

THE HONORABLE ANN AIKEN

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

UNION PACIFIC RAILROAD  
COMPANY,

Plaintiff,

v.

ROD RUNYON, STEVE KRAMER,  
SCOTT HEGE, ANGIE BREWER,  
BOWEN BLAIR, GORHAM BLAINE,  
DAN ERICKSON, ROBERT LIBERTY,  
RODGER NICHOLS, and ANTONE  
MINTHORN,

Defendants.

Case No. 3:17-cv-00038-AA

MOTION TO INTERVENE OF FRIENDS OF  
THE COLUMBIA GORGE, INC., COLUMBIA  
RIVERKEEPER, AND OREGON  
PHYSICIANS FOR SOCIAL  
RESPONSIBILITY; MEMORANDUM IN  
SUPPORT

**Oral Argument Requested**

**Expedited Consideration Requested**

**LR 7-1(A) CONFERRAL CERTIFICATION**

Proposed Intervenors-Defendants Friends of the Columbia Gorge, Inc. (“Friends”), Columbia Riverkeeper (“Riverkeeper”), and Oregon Physicians for Social Responsibility (“Oregon PSR”) (collectively “Proposed Intervenors”) conferred by telephone with counsel for Plaintiff on January 19, 2017, but the parties were unable to resolve the substantive matters addressed in this motion.

## **MOTION TO INTERVENE**

Proposed Intervenors respectfully move this Court for leave to intervene on the side of the Defendants in Case No. 3:17-cv-00038-AA pursuant to Fed. R. Civ. P. 24. This motion is based on the Memorandum in Support below, the Declaration of Michael Lang, the Declaration of Regna Merritt, the Declaration of Brett Vandenheuevel, and such other evidence and argument as the parties may present to the Court. Proposed Intervenors also have submitted a Proposed Order to the Court.

Plaintiff Union Pacific Railroad Company (“UP”) has requested an expedited hearing on its preliminary injunction motion. Proposed Intervenors likewise respectfully request expedited consideration on this motion to intervene.

## **MEMORANDUM IN SUPPORT**

### **I. INTRODUCTION**

By filing this lawsuit, Plaintiff Union Pacific Railroad Company is seeking to circumvent an administrative appeals process currently underway before the Columbia River Gorge Commission (“Gorge Commission”), and to force Wasco County and the Gorge Commission to allow a new rail construction project to proceed without any permits from these agencies under the Columbia River Gorge National Scenic Area Act (“Scenic Area Act”). UP wishes to construct a new railroad track within the Columbia River Gorge National Scenic Area (“NSA” or “Scenic Area”), through and on either side of the City of Mosier, Oregon. UP applied for a Scenic Area land use permit from Wasco County, which is the designated NSA permitting authority for the affected area. Now, UP is seeking to declare the very same NSA permitting process that it is undertaking as preempted (and as a result, unnecessary) under federal railroad law.

The relief requested by UP would be directly contrary to the Columbia River Gorge National Scenic Area Act, the Management Plan for the Columbia River Gorge National Scenic Area, and the Wasco County National Scenic Area Land Use and Development Ordinance

(“NSALUDO”). It would also be directly contrary to a final administrative decision by Wasco County, to which Proposed Intervenors were parties. UP also seeks to circumvent the administrative appeals pending before the Gorge Commission—appeals to which Proposed Intervenors are also parties. Proposed Intervenors thus have strong interests in the instant case and should be permitted to intervene on the side of the Defendants. Accordingly, Proposed Intervenors seek to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2). Alternatively, Proposed Intervenors request permissive intervention under Fed. R. Civ. P. 24(b)(2).

## II. BACKGROUND

This case involves a proposal by Plaintiff Union Pacific Railroad Company to construct and use a new railroad track in the Columbia River Gorge National Scenic Area in the vicinity of Mosier, Oregon. Declaration of Michael Lang at ¶ 5. The proposal would result in a double rail track extending approximately five miles through the National Scenic Area. *Id.* The proposal also includes associated rail facilities like signal cabins and signs, as well as new temporary and permanent access roads. *Id.* The project would involve 11.22 acres of temporary ground disturbance and 19.58 acres of permanent disturbance and the installation of a new rock retaining wall. *Id.*

In the Columbia River Gorge National Scenic Area, new land use and development activities, including proposals for new and expanded railroad construction, require review and approval under the regulations implementing the Columbia River Gorge National Scenic Area Act. *Id.* ¶ 6. UP filed an application with Wasco County seeking approval for this proposed project. *Id.* ¶ 7. Proposed Intervenors participated in every stage of the County’s review of UP’s application. *Id.* ¶ 8.

Wasco County ultimately denied UP’s application. *Id.* UP then filed an appeal of Wasco County’s decision to the Columbia River Gorge Commission. *Id.* Proposed Intervenors intervened in UP’s appeal on the side of Wasco County. *Id.* Proposed Intervenors also filed an appeal of Wasco County’s decision to the Gorge Commission. *Id.* Those appeals are currently pending before the Gorge Commission, and are scheduled for oral argument in June 2017. *Id.*

All three of Proposed Intervenors intervened in UP's appeal currently pending before the Gorge Commission, filed their own appeal in this matter to the Gorge Commission, and were parties to the administrative decision made by Wasco County. Each of the three Proposed Intervenors will be discussed below.

Friends of the Columbia Gorge's mission is to vigorously protect the scenic, natural, cultural, and recreation resources of the Columbia River Gorge. *Id.* ¶ 4. The proposed project would adversely affect the use and enjoyment by Friends' members of natural, cultural, recreational, and scenic resources in the Columbia River Gorge. *Id.* ¶ 11, 12, 13. Friends and its members have an interest in ensuring the strict implementation of the federal Scenic Area Act and its implementing rules. Friends' interests would be greatly affected by allowing this project to proceed in violation of Scenic Area requirements. *Id.* ¶ 16. Friends' members own property, live in, and regularly recreate in the National Scenic Area and would be harmed if the proposed project were allowed to proceed in a manner inconsistent with applicable law. *Id.* ¶ 14.

Oregon Physicians for Social Responsibility is a nonprofit corporation guided by the values and expertise of medicine and public health that works to protect human life from the gravest threats to health and survival by striving to protect our climate and advance environmental health. Declaration of Regna Merritt at ¶ 5. The organization is comprised of approximately 2,000 health professionals and public health advocates working collaboratively to protect the health of all Oregonians. *Id.* ¶ 10. Oregon PSR's members use the NSA and they would be harmed since the project would impair air quality, threaten members' lives and dwellings due to increased fire hazards caused by more trains, threaten water quality, harm recreation by further blocking access to the Columbia River, and damage scenic views. *Id.* ¶¶ 10, 11.

Proposed Intervenor-Defendant Columbia Riverkeeper is a nonprofit conservation organization with approximately 12,000 members, including many members that live, work, and recreate near the proposed project area. Declaration of Brett Vandenheuvell at ¶ 5. Columbia Riverkeeper's mission is to protect and restore the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. *Id.* ¶ 4. The project directly endangers

the water quality of the Columbia River. *Id.* ¶ 10. The project would adversely affect the use and enjoyment by Riverkeeper's members of natural, recreational, and cultural resources in the Scenic Area. *Id.* ¶ 14.

As set forth below, Proposed Intervenors are entitled to intervene. Alternatively, Proposed Intervenors should be permitted to intervene.

**III. THE MOVING PARTIES ARE ENTITLED TO INTERVENE AS OF RIGHT.**

A proposed intervenor must satisfy four criteria to intervene as a matter of right. *County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).

The requirements are as follows:

1. The applicant's motion must be timely;
2. The applicant must assert an interest relating to the property or transaction which is the subject of the action;
3. The applicant must be so situated that without intervention, the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and
4. The applicant's interest must not be adequately represented by the existing parties.

*Id.* As shown below, Proposed Intervenors meet all four criteria.

**A. The Motion to Intervene is Timely.**

In determining whether a motion to intervene is timely, three factors are weighed: (1) the state of the proceeding in which the applicant seeks to intervene, (2) the prejudice to other parties, and (3) the reason for and length of any delay. *Id.*

This Motion to Intervene is filed within several days of the filing of the Complaint (and would likely have been filed sooner if not for persistent inclement weather). The Defendants have not yet filed their Answers to the Complaint. There is no prejudice to any party resulting from the timing of the intervention. This Motion to Intervene is timely.

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**B. Proposed Intervenors Have Significant Interests in the Subject of this Action.**

The Ninth Circuit has “rejected the notion that Rule 24(a)(2) requires a specific legal or equitable interest.” *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980); *see also Blake v. Pallan*, 554 F.2d 947, 952 (9th Cir. 1977). Rather, “the ‘interest’ test is “primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Nuess v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

The Ninth Circuit liberally construes intervention of right. *See Wash. State Building & Const. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (Rule 24 traditionally has received a liberal construction in favor of applicants for intervention); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983) (Rule 24(a)(2) limits the district court’s discretion by providing that an applicant “shall be permitted to intervene” if the applicant satisfies the requirements of the rule).

Proposed Intervenors are parties in the pending litigation before the Gorge Commission, involving the same parties, the same project, the same properties, and the same claims and legal issues. Through the instant action, UP is attempting to obtain rulings from this Court that would effectively overturn the administrative decision of Wasco County and take this matter out of the hands of the Gorge Commission and County. UP’s new federal lawsuit is nothing short of a collateral attack on Wasco County’s final administrative decision, to which Proposed Intervenors are parties. The Scenic Area Act requires UP to bring its claims to the Gorge Commission and then to state court, 16 U.S.C. §§ 544m(a)(2), 544m(b)(4)(A), 544m(b)(6)(A), (C), but UP is instead attempting to improperly bypass that required appeals process by filing claims in federal court. As parties to the Wasco County decision that UP is attempting to collaterally attack in this

Court, Proposed Intervenors have a direct interest in the instant proceeding, thus allowing them to intervene as of right.

In addition, Friends has a distinct and substantial interest in UP's proposed land use activities and in the strict application of Scenic Area requirements. Friends' members live in and use the NSA. Declaration of Michael Lang at ¶¶ 13, 14. Friends was instrumental in helping enact the Scenic Area Act and remains significantly involved in the implementation of the Scenic Area Act. *Id.* ¶ 4. Friends comments on all applications for land use and development activities in the NSA, files appeals of adverse land use decisions, and participates in appeals filed by other parties. *Id.* Here, UP proposes a land use activity that is inconsistent with the Columbia River Gorge National Scenic Area Act ("Scenic Area Act"), the Management Plan for the Columbia River Gorge National Scenic Area ("Management Plan" or "Gorge Management Plan"), and the Wasco County ordinances implementing the Scenic Area Act and the Management Plan. The proposed project would adversely affect Friends' members' use and enjoyment of the NSA and their interests in strict implementation of the Scenic Area requirements. *Id.* ¶¶ 4, 9, 10, 11, 12, 13. In addition, Friends' Land Trust owns several parcels in the vicinity of the project site. *Id.* ¶ 15. Friends' members' use and enjoyment of these properties would be adversely affected by the project. *Id.* The federal courts have repeatedly recognized Friends' interests involving the Columbia River Gorge National Scenic Area, the National Scenic Area Act and implementing regulations, and Friends' standing to raise these interests. *See, e.g., Columbia River Gorge United-Protecting People & Property v. Yeutter*, 960 F.2d 110 (9th Cir. 1992) (Friends was permitted to intervene in challenge to the constitutionality of the Scenic Area Act); *GLW Ventures LLC v. United States Dep't of Agric.*, 3:12-cv-05140-RBL, 2016 WL 3364896 (W.D. Wash June 17, 2016) (Friends was permitted to intervene in two federal actions brought by landowner, where Friends was already a party to Gorge Commission appeals and state court proceedings that were

directly related to and implicated by the federal actions); *Friends of the Columbia Gorge, Inc. v. Schafer*, 624 F. Supp. 2d 1253, 1265–66 (D. Or. 2008) (Friends had standing to bring challenge to revised Gorge Management Plan); *Friends of the Columbia Gorge, Inc. v. United States Forest Serv.*, 546 F. Supp. 2d 1088 (D. Or. 2008) (Friends successfully challenged Forest Service decision to grant road easement in Scenic Area to private landowner); *W. Birkenfeld Trust v. Bailey*, 827 F. Supp. 651 (E.D. Wash. 1993) (Friends was permitted to intervene in private landowners’ challenge to the statutory and constitutional validity of the Gorge Management Plan); *Klickitat County v. Columbia River Gorge Comm’n*, 770 F. Supp. 1419 (E.D. Wash. 1991) (Friends was permitted to intervene in action seeking injunctive relief against Gorge Management Plan).

Columbia Riverkeeper also has a distinct and substantial interest in UP’s proposed project and its effects on the Columbia River. Riverkeeper’s members live in and use the NSA. Declaration of Brett Vandenheuvel at ¶ 5. Within the NSA, Riverkeeper files appeals of adverse decisions and participates in appeals filed by other parties. *Id.* ¶ 6. The proposed project would cause significant adverse effects to natural resources, including to numerous wetlands and waterbodies and sensitive species. *Id.* ¶ 10. The project would affect twelve wetlands, five lakes, and the Columbia River. *Id.* It would also intrude into wetlands buffer zones and sensitive plant buffer zones. *Id.* ¶ 10. The project would adversely affect the use and enjoyment by Riverkeeper’s members of natural and cultural resources in the Scenic Area. *Id.* ¶ 14.

Oregon Physicians for Social Responsibility also has a distinct and substantial interest in UP’s proposed project and its effect on the Columbia River Gorge National Scenic Area. Oregon PSR’s members use the NSA and they would be harmed by the project because it would impair air quality, threaten members’ lives and dwellings due to increased fire hazards caused by more

trains, threaten water quality, harm recreation by further blocking access to the Columbia River, and damage scenic views. Declaration of Regna Merritt at ¶¶ 10, 11.

In conclusion, Proposed Intervenors have significant interests in this action.

**C. Denying Intervention Would Impair Proposed Intervenors' Ability to Protect their Interests.**

As discussed above, Proposed Intervenors are parties to the administrative decision that UP is attempting to collaterally attack in the instant action. Denying intervention to Proposed Intervenors would absolutely impair their ability to protect their interests, because Proposed Intervenors would be prevented from defending Wasco County's binding decision to deny the proposed project, and Proposed Intervenors would also be unable to oppose UP's attempts to bypass and thwart the statutorily required appeals process for challenging the County's decision. The instant action is a direct threat to Proposed Intervenors' interests. Denying Proposed Intervenors the ability to participate in the instant action would impair their interests.

In addition, to allow landowners in the Scenic Area, such as UP, to violate the Scenic Area Act, the Management Plan, and the county Scenic Area ordinances would frustrate and harm Friends' interests. *See* Declaration of Michael Lang at ¶¶ 9, 10, 11. The lawsuit is also a direct threat to the proper and orderly resolution of the pending Gorge Commission appeals, to which Proposed Intervenors are parties. Declaration of Regna Merritt at ¶ 10; Declaration of Brett Vandenhuevel at ¶ 18; Declaration of Michael Lang at ¶ 8. Therefore, denial of intervention would impair Proposed Intervenors' ability to protect their interests.

**D. The Existing Parties will not Adequately Represent the Intervenor-Defendants.**

An applicant for intervention of right need only make a minimal showing that "representation of [its] interest 'may be' inadequate." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (quoting 3B J. Moore, *Federal Practice*); *see also People of the*

*State of Cal. v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986). A would-be intervenor is adequately represented if the following factors are met:

1. The interests of a present party to the suit are such that it will undoubtedly make all of the intervenor's arguments;
2. The present party is capable of and willing to make such arguments; and
3. The intervenor would not offer any necessary element to the proceedings that the other parties would neglect.

*County of Fresno*, 622 F.2d at 438–39.

The instant case presents the Court with issues of first impression involving the effect of federal railroad law as it applies within the National Scenic Area. In addition to the substantive issues, there are numerous procedural issues that will be raised by the parties, including whether a federal court can overturn a County decision made under the Scenic Area Act before that decision is challenged at the Gorge Commission. Because such issues can result in numerous interpretations, it is unlikely that the present Defendants will make the same arguments as Proposed Intervenors. Moreover, Proposed Intervenors have fundamentally different interests in this matter than Defendants: Proposed Intervenors are parties to the Scenic Area administrative appeals processes with specific interests in protecting resources and enforcing the law, while Defendants are decision makers in those quasi-judicial, administrative appeal processes. There is no guarantee that Defendants will approach the issues the same as Proposed Intervenors; indeed, the six Defendants who are Gorge Commissioners have not yet heard or adjudicated the issues and legal arguments in dispute. In a case such as this, where the Court is presented with issues of first impression, it is important that the Court is presented with the best arguments from parties that have intense interests in the issue.

In addition, as public officials acting in their official capacity, Defendants answer to many different stakeholders, while Proposed Intervenors answer only to their members and their Boards

of Directors. *See Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (allowing farm bureau federation to intervene, even though the USDA at that time shared common interests with the farm bureau federation, because the USDA is ultimately not required to represent the concerns of just one stakeholder). Here, although Defendants and Proposed Intervenors may have some overlapping goals and interests, the underlying reasons for these interests are likely different. Defendants' primary interest in this matter are fulfilling their roles defined in the National Scenic Area Act by hearing appeals of final administrative decisions and administering the Scenic Area Act and implementing rules. In contrast, Proposed Intervenors' primary interest are as citizens groups focused on protecting public health, water quality and the scenic, natural, cultural and recreation resources of the Columbia River Gorge through proper implementation of applicable laws, including the Scenic Area Act and implementing rules. Intervention is warranted even where different parties share "a unity of objectives" if the underlying reasons why the different participants desire a particular objective are different. *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011). In addition, a party cannot adequately represent the interests of another party where the parties share a particular outcome but have different interests regarding "the litigation as a whole." *Id.*

It is also possible that, as public officials, Defendants may decide to reach a political compromise of some sort, rather than ensuring the strict protection of the resources of the NSA. Proposed Intervenors plan to present arguments that represent the interests of those who value the NSA primarily for its environmental and recreational values, values that are very important to the NSA. Such representation is a vital element in the proceeding that is not fully shared by any present party.

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Wright and Miller interpret the rule to place the burden on the party opposing the intervention to show that adequate representation of the applicant's interests is already present. 7C Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 190g at 388–90.

**IV. ALTERNATIVELY, THIS COURT SHOULD GRANT PERMISSIVE INTERVENTION.**

If this Court holds that Proposed Intervenors are not entitled to intervene as of right, permissive intervention should nevertheless be allowed, particularly given the substantial stake that Proposed Intervenors have in the outcome of this litigation. Rule 24(b) states that “[u]pon timely application, anyone may be permitted to intervene in an action . . . when an applicant’s claim or defense and the main action have a question of law or fact in common.” Further, “the decision whether to grant permissive intervention resides largely in the discretion of the district court.” *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 382 n.1 (9th Cir. 1987).

Rule 24(b) binds the court’s discretion only in stating that “the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” In *Venegas v. Skaggs*, the Ninth Circuit quoted with approval *Crumble v. Blumthal*, 549 F.2d 462, 468–69 (7th Cir. 1977), for the holding that the “district court abused its discretion in denying permissive intervention where the requirements for permissive intervention had been met and there was ‘no evidence’ that intervention would prejudice the original parties.” *Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989). In *Spangler v. Pasadena City Board of Education*, the court held that

[i]f the trial court determines that the initial conditions for permissive intervention under rule 24(b)(1) or 24(b)(2) are met, it is then entitled to consider other factors in making its discretionary decision on the issue of permissive intervention. These relevant factors include the nature and extent of the intervenors’ interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case.

552 F.2d 1326, 1329 (9th Cir. 1977).

Intervention here will not prejudice the other parties, nor cause undue delay. Proposed Intervenor will abide by any schedule the court imposes. Also, there is little danger that the process will become bogged down by numerous intervenors. Therefore, judicial economy considerations weigh in favor of granting intervention.

The factors named in *Spangler* also support intervention. First, Proposed Intervenor have direct interests in this case, which Proposed Intervenor believe is an impermissible collateral attack on the final decision of Wasco County in an attempt to evade quasi-judicial review by the Gorge Commission, actions to which Proposed Intervenor are parties. Second, Proposed Intervenor have standing to raise relevant legal issues. Third, Proposed Intervenor seek to enforce applicable laws, including the Scenic Area Act and implementing rules, and to oppose collateral attack of Wasco County's final decision. And fourth, Proposed Intervenor's positions on these issues are directly related to the merits of the instant case.

Thus, Proposed Intervenor meet the conditions for permissive intervention under Rule 24(b)(2), there is no evidence that intervention would prejudice the original parties, and all the relevant factors point in favor of allowing intervention. The Court should permit Proposed Intervenor to intervene.

## V. CONCLUSION

For the reasons discussed above, Proposed Intervenor are entitled to intervene as of right. Alternatively, this Court should allow Proposed Intervenor to intervene on a permissive basis.

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DATED this 23rd day of January, 2017.

/s/ Gary K. Kahn

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### CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2017, I electronically filed the foregoing MOTION TO INTERVENE OF FRIENDS OF THE COLUMBIA GORGE, INC., COLUMBIA RIVERKEEPER, AND OREGON PHYSICIANS FOR SOCIAL RESPONSIBILITY; MEMORANDUM IN SUPPORT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorneys:

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and I hereby certify that on the same date I emailed an electronic copy of the foregoing document to the following attorney, who agreed to accept service by email:

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