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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

CLOUD PEAK ENERGY, INC., *et al.*

Petitioners,

v.

UNITED STATES DEPARTMENT OF
INTERIOR, *et al.*

Respondents,

and

POWDER RIVER BASIN RESOURCE
COUNCIL, WESTERN
ORGANIZATION OF RESOURCE
COUNCILS, and THE WILDERNESS
SOCIETY

Applicants for Intervention.

Case No. 2:16-cv-00315-F

Motion to Intervene as Respondents

**POWDER RIVER BASIN RESOURCE COUNCIL, WESTERN ORGANIZATION OF
RESOURCE COUNCILS, AND THE WILDERNESS SOCIETY'S MOTION TO
INTERVENE AS RESPONDENTS**

Powder River Basin Resource Council, Western Organization of Resource Councils, and the Wilderness Society (hereafter "Citizen Organizations"), by and through its undersigned attorney, hereby respectfully move to intervene as Respondents as a matter of right in the above-

captioned action pursuant to Fed. R. Civ. P. 24(a). In the alternative, the Citizen Organizations move for permissive intervention on behalf of the Department of Interior (DOI), pursuant to Rule 24(b).¹

INTRODUCTION

This case brought by the coal industry challenges the legality of the Department of Interior's ("DOI") recently issued rule entitled "Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform" ("Coal Valuation Rule" or "Rule"). *See* ECF 1 (Petition for Review ("Petition")). The Rule amended DOI's Office of Natural Resource Revenue's ("ONRR") regulations governing valuation, for royalty purposes, of coal produced from federal leases. 81 Fed. Reg. 43,338 (July 1, 2016). The Rule became effective January 1, 2017. *Id.* at 43,338.

ONRR's Rule, designed to update and improve valuation regulations to ensure that a fair return is provided to the American public when federal coal is mined, was widely supported by citizens across the country. ONRR received over 190,000 public comments supporting its Rule, including comments from the Citizen Organizations. *Id.* The Citizen Organizations now seek to participate in the litigation to defend the public interest benefits of the Rule.

ARGUMENT

I. The Citizen Organizations are Entitled to Intervene as of Right.

Under Rule 24(a), a movant is entitled to intervene as of right if: (1) the motion is "timely"; (2) the movant "claims an interest relating to the property or transaction that is the

¹ Pursuant to Local Rule 7.1, the undersigned counsel Shannon Anderson has conferred with Petitioners' counsel, who indicated that Petitioners oppose the Citizen Organizations' motion to intervene. Undersigned counsel also conferred with Counsel for the DOI who indicated that the agency will oppose the motion, which provides further support for Citizen Organizations' argument in Section I(C) *infra*.

subject of the action”; (3) “disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest”; and (4) that interest is not “adequately represent[ed]” by existing parties. Fed. R. Civ. P. 24(a); Local Rule 83.6(e). The Citizen Organizations satisfy each of these conditions, as discussed below.

A. The Citizen Organizations’ Interest

The Citizen Organizations claim a significant interest in the Coal Valuation Rule litigation. Powder River Basin Resource Council and the Western Organization of Resource Councils are organizations that advocate for the conservation of Wyoming’s unique land, mineral, water, and clean air resources consistent with responsible use of those resources to sustain the livelihood of present and future generations.² They have worked on federal coal program issues in Wyoming and other western states since their founding, advocating for leasing and valuation policies that provide a fair return to the public and generate revenue to offset local impacts to the environment and communities. The Wilderness Society “actively engages in all aspects of oil and gas and coal leasing and development on the public lands and mineral estate, including land use planning, lease sales, project approval, rulemakings, and other policy initiatives.”³

The organizations and their members advocated for the passage of the Coal Valuation Rule by submitting public comments, through meetings with DOI and administration officials, and through communications, media, and organizing work.⁴ The Citizen Organizations were

² Powder River Basin Resource Council website, available at <http://www.powderriverbasin.org/>.

³ Declaration of Chase Huntley at ¶ 6.

⁴ Declaration of Sara Kendall at ¶ 10; Declaration of Chase Huntley at ¶¶ 4-5, 19, 22.

recognized as national leaders generating support for the Rule.⁵ As such, the organizations have a legally cognizable interest in any challenge Petitioners may have to the Rule. For instance, Federal Courts have recognized that “[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported.” *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995); *see also Coal. of Az./N.M. Counties for Stable Econ. Growth v. Dep’t of Interior*, 100 F.3d 837, 841 (10th Cir. 1996) (activist’s “persistent record of advocacy” for environmental protections adopted by an agency that were subsequently challenged in court had a “direct and substantial interest” sufficient “for the purpose of intervention as of right”).

The Tenth Circuit “follow[s] a somewhat liberal line in allowing intervention.” *Nat’l Farm Lines v. Interstate Commerce Comm’n*, 564 F.2d 381, 384 (10th Cir. 1977); *accord WildEarth Guardians v. Nat’l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010). The Tenth Circuit has held that the Rule 24(a) factors are “not rigid, technical requirements,” but rather are “intended to capture the circumstances in which the practical effect on the prospective intervenor justifies its participation in the litigation.” *San Juan County v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007) (en banc). Additionally, when litigation raises issues of significant public interest—rather than solely private rights—“the requirements for intervention may be relaxed.” *Id.* at 1201.

In addition to this organizational interest, the Citizen Organizations’ members are directly interested in upholding the Coal Valuation Rule. Members of the Citizen Organizations live, raise families, work, and travel in the Powder River Basin and are directly impacted by the

⁵ Kendall Dec. at ¶ 10.

effects of strip mining.⁶ Members of the Citizen Organizations have economic interests in the Rule because they are taxpayers in states that receive a share of federal royalties.⁷ Further, increased royalty payments are likely to affect companies' on-the-ground decisions and management practices, which will make them take steps to protect environmental values.⁸ This in turn will "improve and benefit the lives" of members of the Citizen Organizations.⁹

B. Failure to Allow Intervention Will Impair or Impede the Citizen Organizations' Ability to Protect Their Interests

A movant for intervention "must show only that impairment of its substantial legal interest is possible if intervention is denied." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001) (quoting *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999)).

Petitioners have asked the Court to invalidate and set aside the Coal Valuation Rule. As a result, if Petitioners succeed in this case, the benefits that the Rule provides to the Citizen Organizations and their members will be lost.¹⁰

C. The Citizen Organizations' Interest Is Not Adequately Represented by Existing Parties

The "inadequate representation" requirement also imposes a "minimal burden," particularly when parties seek to intervene in support of the government. *WildEarth Guardians*, 604 F.3d at 1200. "The movant must show only the *possibility* that representation *may* be inadequate." *Id.* (emphasis added).

⁶ Kendall Dec. at ¶¶ 2-3

⁷ *Id.* at ¶ 11; Huntley Dec. at ¶¶ 10-14, 17-18.

⁸ Huntley Dec. at ¶ 11-13.

⁹ *Id.* at ¶¶ 15-16.

¹⁰ Kendall Dec. ¶ 11; Huntley Dec. ¶¶ 20-21, 24.

In most circumstances “the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor.” *Utah Ass’n of Counties*, 255 F.3d at 1256. As a result, the Tenth Circuit “ha[s] repeatedly recognized that it is ‘on its face impossible’ for a government agency to carry the task of protecting the public’s interests and the private interests of a prospective intervenor.” *WildEarth Guardians*, 604 F.3d at 1200 (quoting *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 295 F.3d 1111, 1117 (10th Cir. 2002)). “[T]he burden of showing inadequacy of representation is satisfied,” “[w]here a government agency may be placed in the position of defending both public and private interests.” *Id.*

Without the Citizen Organizations’ participation as an intervenor, DOI will only have to address the arguments and demands of Petitioners when briefing the merits of this case, during any litigation over a remedy, and in settlement negotiations. It is entirely foreseeable that such a scenario will lead DOI to compromise the Citizen Organizations’ interests in favor of Petitioners who are seeking to overturn the Rule. It is also foreseeable that DOI could sign a settlement with Petitioners agreeing to a substantial number of their legal claims and backing away from the Rule or weakening or amending it. See *Utah Ass’n of Counties*, 255 F.3d at 1256 (granting intervention and noting that “‘it is not realistic to assume that the agency’s programs will remain static or unaffected by unanticipated policy shifts’” (quoting *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998)); *Mausolf v. Babbitt*, 85 F.3d 1295, 1296–97, 1302-03 (8th Cir. 1996) (recognizing the concern the agency “might settle with the [plaintiffs] or back away from the rules” as a basis for intervention). This concern is particularly prevalent given the change in administration and that the Rule was adopted by the Obama Administration and will be litigated by the Trump Administration. See, e.g., *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094,

1106-07 (9th Cir. 2002) (noting George W. Bush administration stopped defending challenge to Roadless Rule promulgated by Clinton administration), *abrogated on other grounds Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). Indeed, following the change of administration, ONRR has postponed the effectiveness of the rule. ECF. 23.

D. The Citizen Organizations’ Motion to Intervene is Timely

The Citizen Organizations’ intervention at this early stage is timely. Timeliness is determined “in light of all the circumstances,” principally “the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances.” *Utah Ass’n of Counties*, 255 F.3d at 1250 (quoting *Sanguine, Ltd. v. U.S. Dep’t of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984)). Where no prejudice would result, intervention is favored. *See id.* at 1050–51.

Here, the Citizen Organizations are intervening at the earliest stage possible for the organizations.¹¹ Moreover, no prejudice will result to the other parties from intervention. Under Local Rule 83.6(b)(2), DOI is in the process of preparing the administrative record to be lodged within ninety (90) days of the date of the Petition, which was December 29, 2016. At this point, no administrative record has been filed and no briefs have been filed. The Citizen Organizations will abide by all briefing schedules and requirements set by Local Rule 83.6(c) or through separate approval by the Court. As such, the Councils timely intervention will not prejudice any parties.

¹¹ As nonprofit organizations, staff of the Citizen Organizations needed to obtain the appropriate litigation authorizations from Boards of Directors, litigation committees, and affected members before moving to intervene.

II. Alternatively, the Court Should Grant the Citizen Organizations Permissive Intervention

In addition to qualifying for intervention as of right, the Citizen Organizations satisfy the prerequisites for permissive intervention. Permissive intervention is appropriate where the movant demonstrates: (1) it has a claim or defense that shares a common question of law or fact with the main action; (2) the intervention will not cause undue delay or prejudice; and (3) the motion to intervene is timely. Fed. R. Civ. P. 24(b); *see also Am. Wild Horse Pres. Campaign v. Jewell*, No. 1-14-CV-152-F, 2014 WL 11462717, at *2 (D. Wyo. Aug. 19, 2014). Courts allow permissive intervention to “assist the court in its orderly procedures leading to the resolution of th[e] case.” *Kootenai Tribe of Idaho*, 313 F.3d at 1111.

Here, the Citizen Organizations intend to address the same questions of law that are at the heart of this litigation: DOI’s legal authority to adopt the Coal Valuation Rule as well as the reasonableness of the measures adopted. In addition, this motion to intervene is timely and intervention will not cause undue delay or prejudice to the existing parties. *See supra* Part II.D.

Moreover, due to their extensive involvement in the development of the Rule and their perspective as impacted parties, the Citizen Organizations will significantly contribute to the underlying facts and legal issues.

Accordingly, even if the Court concludes that the Citizen Organizations are not entitled to intervene as of right, permissive intervention is warranted here.

CONCLUSION

For the foregoing reasons, the Court should grant the Citizen Organizations intervention as a matter of right under Rule 24(a). Alternatively, permissive intervention should be allowed under Rule 24(b).

Respectfully submitted this 14th day of March, 2017.

/s/Shannon Anderson

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EXHIBIT LIST

Exhibit 1	Declaration of Sara Kendall
Exhibit 2	Declaration of Chase Huntley

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March 2017, the foregoing **MOTION TO INTERVENE** was served through the Court's CM/ECF electronic filing system, which will send a notice of electronic filing to all counsel of record.

/s/Shannon Anderson
Shannon Anderson