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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

PACIFIC RIVERS COUNCIL,

Plaintiff,

vs.

UNITED STATES FOREST SERVICE; MARK REY, in his official capacity as Under Secretary of Agriculture; DALE BOSWORTH, in his capacity as Chief of the United States Forest Service; BERNARD WEINGARDT, in his official capacity as Regional Forester, Region 5, United States Forest Service,

Defendants.

QUINCY LIBRARY GROUP, an unincorporated citizens group, and PLUMAS COUNTY,

Proposed Intervenors

Case No. CIV. S-05-0953 MCE/GGH

QUINCY LIBRARY GROUP'S NOTICE OF MOTION and MOTION TO INTERVENE, and POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE

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NOTICE OF MOTION AND MOTION TO INTERVENE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Notice is hereby given that on September 12, 2005, at 9:00 a.m. or as soon thereafter as counsel may be heard by the above-entitled Court, the Quincy Library Group and the County of Plumas, hereinafter QLG, will and hereby do move the Court for leave to intervene as defendants in the above-entitled action.

By this motion, the QLG seeks an order granting them leave to intervene as defendants in the above-entitled action pursuant to Rule 24 of the Federal Rules of Civil Procedure. This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in Support of Motion to Intervene, the Declaration of John Sheehan, and exhibits to that declaration, the proposed Answer in Intervention and all pleadings and papers on file in this action, and upon such matters as may be presented to the Court at the time of the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24, the Quincy Library Group and the County of Plumas (QLG) submit this Memorandum of Points and Authorities in support of its Motion to Intervene as Defendant. Pursuant to Local Civil Rule, QLG has conferred with the Plaintiff – the Pacific Rivers Council – and the United States regarding this motion. Counsel for the United States has stated that Defendants will take no position on QLG's motion at this time. Plaintiff's counsel has indicated that Plaintiff will oppose this motion.

I. SUMMARY OF ARGUMENT

This case concerns the management plans that the United States Forest Service ("Forest Service") has established for the eleven national forests in the Sierra Nevada range (the "Sierra

Nevada forests"). In January 2001 the Forest Service adopted the Sierra Nevada Forest Plan Amendment (the "2001 Framework"), which amended the management plans for the Sierra Nevada forests. Among other substantial scientific defects, the 2001 Framework placed restrictions on mechanical vegetation management (logging, thinning, service contracts etc.) and watershed management on QLG forests to the detriment of wildlife, vegetation, fire protection, wood product production, and wildlife habitat. It also placed substantial restrictions on a Congressional pilot program authorized by Congress to test certain vegetation and watershed management techniques on specifically designated land in the Plumas, Lassen, and Tahoe National Forests in the Sierra Nevada. In January 2004 the Forest Service decided to replace the 2001 Framework with a new management plan (the "2004 Framework") (collectively, with the 2001 Framework, the "Sierra Frameworks") that substantially improves the protections of the 2001 Framework and allows the HFQLG pilot program to go forward.

In its complaint, Plaintiff Pacific Rivers Council challenges the 2004 Framework, contending that it weakens forest and watershed protection, increases logging, and harms forest and aquatic habitat. The Plaintiff's position is based on incorrect and false information contained in the 2001 Framework. Further, their position ignores the key watershed provisions of the 2004 Framework and eliminates the opportunities to improve watershed conditions through the HFQLG pilot program. Plaintiff's requested relief would delay management of the Sierra Nevada forests necessary to protect them from catastrophic wildfire and species changes. Even in light of the numerous inadequacies of the 2001 Framework, Plaintiff requests reversal of the 2004 Sierra Framework in favor of a return to the pointless and environmentally damaging Framework of 2001.

QLG has a substantial interest in the outcome of this case and meets the tests for intervention as of right, which permit intervention where (1) the application is timely, (2) the

applicant has a legally protected interest in the action, (3) the action threatens to impair that interest, and (4) none of the existing parties adequately represents the would-be intervenor's interests. QLG's motion for intervention is timely because this motion has been submitted before briefing has taken place, and soon after the motion to consolidate the various Framework actions was denied by this Court. QLG and its members have a legally cognizable interest in the responsible management of the eleven Sierra Nevada forests, as evidenced by QLG's extensive past and present involvement in the Forest Service's research and planning procedures in the Sierra Nevada national forests and QLG members' involvement in the development of the 2001 and 2004 Frameworks. QLG also has a legally cognizable interest in the continuation of the Congressional pilot program because of QLG's long involvement in the development and passage of the Herger-Feinstein Quincy Library Group Forest Recovery Act of 1998 (hereinafter the "QLG Act") and that Act's legally mandated pilot program. The remedy requested by the Plaintiff in this action would severely damage the pilot program and would prevent the community from continuing its 20-year program of watershed improvement in coordination with the federal, state, and local partners in the Feather River Coordinated Management Program (Feather River CRMP). *See* Declaration of John Sheehan at paragraphs 7 and 8. QLG's interests are threatened in the instant case because Plaintiff seeks to eviscerate the QLG Act by returning to the 2001 Framework that contains restrictions on appropriate land management mistakenly promulgated in the 2001 Framework. Plaintiff's position would effectively undo years of public education and advocacy by QLG to establish the QLG Act and its pilot program. Finally, neither Plaintiff nor the federal Defendants will adequately represent QLG's interests in this litigation. Plaintiff seeks to enjoin enforcement of the 2004 Framework that QLG worked hard to strengthen, putting their desired relief in direct conflict with QLG's interests. On the other hand, as evidenced by the Forest Service's denial of QLG's

administrative appeal of the Record of Decision and Environmental Impact Statement for the 2004 Framework, the federal Defendants' interests in this suit also directly diverge from QLG's interests. In fact, the Forest Service cannot be expected to present the evidence of the 20-year attempt to recover the streams and groundwater and restore the aquatic habitat that QLG, Plumas County, and the Feather River CRMP has accomplished and continues to plan and implement. *See* Sheehan Declaration at paragraphs 17 and 18. The HFQLG Act and funding is an important part of that effort and granting the relief requested by Plaintiff would substantially damage the ongoing aquatic recovery in the Northern Sierra Nevada. *See* Sheehan Declaration at paragraph 22. In the alternative, if the Court determines that QLG is not entitled to intervene as of right, QLG requests that this Court exercise its discretion to permit QLG to intervene under Rule 24(a)(b).

BACKGROUND

A. Statutory Context: The Herger-Feinstein Quincy Library Group Forest Recovery Act of 1998

In 1997, the United States Congress enacted the Herger-Feinstein Quincy Library Group Forest Recovery Act (HFQLG Act) to test certain watershed and vegetative management activities, including group selection and Defensible Fuel Profile Zones, as a means to balance ecological and economic activities in the Northern Sierra Nevada. The HFQLG Act included a pilot program that was defined in Section 2(a) as:

> "For purposes of this section, the term "Quincy Library Group - Community Stability Proposal" means the agreement by a coalition of representatives of fisheries, timber, environmental, county government, citizen groups, and local communities that formed in northern California to develop a resource management program that promotes ecologic and economic health for certain Federal lands and communities in the Sierra Nevada area."

The pilot project had a specific purpose laid out in section (B)(1):

> " The Secretary of Agriculture …shall conduct a pilot project on the Federal

lands described in paragraph (2) to implement and demonstrate the effectiveness of the resource management activities described in subsection (d) and the other requirements of this section, as recommended in the Quincy Library Group-Community Stability Proposal."

The pilot project protected vast areas of land from logging and road-building, but did include areas available for logging and other forms of vegetation management:

"(B)(2) PILOT PROJECT AREA. The Secretary shall conduct the pilot project on the Federal lands within Plumas National Forest, Lassen National Forest, and the Sierraville Ranger District of Tahoe National Forest in the State of California designated as "Available for Group Selection" on the map entitled "QUINCY LIBRARY GROUP Community Stability Proposal", dated October 12, 1993 (in this section referred to as the "pilot project area")

The vegetation management allowed by the Act on the land "available for group selection" was restricted in what management activities were allowed:

"During the term of the pilot project, the Secretary shall implement and carry out the following resource management activities on an acreage basis on the Federal lands included within the pilot project area designated under subsection (b)(2):
(1) FUELBREAK CONSTRUCTION.
Construction of a strategic system of defensible fuel profile zones, including shaded fuelbreaks, utilizing thinning, individual tree selection, and other methods of vegetation management consistent with the Quincy Library Group-Community Stability Proposal, on not less than 40,000, but not more than 60,000, acres per year.
(2) GROUP SELECTION AND INDIVIDUAL TREE SELECTION
Utilization of group selection and individual tree selection uneven-aged forest management prescriptions described in the Quincy Library Group-Community Stability Proposal to achieve a desired future condition of all-age, multistory, fire resilient forests."

In January of 2001, the Regional Forester for California signed a Record of Decision (ROD) for the Sierra Nevada Framework (hereinafter the 2001 Framework) that severely limited the QLG Act pilot program. The 2001 Framework ROD, among other errors, eliminated group selection in the pilot project area except as part of a Framework created "administrative study" and eliminated timber management as an authorized multiple use on forests in the Sierra Nevada.

The Quincy Library Group appealed the 2001 Framework and exhausted all available administrative remedies under the Forest Service's appeal regulations, and filed a lawsuit in this court, in an attempt to remedy the unlawful results of the 2001 Framework Record of Decision. In the face of this appeal, the Chief of the Forest Service directed the new Regional Forester to review the 2001 Framework decision as it related to the QLG Act, and in 2004, after the QLG lawsuit had been filed, the Regional Forester completely replaced the 2001 Framework Record of Decision with the 2004 Framework Record of Decision. QLG dismissed its lawsuit as a result of that decision and the QLG Act pilot program was allowed by the Forest Service to go forward as originally enacted by the Congress of the United States. The remedy requested in plaintiff's action would again result in the frustration of the purpose of the QLG Act's pilot program.

B. Statutory Context: The National Forest Management Act

The National Forest Management Act of 1976 ("NFMA") requires the Secretary of Agriculture to assess forestlands, develop a management program based on multiple-use, sustained-yield principles, and implement a resource management plan for each unit of the National Forest System. 16 U.S.C. §§ 1604 *et seq.* A resource management plan allocates land among Management Areas ("MAs"), each of which will be managed for a particular mix of designated multiple uses as set forth in the Multiple-Use Sustained-Yield Act of 1960 ("MUSYA"). 16 U.S.C. §§ 528 *et seq.*

Unlike other types of federal conservation statutes, the law regulating the use of national forests embraces concepts of "multiple use" and "sustained yield of products and services." 16 U.S.C. § 1607. The Forest Service is obligated to balance competing demands on national forests, including timber harvesting, recreational use, and environmental preservation. 16 U.S.C. §§ 528-31. "The national forests, unlike national parks, are not wholly dedicated to

recreational and environmental values." *Cronin v. United States Dept. of Ag.*, 919 F.2d 439, 444 (7th Cir. 1990). Such plans must include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness as set forth in MUSYA. All site-specific projects must be "consistent" with the governing forest plan. 16 U.S.C. § 1604(i). The NFMA also directs the Forest Service to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet multiple use objectives" in the planning process. 16 U.S.C. § 1604(g)(3)(B).

> "In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans - (1) provide for multiple use and sustained yield of the products and services obtained there-from in accordance with the Multiple-Use Sustained-Yield Act of 1960 (16 U.S.C. 528-531), and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness;" 16U.S.C. 1604 (e)

The QLG believes that setting aside the 2004 Framework Records of Decision and starting over would negate the watershed and fire prevention portions of the HFQLG and would result in much less aquatic protection and watershed restoration than would be the case if the 2004 Framework decision were left in place. *See* Sheehan Declaration, paragraph 22.

C. The Sierra National Forest Frameworks

The 2001 Framework is a management plan that affects 11.5 million acres in eleven national forests in the 430-mile-long Sierra Nevada mountain range, spanning from the northeast border with Oregon to the Sequoia National Forest in the south. It amended each of the Land and Resource Management Plans for the Humboldt-Toiyabe, Modoc, Lassen, Plumas, Tahoe, Eldorado, Stanislaus, Sierra, Sequoia and Inyo National Forests.

The need for formulating the Framework arguably originated with a 1992 Forest Service technical team report, which examined the agency's concerns that existing forest management plans were inadequate to protect the viability of the California spotted owl and

recommended adoption of an interim strategy for managing the owl. The Forest Service prepared an environmental assessment, circulated the document for public comment, and in 1993 issued a decision notice that amended the forest plans to incorporate a new management policy for the California Spotted Owl. *See* Sheehan Declaration, paragraph 8. That management policy, and a Congressionally mandated scientific review, the Sierra Nevada Ecosystem Project report, became the basis for the QLG Act that legislated a pilot vegetation and watershed management program for the HFQLG area. During the formal process of developing a long-term management plan for the owl, a process that consumed Sierra Nevada forest policy throughout the 1990's, the Forest Service engaged in several rounds of environmental impact statement ("EIS") preparations that examined not only the viability of the spotted owl but a variety of other issues, including aquatic management.

In May 2000 the Forest Service released for public comment a draft EIS for the 2001 Framework, which analyzed eight alternatives for addressing five problem areas: (1) old forest ecosystems and species, (2) aquatic, riparian, and meadow ecosystems and species, (3) fire and fuels management, (4) noxious weeds, and (5) lower Westside hardwood forest ecosystems. The QLG provided extensive comments to the Regional Forester and the Clinton administration regarding the flaws in the developed alternatives, but shortly before the Clinton administration left office in January of 2001, the Forest Service released its ROD and final EIS adopting a modification of Alternative 8 in the Draft EIS as the final plan.

In 2001 the Chief of the United States Forest Service authorized the Regional Forester to undertake a review of the 2001 Sierra Framework with respect to the QLG Act, fuels treatments, and consistency with the National Fire Plan. The review ultimately resulted in the 2004 Sierra Nevada Plan Amendment Record of Decision ("2004 Framework ROD") on November 18, 2004. While the 2004 revisions fail to recognize or reverse all of the owl habitat

errors that prevent the use of mechanical vegetative treatment at the pace and scale necessary to protect the forest and forest communities, or to provide a long-term timber program as required by the Multiple Use - Sustained Yield Act, the 2004 revisions *did* improve some of the 2001 Framework's key errors. Specifically, the 2004 revisions directly addressed and removed the unjustified restrictions on the QLG Act pilot program and corrected some errors in the scientific evidence relied on in the 2001 Framework record of decision. However, Plaintiff in the instant case wishes to "remove" everything improved in the 2004 Framework and ask the Court to return to the completely defective assumptions, standards, and guidelines that underlie the 2001 Framework Record of Decision. The requested remedy would prevent many of the elements of the HFQLG program from being accomplished and would greatly inhibit the use of HFQLG funds for the continuing watershed restoration activities within the QLG area. *See* Sheehan Declaration, paragraph 22.

ARGUMENT

I. QLG is Entitled to Intervene as a Matter of Right.

Rule 24(a) of the Federal Rules of Civil Procedure governs intervention as of right. That rule states, in relevant part:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Fed. Rule Civ. Pro. 24(a)(2).

Consistent with Rule 24(a) of the Federal Rules of Civil Procedure, the 9th Circuit has established a four-part test to evaluate motions to intervene as of right: "(1) the application to intervene must be timely; (2) 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 applicant's interests." *United States v. State of Washington*, 86 F. 3d 1499, 1503 (9th Cir. 1996); *Forest Conservation Council v. United States Forest Service*, 66 F. 3d 1489, 1493 (9th Cir. 1995). In considering motions under Rule 24 (a)(2), the Ninth Circuit is guided "primarily by practical and equitable considerations" and interprets the rule broadly. *Donnelly v. Glickman*, 159 F. 3d 405, 408 (9th Cir, 1998); *United States v. Washington*, 86 F. 3d at 1503 ("Rule 24 (a) is broadly construed in favor of intervention"). Courts weigh the showing made in support of a motion to intervene under a standard favoring intervention. "Courts are to take *all* well-pleaded, non-conclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true, absent sham, frivolity, or other objections." *Southwest Center for Biological Diversity v. Berg*, 268 F. 3d 810, 820 (9th Cir. 2001) (emphasis added).

A. QLG's Motion to Intervene is Timely

In determining whether this intervention motion is timely, the courts weigh the following three factors: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Cal. Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.,* 309 F.3d 1113, 1119 (9th Cir.2002). The analysis of timeliness turns not on the length of time since the lawsuit was filed, but on whether a party seeking to intervene acted "as soon as he knows or has reason to know that his interests might be adversely affected by the outcome of the litigation." *United States v. State of Oregon,* 913 F.2d 576, 588-89 (9th Cir.1990). In *United States v. Carpenter,* 298 F.3d 1122 (9th Cir. 2002), the court held that the trial court abused its discretion when it failed to accept a motion to intervene as of right, despite the fact that the suit had been pending for more than eighteen months. The court reasoned that the intervention was timely because the interveners acted *as soon as they had notice* that the negotiated settlement may not have

adequately represented their interests. *Id* (emphasis added.) Plaintiff in this case filed his complaint on May 13, 2005. Currently, the Court has issued no orders and the existing parties have made no motions. Courts generally hold motions to intervene to be timely under such circumstances. *See, e.g., Admiral Insurance Co. v. National Casualty Co*., 137 F.R.D. 176, 177 (D.D.C. 1991) (motion to intervene was timely where [t]he major substantive issues . . . have not yet been argued or resolved, and the movants filed the motion promptly.).

QLG is willing to abide by the briefing and other schedules that this Court has established. Accordingly, its intervention should not delay or otherwise prejudice the existing parties. QLG meets the standard for timeliness because it is filing this intervention as soon as it had reason to know its interests might be adversely affected, shortly after United States motion to consolidate the four Framework cases was denied, and before briefing on the merits has begun.

B. QLG Has a Legally Protected Interest in the Subject Matter of This Action

Rule 24(a)(2) requires that "intervention of right requires a timely showing that the applicant possesses an interest relating to the property or transaction which is the subject of the suit and is so situated that the disposition of the suit may as a practical matter impair the ability to protect that interest." *State of Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980). *See* also Fed.R.Civ.P. 24(a)(2); *Blake v. Pallan*, 554 F.2d 947, 951 (9th Cir. 1977). Under Rule 24(a), the court does not require "that a prospective intervenor show that the interest he asserts is one that is protected by the statute under which the litigation is brought. It is generally enough that the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Sierra Club v. United States EPA***,** 995 F.2d 1478, 1484, (9th Cir. 1993). However, in this case the QLG *does* have a protectable, legal interest *under the statute* [NFMA] in which the litigation is brought.

The Plaintiff in this case allege that they have filed their lawsuit based upon their involvement in the 2001 and 2004 Frameworks, the filing of an administrative appeal on the 2004 Framework, and the exhaustion of administrative remedies under Federal law. The QLG has gone though the exact same process and has arguably more right of interest in the 2004 Framework decision than the plaintiff. QLG members include resource professionals who were involved in the development of the 2001 Framework, in accordance with the National Forest Management Act (NFMA). These QLG members participated in the administrative proceedings and appeal process related to the 2001 and 2004 Frameworks. QLG participated in an administrative appeal of the 2004 Framework alongside Plaintiff and other organizations. A core purpose of the QLG involves informing the administration, Congress, state officials, media, and the public about substantive environmental issues under the Forest Service Organic Act, the Multiple Use Sustained Yield Act, and NFMA, and those interests will be directly damaged by Plaintiff if they prevail in this suit.

There is a clear relationship between the QLG's legally protected interest and the claims at issue in this case. The QLG is a Sierra Nevada public interest group composed of local governments, environmentalists, loggers, and timber companies that has spent over ten years trying to find common ground in Sierra Nevada forestry issues, and twenty years in watershed management activities, culminating in the passage of the HFQLG Act by a nearly unanimous United States Congress. If the Plaintiff prevails in this action, the Act will be impossible to carry out, since the 2001 Framework does not allow substantial parts of the pilot program to go forward. In *State of Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980), the court held that the National Organization for Women had a cognizable interest in a suit challenging the procedures for ratification of the Equal Rights Amendment (ERA) due to the close relationship between the inherent interests and goals of NOW and the policies and procedures of the ERA. NOW's

legally recognizable interest in a lawsuit that would affect the ERA is directly analogous to the QLG's legally recognizable interest in this lawsuit that would directly affect the HFQLG Act.

This court has specifically recognized public interest groups, like the QLG, as parties with legally protectable rights under Rule 24(a). In *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-28 (9th Cir. 1983) the court held "that a public interest group was entitled as a matter of right to intervene in an action challenging the legality of a measure which it had supported." *See* also *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995). This court has also specifically recognized parties with environmental interests, like the QLG, as having legally protectable interests for the purposes of a Rule 24(a) intervention analysis. The QLG believes, and can provide evidence that shows, that if plaintiff prevails in this action the local environment, including aquatic ecosystems, will suffer substantial environmental harm. The fact that the plaintiff erroneously believes otherwise does not defeat QLG's environmental interest in this action. In *Kootenai Tribe of Idaho v. Veneman***,** 313 F.3d 1094, 1108 (9th Cir. 2002), the court held that intervenors demonstrated a legally protectable interest where "environmental, conservation and wildlife interests asserted by intervenors 'are necessarily related to the interests intended to be protected by the statute at issue.' " Here, the QLG, a public interest group, seeks to protect the environmental interest in the local forests as intended under NFMA and the HFQLG Act.

C. QLG's Interests May be Impaired if QLG is Not Permitted to Intervene

Rule 24(a)'s "impairment" requirement concerns whether, as a practical matter, a denial of intervention would result in the *practical* impairment of a prospective intervener's interests. *Yniguez v. State of Ariz.*, 939 F.2d 727, 735 (9th Cir. 1991). This burden is minimal. A would-be intervener must show only that impairment of its legal interest is possible if intervention is denied. *Purnell v. City of Akron*, 925 F.2d 941,948 (6th Cir. 1991). As the Advisory

Committee Notes for the 1966 amendments to Rule 24(a) explain, "[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." Fed. R. Civ. P. 24 Advisory Committee's Note to 1966 Amendments. As a general principle, a party is "not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Martin v. Wilks,* 490 U.S. 755, 109 S.Ct. 2180, 2184, 104 L.Ed.2d 835 (1989) (quoting *Hansberry v. Lee,* 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940)). However, this general principle is not dispositive under Rule 24(a) because the impairment analysis focuses the issue on whether the court's decision will result in *practical* impairment of the interests of potential interveners, not whether the decision itself binds them. *Yniguez v. State of Ariz.*, 939 F.2d at 735. Thus, the court is not limited to consequences of a strictly legal nature, but may consider *any* significant legal effect in the applicant's interest and it is not restricted to a rigid *res judicata* test. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission,* 578 F.2d 1341, 1345, (9th Cir. 1978). Consistent with this direction, the D. C. Circuit has observed that the rule's emphasis on "practical disadvantage" was "designed to liberalize the right to intervene in federal actions." *Nuesse v. Camp*, 128 U.S.App.D.C. 172, 180, 385 F.2d 694, 702 (1967).

Plaintiffs' unequivocal purpose in this litigation is to return management of the local national forests to only that allowed under the 2001 Framework. That result restricts opportunities for watershed and vegetation management in the national forests at the expense of fire protection for wildlife and communities, and denies opportunities for both watershed and forest restoration and protection. The requested relief would restrict the HFQLG Act and the Congressional pilot program so that it could not carry out the purposes of the Act-to test a program of watershed management and vegetation management that includes group selection

and DFPZ's on a Congressionally identified portion of the land of the Plumas, Lassen, and Tahoe National Forests. Thus, disposition of this case in favor of Plaintiffs could severely impact QLG's (and its members') abilities to pursue their professional, conservation, educational, scientific, aesthetic, economic, and other interests in the Sierra Nevada forests and would completely frustrate the HFQLG Act pilot program. The only way Proposed Interveners can protect against that harm to their interests is to participate in this action and oppose Plaintiffs' claims. The Proposed Intervenors meet the practical impairment requirement for intervention.

D. QLG's Interests May Not Be Adequately Represented by the Existing Parties

QLG also satisfies the fourth and final element of analysis for intervention as of right because the existing parties may not adequately represent QLG's interests. In determining whether an applicant's interest is adequately represented by the parties, the court considers "(1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect." *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 838, (9th Cir. 1996). The inadequate representation element "is satisfied if [the prospective intervenor] shows that representation of its interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see also Dimond v. District of Columbia,* 792 F.2d at 192 (D.C. Cir. 1986) (burden of showing inadequate representation is "not onerous"). Under this lenient approach, representation may be inadequate where the interests of the party seeking intervention and those of the existing parties are "different" even if they are not "wholly 'adverse,'" *Nuesse*, 385 F.2d at 703, or where they are "similar but not identical." *United*

States v. American Telegraph & Telephone Co., 642 F.2d at 1293 (D.C. Circuit, 1980). Indeed, even where parties share broad strategic objectives, they may have differing interests and goals with respect to particular issues at stake in a given case, and those differences may support intervention. *Id.*

The 9th Circuit has frequently recognized that governmental representation of private, non-governmental intervenors may be inadequate. For example, in *Dimond*, 792 F.2d at 192, the court held that because the government was responsible for representing a broad range of public interests rather than the more narrow interests of the intervenors, the "application for intervention … falls squarely within the relatively large class of cases in this circuit recognizing the inadequacy of governmental representation of the interests of private parties in certain circumstances." *See also Natural Resources Defense Council v. Costle*, 561 F.2d at 911-12 (D.C. Cir. 1977) (the federal agency does not adequately represent industry groups because intervenors' interests are narrower); *Huron Envtl. Activist League v. United States EPA*, 917 F.Supp. 34, 42 (D.D.C. 1996) (intervenors' position did not "mirror" that of agency); *People for the Ethical Treatment of Animals v. Babbitt*, 151 F.R.D. 6, 8 (D.D.C. 1993) (Department of Interior, which must "design and enforce an entire regulatory system in the public interest," could not adequately represent the proposed intervener's concern over a single permit); *Natural Resources Defense Council v. EPA*, 99 F.R.D. at 610 (D.D.C. 1983) (agency's representation inadequate because intervenors' interests were more narrowly focused and, consequently, their interests "may" diverge).

The most important factor in determining the adequacy of representation "is how the interest compares with the interests of existing parties." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086, (9th Cir. 2003). QLG's interests in protection of the Sierra Framework diverge significantly from the interests of the two existing parties. The Plaintiff will not represent

QLG's interests in allowing the vegetative and watershed restoration elements of the HFQLG Act to go forward. The HFQLG pilot program would very likely expire before the next iteration of Framework planning would be over. In fact, the plaintiff's requested remedy, would eliminate the United States Forest Service's ability to implement the Congressional pilot program enacted in the HFQLG statute

It is also likely that the federal defendants will not adequately represent QLG's interests. QLG has appealed the Forest Service's adoption of the 2004 Framework and has a fundamental disagreement with the Forest Service on the long-term level of timber harvesting that is compatible with the statutory requirement that diversity of plant and animal communities be maintained. The federal defendants' decision not to include a timber management program in the 2004 Framework indicates to us that the Forest Service does not share QLG's interest in using logging and other forms of vegetation management to insure the long-term pace and scale of activity necessary to implement the National Fire Plan and provide for local community stability. The Forest Service will not make the same watershed restoration arguments that the QLG wishes to make. The people of the QLG area have worked for 20 years on a coordinated watershed program on private and public land. The arguments made by plaintiff are factually incorrect and the QLG has extensive data proving that fact.

Finally, should Plaintiff prevail in remanding the 2004 Framework to the agency, QLG and the Forest Service would likely differ on the timeliness of any remand by this honorable court. QLG would seek to ensure that the Forest Service is under a court-ordered deadline to promptly reformulate a Forest Management Plan so that the HFQLG Act did not expire while the Forest Service studied the issues for the 5th time (CASPO, 1995 DEIS, 2001 Framework, 2004 Framework). In addition, QLG would seek to keep the existing Forest Plans in place during any remand period. *See, e.g., Middle Rio Grande Conservancy District v. Babbitt*, 206

F.Supp.2d 1156 (D.N.M. 2000) (rule remained in place for 120 days while Forest Service revised rule deficiencies). Given the protracted process the Forest Service has used to issue management plans for the Sierra Nevada forests, it is unlikely that the Forest Service would request that a court-ordered deadline be imposed on itself to re-issue a revised Forest plan quickly. QLG, if permitted to intervene, would request such relief in the event that the 2004 Framework is remanded.

In sum, the instant suit is an attempt to undo the hard-won Congressional program of the HFQLG Act in the Sierra Nevada forests—a program that the QLG has diligently worked towards for the past ten years. This suit directly implicates and contravenes QLG's interest in finding common ground on Sierra Nevada forest management. Therefore, because QLG's interest will not be represented by either of the existing parties, intervention as of right pursuant to Fed. R. Civ. P. 24(a) is appropriate and should be granted.

II. In the Alternative, QLG Should Be Permitted to Intervene Pursuant to F.R.C.P. 24(b).

If the Court determines that QLG is not entitled to intervene as a matter of right, the Court should nonetheless exercise its discretion to allow QLG to intervene under Fed. R. Civ. P. Rule 24(b). That rule provides in relevant part:

> Upon timely application anyone may be permitted to intervene in an action when an applicant's claim or defense and the main action have a question of law or fact in common…. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Fed. R. Civ. P. 24(b).

Courts in this Circuit have recognized that permissive intervention may be granted in the court's discretion if: "(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Beckman Indus., Inc. v. International Ins. Co.,* 966 F.2d 470, 473 (9th Cir.), *cert. denied,* 506 U.S. 868, 113 S.Ct. 197, 121 L.Ed.2d 140

(1992). This is a substantially lower burden than the test for intervention of right under Rule 24(a) but, like intervention of right, permissive intervention is to be granted liberally. *See* Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1904 (1986).

QLG meets all the prerequisites for permissive intervention. First, QLG's motion is timely. *See* Part 1-A *supra*. Second, because QLG will present procedural and substantive arguments in defense of the Forest Service's 2004 Sierra Framework, its defenses will share substantial questions of law and fact with the main action. Third, as discussed above, intervention will not delay or prejudice the existing parties. Thus, even if this Court denies QLG's intervention as a matter of right, it should grant its request for permissive intervention.

CONCLUSION

QLG meets the test for intervention so that it may uphold the hard-fought protections afforded by the HFQLG Act to old forests, local communities, and wildlife in the Sierra Nevada forests. Accordingly, the Court should grant the motion to intervene as of right or, alternatively, by permission.

Dated: August 17, 2005

Respectfully submitted,

/s/ Michael B. Jackson
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Quincy Library Group and Plumas County