No. 09-35200

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Wilderness Society and Prairie Falcon Audubon, Inc.,

Plaintiffs-Appellees,

vs.

United States Forest Service; Jane P. Kollmeyer, Supervisor, Sawtooth National Forest; Scott C. Nannenga, District Ranger, Minidoka Ranger District

Defendants,

And

Magic Valley Trail Machine Assoc., Idaho Recreation Council, and The BlueRibbon Coalition, Inc.,

Intervenor-Applicants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF OF AMICUS CURIAE KOOTENAI TRIBE OF IDAHO, JOINED BY THE CONFEDERATED SALISH AND KOOTENAI TRIBES, THE COQUILLE INDIAN TRIBE, THE KALISPEL TRIBE, THE SHOSHONE-BANNOCK TRIBES, THE CONFEDERATED TRIBES OF SILETZ INDIANS AND THE METLAKATLA INDIAN COMMUNITY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), amicus curiae the Kootenai Tribe of Idaho states that it is a federally-recognized sovereign Indian Tribe, i.e. a governmental entity to which the Rule 26.1 disclosure requirement is inapplicable. Likewise, the Indian Tribes joining in this brief – including the Confederated Salish and Kootenai Tribes, the Coquille Indian Tribe, the Kalispel Tribe, the Shoshone-Bannock Tribes, the Confederated Tribes of Siletz Indians and the Metlakatla Indian Community – are federally-recognized governmental entities not subject to Rule 26.

DATED this 21st day of October, 2010.

/s/Julie A. Weis
Julie A. Weis
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Attorneys for the Kootenai Tribe of Idaho

Joined by the Confederated Salish and Kootenai Tribes, the Coquille Indian Tribe, the Kalispel Tribe, the Confederated Tribes of Siletz Indians and the Metlakatla Indian Community

STATEMENT OF CONSENT

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Kootenai Tribe of Idaho, joined by the Confederated Salish and Kootenai Tribes, the Coquille Indian Tribe, the Kalispel Tribe, the Shoshone-Bannock Tribes, the Confederated Tribes of Siletz Indians and the Metlakatla Indian Community, respectfully submits this brief with the consent of the appellants, the consent of the appellees and without opposition from the federal defendants.

INTRODUCTION AND INTEREST OF AMICUS CURIAE THE KOOTENAI TRIBE OF IDAHO, AND ITS SISTER-TRIBES

The Kootenai Tribe of Idaho, joined by the Confederated Salish and Kootenai Tribes, the Coquille Indian Tribe, the Kalispel Tribe, the Shoshone-Bannock Tribes, the Confederated Tribes of Siletz Indians and the Metlakatla Indian Community (hereinafter sister-Tribes), offers the following views from a Tribal self-determination perspective on the so-called "federal defendant rule" which limits the participation not only of private parties but also of *sovereigns* in cases involving National Environmental Policy Act (NEPA) claims and other claims arising out of statutes that impose obligations on federal agencies. The federal defendant rule now is wisely before an en banc panel of this Court to consider its abandonment.

Kootenai Tribe of Idaho. The Kootenai Tribe of Idaho is a federally-recognized Indian Tribe headquartered near the town of Bonners Ferry in Idaho's

Kootenai River Valley. The Kootenai Tribe as a whole consists of seven modern bands, including two in the United States and five in Canada. These bands have inhabited portions of Idaho, Montana, Washington, British Columbia and Alberta since time immemorial, and they are divided into Lower and Upper Kootenai groups. The Kootenai Tribe of Idaho belongs to the Lower Kootenai group, which historically inhabited the area along the Kootenai River from above Kootenai Falls to Kootenay Lake in Canada.

In 1855, the Kootenai, Salish and Flathead Indians were called to a treaty session at Hellgate, Montana for the purpose of ceding territory to the U.S. government. The Salish and Upper Kootenai Tribes entered into the Hellgate Treaty with the U.S., thereby ceding the majority of the Kootenai territory and creating a reservation hear Flathead Lake for the newly-created Confederated Salish and Kootenai Tribes. Although the Kootenai Tribe of Idaho did not participate in the negotiations or sign the Treaty, the ceded territory included the Idaho Kootenai's aboriginal lands.

Eventually, the U.S. government recognized that the Kootenai Tribe of Idaho was a separate and distinct entity and sent U.S. government Indian agents to the Bonners Ferry area in an effort to persuade Tribal members to leave their aboriginal homeland and move to the Flathead Reservation. These efforts were largely unsuccessful, after which the government gave up and allowed the

remaining Tribal members to stay in the Bonners Ferry area. These members later received allotments under Section 4 of the Indian General Allotment Act of 1887, 24 Stat. 338, as amended, 25 U.S.C. § 331 et seq.

Tribal members continued to hunt, fish and gather throughout their aboriginal territory, but this became increasingly more difficult over the years. Tribal allotments were lost to non-Indians through fraudulent transactions and surveying errors, and the increasing private ownership of property led to decreased hunting, fishing and harvesting opportunities. By 1974, the Tribe had dwindled to a mere 67 members and was tired after years of struggle. Thus, on September 20, 1974, the Tribe declared war on the U.S. – a peaceful war, that is. The declaration of war got the U.S. government's attention, and the Kootenai Tribe was deeded 12.5 acres of land that enabled it to begin the work of rebuilding itself.

Today, the Kootenai Tribe is a strong economic entity that focuses its formidable energies and determination on remaining true to its creation story, namely to keep the Creator-Spirit's Covenant to guard and keep the land forever, with the understanding that the land in turn will provide for Tribal members so long as it is properly managed. The Tribe's identity depends in large part on caring for the many native fish and wildlife species in the Kootenai River Valley, and the Tribe plays an active and innovative role in protecting and recovering fish and

wildlife species – like the endangered Kootenai River white sturgeon, the threatened burbot and the threatened grizzly bear.

Because of the Kootenai Tribe's commitment to properly managing natural resources within its aboriginal territory, the Tribe from time to time seeks to participate in federal litigation involving its natural resource interests. Most recently, the Tribe was denied intervention on the merits of claims raised under NEPA, the Endangered Species Act (ESA) and the National Forest Management Act (NFMA) in the pending Idaho Roadless Rule case, Jayne v. Sherman, No. 09-15-BLW (D. Idaho intervention denied April 16, 2009). Although the Tribe was granted leave to participate as a party in the remedial phase of the case, the Idaho District Court denied intervention as to the liability phase on the grounds that the federal government represented the Tribe's interests. No doubt the court felt constrained by the shackles of the federal defendant rule which is now wisely before an en banc panel of this Court.

Confederated Salish and Kootenai Tribes. The Confederated Salish and Kootenai Tribes (CSKT) are a federally recognized Tribe organized pursuant to the Indian Reorganization Act of 1934 (Wheeler-Howard Act), 25 U.S.C. §§ 476-477. Until 1871, the United States conducted its official relations with the sovereign tribal nations compromising the "domestic dependent nations"[1] within its

[1] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

territories by treaty negotiated by the executive branch and ratified by Congress. The CSKT Tribal chiefs signed the Hellgate Treaty on July 16, 1855, 12 Stat. 975 (ratified March 8, 1859, proclaimed April 18, 1859). Through the Hellgate Treaty, the CSKT reserved to themselves the Flathead Reservation in northwestern Montana, ceding vast tracts of land in what would become the states of Montana and Idaho, and the Canadian provinces of Alberta and British Columbia. In return the United States promised to provide specified goods and services and guaranteed that the CSKT could continue their traditional way of life. See Treaty of Hellgate, Arts. IV and V, 12 Stat. 975; see also U.S. v. Washington (Appeal of Phase II), 759 F.2d 1353, 1366 n. 2 (9th Cir.), cert. denied, 474 U.S. 994 (1985). To effectuate this guarantee, the CSKT retained exclusive possession of a delineated homeland (i.e. the Flathead Indian Reservation) and expressly reserved in perpetuity hunting, fishing, gathering and grazing rights in the ceded lands. See Treaty of Hellgate, Arts. II and III. These rights impact many CSKT and Tribal member interests.

At the time of the 2000 census there were 6,964 enrolled members of the CSKT, most of whom reside on the reservation. Because the Flathead Reservation is within the jurisdiction of this Circuit, the CSKT are directly impacted by the Ninth Circuit's reliance on the "federal defendant rule." Members of the CSKT continue to exercise treaty-based hunting, fishing, and gathering rights on federal public lands. Thus, suits that challenge federal land and resource management

practices could have significant impacts to CSKT treaty rights. The CSKT Tribal government also has an interest in joining the United States to defend challenges to Annual Funding Agreements (AFA) entered into between the federal and CSKT governments under the 1994 Tribal Self-Governance Act, 25 U.S.C. § 558aa et. seq. (Pub. L. No. 103-413). See, e.g., Reed v. Salazar and CSKT, No. 08-cv-2117-CKK (D.D.C. rescinding AFA Sept. 28, 2010); Blue Goose Alliance v. Salazar and CSKT, No. 09-0640-CKK (D.D.C. rescinding AFA Sept. 28, 2010). Notably, the CSKT was granted intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure for the purpose of joining the United States to defend the above challenges to the AFA for National Bison Range Complex. In contrast, under this Circuit's federal defendant rule, tribes that may bear the burden of lawsuits challenging federal actions have no right of intervention to protect tribal interests. Thus, for the reasons explained below, the CSKT joins its sister-Tribes in asking the en banc panel to abandon this rule.

Coquille Indian Tribe. The Coquille Indian Tribe is a formerly terminated tribe that Congress restored to Federal recognition in 1989. Shortly after the Coquille Restoration, Congress transferred 5,400 acres of Federal forestlands to the Tribe, to be held in trust by the Federal government. Congress transferred the "Coquille Forest" to give the Coquille Tribe a measure of economic recovery and land base for cultural restoration. The Coquille Forest legislation authorizes any

person to sue the Assistant Secretary of the Interior for certain violations of the Act, including environmental management standards. One of those management requirements is that the Coquille Forest must be managed subject to the standards and guidelines of federal forest plans on nearby and adjacent federal lands. 25 USC 715c(d)(5). This means that decisions by Federal agencies for lands off the Coquille Forest effectively serve as management decisions for the Coquille Forest.

The Coquille Indian Tribe needs to have the ability to intervene in Federal forestland litigation that directly impacts the Coquille Forest or other interests of the Tribe within its ancestral homeland.

Kalispel Tribe. The traditional homeland of the Kalispel stretched from Paradise, Montana down the Clark Fork River, around Pend Oreille Lake in northern Idaho down the Pend Oreille River, up Priest River to Priest Lake and northwestward across northeastern Washington to the mouth of the Salmo River, just over the international border in British Columbia. Despite the fact that the Kalispel is a non-treaty tribe, the Kalispel Tribe has had an official, continuous long-term relationship with the federal government. The relationship was officially acknowledged by the federal government March 23, 1914 when President Wilson established by Executive Order the Kalispel Indian Reservation consisting of 4,600 acres along the Pend Oreille River in Pend Oreille County, State of Washington.

The Tribe through the Bonneville Power Administration's mitigation program has acquired approximately 2,500 additional acres for wildlife and fishery protection in the Tribe's aboriginal area in Idaho and northeastern Washington. Like its sister-Tribes, the Kalispel Tribe desires to have the ability to participate in federal litigation that affects the Tribe's natural resource interests, particularly within the Tribe's aboriginal area.

Shoshone-Bannock Tribes. The Shoshone and Bannock peoples are comprised of numerous bands that occupied a vast geographic range in the western United States, including, but not limited to, the Snake River basin, Great Basin and Intermountain regions. Various unratified treaties negotiated and signed with the numerous bands of Shoshone and Bannock and the United States finally resulted in the Treaty with the Eastern Band Shoshoni and Bannock, July 3, 1868 (15 Stat 673, ratified by Congress 1869), affirming the Fort Hall Indian Reservation as the permanent homeland of various bands of Shoshone and Bannock peoples. The Treaty reserved specific off-reservation hunting and gathering rights for the eligible members of the Shoshone-Bannock Tribes (SBT).[2] The SBT are a

[2] Treaty with the Eastern Band Shoshoni and Bannocks, July 3, 1868, 15 Stat. 673, Art. IV ("The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied land of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.").

federally recognized Tribe, currently organized under the Indian Reorganization Act of 1934 (Wheeler-Howard Act), 25 U.S.C. §§ 476-477.

The original boundaries of the Fort Hall Reservation encompassed approximately 1.8 million acres in Southeast Idaho. Subsequent land cessions reduced the territory to its current size, approximately 544,000 acres; currently the SBT and individual SBT members possess over 95% of the total land base within the current exterior boundaries of the Fort Hall Indian Reservation. The land cession agreements contained specific provisions reserving priority rights to natural resources on the ceded lands, which include Forest Service lands in the Caribou-Targhee National Forest and Bureau of Land Management lands in the Pocatello Field Office.[3]

The SBT are within the jurisdiction of this Circuit and have the potential to be impacted by the so-called "federal defendant rule" in several ways. Various land management decisions made by federal agencies have the potential to impact the SBT exercise of Treaty reserved hunting, fishing and gathering rights and/or

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[3] See generally *An act to accept and ratify an agreement made with the Shoshone and Bannack Indians, for the surrender and relinquishment to the United States of a portion of the Fort Hall Reservation, in the Territory of Idaho, for the purposes of a town-site, and for the grant of a right of way through said reservation to the Utah and Northern Railway Company, and for other purposes*, Sept. 1, 1888, 25 Stat. 452, and *An act to ratify an agreement with the Indians of the Fort Hall Indian Reservation in Idaho, and making appropriations to carry the same into effect*, June 6, 1900, 31 Stat. 672.

cession agreement reserved priority rights within the boundaries of the original reservation. In addition, the SBT have significant protectable interests in the outcome of decisions by the Bureau of Indian Affairs and other federal agencies that occur within the current reservation boundaries. Under current Ninth Circuit intervention law, the SBT would have no right of intervention in lawsuits that adversely impact significant protectable Tribal interests. The SBT thus joins other tribes from this Circuit in requesting the en banc panel to abandon the federal defendant rule.

Confederated Tribes of Siletz Indians. The Confederated Tribes of Siletz Indians of Oregon (Siletz Tribe), established pursuant to the Siletz Indian Tribe Restoration Act, 25 USC § 711 et seq., is comprised of approximately thirty Indian tribes and bands who were settled by the federal government on the 1.1 million acre "Siletz" or "Coast" reservation from 1855 forward. The 1855 Executive Order creating the Siletz Reservation specified that the Reservation was established for the Coast, Willamette and Umpqua Tribes of Oregon. Several days after the Executive Order was signed, it also became federal policy to remove the tribes of the Rogue Valley to the Siletz Reservation pursuant to the terms of their treaty with the United States. The Siletz Tribe's combined aboriginal territories comprise approximately 20 million acres, located roughly from the Columbia to the Klamath River and from the summit of the Cascade Range to the Pacific

Ocean. Various Siletz tribes and bands entered into seven ratified treaties and one unratified treaty.

The Siletz Tribe now includes 4,754 members and has made strides in overcoming the physical, economic, social, and institutional challenges of isolation in a small, rural, coastal area with limited access to medical care, lack of housing, poverty and joblessness. The Siletz Tribe has established a strong self-governance model and carries out extensive programs in the general areas of health, general welfare, economic development, education, and housing. Our comprehensive Natural Resources management program includes forestry, wildlife, aquatics, environmental, and water quality programs. Even though the Siletz Tribe consistently seeks opportunities for cooperation with our federal partners in each of these areas, the Tribe just as consistently maintains a rigorous policy of Tribal self-determination and independence. As such, the Siletz Tribe joins in asking that the Court abandon the "federal defendant rule."

Metlakatla Indian Community. The Metlakatla Indian Community is a federally-recognized Tribe possessing the only Indian reservation in the state of Alaska, the Annette Islands Reserve in Southeast Alaska 15 miles south of Ketchikan, Alaska. In the summer of 1887, a group of Metlakatlans seeking religious freedom canoed across the ocean from British Columbia to settle on the Annette Islands at the invitation of the U.S. government, including then-President

Grover Cleveland. See Alaska Pacific Fisheries v. U.S., 248 U.S. 78, 86 (1918). Four years later, the Annette Islands were "set apart as a reservation" for the Community by Congress. 25 U.S.C. § 495. In taking that action, Congress intended to create a reservation for use by Community members that would ensure Metlakatlans' ability, though industry, to achieve economic self-sufficiency. Alaska Pacific Fisheries, 248 U.S. at 88-89.

Because fishing was (and always has been) central to the Community's culture, the Supreme Court recognized in Alaska Pacific Fisheries that Congress also intended to include within the Reserve sufficient adjacent waters to fulfill the purposes for which the Reserve was established. Id. at 89 (holding that the "Annette Islands" necessarily includes the "intervening and surrounding waters"). In a separate action designed to further Community self-sufficiency by preventing non-Community members from taking fish in waters adjacent to the Annette Islands, a 1916 Presidential proclamation issued by Woodrow Wilson declared the waters within 3,000 feet of the Annette Islands an exclusive zone "for purposes of supplying fish and other aquatic products for a cannery." 39 Stat. 1777 (1916).

The Community carefully regulates fishing in its 3,000-foot exclusive zone and periodically participates in federal litigation that implicates its sovereign rights. For example, in 2009, the Community participated as a defendant-intervenor in Van Valin v. Locke, No. 09-961-RMC (D.D.C. judgment entered in

favor of federal defendants and aligned intervenors Nov. 23, 2009), a case involving a federal rule regulating the harvest of Pacific halibut by guided charter angers in Southeast Alaskan waters. Whereas the Community was allowed to participate as an intervenor on the merits in Van Valin, the federal defendant rule in this Circuit would have hindered such participation. Thus, the Community joins the Tribal sovereigns herein in asking the Court to abandon the federal defendant rule.

ARGUMENT

I. Indian Tribes Are Sovereign Entities Whose Participation in Litigation Involving Tribal Interests Should Be Encouraged, Not Impeded.

The U.S. Supreme Court has long recognized the "unique legal status" of Indian tribes. Morton v. Mancari, 417 U.S. 535, 551 (1974) (so stating in case holding generally that preference policies involving Indian tribes are not racially discriminatory but rather are based on political affiliation). The "unique legal status" of Indian tribes even is embodied in the United States Constitution, which places Indian tribes on par with foreign nations and the several states. U.S. Const. Art. I, § 8, cl. 3 (empowering Congress to "regulate Commerce with foreign nations and among the several States, and with the Indian Tribes"). Historically, "Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of

the soil, from time immemorial." Worcester v. Georgia, 31 U.S. 515, 559 (1832) (abrogated on other grounds). Currently, tribes are viewed as "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991) (quoting Cherokee Nation v. Georgia, 30 U.S. 1 (1831)).

The Supreme Court has recognized the propriety of tribes intervening in litigation involving natural resources in which they have an interest. See, e.g., Arizona v. California, 460 U.S. 605, 614-15 (1983). Arizona involved a long-running, original Supreme Court proceeding over water rights to Colorado River waters, in which a group of tribes – the Fort Mojave, Chemehuevi, Quechan (Fort Yuma), Colorado River and Cocopah Indian Tribes – sought to intervene. The state sovereigns participating as parties in the action opposed those Tribes' intervention on the grounds that "the presence of the United States insures adequate representation of the Tribes' interests." Id. at 614. The states also asserted more generally that the requirements of Rule 24(a) had not been satisfied for intervention as-of-right. Id.

The Supreme Court concluded otherwise, stating that it was "obvious that the Indian Tribes, at a minimum, satisfy the standards for permissive intervention set forth in the Federal Rules." Id. at 614-15. The Court based that conclusion on

the fact that the litigation directly implicated the Tribes' water rights. Id. at 615. More fundamentally, the Supreme Court observed that "the Indians are entitled 'to take their place as independent qualified members of the modern body politic.' . . . Accordingly, the Indians' participation in litigation critical to their welfare should not be discouraged." Id. (emphasis added and internal citations omitted). Contrary to the Supreme Court's teaching, however, the following argument demonstrates that Ninth Circuit intervention precedent is acting as an impediment to Indian tribes' participation in litigation involving tribal interests.

II. The Kootenai Tribe's Involvement in Roadless Area Land Management Litigation Illustrates the Dysfunction in Ninth Circuit Intervention Case Law.

Like many Indian Tribes, the Kootenai Tribe's commitment to the prudent management of natural resources within its aboriginal territory leads the Tribe periodically to seek intervention in federal litigation involving its ancestral lands. Whereas this Court has observed that the federal defendant rule limits the participation of private parties in cases involving NEPA claims, the following discussion demonstrates that the federal defendant rule also limits sovereigns, including Indian tribes, and has been extended to non-NEPA claims arising out of other statutes that impose obligations on federal agencies. Though illustrative examples of the impediments posed by the federal defendant rule could be offered by the sister-Tribes joining in this amicus brief, the Kootenai Tribe's involvement

in roadless area land management litigation nicely illustrates the problems associated with the federal defendant rule at issue in this case. This is particularly true given the Tribe's involvement in a public lands lawsuit that led to a major Ninth Circuit intervention decision, Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094 (9th Cir. 2002) (Kootenai Tribe).

A. Intervention in the Context of the 2001 Roadless Rule.

In early 2001, the Kootenai Tribe was the lead plaintiff in a lawsuit filed in the District of Idaho challenging the 2001 Roadless Area Conservation Rule (2001 Roadless Rule). See generally Kootenai Tribe, 313 F.3d 1094 (9th Cir. 2002). The Tribe challenged the 2001 Roadless Rule because it was promulgated without meaningful consultation with the Tribe, despite the Rule's substantial impact on the Tribe's ability to care for, and use where appropriate, natural resources within the range of its aboriginal territory, much of which now is encompassed by the Idaho Panhandle and Kootenai National Forests. Regardless of how one views the 2001 Roadless Rule – which is now the law of the land within the range of the Ninth Circuit and New Mexico, with the exception of Alaska (due to the Tongass Exemption) and Idaho (due to the Idaho Roadless Rule), see California ex rel. Lockyer v. U.S. Dept. of Agric., 575 F.3d 999 (9th Cir. 2009) – the federal government's obligation to consult with Indian tribes on a government-to-government basis is a fundamental obligation of great importance in and around

Indian Country. See, e.g., Te-Moak Tribe of Western Shoshone of Nevada v. U.S. DOI, 608 F.3d 592, 608-10 (9th Cir. 2010) (discussing the Tribe's failure-to-consult claim brought under the National Historic Preservation Act but ultimately ruling against the Tribe); Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 787 (9th Cir. 2006) (ruling in favor of the Tribe on a similar failure-to-consult claim).

In Kootenai Tribe, which involved a NEPA challenge to the 2001 Roadless Rule, the district court permitted a coalition of environmental advocacy groups to intervene on the side of the federal defendants under authority of Rule 24 of the Federal Rules of Civil Procedure (Rule 24), either as of right or permissively. Kootenai Tribe, 313 F.3d at 1107-08 (explaining that the district court relied on both Rule 24(a) and Rule 24(b) in granting intervention). In granting intervention, the district court noted "ambiguity in . . . [Ninth Circuit] precedent and welcome[ed] 'clarification' from the Ninth Circuit." Id. at 1108. The district court then issued a preliminary injunction prohibiting implementation of the 2001 Rule, after which the federal defendants opted not to appeal, having been caught in the shifting winds of a new presidential administration. That left the defendant-intervenors in the unusual posture of pursuing an interlocutory appeal on their own.

On appeal, the Ninth Circuit determined that Rule 24(a) had been an improper basis for intervention due to the federal defendant rule. Id. Although the Ninth Circuit acknowledged that its "prior case law is not perhaps crystal clear,"

the Court construed its precedent as precluding non-federal entities from participating as of right under Rule 24(a) as defendant-intervenors in cases involving NEPA claims. Id. That left permissive intervention under Rule 24(b) the only issue for analysis, on which point the Court concluded that "[i]n this unusual context, our precedent requires that we find 'independent jurisdictional grounds' for the defendant-intervenors' appeal." Id. at 1109. This was necessary because an "'interest strong enough to permit intervention is not necessarily a sufficient basis to pursue an appeal abandoned by the other parties.'" Id. (citations omitted).

Ultimately, this Court determined that the defendant-intervenors had a sufficient interest to pursue their independent appeal, after which the Court turned its attention to the plain language requirements of Rule 24(b), particularly the "claim or defense in common with the main action requirement." Id. at 1110-11. See also id. at 1111 (stating that under Rule 24(b)'s plain language, "if there is a common question of law or fact, the requirement of the rule has been satisfied and it is then discretionary with the court whether to allow intervention"). The Court concluded that the Rule's requirement was satisfied because the intervenors had "asserted defenses of the Roadless Rule directly responsive to the claim for injunction. Moreover . . . intervenors . . . have asserted an interest in the use and enjoyment of roadless lands, and in the conservation of roadless lands, in the

national forest lands subject to the Roadless Rule . . . ." Id. The Court observed that permissive intervention was further warranted given that intervenors would aid in the full and fair airing of the issues in the case, id., which of course should be a fundamental goal of any intervenor.

B. Intervention in the Context of the Idaho Roadless Rule.

Moving forward seven years, the Kootenai Tribe of Idaho in April 2009 found itself in a similar position to the Kootenai Tribe environmental advocacy group intervenors when it sought leave of the Idaho District Court to participate on the side of federal defendants in defending the so-called Idaho Roadless Rule. By way of background, much had happened in the roadless area management arena in the ensuing years, including: the Wyoming District Court had invalidated and permanently enjoined the 2001 Roadless Rule, see Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197 (D. Wyo. 2003); the federal government had promulgated an alternative voluntary State Petitions Rule, see 70 Fed. Reg. 25,654 (May 13, 2005), after which the Wyoming District Court's decision had been vacated on appeal, see 414 F.3d 1207 (10th Cir. 2005); the State Petitions Rule had been invalidated and the 2001 Roadless Rule reinstated in a decision later affirmed by this Court, see Lockyer, supra, 575 F.3d 999 (9th Cir. 2009); and the Wyoming District Court had again invalidated and permanently enjoined the 2001 Roadless Rule, Wyoming v. U.S. Dep't of Agric., 570 F. Supp. 2d 1309 (D. Wyo. 2008),

from which decision an appeal currently is pending in the Tenth Circuit. Meanwhile, the State of Idaho had petitioned the U.S. Department of Agriculture under the Administrative Procedures Act to develop an Idaho-specific roadless area management rule, which after several years of public process and analysis resulted in the Idaho Roadless Rule, 73 Fed. Reg. 61,456 (Oct. 16, 2008).

The Kootenai Tribe participated in the collaborative development of the Idaho Roadless Rule, particularly to ensure prudent management and protection of natural resources within the range of the Tribe's aboriginal territory, i.e. Kootenai Territory. Thus, when certain environmental advocacy groups challenged the Idaho Roadless Rule in Idaho District Court (other environmental advocacy groups supported the Idaho Roadless Rule), the Kootenai Tribe moved to intervene in the lawsuit on the side of federal defendants, either as of right under Rule 24(a) or permissively under Rule 24(b). Jayne v. Sherman, No. 09-15-BLW (D. Idaho filed Jan. 16, 2009). The Tribe sought party status to protect its sovereign interests, including its federally-reserved hunting, fishing and gathering rights, because as a sovereign possessed of inherent powers of self-determination, it felt both entitled and obligated to do everything within its power to protect those sovereign rights.

In seeking intervention, the Tribe quite naturally relied on the Kootenai Tribe decision previously issued by this Court, supra, 313 F.3d 1094, particularly with respect to permissive intervention under Rule 24(b). The Tribe pointed out

that like the defendant-intervenors in the Kootenai Tribe case, it was seeking leave to intervene in the Idaho Roadless Rule case to assert an interest related to the Idaho Roadless Rule and to assert defenses of the Idaho Roadless Rule that were "directly responsive to the claims for injunction asserted by plaintiffs." Kootenai Tribe, 313 F.3d at 1110. But much to the Tribe's surprise, the Tribe was denied leave to intervene as to the merits of plaintiffs' claims under the ESA, NFMA and NEPA. Jayne, No. 09-15-BLW, Docket Entry 27 (Order dated April 16, 2009 denying intervention as to the merits but allowing intervention as to the remedy). According to the district court's order, which did not distinguish between Rule 24(a) and Rule 24(b), intervention on the merits of plaintiffs' claims was not permissible because the "governmental defendants are fully able to protect the interest of the proposed intervenors," including the Kootenai Tribe, the State of Idaho and the Idaho Association of Counties.

The district court's ruling denying the Tribe's request for full intervenor status was particularly perplexing given that the "adequate representation" inquiry is an element of the Rule 24(a) intervention as-of-right test, not the Rule 24(b) permissive intervention test. See, e.g., Southwest Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 817 (9th Cir. 2001) (setting forth the four-part test for intervention under Rule 24(a) in the Ninth Circuit, the fourth prong of which asks whether the intervention applicant's interest is "adequately represented by the

existing parties in the lawsuit"). But see Center for Food Safety v. Vilsack, No. C 10-04038 JSW, 2010 WL 3835699, at *2 (N.D. Cal. Sept. 28, 2010) (applying a Rule 24(a) per se "none but the federal defendant" approach in denying a motion for permissive intervention as to the merits under Rule 24(b)). Further, even in the Rule 24(a) context, "an applicant-intervenor's burden in showing inadequate representation is minimal: it is sufficient to show that the representation may be inadequate." Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1498 (9th Cir. 1995) (emphasis in original). Moreover, Ninth Circuit case law expanding on the parameters of inadequate representation in the context of intervention holds that adequate representation exists where, among other things, "the non-party would offer no necessary element to the proceeding that the existing parties would neglect." Southwest Ctr. for Biological Diversity v. Babbitt, 150 F.3d 1152, 1153-54 (9th Cir. 1998). Respectfully, the Kootenai Tribe disagrees that it – or any other Indian tribe – would bring nothing to the litigation table with respect to fish and wildlife species, cultural resources and reserved rights in aboriginal territory within the range of a federal land management rule of broad applicability.

The Tribe – along with the State of Idaho and the Idaho Association of Counties – moved the district court to reconsider its decision denying full intervention. But the court declined to do so. Jayne, No. 09-15-BLW, Docket

Entry 41 (Order dated August 31, 2009). Thus, the Kootenai Tribe was unable to participate as a party, even a permissive one, on the merits of claims brought under the ESA, NFMA and NEPA that directly implicated the management of natural resources in Kootenai Territory. No doubt the Idaho District Court felt constrained by the shackles of the federal defendant rule, and by the less than "crystal clear" Ninth Circuit precedent regarding intervention in the natural resources law context. Kootenai Tribe, 313 F.3d at 1108. Regardless, the result was that an Indian Tribe who was a Tribal plaintiff in litigation involving the 2001 Roadless Rule with respect to Kootenai Territory was denied full defendant-intervenor status in litigation involving the Idaho Roadless Rule for the same physical land area – a peculiar result indeed.

CONCLUSION

Based on the foregoing, and for all of the reasons set forth by the other interested parties who have placed their concerns before this Court, the Ninth Circuit should abandon the federal defendant rule which currently operates to limit the participation of sovereigns in federal lawsuits involving natural resource management issues. After all, who better than Indian tribes – whose members since time immemorial have occupied the lands at issue in natural resource management cases – might participate in such lawsuits in an effort to fully flesh out the complex issues for the benefit of federal judges. As a natural result of

abandoning the federal defendant rule, the underlying matter should be remanded to the district court for renewed consideration of the intervention question unfettered by the constraints of the federal defendant rule. The ultimate final outcome of this particular case aside, the Tribal sovereigns joining herein simply desire a fair opportunity to petition courts within the jurisdiction of the Ninth Circuit for the opportunity to participate in lawsuits implicating their sovereign interests.

DATED this 21st day of October, 2010.

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Joined by the Confederated Salish and Kootenai Tribes, the Coquille Indian Tribe, the Kalispel Tribe, the Shoshone-Bannock Tribes, the Confederated Tribes of Siletz Indians and the Metlakatla Indian Community

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5562 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, font size 14 and Times New Roman type style.

DATED this 21st day of October, 2010.

/s/Julie A. Weis
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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2010, I electronically filed the foregoing **Brief of Amicus Curiae Kootenai Tribe of Idaho, Joined by the Confederated Salish and Kootenai Tribes, the Coquille Indian Tribe, the Kalispel Tribe, the Shoshone-Bannock Tribes, the Confederated Tribes of Siletz Indians and the Metlakatla Indian Community**, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed or caused to be mailed the foregoing document by first class U.S. Mail, postage prepaid, to the following non-CM-ECF participant:

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