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

WILDEARTH GUARDIANS, Plaintiff, and	Lead Case No. CV 16-65-M-DWM Member Case No. CV 17-99-M-DWM

CENTER FOR BIOLOGICAL DIVERSITY,

Consolidated-Plaintiff,

vs.

U.S. FISH & WILDLIFE SERVICE, et al.,

Defendants,

and

MONTANA TRAPPERS ASSOCIATION, et al.

Defendant-Intervenors.

PLAINTIFFS' JOINT OPPOSITION TO MOTION TO DISMISS

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Pursuant to L.R. 7.1(d)(1)(B)(i), Plaintiffs WildEarth Guardians ("Guardians") and Center for Biological Diversity ("Center") hereby respectfully file this joint opposition to the motion to dismiss filed by Defendant-Intervenors Fur Information Council of America, Montana Trappers Association, and National Trappers Association ("Intervenors"). (Doc. 75.)

Intervenors fail to prove the parties they claim are indispensible to this case have the requisite "interest" or "right" under Rule 19. DIs' Mem. at 1-2, 14. (Doc. 76.) While States and Tribes manage wildlife within their borders, they have no "right" to export from the United States hides from bobcats, lynx, river otters, gray wolves, or bears. Instead, all exports are regulated by and must be approved by Defendants U.S. Fish and Wildlife Service ("Service"), and any trade must comply fully with the Convention on International Trade in Endangered Species of Flora and Fauna ("CITES"), 27 U.S.T. 1087, 993 U.N.T.S. 243 (1975). This case, however, asks whether the Service has complied with two other laws – the National Environmental Policy Act ("NEPA") and Section 7 of the Endangered Species Act ("ESA") – when it has regulated and approved exports pursuant to the CITES wildlife export program. Because these are federal agency administrative duties that apply only to the Service, and affect only exports, Intervenors' motion fails.

I. Background

As the Court is aware, CITES is an international treaty governing trade in imperiled species of wildlife and plants. To be protected under CITES, a species must be included on one of the CITES Appendices, and each Appendix provides listed species varying degrees of protection. CITES, Art. III-V. Furbearers, including bobcat, river otter, Canada lynx, gray wolf, and brown bear, are listed on CITES Appendix II. 50 C.F.R. § 23.69(a). All international trade in Appendix II species is prohibited unless the exporting country issues a valid CITES export permit. CITES, Art. IV. To issue a valid export permit the exporting country must: 1) find the export "will not be detrimental to the survival of the species," and (2) "be satisfied that the specimen was not obtained in contravention of the laws of th[e] State for the protection of fauna and flora." *Id*. Art. IV(2)(a), (b).

In 2007, the Service developed the furbearer program to aid it making the requisite findings for the high volume of exports of furs from furbearers from the U.S. *See* 72 Fed. Reg. 48,402 (Aug. 23, 2007). If States and Tribes meet certain conditions, they may operate an approved program, but exports of furbearers from such programs still require CITES permit applications. 50 C.F.R. § 23.69(e)(1).

In this suit, Guardians and the Center challenge the Service's administration of the CITES wildlife export program. In their operative complaints, both allege the Service violated NEPA in issuing a deficient Environmental Assessment

("EA") to evaluate effects of the program, and it illegally failed to prepare an environmental impact statement ("EIS"). Amd. Cmpl. (Doc. 62 [CV 16-65-M-DWM] at 16-19.); Cmpl. (Doc. 1 [CV 17-99-M- DWM] at 38-40.) Further, Guardians alleges the Service violated NEPA and the ESA when it issued a Biological Opinion assessing the effects on Canada lynx of the export of bobcat pelts, and authorizing incidental take providing immunity under the ESA to certain States and Tribes approved to participate in the program. Amd. Cmpl. (Doc. 62 [CV 16-65-M-DWM] at 18-21.)

For relief, for their NEPA claims, Guardians and the Center ask the Court to set aside the EA and Finding of No Significant Impact, and the Center also asks the Court to order the Service to prepare a new NEPA analysis. Amd. Cmpl. (Doc. 62 [CV 16-65-M-DWM] at 22.); Cmpl. (Doc. 1 [CV 17-99-M- DWM] at 41.) For its ESA claims, Guardians asks the Court to set aside the Biological Opinion and Incidental Take Statement and enjoin the Service from issuing tags, allowing the export of bobcat pelts from states and tribal areas that include habitat for Canada lynx. Amd. Cmpl. (Doc. 62 [CV 16-65-M-DWM] at 22.)

Trying to set the stage for its joinder arguments, Intervenors misrepresent this case. First, they assert that "it is evident that Plaintiffs are [] seeking to interfere with the way the States and Tribes manage their wildlife, by forcing them to limit, if not eliminate, the harvesting of the Furbearers and at the very least

restrict the means by which trapping is conducted." DIs' Mem. at 10; *see also id*. at 2 (asserting that Plaintiffs "take aim" at state and tribal "harvesting and trapping of wildlife within their borders and tribal areas"). However, the claims for declaratory relief in Guardians' and the Center's operative complaints are exclusively against the Service, as is the requested injunctive relief. Plaintiffs do not challenge State or Tribal authority to authorize trapping or other means of capturing any wildlife species, or the means they have chosen to do so.

Next, Intervenors assert that Plaintiffs seek "injunctive relief with the purpose of halting, if not wholly eradicating," the CITES wildlife export program. DIs' Mem. at 1; *see also id*. at 15 (Plaintiffs "are seeking injunctive relief designed to put a stop to the CITES Export Program"). As noted, Plaintiffs seek declaratory judgments that the Service has violated NEPA and the ESA, and an order setting aside the EA, Finding of No Significant Impact, Biological Opinion, and Incidental Take Statement, which is typical in an APA case. Guardians seeks further relief, pursuant to and tailored to the principles underlying the need to protect species listed under the ESA – an order ceasing solely the export of bobcat pelts from the 14 states and three tribal areas where trapping may result in continued incidental take of individual Canada lynx, which are listed as threatened with extinction. Such an order, if granted, would implicate only the *export* of bobcat pelts, and presumably last only until the Service complies with NEPA and analyzes whether

to again extend take immunity to States and Tribes that authorize bobcat trapping for export that incidentally takes lynx. Such an order would not change State or Tribal authority to authorize trapping nor, indeed, any continued trapping activities.

Intervenors continue that "Guardians is seeking to have the States and Tribes be required by the Service to adopt the trapping methods published by the Service." DIs' Mem. at 18. As the EA notes, it is the Service's prerogative to set conditions for States and Tribes to participate in its CITES wildlife export program. Plfs' Ex. 1 (EA) at 9. Guardians' purpose in noting that the Service has published methods to avoid incidental take of lynx is to help prove why its Incidental Take Statement – which does not include any of the methods as a condition for take immunity – is arbitrary and capricious. Again, these claims for declaratory and injunctive relief are exclusively against the Service and, even if granted, would affect only bobcat pelt *exports*. They would not "result in the invalidation or modification" of any State or Tribal rule or regulation related to trapping. *Cf*. DIs' Mem. at 18 (case citation omitted).

II. Standard of Review

Intervenors filed their motion to dismiss under Rule 12(b)(7) for failure to join a party under Rule 19. They bear the burden of establishing that dismissal is appropriate. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

There are three successive parts to the inquiry. *Alto v. Black*, 738 F.3d 1111, 1126 (9th Cir. 2013). First, Intervenors must prove the States and Tribes are a "required party" that must be joined because "either: (1) the court cannot afford 'complete relief among the existing parties'" in its absence, "or (2) proceeding with the suit in its absence will 'impair or impede'" its "ability to protect a claimed *legal interest* related to the subject of the action, or 'leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.'" *Id*. (emphasis added). Second, if a person is a required party, the court must determine whether joinder is feasible, or is barred by sovereign immunity. *Id*. Third, if joinder of a required party is impossible, then the court must consider whether, in "equity and good conscience," it should dismiss the case. *Id*. The inquiry is "a practical one and fact specific," and "is designed to avoid the harsh results of rigid application." *Makah Indian Tribe*, 910 F.2d at 558 (citation omitted).

III. Argument

Intervenors fail to demonstrate that the States and Tribes participating in the CITES export program have the requisite "legal interest" to be necessary parties in this case. Moreover, any interests they have are adequately represented by existing parties and, if they are not, the public interest exception permits this case to proceed without them.

A. Intervenors Fail to Prove this Case Cannot Proceed Without States and Tribes.

Intervenors argue that proceeding with this suit in the absence of the States and Tribes participating in the CITES wildlife export program will "impair or impede" their "ability to protect a claimed legal interest related to the subject of the action." DIs' Mem. at 14-19.[1]

As the outset, the Supremacy Clause of the U.S. Constitution mandates that state or tribal sovereign immunity cannot defeat a suit seeking prospective relief to enjoin the violation of federal laws. U.S. Const. Art. VI ("[T]he laws of the United States . . . shall be the supreme law of the Land."); *Ex parte Young*, 209 U.S. 123, 159-60 (1908). As the Supreme Court has explained, "[t]he state has no power to impart . . . immunity from responsibility to the supreme authority of the United States." *Ex parte Young*, 209 U.S. at 160. Consistent with this tenet, federal courts have repeatedly refused to allow states or tribes to use Rule 19 to defeat actions seeking prospective enforcement of federal laws. *See, e.g.*, *Salt River Project v. Lee*, 672 F.3d 1176, 1181-82 (9th Cir. 2012) (considering federal employment law); *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153-55 (9th Cir. 1998) (NEPA and ESA case).

[1] Intervenors do not argue that Plaintiffs cannot obtain complete relief without the States or Tribes; therefore, Plaintiffs do not address that prong of Rule 19.

As one court has noted, allowing Rule 19 to thwart enforcement of any federal law that incidentally affects state or tribal interests would "effectively insulate[] an entire category of [federal] agency action from judicial review." *Hayes v. Chaparral Energy, LLC*, No. 14-CV-495-GFK-PJC, 2016 WL 1175238, at *11 (N.D. Okla. Mar. 23, 2016), *vacated as moot*, 699 Fed. App'x 799. Indeed, taken to its logical end, the premise of Intervenors' argument could defeat most suits seeking judicial review of the environmental decisions of federal agencies that in any way affect state or tribal interests.

1. A Financial Stake in Exports is Not a Protected Legal Interest.

Intervenors assert that the approved States and Tribes have "claims of legal, protectable interests and entitlements in this litigation. . . ." DIs' Mem. at 14. Plaintiffs do not dispute that the wildlife pelts and parts regulated and exported under CITES are largely for commercial purposes. EA at 29-30. But the Ninth Circuit has held that the requisite "legally protected" interest "must be more than a financial stake." *Makah Indian Tribe*, 910 F.2d at 558.

Here, as for the Tribes approved to participate in the CITES wildlife export program, the motion asserts no legally protected interest. Further, the EA does not list comments on the draft EA from any Tribe, *cf*. EA at 35-39, and Plaintiffs cannot find any comments from a Tribe submitted in the public record on the Service's website. Declaration of Peter M.K. Frost, ¶ 2. Intervenors fail to meet

their evidentiary burden of proving the Tribes have the requisite legal interest. *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994) ("The proponent of a motion to dismiss under 12(b)(7) has the burden of producing evidence showing the nature of the interest possessed by an absent party and that the protection of that interest will be impaired by the absence."); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983) (joinder is "contingent . . . upon an initial requirement that the absent party claim a legally protected interest relating to the subject matter of the action").

As for the approved States, their primary comments on the EA relate to prospective loss of revenue from licensing. EA at 39-40. In turn, Intervenors repeat the States' comments related to licensing and finances. DIs' Mem. at 5-7. But under Ninth Circuit caselaw, any financial stake the States may have in this case is not a "legally protected" interest for purposes of Rule 19.

2. There is No "Right" to Export Pelts or Furs Under CITES.

Intervenors' arguments are falsely premised on asserting certain "rights" by the States and Tribes. DIs' Mem. at 1-2, 14. But they have no rights to export furs and the conditions established during ESA consultations are up to the States and Tribes to follow if they want ESA liability coverage. The CITES furbearer program exists to aid the Service in making requisite "non-detriment" findings for

exporting certain Appendix II listed species. 50 C.F.R. § 23.69(b). But the exporter must still apply to export furs. 50 C.F.R. § 23.69(e)(1). Thus, they are not entitled to export furs or pelts even if a State or Tribe is participating in the program, and participation fails to demonstrate an interest within the meaning of Rule 19. *Yellowstone Cty. v. Pease*, 96 F.3d 1169, 1173 (9th Cir. 1996) (party not necessary where it "cannot demonstrate that it is a party to a relevant commercial agreement, lease, trust, or treaty with one of the parties to the lawsuit."). Intervenors further imply this case may impact State or Tribal management of wildlife due to the request for a new ESA Section 7 process and Biological Opinion. DIs' Mem. at 2. However, any conditions in a new Biological Opinion would implicate State or Tribal wildlife management only *if* a state or tribe elected to comply with such conditions in order to be afforded "take" liability protection under the Incidental Take Statement in the Biological Opinion. Thus, no "rights and authority over harvesting and trapping," DIs' Mem. at 2, would be lost without subsequent decision-making by any state or tribe. As a result, the requisite Rule 19 interest is lacking here.

3. The States and Tribes Have No Legally Protectable Interest Because Plaintiffs Seek to Enforce Compliance with Administrative Procedures.

The Ninth Circuit has held that "an absent party has no legally protected interest in a suit merely to enforce compliance with administrative procedures."

Cachil Dehe Band of Wintun Indians v. California, 547 F.3d 962, 971 (9th Cir. 2008) (citing *Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466, 468 (9th Cir. 1986)). In *Northern Alaska*, the Ninth Circuit affirmed the district court's denial of the federal defendants' motion to join via Rule 19 a group of miners that sought permits to mine in national parks in Alaska, on the ground that the miners had no legally protected interest a federal agency's compliance with NEPA. *Id*., 803 F.2d at 469.

Here, like in *Northern Alaska*, Plaintiffs seek to have the CITES wildlife export program properly evaluated in a sufficient NEPA analysis, and the States and Tribes may participate in that administrative procedure. The same is true with the Biological Opinion and Incidental Take Statement: insofar as the Service extended immunity to certain States and Tribes that authorize trapping that results in incidental take of lynx, that decision was required to be evaluated in a NEPA analysis. *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996). If the Court sets aside the Incidental Take Statement, and the Service undertakes to adopt a new one, any interested State and Tribe may participate in the resulting NEPA process. As in *Conner v. Burford*, 848 F.2d 1441, 1460 (9th Cir. 1988), this case "does not purport to adjudicate the rights" of any State or Tribe; "it merely seeks to enforce the public right to administrative compliance with environmental protection standards of NEPA and the ESA." Accordingly, even if the States and Tribes have

protectable interests, they do not "in a suit merely to enforce compliance with administrative procedures." *Cachil Dehe Band*, 547 F.3d at 971.

B. The States and Tribes Participating in the Furbearer Export Program Are Adequately Represented by Existing Parties.

Even if this case may impede or impair States' or Tribes' ability to protect a qualified legal interest, which it does not, "[a]s a practical matter, an absent party's ability to protect its interests will not be impaired by its absence from a suit where its interest will be adequately represented by existing parties to the suit." *Alto*, 738 F.3d at 1127 (citation omitted). 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. *Southwest Center*, 150 F.3d at 1154.

1. The Service Adequately Represents State and Tribal Interests.

Here, the Service can adequately represent the States and Tribes it has approved to participate in the CITES wildlife export program. Intervenors do not dispute that the Service will vigorously defend its actions. Similarly, in *Southwest Center*, an environmental group sued federal agencies, alleging they violated NEPA and the ESA with respect to how much water would be stored in a reservoir. 150 F.3d at 1153. The district court dismissed the case under Rule 19 for failure to

join an Indian community ("Community") that asserted water storage in the reservoir. *Id*. The Ninth Circuit ruled that the district court was correct that the Community had a protectable interest in the case, and that the relief sought would impair its interest. *Id*. The Ninth Circuit nonetheless reversed the district court's dismissal of the case, noting that "[t]he district court did not question the ability or willingness of the United States to represent [a non-party] in the adjudication of the underlying merits of the suit." It also noted that the "the federal government shares the Community's interest in defeating [the plaintiffs'] ESA and NEPA claims," and "the government will be an effective representative of the Community's interests" in adjudicating those claims. *Id*. at 1154. As to any evidence of a conflict in interest, the Ninth Circuit noted that the proponents of dismissal "identify no argument the United States would not or could not make on the Community's behalf, and suggest no 'necessary element' the Community alone could present." *Id*.

The same is true here. Intervenors broadly assert the Service cannot represent the interests of the States and Tribes that the Service permitted to participate in the wildlife export program, because "[t]he federal government does not have a specific interest in protecting the State's sovereign rights over management of their wildlife." DIs' Mem. at 19 n.4 (citation omitted). But this case will do nothing to "impair or impede" any state or tribal "sovereignty" over

wildlife on State or Tribal lands. As the Service acknowledged in its EA: "States and Tribes have broad trustee and policy powers to control and regulate the taking and possession of resident wild species within their borders." Plfs' Ex. 1 (EA at 6). Instead, this case concerns only the *export* of certain animal parts and pelts as regulated under CITES. *See Id.* (stating: "Export of these species from the United States is controlled by U.S. regulations implementing CITES."). Indeed, in its motion to intervene, Defendant-Intervenor Fur Information Council of America emphasized that the relief sought in this case implicates the export of wildlife pelts and parts, but not trapping or snaring authorized by States or Tribes, which might implicate their sovereignty. (Doc. No. 37 at 15). The Council stated that Guardians' lawsuit "seeks to stop CITES exports, not trapping in the U.S. generally," and, indeed, that if the Court were to grant Guardians' request for relief, "[t]rapping will continue, but exports will be adversely impacted." (*Id*.)

Moreover, the States and Tribes that applied for and have been accepted to participate in the CITES wildlife export program recognize the Service regulates such exports, as well as sets standards for participating in the program. Plfs' Ex. 1 (EA at 7) (stating: "States and Tribes wishing to participate in the CITES Export Program are required to develop a Service-approved tagging program that requires the tagging of skins of these species for the skins to be eligible for export."). Setting terms and conditions for exports designed to ensure compliance with

CITES does not deprive a state or tribe of sovereignty to manage wildlife within its borders; if a state or tribe does not like what the Service requires for participants in the export program, it does not have to seek to participate.[2] Intervenors fail to prove this case may impair or impede state or tribal sovereignty over wildlife within their borders. *Southwest Center*, 150 F.3d at 1154 (merely invoking "sovereignty," without proving how it would be impaired, does not satisfy this condition for joinder).

a. The Service Adequately Represent the Tribes.

Next, Intervenors focus on the Tribes, and asserts the Service cannot represent their interests because, broadly, "the federal government has a history of not representing Native American rights even when it had the obligation to do so." DIs' Mem. at 19 n.4 (citation omitted). However, in the context of Rule 19, the Ninth Circuit has ruled: "The United States can adequately represent an Indian tribe unless there exists a conflict of interest between the United States and the

[2] The Council cites *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489 (9th Cir. 1995) for the broad proposition that "[t]he federal government does not have a specific interest in protecting the State's sovereign rights over management of their wildlife." DIs' Mem. at 19 n.4. In that case the plaintiffs included "the agents and contractors" of the federal agency in their request for relief leading the court to conclude the state "could be legally bound" by the relief requested and the state raised legally cognizable *property* interests – not wildlife interests. *Id.* at 1496, 1495, 1497. Here, Plaintiffs seek relief only against Defendants and that relief pertains to the export of furs and the incidental take of lynx, not how or whether trapping of furbearing mammals occurs.

tribe." *Southwest Center*, 150 F.3d at 1154. To prove that such a conflict exists, again, Intervenors bear the burden of "producing evidence" of impairment. *Citizen Band Potawatomi,* 17 F.3d at 1293.

Here, Intervenors fail to meet their burden. This case does not involve any tribal treaty rights. *Cf. Makah Indian Tribe*, 910 F.2d. at 559 (affirming district court's ruling dismissing a case under Rule 19, because the relief sought by one the plaintiff tribe "would violate the treaty rights of other tribes."). To Plaintiffs' knowledge, no Tribe has a treaty right to export any (of the relatively few) wildlife species covered under the CITES export program. Nor does this case erect a "conflict among" the interests of Tribes approved to participate in the export program. *Cf. Washington v. Daley*, 173 F.3d 1158, 1168 (9th Cir. 1999) (noting that a "demonstrable conflict between the Makah and the absent tribes was of paramount concern" as to the joinder issue in the *Makah Indian Tribe* case.). In fact, the Tribes approved to participate in the program have the same interests as the Service: to defend its actions, and oppose any relief that may limit exports. In similar circumstances, the Ninth Circuit has ruled that no demonstrable conflict exists between the federal government and non-party tribes. *Southwest Center*, 150 F.3d at 1154 (rejecting possibility of conflict arising from government's "potentially inconsistent responsibilities," where movant failed to prove "how such

a conflict might actually arise in the context of [the action at hand]").[3] Indeed, as the Tenth Circuit has recognized, if a NEPA case that may affect a tribe must be dismissed for nonjoinder of the tribe, then "[n]o one, except the Tribe, could seek review" of a NEPA analysis that may somehow affect the tribe's interests. *Manygoats v. Kleppe*, 558 F.2d 556, 559 (10th Cir. 1977).

b. The Service Adequately Represent the States.

Intervenors next focus on the states, and assert the Service cannot represent their interests, because "many" states "expressed concern that restricting exports of the five furbearer species would have negative economic impacts." DIs' Mem. at 19 n.4 (citing EA at 39). But the states' comments in that part of the EA addressed something Plaintiffs do not request here: an alternative that the Service would "revise 50 C.F.R. 23.69 so that no export" of the five wildlife species covered under CITES Appendix II would be allowed. Plfs' Ex. 1 (EA at 39; *see* EA at 24). State comments related to complete "elimination" of the export program do nothing to prove the existing parties do not adequately represent state interests as to the relief Plaintiffs seek.

[3] The Council relies on *Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, No. CV-16-08077-PCT-SPL, 2017 WL 4277133, **2-3 (D. Ariz. Sept. 11, 2017). However, *Dine* is distinguishable given that the relief sought there implicated an "arm" of the Navajo Tribe and threatened to "simultaneously jeopardize the solvency of the Navajo Nation and challenge the economic development strategies it has chosen to pursue." *Id*. at 4 & 7. Here, Intervenors fail to prove that anything of the kind would occur for any tribe approved to participate in the wildlife export program.

2. Defendant-Intervenors Represent Any Interests the Service Does Not.

In addition to the Service, the presence in this case of two sets of Defendant-Intervenors – the Council, and the Montana Trappers' Association et al. – further demonstrates adequate representation by the existing parties of non-parties' interests. In *Southwest Center*, the Ninth Circuit noted that the Arizona cities that were defendant-intervenors "further ensure[d]" that the non-party Indian community would be adequately represented by the existing parties in the case, because the cities shared the community's interest in storing water in the reservoir, and in defeating the plaintiffs' claims under NEPA and the ESA. 150 F.3d at 1154.

Here, the two sets of Intervenors further add to the adequate representation of the Service. For its part, in its motion to intervene, the Council represented that it is the "largest fur industry association in the United States," and its members include" fur retailers, manufacturers, and other wholesalers, fashion designers and auction houses, many of whom export their fur skins and products from the United States." (Doc. 37 at 2 & 4-5). The Council asserted it has a significantly protectable interest in this case due to the "commercial and financial detriment" of any relief that Guardians obtains. (*Id*. at 11). The Council specified that its financial interest is in continued export of wildlife parts and pelts regulated under CITES. (*Id*. at 15). Because of its asserted financial interests in the exports, the

Council adequately represents any non-party's financial interest in the relief Plaintiffs seek.

In turn, Defendant-Intervenors Montana Trappers Association et al. will represent a non-party with an interest in continued trapping and snaring at state and tribal levels. This group of Defendant-Intervenors includes the National Trappers Association; their interests extend to furthering continued trapping "at the national level." (Doc. No. 20 at 3). This group also includes "hundreds of members" who trap in "Montana and in other jurisdictions where furbearers classified under Appendix II of CITES may be legally taken." (*Id*. at 11.) These Defendant-intervenors express concern about any "new, potentially burdensome requirements" adopted by states, if exports are limited to comply with relief sought in this suit. (*Id*. at 13). Indeed, their counsel in this case, Gary M. Leistico, has ably represented individual trappers and their associations in federal courts seeking to defend existing state trapping rules and regulations in Montana, *Friends of the Wild Swan v. Vermillion*, 13-CV-66-M-DLC (D. Mont.) (settled), in Idaho, *Center for Biological Diversity v. C.L. "Butch" Otter,* No. 1-CV-14-258-BLW (D. Id.) (pending), and in Minnesota. *Animal Protection Institute v. Holstein*, No 06-3776

(MJD/RLE) (D. Minn.) (settled).[4] The Council fails to prove that it, together with the other set of intervenors, will not represent non-parties' interests in this case.

C. The Claims in this Suit are Properly Brought Against Only Federal Parties.

Assuming arguendo that the Court concludes that the States and Tribes are necessary parties to this suit, they are nevertheless not proper parties because they are immune from being sued for the claims in this case. Plaintiffs allege violations of NEPA and Section 7 of the ESA, and these claims can be brought only against a federal agency under the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 702 and 704.

D. This Case Qualifies for the Public Rights Exception.

If the Court determines the States and Tribes are necessary parties that are immune from suit and therefore cannot be joined, the Court must then decide, "whether, in good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). This case should not be dismissed because it falls within the "public rights exception" to the traditional joinder rules. *See, e.g., Conner*, 848 F.2d at 1460 (adopting exception). In *Conner*, the Ninth Circuit held that the public rights exception applies in "litigation against the [federal] government," including cases such as this one, that "seek[] to enforce the

[4] These cases also evidence that state officials can be sued in federal court under *Ex parte Young*, 209 U.S. 123, 159-60 (1908) and related cases.

public right to administrative compliance with the environmental protection standards of NEPA and the ESA." *Id*.

Moreover, NEPA is quintessentially a "public rights" law; Congress adopted its administrative procedures in part to "assure for all Americans safe, healthy, productive, and aesthetically and culturally pleasing surroundings." 42 U.S.C. § 4331(b)(2). In turn, Congress adopted the ESA to "better safeguard[e], for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants," 16 U.S.C. § 1531(a)(5). In the ESA, "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction." 16 U.S.C. § 1531(a)(4).

As Intervenors note, to qualify under the public interest exception, a case must "transcend the private interests of the litigants and seek to vindicate a public right." DIs' Mem. at 23; *see Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (stating standard). Here, Intervenors assert the exception cannot apply, because "Plaintiffs are seeking to vindicate the private interests of their members to be free of the alleged injuries to them due to trapping and hunting." DIs' Mem. at 23.[5] But Intervenors focus on allegations in Guardians' and the Center's pleadings to support standing, which *must* be personal. *Id.*, *Lujan v. Defs. of*

[5] The Council is wrong that Guardians asserts injuries "due to hunting." DIs' Mem. at 23. One of its standing declarants, Norman A. Bishop, "began hunting and fishing as a teenager and continued to hunt for much of my life, taking mule deer, pronghorn, elk, and moose." Declaration of Norman A. Bishop ¶ 7. (Doc. 30-1.)

Wildlife, 504 U.S. 555, 561 n.1, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) ("injury" for standing must be "particularized," meaning "it must affect the plaintiff in a personal and individual way."). If allegations in a pleading to support standing were the test for the public rights exception, then no case would qualify for it. More important, the gravamen of Plaintiffs' case is to seek to enforce the law and vindicate generally-held public rights under NEPA and the ESA. "'[I]t is obvious that compliance with the law is in the public interest.'" *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1160 (9th Cir. 2011) (quoting *N.D. v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1113 (9th Cir. 2010)).

Next, Intervenors assert the public interest exception cannot apply, "because 'the litigation must not destroy the legal entitlements of the absent parties' as an injunction will do here." DIs' Mem. at 24 (citing *White v. University of California*, 765 F.3d 1010, 1028 (9th Cir. 2014)). However, the non-party Tribes and States the Intervenors assert are necessary parties are not "legally entitled" to export the wildlife parts and pelts covered under CITES, they are "permitted" to, subject to conditions set by CITES and the Service, 50 C.F.R. § 23.69(e). Further, even if Guardians obtains its ESA relief, the only species implicated is bobcat – given that the lawsuit only seeks injunctive relief as to that species because of its implications for threatened lynx, and then only exports from the states and tribal areas within the lynx DPS would be at issue.

Intervenors rely on *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002), but there, in dismissing a case based on traditional rules of joinder, the Ninth Circuit noted that "[i]t is important . . . to retain perspective." *Id*. at 1026. That case concerned tribal gaming on Indian lands in Arizona, and non-tribal plaintiffs' suit to restrict such gaming, sought by suing state officials alone. *Id*. at 1015. In that context, when the Ninth Circuit rejected the public interest exception, it noted that what those plaintiffs sought would not merely "*incidentally*" affect tribes "in course of enforcing some public right[;]" it was "*aimed* at the tribes and their gaming." *Id*. (emphases in original). By contrast, this case is not aimed at any Tribe or, indeed, any State, nor how either manages wildlife, it is aimed at how the Service has administers exports of CITES species.

IV. Conclusion.

The Court should deny the Intervenors' motion to dismiss under Rule 19.

Date: December 8, 2017.

Respectfully submitted,

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Certificate of Compliance.

Pursuant to L.R. 7.1(d)(2)(E), I hereby certify this brief contains 6,123 words.

Date: December 8, 2017. /s/ Peter M.K. Frost
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