**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**
**Judge Robert E. Blackburn**

Civil Action No. 1:19-cv-00208-REB

WILDEARTH GUARDIANS; and
WESTERN WATERSHEDS PROJECT,

Plaintiffs,

v.

U.S. FOREST SERVICE, a federal agency of the United States Department of Agriculture,

Defendant,

and

COLORADO FARM BUREAU FEDERATION, a nonprofit corporation; and
J. PAUL BROWN,

Defendant-Intervenor-Applicants.

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**MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE**
**BY COLORADO FARM BUREAU FEDERATION**
**AND J. PAUL BROWN**

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Applicants in Intervention, Colorado Farm Bureau Federation ("CFB") and J. Paul Brown (collectively, "Applicants"), by and through their undersigned counsel, respectfully submit the following memorandum in support of their Motion to Intervene in the above-captioned case. The Applicants have substantial, constitutionally protected economic and property interests that may be materially affected by the outcome of this litigation. Thus, as demonstrated below, Applicants

are entitled to intervene as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure. In the alternative, Applicants seek permissive intervention pursuant to Rule 24(b).

This memorandum is supported by the *Declaration of Shawn Martini* ("Martini Decl.") (attached hereto as "Exhibit A") and the *Declaration of J. Paul Brown* ("Brown Decl.") (attached hereto as "Exhibit B"), filed concurrently herewith.

## INTRODUCTION

Applicants seek to intervene in this action to protect their interests and, in the case of CFB, the interests of its members. The Plaintiffs' Petition for Review of Agency Action (ECF No. 1) ("Petition for Review") seeks declaratory and injunctive relief reversing and remanding the decision of the U.S. Forest Service authorizing the grazing of sheep on the Wishbone Allotment in the Rio Grande National Forest. If the Plaintiffs' relief is granted, it will jeopardize the interests of the Applicants and the livestock industry of Colorado which they represent. Therefore, Applicants seek to intervene in all phases of this action to protect their interests, efficiently resolve the issues, prevent future litigation, and broaden access to the courts.

## FACTUAL AND PROCEDURAL BACKGROUND

Applicant CFB is the largest agricultural non-profit membership organization in the State of Colorado, representing the interests of nearly 25,000 ranchers, farmers, and other industry professionals in every county in the state. Martini Decl. ¶ 4. CFB was founded in 1919 and is dedicated to preserving and protecting the future of Colorado agriculture and rural values and to protect the Colorado way of life. *Id.* ¶¶ 4, 6, 8, 9. CFB's operations include assisting rural communities (economically and otherwise), sponsoring education and outreach programs, and influencing policy at the state and local level. *Id.* ¶ 5. CFB is devoted to the protection of

agriculture and rural communities, and focuses on issues that are specific to the small towns and individual farmers and ranchers of Colorado. *Id.* ¶¶ 6-7. To that end, CFB has a physical presence in 45 Colorado counties in order to best assist in the day-to-day affairs of its members. *Id.* ¶ 6. CFB members graze their livestock on public lands located within Colorado, including the allotments in the Rio Grande National Forest that are the subject of the 2017 Environmental Assessment and 2018 Final Decision at issue in this case. *Id.* ¶ 8. Preserving the viability of public lands livestock grazing is of paramount importance to the organization. *Id.* ¶¶ 3, 8-9. CFB and its members also operate in the geographic area subject to the Ute Tribe Treaty, which, while not directly at issue in this case, provides the Ute Tribe with a tribal hunting right. Any decision of this Court may be applied to the Ute Tribe Treaty, which would directly affect CFB and its members. *Id.* ¶ 7.

Applicant J. Paul Brown is a member of CFB. Brown Decl. ¶ 5. Mr. Brown is a sheep producer who holds a federal grazing permit on the Tank Creek, Virginia Creek, and Enlich Mesa Allotments in the San Juan National Forest, which are located near the Wishbone Allotment in the Rio Grande National Forest. *Id.* ¶ 6. Mr. Brown is an experienced livestock operator who grew up on a ranch and has been involved in agricultural pursuits his entire life. *Id.* ¶¶ 3-4. He has never received a Notice of Non-Compliance from the Forest Service and is an exemplary steward of the land. *Id.* ¶ 6. Mr. Brown is also an advocate for other ranchers and rural communities, having served as a State legislator and county commissioner; he was also a past president of the Colorado Wool Growers Association and a member of the board of directors of CFB. *Id.* ¶ 4. He is aware of the nature of the Plaintiffs' suit against the Forest Service and is also aware of the agency's conclusion that impacts to bighorn sheep that may be caused by domestic sheep ranching were not major. *Id.* ¶¶ 7-8. While Mr. Brown agrees with the Defendant's decision to not prepare

a full environmental impact statement for the Wishbone Allotment, the agency's other actions – such as the impossible suggestion that he somehow convert his livestock operation to cattle as opposed to sheep – made it clear to him that he could not rely on the Forest Service to adequately represent his interests as a sheep operator in this matter. *Id.* ¶¶ 8, 11, 13. Mr. Brown is deeply concerned that any adverse outcome for the permittee in the Wishbone Allotment will translate to an adverse outcome for his allotments in the nearby San Juan National Forest given the geographic and biological contiguity of the area. *Id.* ¶¶ 9-10. Indeed, it is likely that the only reason that Mr. Brown's allotments were not included in this suit was that the Forest Service has not issued a final decision as to his grazing authorization. *Id.* ¶ 10. Therefore, the outcome of the litigation concerning the Wishbone Allotment is almost certain to determine the future of his livestock operation. *Id.* ¶¶ 10, 12. Mr. Brown's livelihood depends on the viability of his public land livestock operation. If he is not allowed to graze his sheep on National Forest land, he will be forced out of business. *Id.* ¶ 12.

Intervention is sought in this case because the interests of every livestock operator in Colorado – including Mr. Brown's livelihood – are directly threatened by the management actions sought by the Plaintiffs in this case. The Plaintiffs seek to set aside the Forest Service's decision to authorize sheep grazing on the Wishbone Allotment in the Rio Grande National Forest because it contradicts their overarching goal of destroying livestock operations throughout the American West.

In May 2018, the Forest Service created the Wishbone Allotment in the Rio Grande National Forest for the purpose of controlling domestic sheep grazing after it conducted a risk management survey, published an Environmental Assessment ("EA") in November 2017, and

issued a Decision Notice and Finding of No Significant Impact ("DN/FONSI") in March 2018. Petition for Review at ¶¶ 59-66. The Plaintiffs assert that this finding was in error, predominately due to their stated concern that the domestic sheep population might transfer disease to the protected bighorn sheep population that is also present in the Rio Grande National Forest. *Id.* ¶¶ 32-58. The Forest Service, however, determined that there was only a moderate risk to the bighorn sheep population due to the timing and structure of grazing across the allotments and the ability to manage the domestic sheep populations, among other factors. *Id.* ¶ 67 (describing five factors considered in the DN/FONSI). Therefore, the Forest Service approved the creation of the Wishbone Allotment and authorized grazing.

Plaintiffs filed their Petition on January 24, 2019, seeking declaratory and injunctive relief to have the EA and DN/FONSI set aside. The Forest Service filed its Answer (ECF No. 8) on April 22, 2019. A Joint Case Management Plan (ECF No. 11) was entered on April 23, 2019, setting Plaintiffs' opening brief to be filed no later than September 6, 2019, with the response brief to be filed no later than October 8, 2019.

Applicants seek to intervene in this action based on their interests that are protected by NEPA, NFMA, and other federal statutes. Martini Decl. ¶ 9, Brown Decl. ¶ 9. Only through intervention will the Court be able to consider the factual and legal ramifications that are unique to Applicants. If intervention is granted, Applicants will conform to the case management order previously entered in the case.

**ARGUMENT**

Intervention as of right and permissive intervention are both governed by Federal Rule of Civil Procedure 24. "The Tenth Circuit generally follows a liberal view in allowing intervention

under Rule 24(a)." *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005) (citing *Nat'l Farm Lines v. ICC*, 564 F.2d 381, 384 (10th Cir. 1977)). The same is true for permissive intervention under Rule 24(b). *Am. Ass'n of People With Disabilities v. Herrera*, 257 F.R.D. 236, 248 (D.N.M. 2008). For the reasons discussed herein, the Applicants are entitled to intervention as of right per Rule 24(a)(2). Alternatively, the Applicants are entitled to permissive intervention under Rule 24(b).

## I. The Applicants are entitled to intervention as of right under Rule 24(a)(2).

An applicant may intervene as of right if: (1) the application is "timely"; (2) "the applicant claims an interest relating to the property or transaction which is the subject of the action"; (3) the applicant's interest "may as a practical matter" be "impair[ed] or impede[d]"; and (4) "the applicant's interest is [not] adequately represented by existing parties." *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001) (quoting Fed. R. Civ. P. 24(a)(2)). As discussed below, the Applicants are entitled to intervention as of right because they satisfy each of these elements.

### A. The application is timely.

The timeliness of a motion to intervene is assessed "in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." *Utah Ass'n of Ctys*, 255 F.3d at 1250 (citing *Sanguine, Ltd. v. United States Dep't of Interior,* 736 F.2d 1416, 1418 (10th Cir.1984)). Intervention in this matter will not prejudice any existing parties. Although Plaintiffs filed their petition on January 24, 2019 and the Defendant filed its Answer on April 22, 2019, the administrative record has not yet been lodged and no summary judgment

briefing has occurred. Accordingly, Applicants' motion is timely. *See, e.g.*, *Western Energy Alliance v. Zinke,* 877 F.3d 1157, 1164–65 (10th Cir. 2017) (motion to intervene filed a few months after complaint was filed was timely and did not prejudice other parties).

**B. The Applicants claim an interest relating to the property or transaction which is the subject of the action.**

Whether an applicant has a protectable interest is a highly fact-specific inquiry, but generally speaking a protectable interest "is one that would be impeded by the disposition of the action." *Id.* at 1165 (internal citations omitted). Having a "persistent record of advocacy" for a certain cause is also indicative of a protectable interest. *Coal. of Arizona/New Mexico Ctys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 841 (10th Cir. 1996). Here, Mr. Brown has a protectable interest because he will presumably suffer whatever fate his neighboring permittees suffer on the Wishbone Allotment. If the Forest Service decision for the Wishbone Allotment is overturned, it is almost certain that the Forest Service will issue a similarly adverse decision in his own case, meaning he will not be able to graze his sheep in the San Juan National Forest and will face serious economic hardship as a result. Brown Decl. ¶¶ 10-12. CFB likewise has a protectable interest in its ongoing advocacy on behalf of Colorado's livestock operators from being put out of business and preventing the destruction of rural communities and traditional livelihoods, and it has a distinguished record of advocacy to this end. Martini Decl. ¶¶ 8-10. Further, CFB's members, like Mr. Brown, have a concrete interest in maintaining their grazing permits covering National Forest lands. Thus, Applicants have a protectable interest.

**C. Applicants' interests will be impaired as a practical matter.**

The test for whether an applicant's interest will be impaired presents only a "minimal burden" because a movant need only show that "it is 'possible' that the interests they identify will

be impaired." *Western Energy Alliance*, 877 F.3dd at 1167 (citing *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192 (10th Cir. 2010)). "This factor is met in environmental cases where the district court's decision would require the federal agency to engage in an additional round of administrative planning and decision-making that itself might harm the movants' interests, even if they could participate in the subsequent decision-making." *Id.* Here, this is precisely the situation that the Applicants find themselves in. If the decision at issue here is remanded to the agency, there is distinct possibility that the Forest Service could subsequently issue a new decision that is adverse to the Applicants. Moreover, if intervention is denied, Mr. Brown's interest will be impaired as a practical matter because he will not be allowed to participate in a lawsuit that will likely determine his ability to run his livestock operation.

**D. The Applicants' interests are not adequately represented by the existing parties.**

Demonstrating inadequate representation under Rule 24(a)(2) is a minimal burden because a movant need only show "the *possibility* that representation may be inadequate." *WildEarth Guardians,* 604 F.3d at 1200 (emphasis added). Here, the existing parties do not adequately represent the Applicants' interests. Both the overarching goals of the Plaintiffs and the remedy sought in this case are directly antagonistic to the interests and well-being of Applicants since they seek to prohibit sheep grazing on the Wishbone Allotment and, presumably, as many other allotments as possible in Colorado.

The Defendants do not adequately represent the Applicants' interests because their interest in preserving their decision on appeal is distinct from the direct, tangible impact that Mr. Brown's livelihood will suffer, nor is it analogous to CFB's state-wide concern with similarly situated permittees and the rural communities that depend on the use of public lands. Moreover, the Tenth

Circuit has "repeatedly recognized that it is 'on its face impossible' for a government agency to carry the task of protecting the public's interests and the private interests of a prospective intervenor." *Id.*

Here, because the Forest Service is litigating on behalf of the general public, it is obligated to consider a wide spectrum of views, many of which may conflict with the particular interest of Applicants. *See Utahns for Better Transp. v. U.S. Dep't of Transp.,* 295 F.3d 1111, 1117 (10th Cir. 2002); *see also Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995) (citing *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994)). Indeed, the Forest Service is required to represent a broader view than the narrow, parochial interests of Applicants. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1000–1001 (8th Cir. 1993) (because the landowner's individual interests were not shared by the general state citizenry, the State of Minnesota would not adequately represent those interests); *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44–45 (1st Cir. 1992) (Secretary of Commerce's judgments are necessarily constrained by his view of the public welfare).

Applicants intend to diligently defend the Forest Service's decision. Neither Plaintiffs, who effectively seek to set aside decision, nor the Forest Service, which was ultimately responsible for the issuance of the decision, may be expected to represent Applicants' interests. Furthermore, Applicants' activities are subject to regulation by the Forest Service, which issues grazing permits in the Wishbone Allotment, and other similar allotments. Given that the Forest Service regulates aspects of Applicants' operations, it cannot be expected to vigorously protect Applicant's rights and interests. Nor does the Forest Service, as regulator, have the same stake in the lawsuit, as the

point of the lawsuit is to prevent domestic sheep grazing—a private activity in which the Forest Service has no interest.

Under these circumstances, it is unlikely that the Forest Service will make all of Applicants' arguments in defense of the domestic sheep grazing, or that it would even be willing to do so. *See Forest Conservation Council*, 66 F.3d at 1499. When a party has private interests, as opposed to the government's public interests, this difference is sufficient to allow intervention. *Sierra Club*, 18 F.3d at 1208; *Fresno County*, 622 F.2d at 438–439.

**II. The Applicants are entitled to permissive intervention under Rule 24(b).**

In the alternative, the Applicants are entitled to permissive intervention under Federal Rule of Civil Procedure 24(b). As with Rule 24(a), permissive intervention under Rule 24(b) is a generous standard. Under Rule 24(b), "anyone may be permitted to intervene . . . when an applicant's claim or defense and the main action have a question of law or fact in common," provided the intervention will not unduly delay or prejudice the rights of the original parties. Fed. R. Civ. P. 24(b)(1)(B), (3); *see also City of Stilwell, Okl. v. Ozarks Rural Elec. Co-op. Corp.*, 79 F.3d 1038, 1043 (10th Cir. 1996). In fact, intervention under Rule 24(b) is so broadly granted that "[t]o permissively intervene, a party need not have a direct personal or pecuniary interest in the subject of the litigation." *Am. Ass'n of People With Disabilities v. Herrera*, 257 F.R.D. 236, 248 (D.N.M. 2008). In addition, a district court may consider "whether the intervenors' interests are adequately represented by other parties." *Tri-State Generation & Transmission Ass'n, Inc. v. New Mexico Pub. Regulation Comm'n*, 787 F.3d 1068, 1075 (10th Cir. 2015).

As discussed above, the Applicants' motion is timely and will not prejudice or unduly delay the original parties. Both CFB and Mr. Brown, however, will be seriously prejudiced if they are

not allowed to intervene. Moreover, neither party adequately represents the interests of CFB and Mr. Brown. However, both Applicants have a direct personal interest in the outcome of this lawsuit, which more than meets the liberal standard for permissive intervention. Therefore, permissive intervention is appropriate under Rule 24(b).

**CONCLUSION**

The Applicants have significant, legally protectable interests that relate to the subject of this action. The disposition of this action will, as a practical matter, impair or impede their ability to protect their interests. As a matter of law, the Forest Service is presumed to not adequately represent their interests in contesting Plaintiffs' Petition. Intervention will prevent or simplify future litigation involving related issues and at the same time allow an additional interested party to express its views before the Court. The motion is timely. Therefore, the Applicants are entitled to intervene as of right under Federal Rule of Civil Procedure 24(a)(2). Alternatively, the Applicants are entitled to permissive intervention under Rule 24(b).

DATED this the 31st day of May, 2019.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on May 31st, 2019, I electronically filed the foregoing with the Clerk of Court using this Court's CM/ECF system, which will send notification to all counsel of record pursuant to Fed. R. Civ. P. 5 and D.C.COLO.LCivR 5.1(d).

*/s/ Brian Gregg Sheldon*
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