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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

MICHAEL J. CLEMENT, Plaintiff, NELSON NEIGHBORHOOD CONSERVATION COALITION, a Wyoming nonprofit corporation, Proposed Plaintiff-Intervenor, v. CHAD HUDSON, in his official capacity as Forest Supervisor, USDA Forest Service, Bridger-Teton National Forest, Defendant.	)	Civil Action No. 2:26-cv-00001-ABJ

PROPOSED PLAINTIFF-INTERVENOR'S REPLY IN SUPPORT OF MOTION TO INTERVENE AS OF RIGHT

I. INTRODUCTION

The Government's Opposition is notable for what it does not say. It does not contest that Nelson Neighborhood Conservation Coalition's ("NNCC" or "Coalition") motion is timely. Doc. 21 at 6. It does not address the actual interests NNCC's members hold in the subject of this action—their adjacent properties, their children's safety on Nelson Drive, their decades of daily

use of the Nelson Drive Trailhead, their procedural rights under NEPA, and the wildlife habitat they have personally documented for over twenty-five years. It does not address whether disposition of this case will impair those interests. And it does not address whether Plaintiff Clement, proceeding *pro se* on his own behalf, adequately represents the Coalition's members.

Instead, the Government collapses three of the four elements of Federal Rule of Civil Procedure 24(a)(2) into a single argument: that intervention would be "futile" because NNCC's claims would supposedly fail on the merits. Doc. 21 at 6–7. That argument fails for two reasons. First, futility is not the standard for intervention as of right in the Tenth Circuit. *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010); *San Juan Cnty. v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007) (en banc). Second, even if futility was the standard, NNCC's claims are not futile. NNCC does not seek to relitigate the 2012 FONSI. NNCC challenges three distinct agency actions that all occurred within the last seven months: Supervisor Hudson's September 24, 2025 "Review of Environmental Compliance Documents," the November 21, 2025, Special Use Permit ("SUP"), and Hudson's unexplained departure from Supervisor Buchanan's stated 2012 commitments. Each is a final agency action. Each is well within the six-year statute of limitations. And NNCC's claims are not foreclosed by waiver, exhaustion, or any other doctrine the Government invokes.

The Government's brief contains an important concession. It admits that Hudson conducted a fresh *Review* in September 2025, that Hudson *made a determination* that adding a unit was "justified," and that Hudson *concluded* the change would "not change the original FONSI determination" and "would not have a reasonably foreseeable significant impact." Doc. 21 at 5. That is the textbook definition of a final agency action under *Bennett v. Spear*, 520 U.S. 154, 178 (1997). Hudson's Review was the "consummation" of a decision-making process that

determined rights, imposed obligations, and produced legal consequences, namely, the issuance of the SUP six weeks later.

The Court should grant intervention. NNCC's claims are not futile, and the Government does not contest, and cannot contest, that NNCC meets the actual requirements of Rule 24(a)(2).

II. ARGUMENT

The Government Applies the Wrong Legal Standard.

Federal Rule of Civil Procedure 24(a)(2) requires that the Court permit intervention when the movant satisfies four elements: (1) timeliness, (2) a legally protectable interest in the subject of the action, (3) practical impairment of that interest, and (4) inadequate representation by existing parties. *WildEarth Guardians*, 604 F.3d at 1198. The Tenth Circuit "takes a somewhat liberal line in allowing intervention." *Id.* The Rule's elements are "not rigid, technical requirements" but instead aim to "capture the circumstances in which the practical effect on the prospective intervenor justifies its participation in the litigation." *San Juan Cnty.*, 503 F.3d at 1195.

The Government concedes timeliness. Doc. 21 at 6. The Government does not analyze impairment. The Government does not address adequacy of representation. Each of those concessions is independently sufficient to satisfy the corresponding element. *See* Fed. R. Civ. P. 24(a)(2). What remains is the "interest" element, and the Government's brief misstates the law.

The Tenth Circuit construes the "interest" element generously. *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001). An applicant need only show a "direct, substantial, and legally protectable interest in the proceedings." *Id.* (cleaned up). A proposed intervenor in a NEPA case satisfies that test when its members live adjacent to the affected land, regularly use the affected area, and would be entitled to challenge the agency action on their

own. *WildEarth Guardians*, 604 F.3d at 1199. NNCC's three member declarations establish each of these facts. *See* Decl. of Kailey Gieck ¶¶ 6–48; Decl. of Lisa Gillette ¶¶ 6–55; Decl. of Michael McDonnell ¶¶ 5–22.

Nowhere does the Government contest these declarations. Nowhere does the Government deny that NNCC's members live adjacent to and within direct proximity of the proposed 36-dwelling development, that they walk Nelson Drive with their young children, that they use the Nelson Drive Trailhead daily, or that they were given no notice of and no opportunity to comment on the 2025 Review or the SUP. Those uncontested facts establish a Rule 24(a)(2) interest.

Rather than engage with the actual standard, the Government repackages a Rule 12(b)(6) merits attack as an intervention defense and calls it "futility." Doc. 21 at 6–7. The Tenth Circuit has never adopted such a futility doctrine for intervention as of right. The cases the Government cites *McKeen v. U.S. Forest Service*, 615 F.3d 1244 (10th Cir. 2010), *Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088 (10th Cir. 2004), and *Forest Guardians v. U.S. Forest Service*, 641 F.3d 423 (10th Cir. 2011), are merits decisions on APA challenges, not intervention rulings. None holds that a Rule 24(a)(2) interest disappears because a defendant believes the proposed claims might fail.

In any event, even if the Court were inclined to consider "futility" as part of the intervention analysis, the standard would be whether the proposed claims are *clearly* foreclosed. *See, e.g., Brumfield v. Dodd*, 749 F.3d 339, 344–45 (5th Cir. 2014) (proposed intervenor need only show its claim is colorable). NNCC's claims are not clearly foreclosed. As Section II explains, the 2025 Review and the 2025 SUP are independent final agency actions, well within

the limitations period, that the Government's brief itself acknowledges occurred only months ago.

Even Under the Government's Standard, NNCC's Claims Are Not Futile.

The Government's futility theory rests on a single premise: that the only relevant agency action is the May 2012 Decision Notice and FONSI, and that everything that has happened since is mere "implementation." Doc. 21 at 10–12. That premise is wrong. NNCC challenges three distinct, recent agency actions that exist independently of the 2012 FONSI.

A. Hudson's September 24, 2025 Review Is a Final Agency Action.

The Government cannot have it both ways. Its brief describes Hudson's September 24, 2025 "Review of Environmental Compliance Documents" as a substantive determination that *Hudson made*, in which *Hudson concluded* that the increased number of units was "justified," "would not change the original FONSI determination," and "would not have a reasonably foreseeable significant impact." Doc. 21 at 5. Those are agency findings. They were made by a different Supervisor than the one who signed the FONSI, in a different year, on a different administrative record, addressing a different question. They marked the consummation of Hudson's review and produced concrete legal consequences—the issuance of the SUP weeks later.

Under *Bennett v. Spear*, an agency action is final when (1) it marks the "consummation" of the agency's decision-making process and (2) it is one by which "rights or obligations have been determined" or from which "legal consequences will flow." 520 U.S. at 177–78. Hudson's September 2025 Review satisfies both prongs:

- Consummation. Hudson did not merely apply the 2012 FONSI mechanically. He examined a proposed change (13 to 14 units, smaller footprint), evaluated whether it required new NEPA analysis, and concluded that it did not.

That determination was final—the Forest Service did not seek further review, did not invite public comment, and proceeded to issue the SUP based on it.

- Legal Consequences. The Review authorized the SUP. Without it, the Trust could not have built the additional unit or moved forward on a different footprint than the 2012 FONSI specified. The Review created concrete entitlements for the Trust and concrete burdens for NNCC's members.

The cases the Government cites confirm this. In *Sierra Club v. U.S. Army Corps of Engineers*, 446 F.3d 808, 816 (8th Cir. 2006), the court treated a FONSI as final because it was "the culmination of the agency's NEPA decision-making." Hudson's 2025 Review is precisely that, the culmination of his decision to authorize 14 buildings on 3.15 acres rather than 13 within the 6.04-acre footprint Buchanan had approved. Whether Hudson's Review is itself an EA, a supplemental EA determination, or a "no supplementation needed" determination, it is the agency's *present-day* answer to a present-day question. That answer is final and reviewable.

The Government's own factual narrative confirms the point. Hudson did not rubber-stamp Buchanan's 2012 decision. He undertook "a Review of Environmental Compliance Documents, specifically addressing the number of units to be built at the Nelson Drive Administrative Site," because the design plans "propose the construction of 14 units within a smaller footprint"—not the 13 within 6.04 acres that Buchanan authorized. Doc. 21 at 14. Hudson then made a fresh determination that the change required no further NEPA analysis. *Id.* The Government cannot describe Hudson's act as a "Review" and "determination" while simultaneously denying that it is reviewable agency action. *Pennaco Energy v. U.S. Dep't of Interior*, 377 F.3d 1147, 1162 (10th Cir. 2004

B. The November 21, 2025 SUP Is a Final Agency Action.

The Government argues that the SUP is not final agency action because it is "just one implementing step." Doc. 21 at 12. That cannot be right. A permit is a quintessential agency action that creates rights and imposes obligations. *See* 5 U.S.C. § 551(13) (defining "agency

action" to include "licens[ing]"); *Bennett*, 520 U.S. at 178. The SUP grants the Trust the right to construct, operate, and maintain fourteen buildings comprising thirty-six dwellings on National Forest System land for thirty years. Doc. 21 at 5. It contains binding terms, conditions, and obligations. *See* Decl. of Tyler Garrett, Ex. C (SUP) (filed by Trust). The Government identifies no case holding that a Forest Service Special Use Permit—as opposed to the underlying NEPA document—is unreviewable.

The Government's authority is inapposite. *Friends of Marolt Park*, 382 F.3d at 1095, treated the DOT's Record of Decision as reviewable for purposes of the plaintiff's procedural NEPA claim; the case neither addresses, nor forecloses review of, a subsequent implementing permit. *Environmental Defense Center v. Bureau of Ocean Energy Management*, 36 F.4th 850, 868 (9th Cir. 2022), held that an EA and FONSI together constituted final agency action, it did not hold that future permits were beyond review. Indeed, *Environmental Defense Center* expressly contemplates that a downstream "individual permit application" decision would be reviewable when made. 36 F.4th at 868.

NNCC's NEPA and APA claims regarding the SUP accrued, at the earliest, on November 21, 2025. The six-year statute of limitations under 28 U.S.C. § 2401(a) does not expire until 2031. NNCC filed the present motion on May 1, 2026—roughly five months after the SUP issued, and within the same month NNCC's members first learned through Mr. Clement's lawsuit that legal action was underway. The motion is timely many times over.

C. Hudson's Unexplained Departure From Buchanan's 2012 Commitments Is Independently Reviewable.

The Government dismisses Supervisor Buchanan's June 14, 2012 letter as merely "offer[ing] clarification" and not creating any "rights." Doc. 21 at 15. NNCC has never claimed that the letter is itself a final agency action. The letter is *evidence* of a stated agency policy that

Hudson abandoned in 2025 without acknowledgment or reasoned explanation. That abandonment is independently reviewable under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), and *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016).

Buchanan's June 14, 2012 letter, written contemporaneously with the FONSI, made specific representations about how the Project would be implemented:

> My decision is to locate the housing within the 6.04 acres, thus increasing housing density to reflect the character of the surrounding neighborhood, and reduce the sprawl into new habitat to the east. . . . [F]irst I prefer that the final site plan not go outside the 6.04 acres; and second, should the site planning prove this to be unachievable, then my intent is to place 'overflow' east of the north south boundary line.

Buchanan attached a map showing the 6.04-acre footprint. The 2025 SUP authorizes development on 3.15 acres—not within the 6.04-acre footprint, but at a different location entirely. The number of dwellings nearly tripled, from 13 to 36. The Forest Service has never acknowledged this departure. It has never explained the new policy. And it has never identified the "good reasons" the APA requires when an agency changes course. *Fox Television*, 556 U.S. at 515; *Encino Motorcars*, 579 U.S. at 222.

The Government's argument that Buchanan's letter is not a "final decision for purposes of NEPA or the APA" misses the point. The *Fox Television* violation is not the 2012 letter—it is Hudson's 2025 silent departure from the policy reflected in the FONSI and explained in Buchanan's letter. That departure occurred in 2025, was effected through the 2025 Review and SUP, and is reviewable today.

D. The Statute of Limitations Has Not Run.

The Government's statute-of-limitations argument depends on its claim that the only relevant agency action is the 2012 FONSI. Doc. 21 at 7–8. Because that premise fails, so does the limitations argument. Each of NNCC's claims arises from agency conduct in 2025: Hudson's

September 2025 Review, the November 2025 SUP, and Hudson's *Fox Television* departure effectuated through those actions. The six-year clock under 28 U.S.C. § 2401(a) begins to run when the cause of action accrues. *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991) (a substantive challenge to agency action accrues when the agency action is applied to the plaintiff); *Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 603 U.S. 799, 800 144 S.Ct. 2440, 2443. ("Because an APA plaintiff may not file suit and obtain relief until she suffers an injury from final agency action, the statute of limitations does not begin to run until she is injured.")

E. Neither Waiver Nor Exhaustion Bars NNCC's Claims.

The Government argues that NNCC waived its claims by not commenting on the 2012 EA and failed to exhaust by not appealing the 2012 FONSI. Doc. 21 at 8–10. Both arguments fail because NNCC challenges 2025 agency action, not 2012 agency action.

Waiver. The waiver doctrine the Government invokes—from *Department of Transportation v. Public Citizen*, 541 U.S. 752, 764 (2004)—applies when a party fails to raise an issue during a NEPA comment period. There was no comment period for the 2025 Review or the 2025 SUP. The Forest Service issued the Review unilaterally, without notice, and without inviting any public input. Doc. 21 at 5. There is no waivable comment period to miss. *See Sierra Club v. EPA*, 762 F.3d 971, 977 (9th Cir. 2014) (waiver requires a meaningful opportunity to comment).

Exhaustion. The Government invokes 7 U.S.C. § 6912(e) and the 2003 version of 36 C.F.R. Part 215, arguing that NNCC needed to file an administrative appeal. Doc. 21 at 9–10. The Government does not explain how NNCC could have appealed the September 2025 Review when there was no appeal mechanism made available for it. Hudson did not issue the Review

under 36 C.F.R. Part 215 (which the Government concedes has been "repealed and reserved," Doc. 21 at 8). Hudson did not publish a legal notice. He did not commence an objection period. He did not identify any administrative remedy. An exhaustion requirement cannot bar a party from court when the agency itself has provided no path for administrative review. *See Darby v. Cisneros*, 509 U.S. 137, 153–54 (1993) (exhaustion requirement applies only when administrative remedy is required by statute or rule).

Even setting aside the lack of an administrative path, exhaustion is excused where pursuit of administrative remedies would be futile or where the agency provided no remedy to exhaust. *McKart v. United States*, 395 U.S. 185, 193, 197 (1969). The Tenth Circuit has acknowledged this line of exceptions in the § 6912(e) context without rejecting them. *See Forest Guardians*, 641 F.3d at 432–33 (cataloging futility, irreparable-harm, and pure-legal-question exceptions adopted by sister circuits). NNCC's claims arise from Hudson's failure to provide notice or process at all. The Government cannot in the same breath argue that NNCC should have exhausted procedures that the agency never created.

F. The Forest Service's Reinterpretation of "Unit" Is Itself Reviewable.

The Government devotes several pages to defending its interpretation of "multi-family housing unit" as referring to *buildings* rather than individual dwellings. Doc. 21 at 12–13. This argument is a merits dispute, not a threshold bar to intervention. NNCC and Plaintiff Clement both contend that the 2012 FONSI authorized 13 dwellings, not 13 buildings containing up to 36 dwellings. That dispute will be resolved on the administrative record after intervention is granted, not by denying a Rule 24(a)(2) motion.

But even on the Government's own reading, the math does not work. The Government says the FONSI authorized up to 18 "multi-family housing units" under Alternative 3 (the upper

bound) and selected a modified Alternative 5 capped at 13 "multi-family housing units." Doc. 21 at 4. The SUP authorizes *14* buildings. That is one more than the 13 the FONSI selected. The Government concedes this required Hudson to issue a 2025 Review approving the additional unit. Doc. 21 at 5, 14. That concession alone refutes the futility argument: if no 2025 agency action were needed, no Review would have been needed either. The Review exists because the 2012 FONSI did not authorize what is now being built.

NNCC Satisfies Each Element of Rule 24(a)(2).

Stripped of its merits-based futility theory, the Government does not contest that NNCC meets the four elements of Rule 24(a)(2).

A. Timeliness.

The Government concedes timeliness. Doc. 21 at 6. This case is in its earliest stages. No answer or administrative record has been filed. No scheduling order has been entered. Discovery has not begun.

B. Interest in the Subject of the Action.

NNCC's three member declarations establish multiple, direct, legally protectable interests:

- Property interests. Kailey Gieck owns and resides at 65 Nelson Drive, immediately adjacent to the proposed development. Gieck Decl. ¶¶ 2, 5. Lisa Gillette has owned 880 E. Hansen Avenue for over 20 years; her property abuts the intersection that funnels all Nelson Drive traffic. Gillette Decl. ¶¶ 2–6. Michael McDonnell resides at 405 Henley Road, with his property bordering E. Hansen Avenue, one of only two access routes to the development. McDonnell Decl. ¶ 2.
- Recreational interests. All three declarants use the Nelson Drive Trailhead on a daily or near-daily basis for hiking, dog walking, biking, and wildlife observation. Gieck Decl. ¶¶ 22–31; Gillette Decl. ¶¶ 20–24; McDonnell Decl. ¶¶ 15–16.
- Wildlife and environmental interests. McDonnell has personally documented elk, mule deer, bighorn sheep, and migratory songbirds at the site over 25 years, including direct observation of 30+ elk wintering on Putt-Putt Ridge during the 2016–2017 winter. McDonnell Decl. ¶¶ 7–14.

- Procedural rights. All three declarants would have submitted comment had the Forest Service provided any opportunity in 2025. Gieck Decl. ¶¶ 37–42; Gillette Decl. ¶¶ 42–48; McDonnell Decl. ¶¶ 17–19.

The Tenth Circuit has repeatedly recognized that adjacent landowners and frequent users of affected federal lands have a Rule 24(a)(2) interest. *WildEarth Guardians*, 604 F.3d at 1199. The Government does not dispute any of these facts and does not address the standard.

C. Impairment.

If the SUP stands, NNCC's members will live next to a 36-dwelling development, on a street with no sidewalks, where projected vehicle trips will increase by 160 to 230 trips per day. Gieck Decl. ¶¶ 9–21. Their children will face daily traffic hazards. Their trailhead will be transformed. Wildlife habitat will be fragmented. Once construction begins, announced for spring 2026, their harms become irreversible as a practical matter. The Tenth Circuit has long recognized that practical impairment is satisfied by exactly this kind of irreversible on-the-ground harm. *San Juan Cnty.*, 503 F.3d at 1196. The Government does not contest impairment.

D. Inadequate Representation.

The burden on this element is "minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *WildEarth Guardians*, 604 F.3d at 1200. Plaintiff Clement is appearing *pro se* on his own behalf. He has no attorney-client relationship with NNCC's members, no fiduciary duty to them, and no obligation to develop the factual record necessary to establish their distinct interests in adjacent properties, child-safety concerns, daily recreational use, and 25 years of wildlife observation. He cannot bind them to litigation strategy or settlement. He cannot testify to their specific harms. His position, however well-pleaded, cannot substitute for the Coalition's representation of its members. The Government does not address this element.

III. CONCLUSION

The Government's Opposition does not respond to the actual elements of Rule 24(a)(2). It instead recasts a Rule 12(b)(6) merits argument as an intervention defense, asks the Court to apply a "futility" standard the Tenth Circuit has not adopted, and ignores that NNCC's challenges target 2025 agency actions—not the 2012 FONSI. NNCC's claims are timely, its interests are direct and uncontested, those interests will be impaired, and they are not adequately represented. The Court should grant the Motion to Intervene as of Right.

DATED this 20th day of May, 2026.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of May, 2026, I electronically filed the foregoing PROPOSED PLAINTIFF-INTERVENOR'S REPLY IN SUPPORT OF MOTION TO INTERVENE AS OF RIGHT with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record and parties registered to receive notice in this matter, including:

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