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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

TUGAW RANCHES, LLC,	)	
	)	Case No. 4:18-cv-159-CWD
Plaintiff,	)	
	)	
and	)	<b>PROPOSED PLAINTIFFS-</b>
	)	<b>INTERVENORS' OPPOSITION TO</b>
HON. C. L. "BUTCH" OTTER,	)	<b>DEFENDANTS' MOTION TO</b>
HON. SCOTT BEDKE, and HON. BRENT	)	<b>DISMISS [DKT. 14]</b>
HILL,	)	
	)	
Proposed Plaintiffs-Intervenors,	)	
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF THE	)	
INTERIOR, et al.,	)	
	)	
Defendants.	)	
	)	

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Idaho's Governor, Speaker of the House and Senate President Pro Tempore ("the Governor and Legislative Leaders") by and through their undersigned attorneys, and in their capacity as Proposed Plaintiff-Intervenors, hereby submit this provisional response to Defendants' motion to dismiss.

### **Introduction**

Through its Complaint (Dkt. 1), Tugaw Ranches, LLC, challenges the failure of the Defendants (collectively the "Agencies") to submit the Sage-grouse-related rules<sup>1</sup> to Congress as required by the Congressional Review Act ("CRA").

On June 22, 2018, the Agencies moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Dkt. 14. Earlier today, the Governor and Legislative Leaders, on behalf of the citizens of the State of Idaho, filed a motion to intervene in the lawsuit as plaintiffs. Dkt. 20. In the event that intervention is granted, the Proposed Plaintiff-Intervenors file this provisional opposition to the pending motion to dismiss.

### **Proposed Plaintiff-Intervenors' Argument**

#### **I. The Governor and Legislative Leaders Join in the Arguments Made by Tugaw Ranches.**

The Defendants have moved to dismiss Tugaw Ranches' Complaint on the basis that an agency's violation of the CRA is not judicially reviewable. To avoid repetition, and because Defendants' only facially challenge the complaint<sup>2</sup>, the Governor and Legislative Leaders

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<sup>1</sup> See 80 Fed. Reg. 57,633 (Sept. 24, 2015), 80 Fed. Reg. 57,333 (Sept. 23, 2015).

<sup>2</sup> A Rule 12(b)(1) motion may be asserted either as a facial challenge to the complaint or a factual challenge. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack, the complaint is challenged as failing to establish federal jurisdiction, even assuming all the allegations are true and construing the complaint in the light most favorable to plaintiff. *Id.*

respectfully join in the arguments advanced by Tugaw Ranches in opposition to the motion (Dkt. 19).

## **II. The Defendants' Interpretation Promotes Non-Compliance and Inhibits Agency Accountability.**

The Defendants promote nothing less than noncompliance with existing law. Beyond the reach of the courts, federal management agencies would have a blank check to imperil state governments and their citizens, who are forced to bear the brunt of this illegal behavior.

When the Sage-Grouse Rules were originally promulgated, Governor Otter, assisted by members of his Sage-Grouse Task Force, fully participated in the federal process. As described in the proposed Complaint-in-Intention, Governor Otter formally protested the Sage-Grouse Rules by submitting a “consistency review” to BLM and the Forest Service explaining how the federal plans diverged from the State plan. Proposed Complaint-in Intervention at ¶ 42. That review comprehensively detailed the many conflicts among the State’s laws, sage-grouse plan, policies and programs, and the plan amendments promulgated by the Federal Defendants. *Id.*

But the Defendants’ continue to refuse to follow the law—even though submitting the rules should be entirely routine—and advocate for elimination of the only possible legal remedy available to affected third parties. The federal process has failed, and continues to fail, the State.

Defendants have compounded their lawlessness by implementing the rules. *Id.* at ¶ 47. BLM and the Forest Service continue to implement the Sage-Grouse Rules throughout the southern portion of the State even though the CRA makes clear that unsubmitted rules cannot be given legal effect. 5 U.S.C. § 801(a)(1)(A). The development of state lands has been curtailed, tax revenue to the State has gone uncollected, and the State’s plan and attendant efforts to conserve the species and its habitat have been stymied. *See* Proposed Complaint-in-Intervention at ¶ 47. Because the Sage-Grouse Rules differ from Idaho’s plan, inconsistent state and federal

practices have infected the management of the habitat—inconsistencies which will not be resolved if the Defendants continue to allow the Sage-Grouse Rules to remain un-reviewed by Congress. *Id.* at ¶ 38. The illegally promulgated rules continue to harm the State, impede the Governor’s ability to execute Idaho’s laws, and interfere with the State Legislature’s authorization of sage-grouse related statutes and appropriations. *Id.* at ¶ 4. The State of Idaho has been forced into a situation where a federal regulatory program is preempting state authority and the Governor and Legislative Leaders’ ability to legislate and regulate, even though the Rules creating and implementing that regulatory program are not lawfully in effect.

The Defendants’ mis-interpretation of the CRA and Administrative Procedure Act would compound the harm already done to the State and its citizens in this specific instance and have disastrous effects for state governments generally. Defendants seek a blank check to deny Congress the opportunity to review the Sage-Grouse Rules, and any other rules. Immunizing agencies from judicial review prevents realization of the primary purpose of the CRA. Instead of addressing agency overreach, the Defendants’ interpretation of the CRA all but ensures it.

### **III. CONCLUSION.**

The motion to dismiss must be denied. The Defendants’ proposed interpretation of the CRA would grant an unrestricted license to these Agencies and all federal agencies to violate the law and pass the consequences of their inaction on to the people of Idaho and beyond. The CRA was enacted, in part, to force the federal bureaucracy to provide a base level of democratic accountability. The Federal Defendants’ arguments to the contrary should be rejected.

Respectfully submitted this 13th day of July, 2018.

OFFICE OF GOVERNOR C. L. "BUTCH"  
OTTER

By: /s/ Samuel J. Eaton

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**Certificate of Service**

I HEREBY CERTIFY that on the 13th day of July, 2018, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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