ¶ 22 (explaining "collaborative" effort that went into crafting the Oregon ARMPA, and that "[a] broad cross-section of stakeholders including state and local governments, ranchers, landowners, conservation groups, and others, participated in this process and largely felt that the plan was a vital first step in the difficult task of saving the Greater sage-grouse from extinction."). To aid the Court and to promote judicial economy, ONDA would propose that it file its summary judgment briefs one week after Interior's in order to highlight any differences between ONDA's and the government's positions and to avoid duplicative briefing. *See Wildearth Guardians*, 272 F.R.D. at 20 ("In the end, the primary limitation on the district court's discretion is that any conditions imposed should be designed to ensure the fair, efficacious, and prompt resolution of the litigation.").

II. ONDA IS ENTITLED TO PERMISSIVE INTERVENTION

Alternatively, the Court may authorize permissive intervention under Rule 24(b) because ONDA has filed a timely motion and "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). ONDA seeks to defend BLM's sage-grouse ARMPA for Oregon on the basis of Interior's determination, through its U.S. Fish and Wildlife Service, that the implementation of the plan, coupled with the other BLM sage-grouse plans for rest of the species's vast range in the West, is essential to avoiding the necessity of placing the Greater sage-grouse on the endangered species list due to continued fragmentation and loss of sagebrush habitat. ONDA also will assert that interference with, or vacatur of, the

Oregon ARMPA will undermine the discretion and authority of the BLM to conserve the public lands by limiting other uses and requiring proactive conservation and mitigation. *See* Miller Decl. ¶¶ 24–25.

ONDA seeks to defend the legality of the Oregon ARMPA and does not seek to file counter or cross claims. *See* ONDA [Proposed] Answer (filed herewith). Interior has not yet filed its answer and the Court has not yet set any deadlines for filing of the administrative record or dispositive motions. Through its briefing and participation in this case, ONDA would seek to assist this Court by highlighting ONDA's unique interests in sage-grouse conservation in Oregon and in seeing BLM's plan upheld, and would avoid duplicative or unnecessary briefing. Thus, ONDA's participation in the litigation would not unduly delay or prejudice the rights of existing parties. *See* Fed. R. Civ. P. 24(b)(3) (in exercising discretion, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights"). For these reasons, ONDA satisfies the permissive intervention standard.

III. ONDA HAS STANDING

In addition to satisfying the four elements of Rule 24(a), the D.C. Circuit also requires a party seeking to intervene as of right to demonstrate Article III standing. *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013) (citing *Section 4 Deadline Litig.*, 704 F.3d at 976); *see also Jones v. Prince George's Cnty., Md.*, 348 F.3d 1014, 1018–19 (D.C. Cir. 2003) (Article III standing satisfies second element of Rule 24(a)(2)). To demonstrate that its members would have standing to sue in their own right, ONDA "must demonstrate that it has at least one member who . . . can establish the elements of standing." *Friends of the Earth, Bluewater Network Div. v. U.S. Dept. of Interior*, 478 F. Supp. 2d 11, 17 (D.D.C. 2007). "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are

persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 183 (2000) (citations omitted).

Dr. Miller explains that he has a deep connection with eastern Oregon's federal-managed public lands, including places like Steens Mountain in Harney County. *See* Miller Decl. ¶¶ 3–8. For example, he has visited Steens Mountain several times a year since the early 1980s "for its outstanding birds and other wildlife, aesthetic views, scientific aspects, and wilderness qualities" and "will continue to visit the Steens Mountain several times a year each year for the foreseeable future." *Id*. ¶ 4. Dr. Miller is particularly fond of the Greater sage-grouse and has undertaken many trips to count male grouse attending breeding sites in the pre-dawn hours of the early spring when the birds gather at these places called leks to engage in their renowned courtship dance. *Id*. ¶¶ 5–7; *see also* https://youtu.be/cLnbiTkj1TQ (last visited Apr. 13, 2017) (video of the Greater sage-grouse strut display).

Dr. Miller notes that Oregon provides 20% of the sage-grouse's remaining habitat range wide, and explains that the challenged ARMPA protects sage-grouse and their sagebrush habitat in Oregon. Miller Decl. ¶¶ 18, 21–23. He explains that if, as SWCD requests, the plan is enjoined or vacated, conservation of the Greater sage-grouse and its habitat in Oregon would be threatened, causing him injury and also causing injury to ONDA and its mission. *Id*. ¶¶ 24–26. And he explains his and ONDA's strong interest in ensuring that the Oregon ARMPA remain in place so that its science-based, comprehensive, landscape-scale conservation measures are given an opportunity to jump start the nascent steps to recovery of this bird and its sagebrush habitat that are so important to Dr. Miller and to ONDA and its thousands of other members. *See id*. ¶¶ 21–26.

Dr. Miller's injuries are thus fairly traceable to SWCD's claims because enjoining or setting aside the Oregon ARMPA would make these harms more likely. ONDA's harms could be redressed through intervention by allowing ONDA the opportunity to seek to convince the Court that the challenged plan should not be enjoined or set aside. For these reasons, ONDA has standing to support its requested intervention.

CONCLUSION

For these reasons, ONDA respectfully moves the Court to grant ONDA's request for intervention as of right or, in the alternative, permissive intervention.

DATED this 17th day of April, 2017.

Respectfully submitted,

s/ Peter M. Lacy

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