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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

WILDEARTH GUARDIANS, Plaintiff, vs. CRAIG HOOVER, et al. Federal Defendants, MONTANA TRAPPERS ASSOCIATION, et al. Defendant-Intervenors.	CV 16-65-M-DWM FEDERAL DEFENDANTS' OPPOSITION TO DEFENDANT-INTERVENORS' MOTION TO DISMISS

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INTRODUCTION

In these consolidated cases, Plaintiffs challenge a program administered by the United States Fish and Wildlife Service ("Service") pursuant to the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") allowing the Service to best monitor and enforce the treaty's protections for five species of furbearing animals: bobcats, Canada lynx, gray wolves, brown bears (*i.e.*, grizzly bears), and river otters. Plaintiffs' claims for relief target the environmental analyses underlying this program ("CITES Furbearer Export Program" or "Furbearer Program"), arise under two federal statutes – the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA") – and seek relief solely against federal actors. As Federal Defendants will vigorously argue during the Court's previously-scheduled summary judgment proceedings, Plaintiffs' Complaints are meritless.

Because Federal Defendants will defend their actions against claims arising under federal statutes, no further Defendants are necessary to adjudicate this lawsuit. The Court should therefore deny Defendant-Intervenors' motion under Federal Rule of Civil Procedure 12(b)(7), a provision permitting the Court to dismiss an action for failure to join indispensable parties under Rule 19. In their motion, Defendant-Intervenors contend that Rule 19 requires the joinder of dozens of states and tribes in this matter because those sovereigns play a role in the

Furbearer Program, just as do thousands of individuals who seek to trade in furbearers or their parts. Because the absent states and tribes are likely not amenable to joinder due to their sovereign immunity, Defendant-Intervenors conclude that this action must not proceed.

But Rule 19 does not require courts to join every party arguably affected by a federal action with regional or national effect. In particular, Rule 19 does not require the participation of parties who are adequately represented in the existing litigation, as is the case here: not only is the federal government presumed to undertake such representation when it defends action taken in the public interest, but the environmental analyses now entrusted to Federal Defendants' representation undergird programs specifically requested by the absent states and tribes. Even were that not the case, factors of "equity and good conscience" – particularly the narrowness of Plaintiffs' record-review claims and limitations on any associated relief – would caution against dismissal. Finally, application of Rule 19 in this instance would work an injustice on plaintiffs and the public at large by holding judicial review hostage to the consent of every sovereign with a colorable interest in the Furbearer Program, and the Court should therefore apply the well-established "public rights exception" to the Rule to excuse the participation of otherwise indispensable parties. For these reasons and those set forth below, the Court should deny Defendant-Intervenors' motion.

BACKGROUND

I. Legal Background

A. The Convention On International Trade In Endangered Species Of Wild Fauna And Flora

The United States is one of the 183 parties to CITES, a multilateral treaty that protects wildlife by regulating trade in vulnerable species. Article IV of the treaty regulates the export of pelts and other parts of certain furbearing animals, which are listed under CITES Appendix II, 27 U.S.T. 1087, T.I.A.S. No. 8249. This list includes bobcats, Canada lynx, gray wolves, brown bears, and river otters because their parts, products, and derivatives are difficult to distinguish from similar species listed under CITES. 50 C.F.R. § 23.69(a). See also 72 Fed. Reg. 48402, 48436 (Aug. 23, 2007).

To ensure that trade in CITES species does not further threaten their survival, CITES predicates the species' export (including the export of animal parts) on CITES findings and documentation. In particular, the export of a CITES Appendix II species requires the prior grant and presentation of a valid CITES export permit issued by the exporting country, conditioned on advice from the Scientific Authority of the exporting country that such export will not be detrimental to the survival of that species, and on a finding of the Management Authority of the exporting country that the specimen was not obtained in contravention of the laws of that country for the protection of fauna and flora.

CITES Art. IV(2). In the United States, the Service functions as both the Management and Scientific Authorities for purposes of the treaty, 16 U.S.C. § 1537a(a), and has used its rulemaking authority under the ESA, id. § 1540(f), to promulgate implementing regulations. 50 C.F.R. §§ 23.1–23.92. These regulations include prohibitions on the import or export of CITES-listed animals, live or dead, whether whole or parts, unless expressly authorized by valid CITES documents or specifically exempted from CITES documentation requirements. 50 C.F.R. § 23.13. The regulations also provide specific provisions for international trade in certain CITES furbearer species harvested in the United States. 50 C.F.R. § 23.69.

Since the late 1970s, when furbearer species were first listed under CITES, the Service has permitted states and tribes to apply for programmatic approvals of certain furbearer exports. Successful applicants must ensure that CITES furbearers are sustainably and legally acquired within the relevant jurisdiction, and that export will not be detrimental to the survival of the species in the wild. 50 C.F.R. § 23.69(b). Once a state or tribe is approved, it must require tagging of fur skins for export with the Service's serially-unique, non-reusable tags as evidence of legal acquisition and must further supply the Service with annual updates concerning trapping activity. Id. at § 23.69(b)-(c). Otherwise, however, the Service's

administration of the Furbearer Program does not control or direct state and tribal hunting and trapping regimes.

B. The National Environmental Policy Act

An "essentially procedural" statute, NEPA directs federal agencies to study and document the environmental consequences of proposed actions. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 558 (1978). See 42 U.S.C. § 4321 et seq.. Thus, it is well settled that NEPA itself "does not mandate particular results, but simply prescribes [a] necessary process." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (citation omitted).

Regulations promulgated by the Council on Environmental Quality permit multiple methods of NEPA compliance. 40 C.F.R. pts. 1500–1518; Robertson, 490 U.S. at 355–56. Two are relevant to Defendant-Intervenors' motion. First, an agency must prepare an Environmental Impact Statement – a detailed statement subject to extensive regulations regarding format, content, and methodology – for any proposed agency action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). See 40 C.F.R. § 1501.3. Second, the agency may prepare an Environmental Assessment. See id. §§ 1501.4(b), 1508.9. Unlike an Environmental Impact Statement, an Environmental Assessment is a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether" an Environmental Impact Statement is required. Id. at §

1508.9. If the Environmental Assessment concludes with a "finding of no significant impact" (sometimes referred to as a "FONSI"), no further NEPA analysis is necessary. See Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1239 (9th Cir. 2005).

C. The Endangered Species Act

The ESA was enacted "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species . . . ." 16 U.S.C. § 1531(b). Under ESA Section 4, two "consulting agencies" may list species as "endangered" or "threatened," and designate "critical habitat" for listed species.[1] Id. at § 1533. The Service has listed various populations of the Canada lynx, grizzly bear, and the grey wolf under the ESA.[2]

The ESA establishes several protections for listed species. ESA Section 9 prohibits the "take" of endangered species, id. at § 1538, and the Service may by

[1] The ESA is administered by the Secretary of the Interior and the Secretary of Commerce, 16 U.S.C. § 1532(15), with the Secretary of the Interior generally responsible for terrestrial species like those at issue here. The Secretary of the Interior has delegated his responsibilities to the Service.

[2] See, e.g., 65 Fed. Reg. 16052 (Mar. 24, 2000) (listing Canada lynx); 40 Fed. Reg. 31734 (July 28, 1975) (grizzly bear); 82 Fed. Reg. 30,502 (Jun. 30, 2017); Humane Soc'y v. Zinke, 865 F.3d 585 (D.C. Cir. 2017) (summarizing history of grey wolf listing and delisting).

regulation extend this bar to particular threatened species. Id. at § 1533(d).[3] ESA Section 7 requires that federal agencies evaluate their programs' effects on listed species, commanding that:

> "[e]ach Federal agency shall, in consultation with and with the assistance of [the Service], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat."

16 U.S.C. § 1536(a)(2). To determine whether agency action "jeopardizes" a given species, the ESA requires that federal "action agencies" consult with the Service whenever the action agency "may affect" a species listed as threatened or endangered. 50 C.F.R. § 402.14(a). When the Service takes action beyond its consulting obligations under the ESA (such as in its implementation of CITES) it acts as both the action agency and consulting agency, effectively consulting with itself.

Section 7 consultation is "informal" or "formal," as appropriate. Informal consultation is "an optional process that includes all discussions, correspondence, etc., between [the Service] and the [action] agency . . . designed to assist the [action agency] in determining whether formal consultation . . . is required." 50 C.F.R. § 402.13(a). See also 50 C.F.R. § 402.12(k)(1). "If during informal

[3] Under the ESA, take "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. §1532(19).

consultation it is determined by the [action agency], with the written concurrence of [the Service], that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary." Id. at § 402.13(a). If, however, the action agency or the Service determines that the action is "likely to adversely affect" listed species or designated critical habitat, the agencies must engage in formal consultation. Id. at §§ 402.13(a), 402.14(a)–(b). Formal consultation concludes with the Service's "Biological Opinion" as to whether the agency action will jeopardize the listed species or adversely modify the species' critical habitat. Id. at §§ 402.14(g)(4), (h)(3); see also 16 U.S.C. § 1536(b)(4).

II. Procedural Background

The Furbearer Program provides the Service with a comprehensive means to review state and tribal regimes that either directly regulate the capture of CITES furbearer species or that may incidentally affect the species (states and tribes normally cannot permit the trapping of ESA-listed species, which are protected by Section 9 of the Act, but listed species are sometimes trapped by mistake during the permitted pursuit of non-listed species). In 2001, the Service prepared a Biological Opinion concluding that the Furbearer Program's application vis-à-vis bobcats would not jeopardize Canada lynx. Originally designed for a term of ten

years, the Opinion was extended indefinitely in 2012 after the Service documented that take resulting from the Program was within expected bounds.

On May 18, 2017, and after substantial opportunity for public comment, the Service released a final Environmental Assessment for the Furbearer Program. The Assessment evaluated four alternatives for federal regulation of furbearer exports under CITES, none of which addressed the wisdom of individual state or tribal regulatory regimes or called for changes to those regimes. Specifically, the Service considered (1) a "no action" alternative (*i.e.*, administering the furbearer program consistent with past practice); (2) eliminating the Service's requirement for CITES tags and approving state and tribal programs based upon review of other documentation (such as trapper diaries); (3) flatly disallowing furbearer export; or (4) evaluating CITES requirements for export on an individual basis without approved state or tribal programs. See ECF No. 56-3 at 11-25.

Ultimately, the Assessment found that the preferred "no action" alternative would have no significant impact on the human environment and would best permit a streamlined, efficient review of state and tribal furbearer management and harvest programs and effects thereof. Id. at 68-73. Among the parties submitting comments on the draft Environmental Assessment and acknowledged in the final Assessment were 26 states, all but one of which indicated "support" or "strong support" for the chosen alternative (the remaining state, Wyoming, registered

"conditional support" for the preferred alternative but did not support the remaining three alternatives). Id. at 37-39.

In these consolidated cases, Plaintiffs WildEarth Guardians ("Guardians") and the Center for Biological Diversity (the "Center") variously challenge the Furbearer Program's compliance with NEPA and the ESA. Both the Center and Guardians contend that the Service's Environmental Assessment is unlawful and that the Service is obligated to prepare an Environmental Impact Statement, while Guardians further contends that the Service's 2012 extension of its Biological Opinion is unlawful. Put otherwise, the infirmities alleged by Plaintiffs do not flow from any purportedly unlawful state or tribal action, and instead target supposed federal noncompliance with federal statutes. Consistent with the federal focus of Plaintiffs' Complaints, the lawsuits seek relief only as against federal parties: collectively, the operative Complaints ask the Court to declare the Environmental Assessment and Biological Opinion unlawful, set aside both documents, and enjoin the Service's issuance of export documentation for bobcats in state and tribal areas containing habitat for Canada lynx.

The Court has granted motions to intervene as Defendants from both the Montana Trappers Association and Fur Council of America, the latter of which was decided over the objections of Guardians and without responsive briefing. On

November 10, 2017, the Defendant-Intervenors filed the instant motion to dismiss for failure to join indispensable parties under Federal Rule of Civil Procedure 19.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 12(b)(7), a party may seek dismissal for failure to join an indispensable party under the two-part test of Rule 19. See Washington v. Daley, 173 F.3d 1158, 1167 (9th Cir. 1999). First, Rule 19(a) sets forth those parties who are "required" for the court's adjudication and who must therefore be joined if feasible. As relevant to Defendant-Intervenors' motion, such parties include those with "an interest relating to the subject of the action" whose "ability to protect the interest" may be "impair[ed] or impede[d]" by proceeding in the party's absence. Fed. R. Civ. P. 19(a)(1)(B).

Second, Rule 19(b) determines whether in "equity and good conscience" the Court should proceed "among the existing parties" if the absent party is required but cannot be joined. To that end, the Rule prescribes four non-exclusive considerations: (1) the extent to which a judgment in the required party's absence would prejudice the absent or existing parties; (2) the extent to which such prejudice could be avoided or lessened; (3) the extent to which a judgment in the required party's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. Id. at 19(b). The application of these factors is case specific, and "[t]he moving party has the

burden of persuasion in arguing for dismissal." Clinton v. Babbitt, 180 F.3d 1081, 1088 (9th Cir. 1999). "Dismissal, however, is not the preferred outcome under the Rules." Askew v. Sheriff of Cook Cty., Ill., 568 F.3d 632, 634 (7th Cir. 2009).

ARGUMENT

I. The States And Tribes Are Not "Required Parties" Under Rule 19 Because They Are Adequately Represented By Federal Defendants

Assuming that the states and tribes retain "interests" in the Furbearer Program of the type contemplated by Rule 19(a)(1)(B), the absent parties are nonetheless not "required" under the Rule because proceeding in their absence will not "as a practical matter impair or impede the[ir] ability to protect [such] interest[s]." Fed. R. Civ. P. 12(a)(1)(B)(ii). In particular, this action will not threaten the states' and tribes' interests because the Federal Defendants can and will adequately represent the absent parties. In the Ninth Circuit:

> A non-party is adequately represented by existing parties if: (1) the interests of the existing parties are such that they would undoubtedly make all of the non-party's arguments; (2) the existing parties are capable of and willing to make such arguments; and (3) the non-party would offer no necessary element to the proceeding that existing parties would neglect.

Sw. Ctr. for Biological Diversity v. Babbitt, 150 F.3d 1152, 1153–54 (9th Cir. 1998). These factors presumptively weigh in favor of adequate representation when the government is a party and is charged with representing the interests of the absent parties. United States v. City of Los Angeles, Cal., 288 F.3d 391, 401 (9th Cir. 2002). Likewise, "a presumption of adequacy of representation arises"

when the absent parties and existing parties "have the same ultimate objective." Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003), as amended (May 13, 2003) (citation omitted).

Applying these considerations, the Ninth Circuit has noted that NEPA's provisions for public involvement and comment – *i.e.*, provisions not strictly tethered to the ultimate form of NEPA analysis – position the federal government as an adequate representative for absent sovereigns. Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1499 (9th Cir. 1995), abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011). Likewise, the ESA provides for comment by "applicants" for federal licenses or permits during the preparation of Biological Opinions, 50 C.F.R. § 402.14(g)(5), and specifically requires cooperation between state governments and federal agencies as part of the Act's implementation. 16 U.S.C § 1535.

With these procedural safeguards in mind, there is every indication that the Executive Branch will fully, capably, and sufficiently defend its actions in a fashion protecting the states' and tribes' interests. In particular, the nature of this lawsuit as an action for review of an administrative record – *i.e.*, an action limited strictly to the evaluation of Federal Defendants' stated rationale and conclusions – positions the United States as the only necessary Defendant. See Makah Indian Tribe v. Verity, 910 F.2d 555, 559 (9th Cir. 1990) (rejecting Rule 12(b)(7) motion

because "[u]nder the [Administrative Procedure Act], any person adversely affected by agency action may seek review").[4] This is particularly true where, as here, the challenged environmental analyses support exactly the federal programs requested and obtained by the absent parties. See ECF No. 22 ("Intervenors' Br.") at 4-6 (compiling state comments on draft Environmental Assessment).

According to Defendant-Intervenors, Federal Defendants will not adequately represent the absent Tribes because the United States' litigating positions have occasionally differed from those of *other* Tribes in *other* lawsuits. But that truism is irrelevant to the instant motion, since Rule 19 demands that Defendant-Intervenors show a particular "conflict of interest between the United States and the [absent] tribe[s]" to overcome the usual presumption in favor of adequate representation. Washington v. Daley, 173 F.3d 1158, 1167 (9th Cir. 1999). Defendant-Intervenors fail to identify such a conflict because none exists: not only does the United States retain a general trust obligation vis-à-vis federally-recognized tribes, but, as noted, the analyses challenged by Plaintiffs undergird a process *facilitating* the absent tribes' *voluntary* participation in the Furbearer Program, id. at 1167–68.

[4] Insofar as Defendant-Intervenors contend that Federal Defendants will not adequately represent the absent parties simply because Federal Defendants oppose the instant motion to dismiss, the Ninth Circuit has squarely considered and rejected such arguments. Sw. Ctr. for Biological Diversity v. Babbitt, 150 F.3d at 1154.

Defendant-Intervenors further contend that Federal Defendants will not adequately represent the absent states because the federal government does not share the states' particular interest in wildlife management. See Intervenors' Br. at 19 n.4 (citing Forest Conservation Council, 66 F.3d at 1498-99). In Forest Conservation Council, the Ninth Circuit determined that while federal defendants were capable of adequately representing the interests of Arizona with respect to the merits of challenged environmental reviews, the plaintiffs' explicit and detailed request for additional, "broad" injunctive relief – an order essentially suspending activity on all national forests throughout the state – might compel Arizona to offer divergent arguments with respect to remedy. Id. at 1499. In this case, however, the Center seeks no such order, and instead requests only the type of vague or relatively tailored injunctive relief that will not implicate distinct state-wide concerns. Compare Forest Conservation Council, 66 F.3d at 1497 n. 9 (applying Rule 19 inquiry to "the prayer for relief in the plaintiffs' complaint") with 9:17-cv-00099-DWM, ECF No. 1 (Center Compl.) at 41 (contemplating only that Plaintiff "may" seek injunctive relief).

To be sure, Guardian's request for relief more closely resembles that in Forest Conservation Council by seeking to enjoin *all* grants of CITES permits for bobcat export throughout large swathes of the country. But such an order is so broad as to be presumptively unavailable to Guardians as a matter of law, thereby

militating against dismissal under Rule 19. In particular, the relief sought by Guardians is inappropriate because a "less drastic remedy" – simply setting aside the challenged analyses – could effectively halt the Furbearer Program's provisions for bobcats while preserving the right of individuals to seek CITES documentation outside of the Program (a right not challenged by Guardians). Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165-66 (2010). Put otherwise, Guardian's overbroad request for injunctive relief does not risk inadequate representation because it is tantamount to no request at all.[5]

Finally, Defendant-Intervenors conclude that the absent parties lack adequate representation in this case because the Court previously made similar findings with respect to Defendant-Intervenor Fur Information Council. Intervenors' Br. at 19 n. 4 (citing ECF No. 44 at 3-4.) But in so finding, the Court relied on the Council's particularized showing of organizational and financial interests that differed from those of Federal Defendants and the preexisting Defendant-Intervenor. Id. See also ECF No. 36-1 (declaration explaining the Council's interests). There are no such showings in Defendant-Intervenors'

[5] On this score, Defendant-Intervenors are wrong to contend that the Court "must" issue an injunction for ESA violations. Intervenors' Br. at 14-15 (citing Washington Toxics Coal. v. EPA, 413 F.3d 1024, 1034 (9th Cir. 2005). As the Ninth Circuit recognized in Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1090-91 (9th Cir. 2015), Washington Toxics has been superseded by Supreme Court precedent requiring a plaintiff to *demonstrate* the propriety of injunctive relief in both NEPA and ESA lawsuits.

motion beyond the conclusory and unremarkable observations that states and tribes enjoy certain managerial authority over wildlife within the borders. Putting aside the obvious point that this authority is circumscribed by valid congressional enactments like the ESA and NEPA – statutes that Federal Defendants are best suited to litigate and that subsume the interests of the absent parties – Defendant-Intervenors' failure to explain why these interests depart from those of Federal Defendants or Defendant-Intervenors wholly defeats any claim of inadequate representation. See Southwest Center, 150 F.3d at 1154 (rejecting possibility of conflict arising from government's "potentially inconsistent responsibilities" where parties failed to demonstrate "how such a conflict might actually arise in the context of [the action at hand]").

II. Equity And Good Conscience Require That This Case Proceed In The Absence Of Any Required Parties

Even where required parties are sovereigns, the Ninth Circuit has "nonetheless consistently applied the four-part test to determine whether [they] are indispensable parties." Confederated Tribes of Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1499 (9th Cir. 1991). Although the absent states and tribes are not required parties in this case, application of the four factors enumerated by Rule 19(b) would in any event forestall dismissal under Rule 12(b)(7). [6]

[6] For purposes of this brief, Federal Defendants assume that it is not feasible to join the absent parties on the grounds that they enjoy sovereign immunity.

"[T]he first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made a party necessary under Rule 19(a): a protectible [sic] interest that will be impaired or impeded by the party's absence." Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1024–25 (9th Cir. 2002). In this case, therefore, the absent parties are not required to be joined under Rule 19(b) because Federal Defendants will minimize any risk of prejudice through adequate representation of parties' interests. See supra at 12-16. And even were that not the case, the absent parties are highly unlikely to be prejudiced because Plaintiffs seek relief only as against Federal Defendants and do not ask the Court to modify or overturn any particular component of state law trapping regimes. Insofar as Defendant-Intervenors contend that the absent parties will take such action *on their own* following an adverse ruling, this speculation is entirely unsubstantiated and markedly different from the risks identified by the Ninth Circuit as favoring dismissal under Rule 19(b). See, e.g, Am. Greyhound Racing, 305 F.3d at 1025 (finding prejudice to absent tribes where plaintiffs explicitly sought the perpetual cancellation of those tribes' gaming compacts).

The second 19(b) factor also weighs against dismissal: even if an order rendered in the states' and tribes' absence would prejudice the parties, the Court would retain discretion to tailor that relief in a fashion tipping against dismissal. Fed. R. Civ. P. 19(b)(2). In particular, the Court can avoid collateral damage to

state and tribal interests by refraining from overbroad injunctive relief – particularly the injunctive relief requested by Guardians – and simply remanding any invalid actions to the Service for further development. Washington, 173 F.3d at 1168. As the Ninth Circuit has explained, the prospect of ordinary remand weighs heavily against dismissal because each of Plaintiffs, Defendant-Intervenors, and the absent parties would enjoy their normal participatory rights in any post-litigation administrative proceedings, thereby allaying any fears that judgment in this case would "freeze out" the absent parties from later processes concerning the Furbearer Program. See Stock W. Corp. v. Lujan, 982 F.2d 1389, 1399 (9th Cir. 1993). The Ninth Circuit has likewise determined that a court's ability to remand agency action militates against dismissal under Rule 19(b)'s third factor, which asks whether the court can render an adequate judgment in the required parties' absence. Id.

Finally, and as set forth more fully below, Rule 19(b)'s fourth factor – the plaintiff's recourse to adequate remedies should the case be dismissed – cuts sharply against dismissal. Fed. R. Civ. P. 19(b)(4). The United States has waived sovereign immunity for challenges such as Plaintiffs only via the Administrative Procedure Act, 5 U.S.C §§ 701-06, and dismissing the instant action on the grounds that it implicates absent sovereigns would effectively place that cause of action out of reach for Plaintiffs, who would then be required to obtain the consent

of dozens of states and tribes as a prerequisite to judicial review. Where plaintiffs are similarly unable to seek redress, the fourth Rule 19(b) factor "strongly" favors proceeding with the existing parties. White v. Univ. of Cal., 765 F.3d 1010, 1028 (9th Cir. 2014).

III. Under Any Application Of Rule 19, This Case Should Not Be Dismissed Because It Implicates A Nationwide Public Program Administered By The Federal Government

Ultimately, this suit should proceed even if the absent states and tribes are indispensable parties under Rule 19. That is because "[t]he federal courts have . . . recognized a 'public rights exception' to the usual rules of joinder 'when litigation transcend[s] the private interests of the litigants and seek[s] to vindicate a public right.'" Kettle Range Conservation Grp. v. U.S. Bureau of Land Mgmt., 150 F.3d 1083, 1086–87 (9th Cir. 1998) (citing Kescoli v. Babbitt, 101 F.3d 1304, 1311 (9th Cir. 1996). The exception recognizes that a strict application of Rule 19 would sound the "death knell" for judicial review of executive action with regional or national effect, since any absent party arguably affected by the rule and enjoying sovereign immunity could forestall that review simply by withholding consent for joinder. Conner v. Burford, 848 F.2d 1441, 1460 (9th Cir. 1988). See also Manygoats v. Kleppe, 558 F.2d 556, 559 (10th Cir. 1977).

The public rights exception applies here because Plaintiffs have attacked a nationwide export program administered by the United States Fish and Wildlife

Service, "a public right vested in [the agency] as a public body, charged in the public interest." Nat'l Licorice Co. v. NLRB, 309 U.S. 350, 364 (1940). The Ninth Circuit and other courts have repeatedly emphasized that challenges implicating the public's right to natural resources – and, in particular, the procedural rights created by statutes like NEPA – are precisely the type of lawsuits transcending the parochial disputes normally subject to Rule 19. Conner, 848 F.2d at 1458-62; Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Dep't of the Interior, 929 F. Supp. 2d 1039, 1062 (E.D. Cal. 2013). Indeed, the very thrust of Defendant-Intervenors' motion is that this lawsuit implicates the interests of dozens of states and tribes scattered throughout the nation, not a handful of closely-related private parties contesting a discrete contract, *res*, or transaction.

Defendant-Intervenors seek to evade the public rights exception by recasting Plaintiffs' claims for relief as the vindication of private interests in conservation or as a *de facto* attempt to destroy state and tribal trapping regimes. As an initial matter, it is dubious whether Plaintiffs have any legally-protected, "private" rights in federally-protected species independent of those bestowed upon the public at large by Congress. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring). In any event, and as Plaintiffs' Complaints make plain, this litigation is directed squarely at a federal permitting regime and not at Defendant-Intervenors or at absent sovereigns. See supra at 8-11. And even

assuming that Plaintiffs' stated claims for relief concealed some unstated effort to upset non-federal activity, the means they have chosen to that end – an attempt to modify federal export permitting – would "transcend[] . . . private interests" no differently than a lawsuit motivated by that permitting in the first instance. Kettle Range Conservation Grp., 150 F.3d at 1086–87. Accord Am. Greyhound Racing, 305 F.3d at 1026 (declining to apply public rights exception where plaintiff's private, pecuniary interests in gambling activities only "incidentally" touched on gambling as a matter of public concern).

Nor is this litigation capable of "destroying" any rights held by absent parties, an outcome that would defeat the public rights exception. See White, 765 F.3d at 1028. When the Ninth Circuit has declined to apply the public rights exception on this basis, it has recognized that absent parties risk a final judgment capable of wholly and permanently eradicating their legally-protected interests. Id. (declining to fix title to artifacts); Shermoen v. United States, 982 F.2d 1312, 1316 (9th Cir. 1992) (partition of tribal reservation and escrow funds). But while Defendant-Intervenors have not articulated precisely which of the absent parties' rights might be affected by this lawsuit, see supra at 16-17, any such rights would easily survive adjudication as between the existing parties because Plaintiffs do not request that the Court take the extraordinary (and likely improper) step of permanently curtailing the trapping and conservation regimes of third-party

sovereigns. And to the extent that Plaintiffs' request for the modification of federal rights might implicate the administrative reworking of those rights or speculative, downstream actions by states or tribes, the absent parties would in all events retain an option to participate in future NEPA and ESA processes on that score. This option preserves, not "destroys," any rights of absent sovereigns, and thereby cements the public rights exception as applied to Plaintiffs' motion. See Conner, 848 F.2d at 1458-62.

CONCLUSION

For the reasons set forth above, the Court should deny Defendant-Intervenors' motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief is 5,220 words, excluding the caption, table of authorities, table of contents, signature blocks, and certificate of compliance.

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