No. 16-35443

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IDAHO RIVERS UNITED and FRIENDS OF THE CLEARWATER,

Plaintiffs - Appellees,

v.

NEZ PERCE CLEARWATER FOREST SUPERVISOR CHERYL F. PROBERT; UNITED STATES FOREST SERVICE; NOAA FISHERIES; and U.S. FISH AND WILDLIFE SERVICE,

Defendants,

and

IDAHO FOREST GROUP, LLC, a Delaware limited liability company, and R & R CONNER AVIATION, LLC, a Montana limited liability company,

Applicants - Intervenors - Appellants.

On Appeal from the United States
District Court for the District of Idaho,
Moscow Division, Case No. 3:16-cv-00102-CWD

BRIEF *AMICUS CURIAE* OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPLICANTS - INTERVENORS - APPELLANTS AND IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, nonprofit corporation Pacific Legal Foundation (PLF) states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt foundation incorporated under the laws of California, organized for the purpose of litigating important matters of public interest. PLF is headquartered in Sacramento, California, and has satellite offices in Washington State, Florida, and Washington, D.C. Founded in 1973, PLF supports the principles of limited government and free enterprise, a balanced approach to environmental protection, and the right of individuals to own and make reasonable use of their private property. PLF litigates on behalf of clients, and participates as amicus curiae, in many cases involving the balancing of interests with environmental protection regulations.[1] *See, e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct 1807 (2016); *Sackett v. U.S. Envtl. Prot. Agency*, 132 S. Ct. 1367 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006); *Or. Nat. Desert Ass'n v. Lohn*, 308 Fed. App'x 102 (9th Cir. 2009).

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than Amicus Curiae PLF, its donors, and its counsel made a monetary contribution to the preparation and submission of this brief.

INTRODUCTION

On August 3, 2014, a lightning strike ignited a wildfire in the Johnson Bar Campground. *Idaho Rivers United v. Probert*, 2016 WL 2757690, slip op. at 1 (D. Idaho May 12, 2016), ER 178, CR 49. The fire ultimately burned approximately 13,300 acres of Idaho forest, including portions of the Nez Perce National Forest. *Id.* The United States Forest Service, in an effort to recover the value of dead and dying timber on 2,104 burned acres, authorized the Johnson Bar Fire Salvage Project (Project). *Idaho Rivers United v. Probert*, No. 3:16-cv-00102-CWD, slip op. at 2 (D. Idaho Apr. 19, 2016), ER 2, CR 38. In early 2016, the Forest Service auctioned off timber sales contracts to carry out the Project. *Id.* at 3, ER 3, CR 38. Prospective intervenors Idaho Forest Group, LLC, and R & R Conner Aviation, LLC (Timber Companies), won the contracts. *Id.*

Unhappy with the proposed Project and seeking to halt it, Idaho Rivers United and Friends of the Clearwater (Idaho Rivers United) filed suit against several federal defendants (Forest Service). *Id.* Because Idaho Rivers United's suit could negatively affect the Timber Companies' contract rights, the Timber Companies filed a motion to intervene in the suit to protect those interests. *Id.* The district court denied the Timber

Companies' motion to intervene, holding that they failed to meet their burden to intervene as of right. *Id.* at 5, ER 5, CR 38.

To intervene as a matter of right under Federal Rule of Civil Procedure 24(a)(2), prospective intervenors must show: (1) the motion to intervene is timely; (2) intervenors have a "significantly protectable" interest relating to the property or transaction subject to the action; (3) the disposition of the action may, as a practical matter, impair or impede intervenors' ability to protect their interest; and (4) the existing parties do not adequately represent intervenors' interest. *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc). Following "practical and equitable considerations," courts construe the intervention rule "broadly in favor of proposed intervenors." *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002). That is because "[a] liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *Id.*

This Court should reverse the district court's denial of the motion to intervene, for three reasons.

First, the lower court's decision exacerbates the harms that result from "sue and settle" litigation, allowing environmental advocacy groups

to circumvent the democratic process and undermine the Administrative Procedure Act (APA). Instead, the intervention rules should be applied liberally to avoid such undesirable outcomes. Here, a liberal application would give the Timber Companies the opportunity, *before* legally binding rules are implemented that further burden the Timber Companies and the public, to present a more complete picture to the lower court of the effects of Idaho Rivers United's suit.

Second, the district court improperly downplayed the significance of the Timber Companies' contract rights by overemphasizing the Timber Companies' knowledge of Idaho Rivers United's ongoing lawsuit when they acquired their rights. In so doing, the district court failed to acknowledge that, regardless of the Timber Companies' knowledge of the suit, that suit still would have a direct and substantial effect on their contract rights.

Third, the district court erroneously held that the Forest Service adequately represents the Timber Companies. The district court incorrectly equated the Timber Companies' specific objective in performing the contract with the Forest Service's general objective in completing the Project.

The decision below should be reversed.

ARGUMENT

I

RESTRICTIVE APPLICATION OF THE INTERVENTION RULE ENCOURAGES "SUE AND SETTLE" LITIGATION AND LEADS TO ANTI-DEMOCRATIC CONSEQUENCES

The "sue and settle" phenomenon describes when a government agency gives up its statutory discretion by voluntarily settling lawsuits filed by outside groups that "effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements . . . ." William L. Kovacs, et al., *A Report On Sue and Settle: Regulating Behind Closed Doors* 3, U.S. Chamber of Commerce (2013).[2] Because these agreements often are negotiated behind closed doors, the public and other affected parties are unable to participate. *Id*. This lack of transparency and public participation undermines the traditional democratic process that requires lawmakers to balance competing interests and the rulemaking process mandated by the APA.

Although this case is not a classic example of sue and settle litigation, it does illustrate the central problem with litigation that is not

[2] https://www.uschamber.com/sites/default/files/documents/files/sueandsettlereport-final.pdf.

fully adversarial. Instead of thoroughly defending the Project, the Forest Service acquiesced after losing at the preliminary injunction stage. *See generally* joint motion for dismissal, *Idaho Rivers United v. Probert*, No. 3:16-cv-00102-CWD (D. Idaho filed July 20, 2016), ER 172, CR 60. If the Timber Companies are allowed to intervene, they will vigorously prosecute an appeal of the injunction. How this Court applies the intervention rule, therefore, significantly affects the ability of advocacy groups to engage in sue and settle litigation. By applying a liberal intervention rule, this Court can mitigate the problems stemming from sue and settle litigation.

A. Intervention Provides a Check Against Advocacy Groups' Use of "Sue and Settle" Litigation, and Encourages Good Government

Advocacy groups frequently utilize sue and settle litigation to achieve their desired policy outcomes, and government agencies all too often accede to their demands. *See* Kovacs, U.S. Chamber of Commerce at 12; Henry N. Butler & Nathaniel J. Harris, *Sue, Settle, & Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 Harv. J.L. & Pub. Pol'y 579, 600 (2014) (discussing multiple incentives the government has to embrace sue and settle litigation). A troubling aspect of sue and settle litigation is that it upsets the traditional democratic

process whereby all parties interested in a regulatory outcome, as well as the general public, are represented through their various elected representatives. *See* Philip P. Frickey, *Legislative Processes and Products*, 46 J. Legal Educ. 469, 469-70 (1996).

The traditional democratic process focuses on reaching compromises and works to ensure fairly balanced outcomes. *Id*. at 470. By circumventing the democratic process through sue and settle litigation, advocacy groups free themselves of the need to engage in public persuasion efforts to influence regulatory agencies and legislative bodies. After all, if environmental advocacy groups can obtain their preferred outcome with a single collusive lawsuit, they have no need to engage in the complex democratic process. Still more problematic, sue and settle litigation produces rules and burdens that apply to parties who are excluded from the negotiations and have no opportunity to persuade elected officials to weigh those burdens before acting. Butler & Harris, 37 Harv. J.L. & Pub. Pol'y at 599-600.

Furthermore, given the nature of the revolving door in some sectors of government—where individuals rotate between working for the

government and advocacy groups[3]—sue and settle litigation creates major concerns about government accountability. In some instances, employees with the United States Environmental Protection Agency (EPA) may even encourage environmental groups to sue them. *See, e.g.*, Chris Horner, *Improper Collusion Between Environmental Pressure Groups and the Environmental Protection Agency as Revealed by Freedom of Information Act Requests: Interim Report*, Energy & Env't Legal Inst. Rep. 3-9 (2014) (summarizing government emails that show the collusive relationships between agency employees and environmental advocacy groups);[4]

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[3] It is well documented for example, that there is a revolving door between the EPA and environmental organizations. Jeffrey H. Joseph, *Too Close for Comfort*, Balt. Sun (Mar. 3, 2014), http://articles.baltimoresun.com/ 2014-03-03/news/bs-ed-revolving-door-20140302_1_epa-officials-al-armendariz-natural-resources-defense-council (discussing how the EPA is currently staffed with many people who previously worked for the National Resources Defense Council, a progressive environmental advocacy group). There is also a revolving-door problem at the state government level. Nicholas Kusnetz, *State Integrity 2012: Revolving Door Swings Freely in America's Statehouses*, The Center for Public Integrity (last updated May 19, 2014), http://www.publicintegrity.org/2013/01/16/12028/revolving-door-swings-freely-americas-statehouses ("in many states, it is simply common practice for lawmakers and other officials to cash in on their expertise and connections by lobbying or consulting for the private sector immediately after leaving office").

[4] http://eelegal.org/wp-content/uploads/2014/09/EE-Legal-FOIA-Collusion-Report-9-15-2014.pdf.

Mark Tapscott, *EPA Rife with Green Conflicts of Interest*, Washington Examiner (Sept. 16, 2014) (summarizing report showing high-level EPA officials routinely violate conflicts of interest policies);[5] Butler & Harris, 37 Harv. J.L. & Pub. Pol'y at 602 (describing the 1976 "Toxics Consent Decree" resulting from sue and settle litigation as "welcomed or even encouraged" by the EPA to deal with government standards for toxic pollutants). Indeed, sue and settle litigation allows agencies to implement environmental groups' policy objectives with substantially less congressional oversight and without expending political capital. Butler & Harris, 37 Harv. J.L. & Pub. Pol'y at 601.

The liberal use of sue and settle litigation also comes at significant financial cost. Rules and regulations created via sue and settle litigation impose billions of dollars in additional compliance costs on private businesses. Kovacs, U.S. Chamber of Commerce at 14-20 (highlighting ten new regulations costing over $100 billion annually that resulted from sue and settle cases); Butler & Harris, 37 Harv. J.L. & Pub. Pol'y at 600 ("the compliance costs imposed on private businesses can differ greatly across states"). Some environmental advocacy groups generate millions

[5] http://www.washingtonexaminer.com/epa-rife-with-green-conflicts-of-interest/article/2553427.

of dollars in attorneys' fees—paid by the government—as part of sue and settle litigation. Michael Bastasch & Ethan Barton, *Lawyers Win Millions Suing Government Under Environmental Laws, Then Give It to Democrats*, The Daily Caller (Aug. 23, 2016).[6]

The deleterious effects of sue and settle litigation are lessened, however, if the intervention rule is liberally applied. Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 Seattle U. L. Rev. 891, 920-21 (2014). While an intervenor may not block a settlement agreement between an environmental advocacy group and the government, *Southern Cal. Edison Co. v. Lynch*, 307 F.3d 794, 806-07 (9th Cir. 2002), intervention provides an opportunity for intervenors to present a broader range of arguments. *Cf. United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1152-53 (9th Cir. 2010) (participation of applicant intervenors necessary for court to comply with CERCLA requirement that judicial review of consent decrees ensure settlements are "fair, reasonable, and consistent" with the statute's objectives). Those arguments can call the court's attention to problematic aspects of settlements, and even challenge settlements reached between opportunistic advocacy groups and overly

[6] http://dailycaller.com/2016/08/23/exclusive-lawyers-win-millions-suing-govt-under-environmental-laws-then-give-it-to-democrats/.

compliant government officials. *Cf. Indus. Commc'ns & Elecs., Inc. v. Town of Alton*, 646 F.3d 76 (1st Cir. 2011) (intervenors permitted to challenge settlement between town and corporation to show their legally protected rights under state law are harmed by the settlement). Without the opportunity for courts to consider the full implications of a sue and settle case, resulting settlements are usually one-sided.

B. "Sue and Settle" Litigation Undermines the Administrative Procedure Act

It is often easier for an environmental advocacy group to negotiate with officials at government agencies who support the group's policy positions rather than engage in the rulemaking process. When it becomes too easy for favored groups to obtain settlements to their challenges to government actions under environmental protection laws, then the federal APA is undermined. A generous interpretation of the intervention rule, however, protects the integrity of the APA. Such an interpretation protects the APA because it provides opportunities for affected groups not originally included in the litigation to have their views heard before legal consequences attach. *See* Ben Tyson, Note, *An Empirical Analysis of Sue-And-Settle in Environmental Litigation*, 100 Va. L. Rev. 1545, 1559 (2014).

Before enacting a rule that has binding consequences on the public, administrative agencies must allow for public input by going through the rulemaking process. 5 U.S.C. § 553; *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1483-84 (9th Cir. 1992). Part of this process includes requirements that agencies allow interested persons to receive notice and provide comments that the agency must consider before adopting a final rule. 5 U.S.C. § 553(c); *Riverbend Farms*, 958 F.2d at 1484; *see also Paulsen v. Daniels*, 413 F.3d 999, 1005 (9th Cir. 2005) ("It is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later.").

In sue and settle litigation, the public's voice is stymied because agencies are predisposed to accept the already-negotiated substance of consent decrees. Tyson, 100 Va. L. Rev. at 1577. Agencies often propose rules that enact a negotiated consent decree or settlement agreement, to avoid further litigation. Kelli Hayes, Comments, *Sue and Settle: Forcing Government Regulation Through Litigation*, 40 U. Dayton L. Rev. 105, 112 (2015). But notice and comment in sue and settle litigation is not the type of public participation that Congress envisioned with the rulemaking process. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978)

(agencies are entrusted with discretion so long as their notice and comment process "as a whole and in each of its major aspects provides a degree of public awareness, understanding, and *participation*.") (emphasis added). If the substance of a rule is set by consent decree or settlement agreement, then notice and comment become a charade because the public's input, after the fact, can have no real effect on rulemaking. Kovacs, U.S. Chamber of Commerce at 24-25 ("In cases where EPA allows public comment on draft consent decrees, EPA only rarely alters the consent agreement—even after it receives adverse comments."). Instead, the only parties able to influence an agency's policy decisions are the groups with the resources and inclination to file lawsuits and negotiate settlements. This practice substantially conflicts with the APA's command that agencies consider the relevant matter presented by the public when engaging in the regulatory rulemaking process. 5 U.S.C. § 553(c).

The prospect of an undermined rulemaking process is not merely hypothetical, but is already occurring. From 2009-2012, over seventy sue and settle lawsuits were filed against the EPA and United States Fish and Wildlife Service alone. Kovacs, U.S. Chamber of Commerce at 12. Those

lawsuits resulted in more than 100 new federal rules and increased compliance costs by over $100 million a year. *Id.*

Intervention, therefore, is necessary to provide the opportunity for an impartial court to consider arguments and evidence that administrative agencies otherwise neglect. With the recent surge in sue and settle litigation, if courts do not liberally allow intervention, then agencies will go unchecked. Such a result undermines the APA, and allows environmental advocacy groups—like Idaho Rivers United—to continue to gratuitously circumvent the law and impose hefty burdens on the American economy.

II

PROTECTABLE INTERESTS INCLUDE CONTRACT RIGHTS WHENEVER THOSE RIGHTS MAY BE LIMITED BY A LAWSUIT

Whenever a lawsuit threatens the protected rights of a party not included in the suit, that party's interests are sufficient to merit intervention. That conclusion follows even when a party acquires contract rights after the lawsuit has been filed. Below, the district court correctly acknowledged the Timber Companies' contract rights in the Project. *Idaho Rivers United*, No. 3:16-cv-00102-CWD, slip op., at 5-6, ER 5-6, CR 38. But

the court improperly minimized them by concluding that these rights were second-class because they were unrelated to the subject matter of Idaho Rivers United's lawsuit, and acquired after the suit's filing. *Id.*

Without qualification, "[c]ontract rights are traditionally protected interests" that support intervention as of right. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001). Intervention is appropriate to defend protected interests when "the injunctive relief sought by the plaintiffs will have direct, immediate, and harmful effects upon a third party's legally protectable interests." *Id.* at 818. Thus, the requisite interest need only be "protectable under some law, and there [must be] a relationship between the legally protected interest and the claims at issue." *Wilderness Soc'y*, 630 F.3d at 1179.

Applying these rules in a case with similar facts, the Oregon federal district court granted intervention to a corporation that held timber contracts in Mt. Hood National Forest. *Bark v. Northrop*, No. 3:13-cv-01267-HZ, 2013 WL 6576306 at *1 (D. Or. Dec. 12, 2013). The corporation sought to intervene in a lawsuit filed by an environmental group challenging a timber sale two months before the corporation acquired its timber contracts. *Id.* at *1, *3. In granting intervention, the court held that an injunction

halting the timber sale or a judgment declaring the timber sale to be unlawful would threaten the corporation's contracts. *Id*. at *3. Thus, the court held that the corporation had a right to intervene to protect its interests. *Id*. That those rights were acquired after initiation of the lawsuit was of no moment to the court.

This Court's general intervention case law also supports a generous reading of the intervention rules to protect contract interests. For example, in *Berg*, a construction company and several building trade associations sought to intervene in an environmental group's lawsuit. *Berg*, 268 F.3d at 814. The suit challenged conservation plans and permits issued by the City of San Diego out of concern for potential effects on endangered species. *Id*. This Court reversed the district court's denial of the motion to intervene and held that the potential intervenors demonstrated sufficient protectable interests. *Id*. at 818. To this Court, it was sufficient that the intervenors were beneficiaries of the "assurances and approval" process for construction projects set out in a contractually binding agreement. *Id*. Confirming that contracts are protected interests, this Court also held that the relationship between the protected interest

and the claims at issue was sufficiently related because the contractual agreement was threatened by the pending suit. *Id*. at 820.

Likewise here, the Timber Companies have protected interests because they hold contracts with the Forest Service to harvest timber in the Nez Perce National Forest. *Idaho Rivers United*, No. 3:16-cv-00102-CWD, slip op. at 3, ER 3, CR 38. These interests do not change simply because the Timber Companies knew about pending litigation that could affect the interests. *See Berg*, 268 F.3d at 820. Indeed, precisely because contract rights can be attacked through litigation, intervention may be necessary—as it is here—to protect those rights. The need to protect the Timber Companies' rights from the possibility that Idaho Rivers United's suit will affect their contract rights makes those interests sufficiently germane to the suit. *See Wilderness Soc'y*, 630 F.3d at 1179. Therefore, the "liberal policy in favor of intervention" supports allowing the Timber Companies to protect their rights. *See Los Angeles*, 288 F.3d at 397-98.

III

THE GOVERNMENT OFTEN FAILS TO ADEQUATELY REPRESENT AFFECTED PRIVATE PARTIES IN ENVIRONMENTAL CASES

Although limited, intervention is an important right. *See* Kathy Black, Comment, *Trashing The Presumption: Intervention on The Side of Government*, 39 Envtl. L. 481, 487 (2009) (noting that the purpose of intervention is "to present and resolve all issues in a single litigation proceeding"). The interests of government parties frequently diverge from the narrow interests of groups affected by—but not included in—a pending lawsuit. Therefore, absent the ability to intervene, prospective intervenors have little recourse to protect their interests.[7] Here, the district court incorrectly held that the Forest Service will adequately represent the Timber Companies' economic interests because their interests are "congruent" and share the same "ultimate objective"—the economic well-being of local communities. *Idaho Rivers United*, No. 3:16-cv-00102-CWD, slip op. at 7, ER 7, CR 38. The court also erroneously held that the Timber Companies failed to rebut the presumption of adequacy that arises when a prospective intervenor and an existing party share the same ultimate

[7] As discussed above in Part I, this problem is particularly acute in the context of "sue and settle" litigation.

objective. *Id*. (citing *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)).

When determining adequacy of representation, courts must consider: (1) whether the interests of a party are similar enough that it will undoubtedly make all the intervenor's arguments; (2) whether the party will make such arguments; and (3) whether the intervenor would offer any elements to the proceedings that would otherwise be neglected. *Berg*, 268 F.3d at 822. A prospective intervenor's burden of showing inadequacy is "minimal," and the intervenor only needs to show that its interests "may be" inadequately represented by existing parties. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). But a presumption of adequacy arises whenever the prospective intervenor and an existing party share the same ultimate objective. *Berg*, 268 F.3d at 832.

In holding that the Forest Service will adequately represent the Timber Companies' economic interests, the district court misconstrued the meaning of "ultimate objective." The ultimate objective of the Forest Service, as identified by the district court, is to "assist in supporting the economic structure of local communities." *Idaho Rivers United*, No. 3:16-cv-00102-CWD, slip op. at 7, ER 7, CR 38. The Timber Companies'

ultimate objective is retaining their employees by acquiring contracts for ongoing projects. *See id.* Although the Timber Companies and the Forest Service share a common general goal—completion of the Project—that commonality is insufficient to ensure that the Forest Service will adequately represent the Timber Companies' individual interests in participating in the Project. This is particularly true given that the Forest Service's interest is in the Project as a whole.

Stated differently, the Timber Companies' interest is in acquiring and performing timber contracts to maintain *their* businesses and provide jobs for *their* employees. The Forest Service's interest is the broad economic welfare of the communities in the general area of the Nez Perce National Forest. The Forest Service's interest is met so long as *any* party completes the Project, whereas the Timber Companies' interests are met only if *they* participate in the Project. As a result, the Forest Service will not adequately represent the Timber Companies' individual interests. *See Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated on other grounds* by *Wilderness Soc'y*, 630 F.3d at 1180, ("Inadequate representation is most likely to be found when the applicant asserts a personal interest that does not belong to the general

public.") (quoting 3B Moore's Federal Practice, ¶ 24.07[4], at 27-28 (2d ed. 1995)); *see also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 n.9 (D.C. Cir. 2003) (collecting case examples of inadequate representation by the government).

The Timber Companies have met their "minimal" burden of showing inadequacy. *See Trbovich*, 404 U.S. at 538 n.10. As this Court previously noted, "[t]he priorities of the defending government agencies are not simply to confirm the [prospective intervenor's] interests." *Berg*, 268 F.3d at 823. Rather, "[t]he interests of government and the private sector may diverge." *Id*. Indeed, "[t]he straightforward business interests asserted by intervenors here may become lost in the thicket of sometimes inconsistent governmental policies." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 973-74 (3d Cir. 1998). The Fifth Circuit's decision in *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994), demonstrates the point. In *Sierra Club*, the district court denied the application for intervention of a group of timber trade associations, holding that they shared the same objective with the Forest Service in defending a forest management plan. 18 F.3d at 1204, 1207-08. The Fifth Circuit reversed, noting "[t]he government must

represent the broad public interest, not just the economic concerns of the timber industry." *Id*. at 1208.

The same is true here. The Forest Service is broadly concerned with completing the Project to recover the value of dead and dying timber while removing a dangerous source of fuel for wildfires from the forest. *See Idaho Rivers United*, No. 3:16-cv-00102-CWD, slip op. at 2, ER 2, CR 38; John Crisp, *Hazards, Dead Trees Are Only a Few Issues To Consider Following Wildfire*, Living With Wildfire in Wyoming 20-21 (2013).[8] In contrast, the Timber Companies seek to protect their contracts and to generate profits by providing *their* services and workers to perform the actual work of recovering the timber. Memorandum in support of motion to intervene by Idaho Forest Group, LLC, and R & R Conner Aviation, LLC, at 9, 13, *Idaho Rivers United v. Probert*, No. 3:16-cv-00102-CWD, slip op. (D. Idaho filed Apr. 11, 2016), ER 339, 434, CR 20-1. The Timber Companies make arguments in defense of their contracts that the Forest Service would not make to defend the Project. *Id*. at 13-14, ER 343-44, CR 20-1. That is so because the Timber Companies have more reason to defend the particular contract decision made here than the Forest Service,

[8] http://www.uwyo.edu/barnbackyard/_files/documents/resources/wildfire2013/wildfire_web.pdf.

which only cares that *some* contracted harvesting occurs. Therefore, the Timber Companies have met their "minimal" burden to establish inadequacy of representation. *See Arakaki*, 324 F.3d at 1086.

CONCLUSION

For the foregoing reasons, the district court's denial of Idaho Forest Group, LLC, and R & R Conner Aviation, LLC's, motion to intervene should be reversed.

DATED: September 9, 2016.

Respectfully submitted,

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DATED: September 9, 2016.

s/ Caleb R. Trotter
CALEB R. TROTTER

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 9, 2016.

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s/ Caleb R. Trotter
CALEB R. TROTTER