KRISTEN L. BOYLES (CSB #158450)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
(206) 343-7340
(206) 343-1526 *[FAX]*
kboyles@earthjustice.org

Attorney for Plaintiffs
The Wilderness Society, et al.

CLAUDIA POLSKY (CSB #185505)
Deputy Attorney General
State of California Department of Justice
1515 Clay Street
P.O. Box 70550
Oakland, CA 94612-1413
(510) 622-2112
(510) 622-2270 *[FAX]*
claudia.polsky@doj.ca.gov

Attorney for Plaintiffs People of the State of California, et al.

(additional counsel listed at signature block)

THE HONORABLE ELIZABETH D. LAPORTE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, et al., Defendants.	Case No. 05-03508-EDL consolidated with

THE WILDERNESS SOCIETY, et al., Plaintiffs, v. UNITED STATES FOREST SERVICE, et al., Defendants.	Case No. 05-04038-EDL BRIEF IN SUPPORT OF FURTHER INJUNCTIVE RELIEF

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

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705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

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705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

INTRODUCTION

In its Opinion and Order on Cross-Motions for Summary Judgment (Sept. 20, 2006), this Court granted the motions for summary judgment brought by the State and environmental plaintiffs and concurrently denied the federal defendants' summary judgment motion. The Court ordered that "[t]he State Petitions Rule is set aside and the Roadless Rule, including the Tongass Amendment, is reinstated. Defendants are enjoined from taking any further action contrary to the Roadless Rule without undertaking environmental analysis consistent with this opinion." Slip op. at 53. At that time, the Court ordered the parties to meet and confer regarding specific language they believed should be included in the Court's injunction. Id.

On September 22, 2006, the federal defendants filed with the Court their interpretation of the Court's injunction. See Attachment to Defendants' Notice on Compliance With the Court's September 20, 2006 Order (Sept. 22, 2006). Specifically, the Forest Service stated that it did not intend to approve any further management activities in Inventoried Roadless Areas that would be prohibited by the 2001 Roadless Rule. However, the Forest Service also made clear its view that projects approved prior to this Court's injunction order are not similarly constrained.

Accordingly, plaintiffs moved for injunctive relief with respect to logging in inventoried roadless areas at the Blackberry timber sale in the Siskiyou National Forest in Oregon. The Court denied that motion on October 3, 2006. In the denial, however, the Court reaffirmed its broad discretion to fashion an equitable remedy, Order Re: Motion for Clarification at 2; rejected the federal defendants' and defendant-intervenor's arguments concerning "retroactive" injunctions, id. at 3; and again ordered the parties to meet and confer regarding "any other previously approved projects" in inventoried roadless areas and to file a schedule for briefing "regarding the applicability of the Court's injunction to those projects, with attention to the specific facts and circumstances of each project, and, if appropriate, a mechanism for involving any third parties whose existing contract rights could be impaired." Id. at 4. Counsel for plaintiffs and federal defendants have conferred and exchanged draft lists setting forth their understanding of the status of previously

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705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

approved projects in inventoried roadless areas.

This brief sets forth the language proposed by plaintiffs for the Court's final injunctive decree, explains the facts of the previously approved projects for which injunctive relief is sought, and discusses why there is no need for third party involvement in this injunctive request.

INJUNCTION

I. STATE PETITIONS RULE

Plaintiffs' proposed injunction repeats the Court's prior order so that all aspects of the final injunction are in a single Court order.

II. NEW FOREST SERVICE ACTIONS AND ACTIONS IN ROADLESS AREAS

As the Court previously ordered, federal defendants are enjoined from taking any further action contrary to the 2001 Roadless Rule without first remedying the legal violations identified in the Court's opinion of September 20, 2006. Plaintiffs ask the Court to add language defining "further action" as actions by the Forest Service including, but not limited to, approving or authorizing any management activities in inventoried roadless areas that would be prohibited by the 2001 Roadless Rule, including the Tongass Amendment, and issuing or awarding leases or contracts for projects in inventoried roadless areas that would be prohibited by the 2001 Roadless Rule, including the Tongass Amendment. The effective date of this injunction is September 20, 2006, the date of the Court's opinion and order on summary judgment.

III. SPECIFIC ACTIVITIES IN ROADLESS AREAS

On September 1, 2006, the plaintiffs and federal defendants filed a stipulated list of projects approved in roadless areas under the applicable interim directives. Some of those projects, such as the South Manning Creek Simplot Exploration Phase I, have been completed; other projects, such as the Batchelder Brook Project and Wildwood Project, have been withdrawn by the Forest Service; and others, such as the Harris Park Timber Sale, arguably comply with the 2001 Roadless Rule. See Stipulation in Response to Court's August 7, 2006 Order (Sept. 1, 2006).[1] Because the Roadless

[1] The Court has already denied the injunctive request for roadless area logging at the Biscuit Project.

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705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Rule's prohibitions do not focus on the date of a decision or approval regarding a project,[2] with the Court's reinstatement of the Roadless Rule, plaintiffs ask the Court to enjoin a group of oil and gas leases and one specific road building project.

A. Oil and Gas Leases

The Roadless Rule prohibits road construction or reconstruction in connection with any mineral lease issued after January 12, 2001. See 36 C.F.R. § 294.12(b)(7). The rule provides an exception allowing road construction or reconstruction only in connection with "the continuation, extension, or renewal of a mineral lease" that was already issued by the Secretary of Interior as of January 12, 2001. See id. By its terms, the Roadless Rule limits the portions of inventoried roadless areas that may be impacted by road construction or reconstruction to facilitate oil and gas development "to only those areas currently under lease" as of January 12, 2001. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244, 3,266 (2001).

1. Leasing background

Oil and gas leasing on Forest Service lands is a multi-stage process involving both the Forest Service and the Bureau of Land Management ("BLM"), governed by the Mineral Leasing Act, 30 U.S.C. § 181 et seq., as modified by the Federal Onshore Oil and Gas Leasing Reform Act of 1987, 30 U.S.C. § 226(g)-(h). Under these Acts, the BLM and the Forest Service share responsibility for issuing such leases. Pertinently here, the Leasing Reform Act "provides that the Forest Service shall regulate all surface-disturbing activities on NFS [National Forest Service] lands. 30 U.S.C. § 226(g). No permit to drill on NFS lands may be granted without analysis and approval by the Forest Service of a plan of operations covering proposed surface-disturbing activities within the lease area." Wyoming Outdoor Council v. U.S. Forest Serv., 165 F.3d 43, 45 (D.C. Cir. 1999).

In practice, oil and gas companies submit requests to the BLM to lease certain lands. The

[2] The Roadless Rule's only reference to the date of a decision document is that it does not apply to decisions rendered before its effective date of January 12, 2001, 36 C.F.R. §§ 294.13(a), 294.14(c) – an issue not here in dispute.

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705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

BLM forwards these requests to the Forest Service. The Forest Service reviews these requests and decides, pursuant to 36 C.F.R. § 228.102, whether to authorize leasing and under what conditions. The BLM takes these authorizations, and, at a subsequent lease sale, offers the lands for lease under conditions approved by the Forest Service. If the sale is protested, the BLM does not issue the leases until it resolves the protest and the time for any administrative appeal of the leasing decision has run. See 43 U.S.C. § 4.21(a). Up until that point, both the BLM and Forest Service retain the authority to attach additional stipulations to the leases, or decide not to issue them at all. Wyoming Outdoor Council, 165 F.3d at 50. If additional stipulations are added, the buyer can either accept the lease with the changes, or reject the changes and get a refund.

Once a lease is issued, federal law sets forth an entirely separate process that the BLM and Forest Service must complete to approve an oil and gas drilling project on the lease. 36 C.F.R. § 228.106, entitled "Operator's submission of surface use plan of operations," states:

> (a) General. No permit to drill on a Federal oil and gas lease for National Forest System lands may be granted without the analysis and approval of a surface use plan of operations covering proposed surface disturbing activities. An operator must obtain an approved surface use plan of operations before conducting operations that will cause surface disturbance. The operator shall submit a proposed surface use plan of operations as part of an Application for a Permit to Drill to the appropriate Bureau of Land Management office for forwarding to the Forest Service, unless otherwise directed by the Onshore Oil and Gas Order in effect when the proposed plan of operations is submitted.

The Forest Service then reviews the plan and makes a decision whether to approve, approve with conditions, or deny the plan. 36 C.F.R. § 228.107 ("Review of surface use plan of operations"). This subsection is clear that this is a separate decision point subject to appeal. See 36 C.F.R. § 228.107(b), (c). Moreover, 36 C.F.R. § 228.112(c) explicitly states that "[n]othing in this subpart shall be construed to relieve an operator from complying with applicable Federal and State laws or regulations, …."

The applicable regulations demonstrate that while the leases issued by the Forest Service and BLM from January 12, 2001 until this Court's injunction ruling represent a conveyance of

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705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

development rights within inventoried roadless areas, they do not constitute "previously approved projects" that directly authorize surface development in roadless areas. Any such surface development must receive a second stage of Forest Service authorization through review and approval of a surface use plan of operations that is still to come. Because no surface-disturbing activities on a federal oil and gas lease may proceed until the Forest Service approves a surface use plan of operations, and any such surface use plans are subject to "applicable Federal … regulations," 36 C.F.R. § 228.112(c), this Court's September 20 injunction order should already prohibit defendants from approving any future surface use plan for leases issued after January 12, 2001, that permit road building in an inventoried roadless area – for such an approval would be a new action by the Forest Service that would be constrained by this Court's injunction. However, because the Forest Service's position to date seems to be linked to the date of the sale of the oil and gas leases, not the approval of surface use plans, and because defendants' view threatens to open thousands of acres of inventoried roadless areas to road construction to facilitate oil and gas development, plaintiffs ask the Court to specifically issue an injunction directed at the previously sold and issued oil and gas leases.

2. Leases at issue

To the best of their ability, using publicly available information, plaintiffs have compiled a list of federal oil and gas parcels located within or partially within inventoried roadless areas in the western BLM administrative states. See Exhibit 1 to Declaration of Doug Pflugh (Oct. 18, 2006).[3] Several aspects of this list are significant:

1. The list is divided by state and then by lease sale date. The entries include information about the lease parcels, including acres in inventoried roadless areas and on-the-ground status, to the best of plaintiffs' knowledge.

2. Because the 2001 Roadless Rule applies to oil and gas leases (a type of mineral

[3] Due to our understanding of the limitations of publicly available information, plaintiffs do not represent that this is an exhaustive list of all federal oil and gas leases on Forest Service lands issued after January 12, 2001.

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(206) 343-7340

lease) that were issued after January 12, 2001, several sale dates on the list precede January 2001, but all authorized leases on the list were issued after January 12, 2001.

3. On the opposite end of the time scale, leases that were sold but not yet issued (generally those sold most recently or under protest) are listed separately by state as "pending" leases. This category also contains some pending leases that have been suspended prior to sale to allow for environmental review and land management planning activities. The Court's injunction on new activities already applies to this group of leases.

There are three basic categories of leases with respect to compliance with the 2001 Roadless Rule. For some parcels, notice of application of the Roadless Rule was attached to the sale documents for the parcel. This category is denoted on the list with the letters "LN." (For example, the August 2001 sale on the GMUG National Forests in Colorado). As the regulations make clear (at 43 C.F.R. § 3101.1-3), such lease notices are for information only and carry no legal consequences standing alone. Accordingly, the notices are not sufficient by themselves to subject these leases to the restrictions of the Roadless Rule.

The second category are leases that were sold with no provisions about or discussion of the 2001 Roadless Rule. This category is denoted on the list with the letter "X." (For example, the November 2003 leases on the White River National Forest in Colorado.)

The third category of leases are those with a Roadless Rule-derived "no surface occupancy" stipulation in the contract. This category is denoted on the list with the letters "NSO." (For example, some of the August 2005 leases on the GMUG National Forests in Colorado). Although these leases may at present prohibit road building, lease stipulations can always be waived by the federal agencies at the request of the leaseholder, although waiving some stipulations could require a particular process, such as public notice and/or a supplemental environmental analysis. See 43 C.F.R. § 3101.1-4 (providing for waiver of lease stipulations). In the event of such a waiver, defendants could authorize surface disturbance on such leases in violation of the Roadless Rule, as the leases are currently framed.

Plaintiffs seek injunctive relief with respect to each of these lease categories.

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705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

3. Harm and the balance of the equities

This Court should balance the equities in favor of issuing an injunction to subject the challenged leases to the restrictions of the 2001 Roadless Rule. Four factors in particular favor such an injunctive decree. First, of the leases identified by plaintiffs as threatening violations of the Roadless Rule, on-the-ground activity has begun only on one parcel on the White River National Forest in Colorado sold in May 2003 and one parcel on the Custer National Forest in North Dakota sold in May 2004. Plaintiffs are not seeking (and in fact could not seek) to stop road building that has already occurred, and those parcels are not included in plaintiffs' injunction request. For the parcels where plaintiffs ask the Court to impose the Roadless Rule's restrictions, no on-the-ground activity has begun. Indeed, only two parcels in plaintiffs' list – a White River National Forest (Colorado) lease sold in May 2003 and a Uinta National Forest (Utah) lease sold in November 2001 – have pending applications for a permit to drill ("APD").

Second, these leases were issued and purchased in inventoried roadless areas at times when either the validity of the Roadless Rule itself, or the Rule's repeal, was being contested in the courts, and the ultimate application of the Rule to the leases was in flux. The Forest Service, BLM, and lease purchasers were on notice that the Rule might be applied to those leases, and with that notice, there is no equitable reason why the Rule should not be applied now. The Ninth Circuit has held that "[a]fter a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status…." National Forest Preservation Group v. Butz, 485 F.2d 408, 411 (9th Cir. 1973); accord Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1187 (9th Cir. 2000) (issuing a preliminary injunction invalidating a land exchange even though it had already been completed, as defendants were on notice that a court could grant such relief).

There is ample evidence that the Forest Service and potential purchasers were on notice that the Roadless Rule would apply to these lease parcels. Many of the leases issued from January 2001 to present have attached lease notices noting application of the Roadless Rule to that parcel. Other parcels were leased with "no surface occupancy" stipulations in the contracts. These instances

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

constitute the agencies' direct admission that the Roadless Rule would apply to the leases and are clear evidence that the leaseholders were aware of the rule's potential application.

Third, economic loss is not irreparable harm:

> The balance of hardships also tips in Earth Island's favor. The [Forest Service and timber company] contend, with some reason, that they will suffer economic losses if we enjoin the timber sales. But in Babbitt, we stated that a cruise ship's "loss of anticipated revenues … does not outweigh the potential irreparable damage to the environment." Id. at 738. Further, in Earth Island we noted the importance of preserving the public's interest in "preserving precious, unreplenishable resources." Earth Island, 351 F.3d at 1309 (quoting Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1125 (9th Cir. 2002). Finally, we believe that a preliminary injunction advances the public interest. The preservation of our environment, as required by NEPA and the NFMA, is clearly in the public interest.

Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1177 (9th Cir. 2006) (enjoining post-fire logging; irreparable injury shown). The bases for injunctive relief in the federal courts "are irreparable injury and inadequacy of legal remedies." Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Id. at 545. Plaintiffs respectfully submit that road building in conjunction with these oil and gas leases will cause such irreparable harm by subjecting thousands of acres in some of the most ecologically significant public lands remaining in our nation to industrial activity. See Declaration of Jim Catlin (April 28, 2006) (attesting to irreparable harm from proposed oil and gas leasing on the Uinta National Forest).

Finally, plaintiffs do not ask for the leases to be invalidated, but instead for the Court to enjoin the federal defendants from permitting any road building on any of the leases, as required by the Roadless Rule. With this tailored injunction request, plaintiffs ask for less than was granted by the Ninth Circuit in Conner v. Burford, 848 F.2d 1441, 1461 (9th Cir. 1988), where the court identified legal violations in connection with issuance of federal oil and gas leases and enjoined "the federal defendants from permitting any surface-disturbing activity to occur on any of the leases until

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705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

they have fully complied with NEPA and ESA." (emphasis added). Here, plaintiffs seek to enjoin only road building; surface activity that does not involve roads (for example, with materials brought in by helicopter) would not be enjoined.

4. Third party involvement is not necessary.

As the Ninth Circuit made clear in Conner, third parties need not be involved in this Court's injunctive remedy proceedings with respect to these roadless area oil and gas leases. In Conner, the Ninth Circuit upheld the district court's determination that oil and gas leases issued without "no surface occupancy" stipulations required evaluation in an environmental impact statement, and that the Endangered Species Act consultation on the lease sales was invalidly segmented. See 848 F.2d at 1446-57. On appeal, a number of lease purchasers sought to vacate, reconsider, or amend the judgment for violation of Fed. R. Civ. P. 19 – failure to join necessary and indispensable parties. Id. at 1458. The Ninth Circuit reviewed the "public rights" exception to traditional joinder rules under National Licorice Co. v. National Labor Relations Board, 309 U.S. 350 (1940) and found that the lessees were not indispensable parties:

> Like the cases cited above, this case is amenable to the application of the National Licorice public rights doctrine. The appellees' litigation against the government does not purport to adjudicate the rights of current lessees; it merely seeks to enforce the public right to administrative compliance with the environmental protection standards of NEPA and the ESA.

848 F.2d at 1460 (footnote omitted). The Court continued:

> We enjoin only the actions of the government; the lessees remain free to assert whatever claims they may have against the government. Thus, the public right to compliance with environmental standards is vindicated with a minimum imposition on the rights of lessees.

Id. at 1461 (footnote omitted). Similarly here, the public rights doctrine applies to plaintiffs' NEPA and ESA claims against the Forest Service, and the Court need not and should not involve third party lessees.[4]

[4] Nor should the lessees be heard under the Fifth Amendment due process clause as their "property interests were not adjudicated in this litigation." Conner, 848 F.2d at 1461 n.52.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

For these reasons, plaintiffs ask the Court to order that the 2001 Roadless Rule shall apply to any mineral leases of National Forest lands issued after January 12, 2001, and, accordingly, enjoin the Forest Service from approving or allowing any surface use of a mineral lease issued after January 12, 2001 that would violate the Roadless Rule (including the Tongass amendment). This order does not apply to roads that have already been constructed or reconstructed on lease parcels pursuant to approved surface use plans of operation.

B. Coal Creek-Big Creek Road Project, Salmon-Challis NF, Idaho

The Roadless Rule prohibits road construction or reconstruction in inventoried roadless areas of the National Forest System. See 36 C.F.R. § 294.12. On June 30, 2006, the Forest Service signed a Decision Notice for the Coal Creek-Big Creek Road Project on the Salmon-Challis National Forest in Idaho. See Coal Creek-Big Creek Road Project Decision Notice, Exhibit A to Declaration of Craig Gehrke (Oct. 18, 2006). This decision will construct approximately two miles of new road through the Borah Peak Inventoried Roadless Area to re-establish authorized motorized access to the Big Creek Trailhead. The Wilderness Society ("TWS"), one of the environmental plaintiffs, had previously provided comments to the Forest Service suggesting possible alternatives to resolve the many issues presented by the Coal Creek-Big Creek Road Project, including its roadless area impacts, harm to threatened bull trout, water quality, and recreational use of the area. See Gehrke Decl., Exhibit B. TWS timely appealed the Forest Service's road decision. See Gehrke Decl., Exhibit C. TWS's appeal was denied on October 5, 2006. To the best of plaintiffs' knowledge, no contracts for the road project have been offered or awarded, and there are no third parties to involve in this litigation. As of October 18, 2006, no work had started on the road. If implemented, the project would violate the Roadless Rule. It would also irreparably harm the Borah Peak roadless area and plaintiffs' interests in roadless area protection. See Gehrke Decl. ¶ 4 ("My interests in roadless area protection of Idaho's wild landscapes will be directly and irreparably harmed by the Coal Creek-Big Creek Road Project. I have hiked and explored in the Borah Peak inventoried roadless area, and the loss of roadless character in the project area would impact my use

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705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

of this area."). Plaintiffs ask the Court to enjoin the Forest Service from proceeding with the Coal Creek-Big Creek Road Project.

CONCLUSION

This Court has authority to craft a remedy that addresses previously approved road building and timber harvest that violates the Roadless Rule – a rule that itself contains the particular effective date of January 12, 2001. The equities discussed above support plaintiffs' request that the Court enter their proposed injunction.

Respectfully submitted this 18th day of October, 2006.

/s/ Kristen L. Boyles
KRISTEN L. BOYLES (CSB #158450)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
(206) 343-7340
(206) 343-1526 *[FAX]*
kboyles@earthjustice.org

TIMOTHY J. PRESO (MSB #5255)
Earthjustice
209 South Willson Avenue
Bozeman, MT 59715
(406) 586-9699
(406) 586-9695 *[FAX]*
tpreso@earthjustice.org

THOMAS S. WALDO (ASB #9007047)
Earthjustice
325 Fourth Street
Juneau, AK 99801-1145
(907) 586-2751
(907) 463-5891*[FAX]*
twaldo@earthjustice.org

Attorneys for Plaintiffs The Wilderness Society, et al.

GREGORY C. LOARIE (CSB #215859)
Earthjustice
426 Seventeenth Street, 5th Floor
Oakland, CA 94612
(510) 550-6725
(510) 550-6749 *[FAX]*
gloarie@earthjustice.org

Local Counsel for Plaintiffs The Wilderness Society, et al.

BILL LOCKYER, Attorney General
THEODORA BERGER
Assistant Attorney General
KEN ALEX
Supervising Deputy Attorney General

/s/ Kristen L. Boyles, for *
CLAUDIA POLSKY (CSB #185505)
Deputy Attorney General
State of California Department of Justice
1515 Clay Street
P.O. Box 70550
Oakland, CA 94612-1413
(510) 622-2112
(510) 622-2270 *[FAX]*
claudia.polsky@doj.ca.gov

Attorneys for Plaintiffs People of the State of California

* per email authorization

HARDY MYERS, Attorney General
of the State of Oregon

/s/ Kristen L. Boyles, for *
DAVID E. LEITH (OR Bar. No. 93341)
Assistant Attorney General
1162 Court Street NE
Salem, OR 97301-4096
(503) 378-6313
(503) 378-3465 *[FAX]*
David.Leith@doj.state.or.us

Attorneys for State of Oregon,
by and through Governor Theodore Kulongoski

PATRICIA A. MADRID, Attorney General
of the State of New Mexico

/s/ Kristen L. Boyles, for *
STEPHEN R. FARRIS (NM Bar No. 6234)
Assistant Attorney General
Director, Water, Environment and Utilities Division
New Mexico Attorney General's Office
P.O. Drawer 1508
Santa Fe, NM 87504
(505) 827-6939
(505) 827-4440 *[FAX]*
SFarris@ago.state.nm.us

Attorneys for State of New Mexico,
ex rel. Patricia A. Madrid, Attorney General

* per email authorization

ROB McKENNA, Attorney General
of the State of Washington

/s/ Kristen L. Boyles, for *

MARY SUE WILSON (WSB #19257)
Senior Assistant Attorney General
JOAN M. MARCHIORO (WSB #19250)
Senior Counsel
RONALD L. LAVIGNE (WSB #18550)
Assistant Attorney General
SHEILA LYNCH (WSB #26343)
Assistant Attorney General
Washington State Office of Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6770
(360) 586-6760 *[FAX]*
marysuew@atg.wa.gov
joanm2@atg.wa.gov
ronaldl@atg.wa.gov
sheilal@atg.wa.gov

Attorneys for State of Washington

* per email authorization

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340