UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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WESTERN ORGANIZATION OF RESOURCE COUNCILS, FRIENDS OF THE EARTH, *Plaintiffs,* v. JEWELL, *et al.*, *Defendants,* STATE OF WYOMING, *Intervenor.*	**Case No. 14-cv-1993-RBW**

PLAINTIFFS' CONSOLIDATED RESPONSE IN OPPOSITION TO MOTIONS TO INTERVENE BY STATE OF NORTH DAKOTA AND WYOMING MINING ASSOCIATION

INTRODUCTION

The State of North Dakota ("North Dakota") and the Wyoming Mining Association ("WMA") (collectively, "Proposed Intervenors") have each moved before this Court to intervene in this case as an intervenor-defendant. ECF Nos. 17, 22. Because neither North Dakota nor WMA has established that the State of Wyoming, an admitted intervenor, would fail to represent its interests adequately, the Court should deny Proposed Intervenors' request for intervention as of right pursuant to Fed. R. Civ. P. 24(a). For this reason and because Proposed Intervenor's asserted interests in this litigation are minimal and any harm to those asserted interests is speculative, the Court should deny Proposed Intervenors' request for permissive intervention.

In the event the Court grants the Motion to Intervene of either North Dakota or WMA, Plaintiffs request the Court subject Proposed Intervenors to the same conditions the Court ordered with respect to Wyoming,[1] ECF No. 29, namely, (1) to confine arguments to the existing claims in this action and not interject new claims or collateral issues, and (2) to limit to 25 pages any memoranda of points and authorities filed by Intervenors in support of or in opposition to any future motion, and to limit to 10 pages each reply memorandum, unless otherwise authorized by the Court. *See* ECF No. 29. Additionally, Plaintiffs request the Court to order all Intervenors, including Wyoming, (3) to file joint consolidated motions and memoranda in support of or in opposition thereto, and (4) in the event that a party files a motion for summary judgment, to require Intervenors to file a joint statement of facts with references to the administrative record consistent with LCvR 7(h)(2). Such a condition would avoid inefficient and duplicative presentations, prevent waste of judicial resources, and avoid needlessly burdening Plaintiffs.

[1] On February 18, 2015, the Court granted the State of Wyoming's ("Wyoming") Motion to Intervene. Feb. 18, 2015, Minute Order. On February 26, 2015, the Court imposed certain conditions on Wyoming's intervention. ECF No. 29.

ARGUMENT

I. The Court Should Deny Proposed Intervenors' Motions to Intervene

A. Proposed Intervenors Are Not Entitled to Intervention As of Right

For a party to intervene as of right pursuant to Fed. R. Civ. P. 24(a), the party must establish that (1) the application is timely, (2) it has a cognizable interest relating to the property or transaction that is the subject of the action, (3) its interests may as a practical matter be impaired or impeded by disposition of this action, and (4) its interests are not adequately represented by existing parties. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). Because Proposed Intervenors have failed to establish that Intervenor-Defendant Wyoming will fail to represent their interests adequately, the Court should deny their request to intervene as of right.

North Dakota does not contend that Wyoming does not adequately represent its asserted interests. ECF No. 17 at 18-19. Instead, North Dakota focuses its argument exclusively on whether *Federal Defendants* adequately represent its interests. As a State that derives revenue from federal coal leasing and seeks to intervene in this litigation to protect that revenue stream, Wyoming is identically situated as North Dakota relative to this litigation. A review of North Dakota's and Wyoming's Motions to Intervene and Affidavits and Declarations submitted in support confirms this point. *See* ECF Nos. 10-1, 10-2, 17-1 to 17-5. North Dakota's failure to establish that its asserted interests are not protected by Wyoming is fatal to its application for intervention as of right. *Fund for Animals*, 322 F.3d at 731.

Similarly, WMA has not argued, nor could it, that its interests would not be adequately represented by Wyoming. ECF No. 22 at 9-10. WMA "represents the interests of mining companies, including coal producers, that operate mining properties in the State of Wyoming."

Decl. of Jonathan Downing, ECF No. 22-1 at 2. All of the mining activities by WMA's members occur in Wyoming. *Id.* Both Wyoming's and WMA's asserted interests relate to ensuring that mining of federal coal in Wyoming continues unimpeded to ensure continued revenue to each party. By virtue of the huge revenues Wyoming receives from severance taxes and ad valorem taxes on coal production ($507,348,457 in fiscal year 2013, ECF No. 10 at 5), the financial interests of Wyoming's coal producers and the State of Wyoming are entirely aligned. Thus, WMA's interests are already represented by Intervenor-Defendant Wyoming.

Friends of Animals v. Kempthorne, 452 F. Supp. 2d 64 (D.D.C. 2006), cited by WMA in support of its application, ECF No. 22 at 10, instead supports denying WMA's request for intervention as of right. Although the district court in that case rejected plaintiff's argument that the defendant federal agency adequately represented the applicant's interests, the court relied on the unique position of a federal agency as it related to the litigation. *Id.* at 70. The court relied on D.C. Circuit caselaw establishing that "a federal agency's obligation 'is to represent the interests of the American people,'" and that the proposed intervenor represented the interests of its members. *Id.* (quoting *Fund for Animals*, 322 F.3d at 736). Here, however, Wyoming's asserted interests, in its own words, are much narrower. ECF No. 10 at 5-8. Wyoming's sole asserted interest is the revenue stream from federal coal leasing. As Wyoming maintains, this interest depends solely on the continued unfettered leasing under the federal coal management program—the very same argument that underlies WMA's asserted interest in protecting its members' mining activities in Wyoming. Wyoming's and WMA's asserted interests thus overlap perfectly, such that WMA's interests are already adequately represented. The Court should deny WMA's request to intervene as of right.

B. Proposed Intervenors Are Not Entitled to Permissive Intervention

Proposed Intervenors have not established that the Court should exercise its discretion to grant their requests for permissive intervention. Proposed Intervenors' asserted interests are minimal and the bare claims that those interests may be harmed is unsupported and highly speculative. Proposed Intervenors' asserted interests do not relate to the merits of Plaintiffs' claim that the Federal Defendants have failed to comply with the National Environmental Policy Act (NEPA). Rather, their asserted interests in this litigation—for North Dakota, lost revenue and a "regulatory burden," ECF No. 17 at 7-10, and for WMA, effects on its members' leasehold interests in federal coal, ECF No. 22 at 4-7—would be affected only at the remedy phase of this litigation, if at all.

The Court's determination of whether permissive intervention is proper is an "inherently discretionary enterprise." *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). To be entitled to permissive intervention under Rule 24(b)(2), "the putative intervenor must ordinarily present: (1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *Id.* Additionally, "the district court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* at 1045 (internal quotation marks omitted).

The interests asserted by Proposed Intervenors are minimal and any claim of future harm to those interests is highly speculative. Intervention by Proposed Intervenors would therefore be inefficient and duplicative, and would needlessly complicate this litigation. North Dakota asserts that it receives over $2.5 million in annual revenue in the form of royalty payments, coal lease bonus payments, rentals, and state severance and conversion taxes. ECF No. 17 at 7. But

Plaintiffs have not requested a halt to mining under existing federal coal leases, making merely hypothetical any harm to North Dakota's interests in any future revenue in the form of federal royalties, rentals, and state severance and conversion taxes, each of which flows from ongoing mining operations and does not relate to a lack of new coal lease sales. *See generally* Complaint, ECF No. 1 at 65-66. North Dakota has not made any specific assertions of harm beyond vague and unsupportable assertions that these revenue streams would be "negatively impacted." ECF No. 17 at 8. If anything, it might be expected that, to the extent new leasing was halted by injunction, the perception of limitations on supply might drive up the price obtainable from existing coal mines, increasing revenues to North Dakota's treasury.

Any assertion of harm to interests in future coal lease bonus payments suffers from a similar lack of specificity. According to Defendant Bureau of Land Management, North Dakota has conducted only one lease sale since June 2007, making it speculative in the extreme that North Dakota would suffer any lost revenue from bonus payments resulting from new lease sales during the limited period that any injunction issued in this case is in effect.[2] BLM, "Successful Competitive Lease Sales Since 1990, Montana," http://www.blm.gov/mt/st/en/prog/energy/coal/tables.html.[3]

Proposed Intervenors themselves recognize, and Plaintiffs agree, that their asserted interests stand to be harmed only if the Court grants Plaintiffs' request for injunctive relief halting certain action under the federal coal management program. ECF No. 17 at 7 (asserting that North Dakota's asserted interests would be harmed "[s]hould this court enjoin Federal

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[2] North Dakota additionally asserts, without any citation to legal authority, that it stands to suffer injury to its "regulatory interests." ECF No. 17 at 9-10. This novel theory lacks any basis in law and, in any event, is speculative due to North Dakota's failure to establish that it will conduct a lease sale or lease modification during the period of any injunction that is issued in this case.

[3] Likely because so little federal coal leasing occurs in North Dakota, data on North Dakota federal coal leasing is included with data compiled by BLM's Montana field office.

Defendants from considering new or pending coal lease applications"); ECF No. 22 at 11 (asserting "[a]n injunction barring Federal [D]efendants from considering new or pending coal lease applications . . . may affect" WMA's members' interests). But a finding by the Court in favor of Plaintiffs' claim that Federal Defendants have violated NEPA and an accompanying declaratory judgment would not affect Proposed Intervenors' interests. Only at the stage of the litigation addressing the appropriateness of injunctive relief would Proposed Intervenors' purported interests potentially be affected. The Court should exercise its discretion to deny permissive intervention based on bare and speculative assertions of future harm.

II. If the Court Grants Proposed Intervenors' Motions to Intervene, the Court Should Impose Certain Conditions on All Intervenors

In addition to the conditions imposed on Wyoming, *see* ECF No. 29, the Court should impose conditions to prevent multiple Intervenors from needlessly complicating this proceeding and making multiple, duplicative presentations. Accordingly, if the Court grants Proposed Intervenors' motions to intervene, in the interest of preserving judicial efficiency and avoiding an undue burden on Plaintiffs, this Court should require all Intervenors, including Wyoming, to (1) file joint consolidated motions and briefs; and (2) in the event that a party files a motion for summary judgment, require Intervenors to file a joint statement of facts with references to the administrative record consistent with LCvR 7(h)(2). Adopting these conditions will prevent multiple filings to which Plaintiffs will have to file duplicative responses, and will relieve the Court of the burden of such multiple filings.[4]

Courts have wide discretion to impose limitations on intervenors' participation.

[4] If in the very unlikely situation that any of the Intervenors desire to make an argument opposed by another Intervenor, then this Court could entertain a motion from that party asserting why a separate and additional motion or brief is necessary. However, unless and until such a divergence of interests occurs, joint briefing and presentations is appropriate.

Intervention of right pursuant to Fed. R. Civ. P. 24(a) "may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." Fed. R. Civ. P. 24 Advisory Committee Notes (1966 Amendment). Indeed, courts have routinely exercised the authority to impose appropriate conditions on intervenors, both where intervention was by right under Rule 24(a) and permissive under Rule 24(b). *E.g., Fund for Animals,* 322 F.3d at 737 n.11. Such conditions have included a requirement to submit joint briefing. *See Earthworks v. U.S. Dep't of Interior*, No. 09-1972 (D.D.C. August 3, 2010), ECF No. 41 (granting intervention for multiple intervenors but ordering intervenors "to submit joint motions and memoranda with the existing Intervenors") (attached as Exh. 1); *Center for Biological Diversity v. Kelly*, No. 13–cv–427, 2014 WL 4104166, at *3, *3 n.3 (D. Idaho Aug. 15, 2014) (ordering county and private party intervenors to submit joint briefing in action under Endangered Species Act); *U.S. Ethernet Innovations, LLC v. Acer, Inc.*, Nos. C10–3724, C10–5254, 2013 WL 1701737, at *5 (N.D. Cal. Apr. 18, 2013) (ordering intervenors and defendant to file jointly any dispositive motion with a single brief of no more than 25 pages); *Kentuckians for the Commonwealth v. Rivenburgh*, 204 F.R.D. 301, 306 (S.D. W.Va. 2001) (granting intervention on the condition that the intervenors "coordinate to avoid duplicative discovery, evidence, argument, pleadings, filings, and memoranda" and stating that "[a]ny departure from this Order will be allowed only after a just cause showing that Intervenors' divergent interests and positions require individual presentation").

The need for such conditions is apparent from Proposed Intervenors' proposed pleadings. For example, in North Dakota's Proposed Motion to Dismiss, ECF No. 18-1, the state makes identical arguments to those raised in Wyoming's Motion to Dismiss, ECF No. 10-4. North Dakota argues that Plaintiffs fail to challenge a final agency action and that Defendants have no

legal duty to supplement the Programmatic Environmental Impact Statement (PEIS), ECF No. 18-1 at 8-15, an argument that simply repeats an argument also made by Wyoming, ECF No. 10-4 at 17-26.

Likewise, North Dakota's and Wyoming's arguments are based on the same factual and legal conclusions: that (1) the 1979 PEIS analyzed only the regional leasing process, ECF No. 18-1 at 12-13, ECF No. 10-4, 19-20; (2) BLM has not taken any action with respect to regional leasing, ECF No. 18-1 at 13-14, ECF No. 10-4 at 20-23; and (3) therefore, Defendants have no duty to supplement the PEIS, ECF No. 18-1 at 14; ECF No. 10-4 at 23-25. North Dakota and Wyoming have demonstrated the overlap of their positions, *i.e.*, that NEPA does not require a supplemental PEIS in this instance, and that separate briefing of these positions offers the Court nothing more than repetition of arguments and issues already fully briefed.[5]

Wyoming contends that imposition of conditions requested by Plaintiffs, including a requirement to submit joint briefs and memoranda, would "significantly impair[] the State's right to procedural due process." ECF No. 27 at 5. This statement is utterly baseless, as intervention is a creature of the Federal Rules of Civil Procedure and, in some instances, by statute. Wyoming thus has no constitutional basis to assert that the conditions requested by Plaintiffs should not be imposed in this case.

[5] Much of Wyoming's argument in its Response to Order to Show Cause is directed against a requirement that it jointly submit motions and memoranda with the *Federal Defendants*. ECF No. 27 at 5-6. Plaintiffs do not seek a requirement that Wyoming be required to submit joint briefing with Federal Defendants. Plaintiffs seek a requirement that all *Intervenors* submit joint briefs. ECF No. 14 at 2.

CONCLUSION

Plaintiffs request that the Court deny North Dakota's and WMA's Motions to Intervene. In the alternative, Plaintiffs request the Court to limit the participation of North Dakota and WMA in accordance with the conditions set forth above.

Respectfully submitted this 9th day of March, 2015,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing is being filed with the Clerk of the Court using the CM/ECF system, thereby serving it on all parties of record, this 9th day of March, 2015.

/s/ John Bernetich
John Bernetich
Counsel for Plaintiffs