

1 PAUL A. TURCKE (applicant *pro hac vice*)  
2 MOORE SMITH BUXTON & TURCKE,  
3 CHARTERED  
4 225 North 9th Street, Suite 420  
5 Boise, Idaho 83702  
6 Telephone: (208) 331-1800  
7 Facsimile: (208) 331-1202  
8 [pat@msbtlaw.com](mailto:pat@msbtlaw.com)

DENNIS PORTER (Cal. Bar #67176)  
Attorney at Law  
8120 36<sup>th</sup> Avenue  
Sacramento, CA 95824-2304  
Telephone: (916) 381-8300  
Facsimile: (916) 381-8726  
[dlporter2@yahoo.com](mailto:dlporter2@yahoo.com)

Attorneys for Defendant-Intervenors-Applicants

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

9	CENTER FOR SIERRA NEVADA	)	
10	CONSERVATION, et al.	)	Case No. CV 05-3508-EDL
		)	Case No. CV-09-2523-LKK-JJM
11	Plaintiffs,	)	
	vs.	)	MEMORANDUM OF POINTS
12		)	AND AUTHORITIES IN
13	UNITED STATES FOREST SERVICE, et al.	)	SUPPORT OF MOTION TO
		)	INTERVENE
14	Defendants,	)	
	and	)	
15		)	
16	CALIFORNIA ASSOC. OF 4 WHEEL DRIVE	)	
	CLUBS, et al.	)	
17		)	
	Defendant-Intervenor-Applicants.	)	

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**I. INTRODUCTION**

20 The California Association of 4 Wheel Drive Clubs, California Enduro Riders  
21 Association, American Motorcyclist Association District 36, and BlueRibbon Coalition (“the  
22 Recreation Groups”) submits this Memorandum to support their Motion to Intervene in the  
23 above-captioned case. Counsel for the Recreation Groups has discussed the motion with counsel  
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1 for the other parties. Defendants take no position, while Plaintiffs have indicated they will  
2 oppose the motion.

## 3 II. BACKGROUND

4 This case involves challenges to Forest Service designation of roads, trails and areas for  
5 motorized vehicle travel on the Eldorado National Forest. The challenged decision was issued  
6 via a Record of Decision for the Forest's Public Wheeled Motorized Travel Management Plan  
7 dated March 31, 2008, and the associated Final Environmental Impact Statement. These agency  
8 actions continue and arise from a long history of controversy over motorized recreation  
9 management on the Forest with which this Court is well familiar. *See, generally, Center for*  
10 *Sierra Nevada Conservation v. Berry*, Case No. CV 02-325 LKK (E.D.Cal.). The Recreation  
11 Groups and their members have various interests in the subject matter of this action, and wish to  
12 protect these interests through continued formal involvement in litigation over motorized travel  
13 management on the Eldorado National Forest.  
14

## 15 III. ARGUMENT

### 16 **A. The Court Should Exercise Discretion to Allow Permissive Intervention** 17 **Under Fed. R. Civ. P. 24(b).**

18 The simplest resolution of the motion is for the Court to allow the Recreation Groups to  
19 enter the case under Fed.R.Civ.P. 24(b). That rule states:  
20

21 (1) On timely motion, the court may permit anyone to intervene who...(B) has a  
22 claim or defense that shares with the main action a common question of law or  
23 fact. . . .(3) In exercising its discretion the Court must consider whether the  
24 intervention will unduly delay or prejudice the adjudication of the original  
25 parties' rights.  
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1 Fed.R.Civ.P.24(b). The Ninth Circuit has noted that permissive intervention presents a lesser  
2 “interest” requirement than intervention as of right. *Kootenai Tribe v. Veneman*, 313 F.3d 1094,  
3 1110 (9<sup>th</sup> Cir. 2002).

4 This case parallels the permissive intervention analysis in *Kootenai Tribe* and similar  
5 public lands cases. The motion has been timely filed. Federal Defendants have not yet answered  
6 the complaint. The Recreation Groups possesses recreational and aesthetic interests “related to”  
7 the management schemes at issue, and hope to assert defenses “directly responsive” to Plaintiffs’  
8 claims. *Kootenai Tribe*, 313 F.3d at 1110; *see generally*, Declarations of Robert Reed; Rick  
9 Guidice (filed contemporaneously herewith). The Recreation Groups should fare no worse than  
10 intervenor-appellants in *Kootenai Tribe*, where the Circuit concluded “it was within the district  
11 court’s discretion to decide whether to permit them to participate.” *Id.* In this case involving  
12 important public lands management issues, “the presence of intervenors [might] assist the court  
13 in its orderly procedure leading to the resolution of this case, which impact[s] large and varied  
14 interests.” *Id.* at 1111. The Court can properly exercise discretion under Rule 24(b) to allow  
15 permissive intervention and afford the Recreation Groups full party status in all aspects of this  
16 case.  
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19 The Court is generally familiar with the Recreation Groups’ interests and manner of  
20 participation through *Berry*. The Court could properly reach conclusions similar to those of the  
21 district court in *Kootenai Tribe*. Indeed, such an outcome is not only within the Court’s  
22 discretion, but arguably advances sound policy considerations in important matters such as these  
23 involving public lands. The Recreation Groups’ long standing involvement in these issues  
24 should not end at the courthouse door.  
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1 The motion to intervene is appropriately resolved by allowing the Recreation Groups  
2 permissive intervention in this matter with full rights as a party.

3 **B. The Recreation Groups May Also Intervene As Of Right.**

4 If the Court allows permissive intervention, that result will end the intervention analysis.  
5 Should it become necessary to pursue further analysis, the Recreation Groups maintain that  
6 intervention “as of right” should be proper under Fed. R. Civ. P. 24(a), which provides:  
7

8 On timely motion, the court must permit anyone to intervene who:...(2) claims an  
9 interest relating to the property or transaction that is the subject of the action and  
10 the applicant is so situated that disposing of the action may as a practical matter  
impair or impede the movant’s ability to protect that interest, unless existing  
parties adequately represented that interest.

11 Fed.R.Civ.P. 24(a)(2); *see also, Scotts Valley Band of Pomo Indians v. United States*, 921 F.2d  
12 924, 926 (9th Cir. 1990). The Ninth Circuit has forged a “none but a federal defendant” rule in  
13 other public lands cases and ruled that would-be private intervenors do not possess the requisite  
14 interest to intervene “as of right” under Rule 24(a). *See Kootenai Tribe*, 313 F.3d at 1108  
15 (addressing rule in litigation focusing on National Environmental Policy Act (“NEPA”). Under  
16 this rule, a private party cannot assert *any* interest meeting Rule 24(a)’s “interest prong” because  
17 “the federal government is the only proper defendant in an action to compel compliance with  
18 NEPA.” *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1114 (9th  
19 Cir. 2000). This rationale has been extended to limit Rule 24(a) intervention in cases involving  
20 public lands statutes other than NEPA where the relevant statutory language arguably governs  
21 only the conduct of the federal government. *See, e.g., Southwest Center for Biological Diversity*  
22 *v. U.S. Forest Service*, 82 F.Supp.2d 1070, 1073-1074 (D.Ariz. 2000) (limiting interested private  
23 parties’ intervention to remedial phase in ESA litigation). In the event that some record on this  
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1 issue might be necessary the Recreation Groups will present Rule 24(a) intervention arguments  
2 as an alternative basis for intervention here.

3 **1. The Recreation Groups hold sufficient interests in the subject matter of this**  
4 **action.**

5 The Recreation Groups satisfy any other of the available interest tests other than the  
6 “none but a federal defendant rule.” “The ‘interest’ test is primarily a practical guide to  
7 disposing of lawsuits by involving as many apparently concerned persons as is compatible with  
8 efficiency and due process.” *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980). It  
9 is a threshold test, not “the determinative criterion for intervention . . . .” *Id.*; *Cascade Natural*  
10 *Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135-36 (1967) (interest claimed by the  
11 applicant in intervention does not have to be a direct interest in the property or transaction at  
12 issue, provided that it is an interest that would be impaired by the outcome); *Donaldson v.*  
13 *United States*, 400 U.S. 517, 542 (1971) (Rule 24(a) “obviously” refers to a “significantly  
14 protectable interest”). In the resource-management context, where one interest group supports  
15 an agency decision and the other opposes it, and where both groups actively participated in the  
16 administrative process leading to the challenged agency action, the group supporting the agency  
17 decision has been entitled to intervene as a matter of right. *Sagebrush Rebellion, Inc. v. Watt*,  
18 713 F.2d 525, 526-28 (9th Cir. 1983), *aff’d following remand*, 790 F.2d 760 (9th Cir. 1986).

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21 The “none but a federal defendant” rule cases have never meaningfully distinguished the  
22 above-cited precedent. The “none but a federal defendant” rule was first announced by the Ninth  
23 Circuit in *Portland Audubon Soc’y v. Hodel*, 866 F.2d 302 (9<sup>th</sup> Cir. 1988). In stark contrast to its  
24 present-day expansion, the rule was only applied to NEPA claims and the rationale wholly  
25 dependent upon characterizing timber industry applicants as holding “purely economic interests”  
26

1 in the outcome of the suit. *Portland Audubon*. 866 F.2d at 309; *see also, id.* at 304, 308  
2 (indicating intervention granted for “certain of the plaintiff’s claims” including under substantive  
3 statutes such as the Federal Land Policy and Management Act). Never has the Circuit  
4 adequately explained why the narrow rule of *Portland Audubon* has been extended to preclude  
5 intervention by all forms of private interests to both procedural claims under NEPA as well as  
6 substantive claims under other “environmental” laws, particularly when the applicant asserts  
7 virtually the same type of recreational and aesthetic interests as the plaintiff(s).  
8

9         The Recreation Groups and its members have legally-protectable interests relating to  
10 sound management of recreation associated with motorized vehicle access. Declaration of Don  
11 Amador at ¶ 5 and Reed Declaration at ¶ 3 (recreational and aesthetic interests); Guidice  
12 Declaration at ¶¶ 4-5 (special use permits and associated event participation); ¶ 6 (procedural  
13 and participatory interests); ¶ 7 (socioeconomic interests). The Recreation Groups possess  
14 interest equivalent to, if not broader than, those Plaintiffs must rely upon to establish standing.  
15 The procedural history here aptly demonstrates the possible illogic of the “none but a federal  
16 defendant” rule. One defending that Rule might contend the Recreation Groups were allowed  
17 full party status in *Berry* by virtue of their presentation of a cross-claim, and that the absence of  
18 such an affirmative challenge to the Forest Service’s decision precludes the requisite interest for  
19 intervention under Rule 24(a). The practical effect of such reasoning is to encourage litigation,  
20 for the courthouse door would open only to those unwilling to accept the Solomonic outcome of  
21 the agency process. Through this harshest application of the “none but a federal defendant” rule  
22 those most disgruntled and most litigious are rewarded by filing suit, where, unlike the  
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1 administrative process, their complaints will be singularly considered by the agency and the  
2 court.

3 If Plaintiffs can satisfy standing requirements then the Recreation Groups must satisfy  
4 any “interest” requirement of Rule 24(a). Whether the necessary interest is defined as concrete,  
5 significant, significantly protectable, article III standing, or any other formulation from the  
6 spectrum of cases, the Recreation Groups satisfy all such tests.

7  
8 **2. The Recreation Groups meet the impairment requirement.**

9 Plaintiffs seek to have set aside the agency action which authorizes the Recreation  
10 Groups’ access to the Forest. *See, e.g.*, Declaration of Dave Pickett at ¶¶ 5, 7. The Recreation  
11 Groups members’ uses could thus be prohibited if Plaintiffs’ remedy is granted.

12 The contours and duration of any potential injunction are unknown. The Recreation  
13 Groups will have no ability to provide input on or challenge an injunction while it remains in  
14 effect unless they obtain status as a party. *See Forest Conservation Council v. U.S. Forest*  
15 *Service*, 66 F.3d 1489, 1498 (9th Cir. 1995). The potential *stare decisis* effect of a judgment in  
16 this case provides sufficient impairment to justify intervention. *Id.*; *Natural Resources Defense*  
17 *Council, Inc. v. U.S. Nuclear Regulatory Comm’n*, 578 F.2d 1341, 1345 (9th Cir. 1978); *Sierra*  
18 *Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1993). The Recreation Groups meet the “minimal”  
19 impairment requirement.  
20

21 **3. The existing parties do not adequately represent the interests of the**  
22 **Recreation Groups.**

23 All parties represent starkly different interests. Generally, courts should find favorably  
24 on this prong of the Rule 24(a) analysis if there is any question at all about whether existing  
25 parties adequately represent the would-be intervenor’s interests. *Trbovich v. United Mine*  
26

1 *Workers*, 404 U.S. 528, 538 n.10 (1972); *Sagebrush Rebellion*, 713 F.3d at 528. Courts have  
2 considered: (1) whether the interests of a present party are such that the party will undoubtedly  
3 make all of the intervenor’s arguments; (2) if so, whether the present party is capable of and  
4 willing to make those arguments; and (3) whether the would-be intervenor would offer any  
5 necessary element to the proceedings that the other parties would neglect. *County of Fresno*,  
6 622 F.2d at 438-39. Intervention should be approved where possible conflicts of interest may  
7 arise. *State of New Mexico v. Aamodt*, 539 U.S. 1102 (10th Cir. 1976), *cert. denied*, 429 U.S.  
8 1121 (1977) (Indian tribes granted intervention in water rights litigation despite being  
9 represented by government counsel due to potential conflict of interest between tribe and  
10 government).

12 Even a vigorous defense of the agency decision might somehow not survive, or change  
13 during, the “recurrent event in our system of government” of changing “from one presidential  
14 administration to another....” *Sagebrush Rebellion*, 713 F.2d at 528. The Recreation Groups  
15 simply wish to be more rather than less informed about the parties’ positions and preserve a full  
16 range of future options. Any non-federal interest will be unable to respond absent timely  
17 intervention in the early stages of the case. Of course none of these propositions are solely  
18 applicable to “multiple use” interests, but protect the participation and interests of preservationist  
19 groups as well. *See, e.g., Kootenai Tribe*, 313 F.3d at 1107 (2001 Roadless Rule defended by  
20 private preservationist interests but not by Federal Defendants who declined to appeal);  
21 *Wyoming v. U.S. Dept. of Agriculture*, 277 F.Supp.2d 1197, 1238 (D.Wyo. 2003), *vacated and*  
22 *remanded*, 414 F.3d 1207 (10<sup>th</sup> Cir. 2005) (district court declared unlawful and set aside 2001  
23 Roadless Rule, preservationist intervenors brought sole appeal, and Circuit Court declared  
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25

1 appeal moot and vacated decision based on Federal Defendant-Appellee’s assertions that 2001  
2 Roadless Rule had been repealed and was incapable of being resurrected). Suffice it to say that  
3 litigation can take unusual and unexpected turns and that private interests cannot be defended, let  
4 alone advanced, absent the ability to attain party status in the initial stages of potentially long-  
5 running public lands cases.

6 **4. Even the “none but a federal defendant rule” contemplates limited**  
7 **intervention.**

8 Even where the “none but a federal defendant” rule applies, private parties are still  
9 allowed to fully intervene in the “remedy phase” of public lands and environmental litigation.  
10 *Forest Conservation Council*, 66 F.3d at 1494. Thus, the worst case scenario for a would-be  
11 intervenor demonstrating tangible interests in the outcome of a case such as this should be to  
12 receive *amicus* status on liability issues and full-party status in any remedy phase necessitated by  
13 a court’s ruling on liability.  
14

15 **5. The “none but a federal defendant rule” is a minority position in a Circuit**  
16 **split.**

17 While counsel, and this Court, must acknowledge the Circuit’s “none but a federal  
18 defendant” rule, counsel does not believe that those decisions limiting intervention are correctly  
19 decided. Several circuits have refused to follow, if not flatly rejected, the Ninth Circuit’s  
20 reasoning. *Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1253-54 (10th Cir. 2001); *Mausolf*  
21 *v. Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996); *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5<sup>th</sup> Cir.  
22 1994); *Kleissler v. U.S. Forest Service*, 157 F.3d 964, 971-972 (3d Cir. 1998); *Conservation Law*  
23 *Found. v. Mosbacher*, 966 F.2d 39 (1<sup>st</sup> Cir. 1992). A decision allowing permissive intervention  
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