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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

NORTHERN PLAINS RESOURCE COUNCIL, BOLD ALLIANCE, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, and FRIENDS OF THE EARTH,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS and LIEUTENANT GENERAL TODD T. SEMONITE (in his official capacity as U.S. Army Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers),

Defendants,

TC ENERGY CORPORATION and TRANSCANADA KEYSTONE PIPELINE LP,

Intervenor-Defendants.

CV 19-44-GF-BMM

Plaintiffs' Opposition to Motion to Intervene by American Gas Association et al.

INTRODUCTION

The Court should deny the motion to intervene filed by the American Gas Association, American Petroleum Institute, Association of Oil Pipe Lines, Interstate Natural Gas Association of America, and National Rural Electric Cooperative Association (collectively "Industry Groups"). The Industry Groups are not entitled to intervene as of right—even assuming they have a protectable interest, that interest is adequately represented by existing parties. Notably, Intervenor-Defendants TC Energy Corporation and TransCanada Keystone Pipeline, LP (collectively "TC Energy") are members of two of the Industry Groups now seeking to intervene. TC Energy not only has the same interests in this action as the Industry Groups, but it is also defending a specific project—the Keystone XL pipeline—and therefore would certainly represent the Industry Groups' generalized interests here with more specificity.

Permissive intervention is also unwarranted. As Plaintiffs have previously made clear, timely resolution of this case before construction on the Keystone XL pipeline begins in 2020 is essential. A fourth set of duplicative briefs on the defendant side would add no value to the Court's consideration of this matter and would increase the risk of delay, to Plaintiffs' prejudice. The Court should therefore deny the Industry Groups' motion to intervene.

BACKGROUND

This case challenges the U.S. Army Corps of Engineers' ("Corps") issuance of Nationwide Permit 12 ("NWP 12"), a streamlined permitting process for oil pipelines and other utility projects nationwide, as violating the National Environmental Policy Act ("NEPA"), the Clean Water Act ("CWA"), and the Endangered Species Act ("ESA"), as well as the Corps' use of NWP 12 to approve the Keystone XL pipeline in violation of NWP 12, the CWA, and the ESA. Plaintiffs seek declaratory relief and a remand as to NWP 12 itself, and declaratory relief, vacatur, and injunctive relief as to the Corps' use of NWP 12 to approve the Keystone XL pipeline. Am. Compl. 87-88, ECF No. 36.

The Court has already granted intervention to TC Energy (the proponent of Keystone XL) and the State of Montana.[1] Order Granting Mot. to Intervene by TC Energy Corp., ECF No. 20; Order Granting Mot. to Intervene by Montana, ECF No. 44. The Industry Groups now seek to intervene and become a fourth set of parties on the defendant side of the case. Mot. by Am. Gas Assoc. et al. to Intervene, ECF No. 48. The Corps opposes the Industry Groups' intervention as of right. Fed. Defs.' Resp. to Am. Gas Assoc. et al.'s Mot. to Intervene, ECF No. 51.

[1] Plaintiffs have asked that the Court issue an order *nunc pro tunc* clarifying that the grant of intervention is on a permissive basis and strictly limiting Montana's participation in the case so as to avoid delay and prejudice to the parties. Pls.' Resp. to the State of Montana's Mot. to Intervene, ECF No. 50.

As explained below, the Industry Groups are not entitled to intervene, either as of right or permissively.

ARGUMENT

I. The Industry Groups are not entitled to intervene as of right

A party seeking to intervene as of right under Federal Rule of Civil Procedure 24(a) must establish that each of the following four criteria are met: "(1) the motion must be timely; (2) the applicant must claim a 'significantly protectable' interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that 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 be inadequately represented by the parties to the action." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (quoting *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993)). The Industry Groups have failed to establish that intervention as of right is warranted here.

First, the Corps argues in its opposition to intervention as of right that the Industry Groups do not have a protectable interest that will be impaired or impeded by this action. Fed. Defs.' Resp. to Am. Gas Assoc. et al.'s Mot. to Intervene 3, ECF No. 51. As the Corps points out, Plaintiffs do not seek to vacate NWP 12, but rather seek vacatur and injunctive relief only as to Keystone XL approvals. *Id.*; *see*

Am. Compl. 87-88, ECF No. 36. Therefore, the Corps argues that the Industry Groups' broader interests are not implicated.

Second, even assuming the Industry Groups have an interest that may be impaired, they have failed to show that the existing parties would not adequately represent that interest. The Ninth Circuit considers three factors in determining the adequacy of representation: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003), *as amended* (May 13, 2003).

None of these factors is satisfied here. First, a current party, TC Energy, has identical interests to the Industry Groups and therefore will make the same arguments. Indeed, TC Energy is a *member* of two of the Industry Groups: the American Petroleum Institute and Association of Oil Pipe Lines. Decl. of J. Prange ¶¶ 3-4. The Industry Groups claim their members will be harmed if Plaintiffs prevail because those members may no longer be able to use NWP 12 for some future, unspecified projects. Mem. in Supp. of Mot. to Intervene 20-21, ECF No. 49. Even if that were true, that is the same interest, albeit with less specificity, that TC Energy claims as to the Keystone XL pipeline. Mem. in Supp. of Unopposed

Mot. by TransCanada Keystone Pipeline, LP and TC Energy Corp. to Intervene 9, ECF No. 19. Therefore, TC Energy's defense of that interest will be in all material respects identical to the Industry Groups' defense of their interest in using NWP 12. The "most important" factor of this test—"how the interest compares with the interests of existing parties"—weighs heavily against intervention. *See Arakaki*, 324 F.3d at 1086.

Second, TC Energy is capable of making any arguments the Industry Groups might make. There is no reason why any of the Industry Groups' particular arguments cannot instead be made through TC Energy, as a member of those groups. In fact, because this lawsuit challenges NWP 12 as it was actually used for TC Energy's proposed project (as opposed to a hypothetical future project), TC Energy has the most incentive to mount a vigorous defense.

Third, the Industry Groups do not offer any necessary elements to the proceeding that other parties would neglect. This case already includes the federal government (the Corps), a state government that has espoused similar interests in the future use of NWP 12 as the Industry Groups, and the private project proponent. It is difficult to imagine any further value to the Court from a fourth set of briefs that would duplicate the arguments in defense of NWP 12.

In any case, to the extent that the Industry Groups claim that they have a broader view than TC Energy, that argument ignores the fact that TC Energy is not

a one-pipeline company. TC Energy, like the Industry Groups, has a long-term interest in using NWP 12 for other pipelines. *See, e.g.*, *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1046 (10th Cir. 2015) (showing that TC Energy (formerly known as TransCanada) used NWP 12 for other pipelines). Because the Industry Groups' interests will be adequately represented by the parties already in this case, the Industry Groups are not entitled to intervene as of right.

II. The Court should not allow permissive intervention

Plaintiffs oppose permissive intervention under Rule 24(b)(3) because the Industry Groups' participation will be duplicative and will delay the proceedings, to Plaintiffs' prejudice. "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3); *see also Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987) (providing that "in a complex case . . . a district judge's decision on how best to balance the rights of the parties against the need to keep the litigation from becoming unmanageable is entitled to great deference"). Courts can rightfully deny permissive intervention "when the interests of the potential intervenor are identical to the interests of entities already parties to the litigation, since intervention in such circumstances would be duplicative and superfluous and would not promote the efficient

resolution of the case." *Heffner v. Murphy*, No. 08CV990, 2010 WL 2606520, at *1 (M.D. Pa. June 25, 2010).

Time is of the essence in this case: TC Energy intends to begin construction of Keystone XL in the spring of 2020. *See* Status Report 2, ECF No. 38. Thus, timely resolution of this case is critical so that Plaintiffs are not forced to seek a preliminary injunction. If the Industry Groups' motion to intervene is granted, it could delay the proceedings—the Industry Groups may file additional motions or seek extensions of their deadlines. And even if the Industry Groups follow the schedule ultimately adopted by the Court and are precluded from filing extra motions, their participation will nonetheless cause delay by adding to the number of pages Plaintiffs and the Court must review before resolving the case. Therefore, the "participation of duplicative parties in this litigation would unduly complicate and delay" this case, "thereby prejudicing the interests of the original parties." *See Lelsz v. Kavanagh*, 98 F.R.D. 11, 26 (E.D. Tex. 1982).

This delay would be entirely without purpose, as the Industry Groups' briefs will undoubtedly be duplicative of the other parties' briefs in this case. As explained above, it is difficult to imagine what unique, legally relevant arguments the Industry Groups would present that would not already be covered by existing parties. "[W]here the interests of a party are already adequately represented and allowing intervention would be duplicative, permissive intervention is properly

denied." *ACRA Turf, LLC v. Zanzucckí*, No. CIV.A. 12-2775 MAS, 2013 WL 776236, at *3 (D.N.J. Feb. 27, 2013), *aff'd sub nom. Acra Turf Club, LLC v. Zanzucckí*, 561 F. App'x 219 (3d Cir. 2014). If anything, it would be more appropriate to allow the Industry Groups to participate as amici curiae than to become full parties through intervention.

Nonetheless, if the Court is inclined to grant permissive intervention, the Court should: (1) limit the Industry Groups to participating only in briefing at summary judgment and preclude them from delaying the case with other motions, including motions to dismiss; (2) limit the length of their briefs to one-half the length allowed for the briefs of the original parties; and (3) require them to minimize duplication of arguments already covered in the Corps' briefing and focus on only those issues raised in their motion to intervene, to the extent those issues are legally relevant. These conditions will promote judicial efficiency and help prevent this case from becoming unmanageable and prejudicing the parties. *See Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 741-42 (9th Cir. 2011) (holding that it was reasonable to limit permissive intervenor's arguments at summary judgment where intervenor was adequately represented).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Industry Groups' motion to intervene.

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Respectfully submitted,

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WORD COUNT CERTIFICATION

I certify that the foregoing response contains 1,907 words, as counted with Microsoft Word's "word count" tool, and excluding material Local Civil Rule 7.1(d)(2)(E) omits from the word-count requirement.

/s/ Jaclyn H. Prange

CERTIFICATE OF SERVICE

I certify that I served the foregoing brief on all counsel of record via the Court's CM/ECF system.

/s/ Jaclyn H. Prange