IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WESTERN ENERGY ALLIANCE, Plaintiff, v. SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior, and BUREAU OF LAND MANAGEMENT, Defendants, and THE WILDERNESS SOCIETY, WYOMING OUTDOOR COUNCIL, SOUTHERN UTAH WILDERNESS ALLIANCE, SAN JUAN CITIZENS ALLIANCE, GREAT OLD BROADS FOR WILDERNESS, SIERRA CLUB, WILDEARTH GUARDIANS, CENTER FOR BIOLOGICAL DIVERSITY, and EARTHWORKS, Applicants for Intervention.	)	Civil Case No. 1:16-cv-00912-LF-KBM **CONSERVATION GROUPS' MOTION TO INTERVENE**

INTRODUCTION

The Wilderness Society, Wyoming Outdoor Council, Southern Utah Wilderness Alliance (SUWA), San Juan Citizens Alliance, Great Old Broads for Wilderness, Sierra Club, WildEarth Guardians, Center for Biological Diversity, and Earthworks (collectively, the Conservation Groups) respectfully move under Fed. R. Civ. P. 24 to intervene as defendants in this action. The Conservation Groups request intervention because Plaintiff Western Energy Alliance

(WEA) seeks relief that would harm their interests by eliminating important environmental protections on public lands, and by pursuing a declaratory ruling that could fundamentally change the federal oil and gas leasing program.

First, WEA challenges a 2010 Bureau of Land Management (BLM) policy reforming oil and gas leasing on public lands, Instruction Memorandum 2010-117 (IM 2010-117 or the Leasing Reform Policy).[1] *See* Complaint ¶¶ 15-16, 111-125 & Prayer for Relief No. 4 (Aug. 11, 2016), Dkt. No. 1. These reforms require BLM to more carefully consider—before offering leases for sale—natural resources that could be impacted. IM 2010-117 also substantially increases the transparency and public input on BLM's leasing decisions, as well as establishing a Master Leasing Plan (MLP) process that provides additional planning for oil and gas leasing on certain public lands. These reforms have reduced conflicts between oil and gas development and other resources. WEA, however, seeks to "revise or rescind" the Leasing Reform Policy. *See* Complaint at Prayer for Relief No. 4.

Second, WEA seeks a far-reaching ruling that BLM must offer oil and gas leases for sale every three months wherever a company expresses interest in leasing public lands. *See* Complaint ¶¶ 18, 111-125 & Prayer for Relief Nos. 2-3. WEA's claim threatens to transform BLM's well-established discretion over oil and gas leasing into a legal mandate to continually offer new leases without adequate environmental reviews or full consideration of other resources.

[1]A copy of IM 2010-117 is attached as Ex. 3. It is also available at: http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2010/IM_2010-117.html .

The Conservation Groups seek intervention as of right under Fed. R. Civ. P. 24(a)(2), or alternatively, permissive intervention under Fed. R. Civ. P. 24(b). Several of the Conservation Groups have worked for decades to reform BLM's leasing process, and those efforts bore fruit in the Leasing Reform Policy that WEA seeks to rescind. More broadly, the Conservation Groups work to protect public lands from impacts of oil and gas development. Ensuring that BLM fully considers the impacts of such development before selling leases—including how wildlife, wilderness-quality lands, air quality, public health, and climate will be affected—is critical to those efforts. WEA's challenge could impair these objectives.

Pursuant to D.N.M.LR-Civ. 7.1(a) and 10.5, counsel for the Conservation Groups has conferred with attorneys for the Federal Defendants (collectively, BLM) and WEA about this motion. WEA indicated that it will take a position after reviewing the motion.

Counsel for BLM indicated that the agency takes no position on the Conservation Groups' request to intervene in Counts 2-3 (alleging violations of the Mineral Leasing Act). BLM opposes the Conservation Groups' intervention in Count 1 (alleging a Freedom of Information Act (FOIA) violation), but does agree to provide them with a copy on electronic disc of any documents released to WEA in response to WEA's FOIA request. So long as they receive copies of all FOIA documents produced to WEA, the Conservation Groups do not object if this Court grants intervention subject to a condition that the Conservation Groups may not participate in briefing or other proceedings that only address Count 1.

BLM and WEA have consented to the Conservation Groups' submission of exhibits exceeding 50 pages in support of this motion.[2]

BACKGROUND

I. BLM's Oil and Gas Leasing Process

Under the Mineral Leasing Act (MLA), BLM has broad discretion whether to lease lands for oil and gas development. 30 U.S.C. § 226(a) ("All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits *may be leased* by the Secretary" (emphasis added)); *see, e.g.*, *Udall v. Tallman*, 380 U.S. 1, 4 (1965); *W. Energy All.v. Salazar*, 709 F.3d 1040, 1044 (10th Cir. 2013) (*WEA II*).

Before deciding to offer a lease for sale, BLM must conduct an environmental review pursuant to the National Environmental Policy Act (NEPA). *See N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 703-04 (10th Cir. 2009) (*New Mexico*); *Conner v. Burford*, 848 F.2d 1441, 1449-51 (9th Cir. 1988). NEPA requires federal agencies to prepare a detailed environmental impact statement (EIS) for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). An EIS must, among other things, describe the "environmental impact of the proposed action," and evaluate alternatives to the proposal. *Id.* To determine whether a proposed action may significantly affect the quality of the human environment, thus requiring an EIS, agencies can prepare a shorter environmental assessment (EA). *See New Mexico*, 565 F.3d at 703; 40 C.F.R. § 1501.4. Based on the EA, a federal agency either concludes its analysis with a finding of no significant impact (FONSI), or the agency must

[2] BLM has indicated that no Answer is required in this Administrative Procedure Act (APA) case. Federal Defendants' Response to Complaint at 2-3 (Sept. 26, 2016), Dkt. No. 7. But to ensure no questions arise about whether this motion complies with Fed. R. Civ. P. 24(c), the Conservation Groups have attached a proposed Answer. *See* Ex. 2.

prepare a full EIS. *New Mexico*, 565 F.3d at 703-04. "At all stages throughout the [EIS] process, the public must be informed and its comments considered." *Id.* at 704.

BLM's pre-leasing environmental reviews (or lack thereof) have long been a source of controversy. Issuance of an oil and gas lease generally gives the lessee a right to use the land for oil and gas development. *Sierra Club v. Peterson*, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983); *see also Conner*, 848 F.2d at 1449-51. For many years, however, a disagreement existed over whether BLM could defer analyzing the impacts of oil and gas development until a later stage in the process, after the leases were issued locking in that contractual right. *Compare Conner*, 848 F.2d at 1449-51; *Peterson*, 717 F.2d at 1414-15 (requiring analysis before leasing) *with Park Cty. Res. Council v. U.S. Dep't of Agric.*, 817 F.2d 609, 623-24 (10th Cir. 1987), *overruled in part on other grounds by Vill. of Los Rachos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992) (allowing analysis to be deferred). The Tenth Circuit ultimately resolved the issue by ruling (in litigation involving several of the Conservation Groups) that BLM must complete its environmental analysis of reasonably foreseeable development before issuing the leases. *New Mexico*, 565 F.3d at 716-18; *Pennaco Energy v. U.S. Dep't of Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004).

But even then, BLM for years allowed little public input or opportunity to comment while the agency considered particular parcels for leasing. Public input typically was relegated to filing administrative appeals (known as "protests") after BLM already had made its leasing decisions. Decl. of Phillip Hanceford (Hanceford Decl.) ¶¶ 14-15, attached as Ex. 1. This arrangement led to numerous time-consuming administrative appeals and litigation by the Conservation Groups and other members of the public challenging those decisions. *See, e.g., W.*

Energy All. v. Salazar, 2011 WL 3737520 (D. Wyo. June 29, 2011) (*WEA I*); *SUWA v. Allred*, 2009 WL 765882 (D.D.C. Jan. 20, 2009) (*Allred*); *The Wilderness Soc'y v. Wisely*, 524 F. Supp. 2d 1285 (D. Colo. 2007); *SUWA v. Norton*, 457 F. Supp. 2d 1253 (D. Utah 2006); *Mont. Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127 (D. Mont. 2004). In response to one of those cases (where a federal court enjoined the issuance of 77 Utah oil and gas leases in response to a lawsuit by several Conservation Groups), *Allred*, 2009 WL 765882, at * 2, the Interior Department conducted a review of its leasing procedures. The resulting June 2009 report recommended several reforms, including that "BLM should develop guidance to assist BLM officials in making parcel-specific leasing decisions."[3] The agency followed that recommendation when it promulgated the Leasing Reform Policy challenged in this case.

On May 17, 2010, BLM issued Instruction Memorandum (IM) 2010-117 to improve its environmental reviews and to provide greater opportunity for meaningful public involvement. The Leasing Reform Policy serves to:

> ensur[e] orderly, effective, timely, and environmentally responsible leasing of oil and gas resources on Federal lands. The leasing process established in this IM will create more certainty and predictability, protect multiple-use values when the [BLM] makes leasing decisions, and provide for consideration of natural and cultural resources as well as meaningful public involvement.

IM 2010-117, Purpose. Among other things, the Leasing Reform Policy requires interdisciplinary reviews by a team that includes agency staff with expertise in resources other than minerals, such as wildlife, air quality, water, and historic and cultural resources. The team also involves specialists from other agencies, where appropriate. IM 2010-117 § III(C). The

[3] Deputy Sec'y David J. Hayes, U.S. Dep't of the Interior, *Report To Secretary Ken Salazar Regarding The Potential Leasing Of 77 Parcels In Utah* at 6-7 (June 11, 2009), http://www.blm.gov/style/medialib/blm/ut/lands_and_minerals/oil_and_gas/november_2011.Par.88044.File.dat/Utah_Final_Report.pdf.

Policy directed that the review team should generally conduct a site visit to evaluate the lands under consideration for leasing, which was a departure from prior practice in many BLM offices. *Id.*[4] The Policy also makes clear that "[m]ost parcels that [BLM] determines should be available for lease will require site-specific NEPA analysis." *Id.* § III(E).

In doing this review, the Leasing Reform Policy directs that BLM must consider a variety of issues, such as: (a) whether existing information about an area is current and adequate for making leasing decisions, (b) whether the existing management plan for that area provides adequate protection for other resources, (c) whether the value of other natural resources outweigh the potential benefit from oil and gas development, and (d) whether oil and gas leasing would result in unacceptable impacts to a national park, national wildlife refuge, or other specially-designated areas. *Id.* § III(C)(2), (4).

The Leasing Reform Policy also increases the transparency of the leasing process. It directs BLM to coordinate and consult with "stakeholders that may be affected by the BLM's leasing decisions," such as other federal agencies, tribal governments, and state and local governments. *Id.* § III(C)(6). BLM is directed to identify members of the public "with an interest in local BLM oil and gas leasing," who should be "kept informed" and invited to comment during the NEPA process. *Id.* § III(C)(7), (E).

BLM recognized that conducting better pre-leasing reviews would require time. The Leasing Reform Policy directs that BLM state offices develop a "rotating" sales schedule among field offices within the state. *Id.* § III(A); *see also* Complaint ¶¶ 15-16. The rotating schedule

[4] *See, e.g.*, BLM, *Final BLM Review of 77 Oil and Gas Lease Parcels Offered in BLM-Utah's December 2008 Lease Sale* at 15 (Oct. 7, 2009) (noting that field office staff "were not afforded the opportunity to visit the specific lease parcels" prior the lease sale in question), http://www.suwa.org/app/uploads/BLM_Utah77LeaseParcelReport.pdf.

allows each field office within a state "to devote sufficient time and resources to implementing the parcel review policy established by" the Leasing Reform Policy. IM 2010-117 § III(A). BLM also directed that leasing review timeframes should be extended "as necessary, to ensure there is adequate time for the field offices to conduct comprehensive parcel reviews." *Id.* With more time for each NEPA review, the policies of IM 2010-117 have allowed for more thorough environmental reviews and greater public involvement before leases are offered for sale. This, in turn, has reduced the need for later administrative appeals. Hanceford Decl. ¶ 16.

The Leasing Reform Policy also provides an important new planning tool, called the Master Leasing Plan (MLP) process. IM 2010-117 § II. An MLP allows BLM to better plan in areas where oil and gas companies have expressed interest in development that may conflict with other resources. An MLP seeks to identify resource conflicts and environmental impacts in advance, and to develop mitigation measures or other approaches to address them (such as prohibiting surface occupancy or closing an area to leasing). *Id.*

II. The Conservation Groups' Interests in Oil and Gas Leasing on Public Lands

The Conservation Groups seeking intervention have a long history of working to reform BLM's leasing process, and seeking to protect public lands from the impacts of oil and gas development. These goals are closely related. They require that BLM fully consider environmental impacts before selling leases, and offer robust opportunities for public involvement early in the leasing process.

The Wilderness Society (TWS) is a non-profit organization dedicated to protecting wilderness and wilderness-quality lands across the country. Hanceford Decl. ¶¶ 4-6. TWS worked for decades to reform BLM's process of leasing public lands for oil and gas

development; that work led to the issuance of IM 2010-117. *Id.* ¶¶ 7-8. Since that time, TWS has continued to be involved with improving the leasing process by submitting comments and constructive feedback for at least 21 potential oil and gas lease sales. *Id.* ¶ 11. TWS has also advocated for the BLM's adoption of MLPs through which BLM develops a broad plan for both conservation and development for large landscapes in order to better protect species' habitats, watersheds, and other sensitive lands. *Id.* ¶ 18.

The Wyoming Outdoor Council is Wyoming's oldest independent statewide conservation organization and is dedicated to protecting Wyoming's landscapes, wildlife, and clean air and water. Decl. of Lisa McGee (McGee Decl.) ¶ 2, attached as Ex. 1. Minimizing the impacts of oil and gas leasing has been a primary focus for the Wyoming Outdoor Council—both keeping development out of sensitive areas, and making sure that where it does occur, leases are developed with great care and sensitivity to the surrounding landscape. *Id.* ¶¶ 1, 3. Among other strategies, the Wyoming Outdoor Council has worked for over two decades to help reform the process by which BLM conducts oil and gas leasing, including the development of MLPs. *Id.* ¶¶ 7, 19. Wyoming Outdoor Council also regularly participates in the environmental review process of oil and gas leasing under IM 2010-117. *Id.* ¶ 17.

SUWA's mission is to preserve and protect the wilderness and other sensitive public lands within the Colorado Plateau in Utah. Decl. of Ray Bloxham (Bloxham Decl.) ¶ 3, attached as Ex. 1. SUWA has regularly participated in BLM decision-making processes for oil and gas leasing in Utah, including pursuing administrative appeals and litigation in many instances. *Id.* ¶¶ 4-5. In addition, SUWA has been a long-time advocate for oil and gas leasing reforms,

including MLPs, to increase the level of environmental review prior to leasing and thereby better protect sensitive lands. *Id.* ¶ 7.

San Juan Citizens Alliance (SJCA) represents residents in the San Juan Basin of New Mexico and Colorado and is dedicated to social, economic and environmental justice in the region. Decl. of Mike Eisenfeld (Eisenfeld Decl.) ¶ 1, attached as Ex. 1. SJCA has a long history of participating in the decision-making processes for oil and gas leasing in the San Juan Basin. *Id.* ¶¶ 4-5. In recent years, SJCA has worked to protect the area around the Chaco Culture National Historical Park, a UNESCO World Heritage site located in a part of New Mexico where BLM is considering new oil and gas leasing. *Id.* ¶¶ 6-9. In one of the lease sales discussed by WEA's Complaint, SJCA and other groups filed an administrative protest of BLM's plan to offer lease parcels in the Chaco area. *Id.* ¶ 8.

Great Old Broads for Wilderness is a grassroots organization working to improve conservation and management of public lands. Decl. of Shelley Silbert (Silbert Decl.), ¶ 1, attached as Ex. 1. They regularly engage with BLM on planning for oil and gas development on public lands, including on MLPs for Colorado, Utah and New Mexico. *Id.* ¶ 1. Members of Great Old Broads for Wilderness have attended BLM oil and gas lease sales in multiple states and are dedicated to protecting BLM's discretion to postpone lease sales as necessary to ensure a safe, inclusive and transparent process in accordance with the best available science. *Id.* ¶ 4.

The Sierra Club works to protect America's wildlands from oil and gas development, along with other extractive industries that threaten their members' use and enjoyment of these areas. Decl. of Lena Moffitt (Moffitt Decl.), ¶¶ 4-5, attached as Ex. 1. Sierra Club members are

active in commenting on and protesting oil and gas lease sales in the states at issue in this litigation. *Id.* ¶¶ 6-7.

WildEarth Guardians (Guardians) works to protect and restore the wildlife, wild places, wild rivers, and health of the American West. As part of that work, Guardians works to confront the environmental and public health impacts of oil and gas development, including its impacts on global climate. Decl. of Jeremy Nichols (Nichols Decl.) ¶¶ 3-4, attached as Ex. 1. Guardians is pursuing a major campaign aimed at spurring BLM to be more transparent in disclosing the greenhouse gas emissions associated with its oil and gas leasing approvals, and to require the agency to limit those emissions. *Id.* ¶ 5. Guardians has submitted comments and administrative appeals on numerous BLM oil and gas lease sales in different states. *Id.* ¶ 9.

The Center for Biological Diversity (CBD) is dedicated to conserving public lands and endangered species in the western United States and curbing the adverse impacts of fossil fuel development on public lands and the environment. Decl. of Taylor McKinnon (McKinnon Decl.), ¶ 2, attached as Ex. 1. CBD also regularly participates in the NEPA process for BLM oil and gas lease sales to provide biological and other scientific information, and attempts to ensure that BLM adequately considers and mitigates the impacts of leasing and development on sensitive species and habitats, air, water, public health, and climate change. *Id.* ¶¶ 6, 9-13. Since 2014, CBD has commented on and protested numerous proposed lease sales. *Id.* ¶¶ 15-29.

Earthworks is an organization dedicated to protecting communities and the environment from the impacts of energy and mineral development while seeking sustainable solutions. Earthworks collaborates with communities and grassroots organizations to reform government policies to protect air, water, public lands, and communities. Declaration of Aaron Mintzes

(Mintzes Decl.) ¶ 1, attached as Ex. 1. Many Earthworks members live and recreate on and near lands subject to leasing by BLM, and at least two Earthworks staff members have in the past five years filed administrative protests of BLM leases adjacent to their homes. Mintzes Decl. ¶¶ 2, 5. Earthworks also has actively supported efforts to develop an MLP for BLM lands in southwestern Colorado. *Id.* ¶ 6. Earthworks is working to protect cultural sites in the Chaco area, and protested a proposed lease sale there that is one of those raised in WEA's Complaint. *Id.* ¶ 4.

ARGUMENT

I. THE CONSERVATION GROUPS ARE ENTITLED TO INTERVENE AS OF RIGHT

Under Fed. R. Civ. P. 24(a), a movant is entitled to intervene as of right if: (1) the motion to intervene is timely; (2) the movant claims an interest in the property or transaction that is the subject of the action; (3) the movant's interest may "as a practical matter" be impaired or impeded by the litigation; and (4) the movant's interest is not adequately represented by existing parties. *See, e.g., WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1196–98 (10th Cir. 2010) (*Nat'l Park Serv.*).

The Tenth Circuit follows "a somewhat liberal line in allowing intervention." *Id.* (quoting *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 995 (10th Cir. 2009) (*WildEarth Guardians*)). The court has explained that the Rule 24 factors are "not rigid, technical requirements." *San Juan Cty. v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007) (en banc). Instead, Rule 24(a) was intended to "expand the circumstances" in which intervention as of right would be allowed and thus, the principal focus is on "the practical effect of litigation on a prospective intervenor rather than legal technicalities." *Id.* at 1188.

The Conservation Groups satisfy each of the Rule 24(a) requirements and are entitled to intervene in this action as of right.

A. The Motion to Intervene is Timely.

A motion to intervene under Rule 24(a) must be 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." *See Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1250-51 (10th Cir. 2001) (*UAC*) (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.*

Here, WEA filed its Complaint on August 11, 2016. The initial status conference, set for October 27, 2016, has not yet occurred, and this Court has issued no substantive orders or rulings. Nor have BLM and WEA proposed a scheduling order or filed any substantive motions. Intervention will not interfere with any proceedings in this case and will not prejudice the existing parties. This motion is therefore timely.

B. The Conservation Groups Have an Interest in the Subject Matter of this Litigation.

To intervene as of right under Rule 24(a), the movant must demonstrate "an interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a); *see also Nat'l Park Serv.*, 604 F.3d at 1198. Again, there is no "rigid formula" or "mechanical rule" for evaluating the movant's interest in the litigation. *San Juan Cty.*, 503 F.3d at 1199. Rather, courts must apply "practical judgment" to determine "whether the strength of the interest and the potential risk of injury to that interest justify intervention." *Id.*

The threshold for establishing the required legally-protectable interest is not high. *Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 246 (D.N.M. 2008). In addition, when litigation raises an issue of significant public interest—rather than solely private rights—"the requirements for intervention may be relaxed." *San Juan Cty.*, 503 F.3d at 1201. The Conservation Groups have multiple interests in BLM's oil and gas leasing program that meet the relaxed standard for intervention in this case.

1. The Conservation Groups Advocated for BLM's Leasing Reforms.

Several Conservation Groups have worked for years to reform BLM's oil and gas leasing practices. *See supra* pp. 3-12. Those efforts succeeded when BLM adopted the Leasing Reform Policy, including its MLP provision. *See supra* pp. 3-8. Because WEA is directly targeting these reforms, the Conservation Groups have a clear legal interest in this litigation.

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 N.M. Off-Highway Vehicle All. v. U.S. Forest Serv.*, 540 F. App'x 877, 880 (10th Cir. 2013) (environmental groups that had "participated in the administrative process by submitting comments and by appealing [the challenged plan]," "easily" demonstrated an interest in later litigation); *Coal. of Ariz./N.M Ctys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 841 (10th Cir. 1996) (*Coal. of Ctys.)* (party with a "persistent record of advocacy for [the environmental] protection[s]" adopted by an agency that were subsequently challenged in court has a "direct and substantial interest" sufficient "for the purpose of intervention as of right").

Here, several Conservation Groups have advocated for BLM to adopt and implement the very leasing reforms challenged in this litigation.[5] The Leasing Reform Policy directly benefits the Conservation Groups by requiring a more transparent and inclusive public process, a higher quality environmental review, and ultimately, better environmental outcomes. For example, several Conservation Groups have taken advantage of the Leasing Reform Policy procedures to submit comments and provide other input on numerous potential lease sales.[6] Moreover, several Conservation Groups have supported BLM's development of MLPs in certain areas that implement the Leasing Reform Policy.[7] Because WEA's Complaint attacks these years-long efforts to reform BLM's leasing practices, the Conservation Groups have a sufficient interest in this litigation to warrant intervention as of right.

2. The Conservation Groups Have An Interest in Protecting Public Lands And Ensuring That BLM Continues To Follow A Transparent And Thorough Leasing Process.

In addition to their history of advocacy, the Conservation Groups have an interest in protecting public lands from the impacts of oil and gas drilling. It is "indisputable" that a movant's environmental concern for public lands at issue in a case, and prior litigation to protect those lands, represent a legally-protectable interest for intervention. *San Juan Cty.*, 503 F.3d at 1199; *see Utah v. United States*, 2008 WL 4571787, at *6 (D. Utah Oct. 8, 2008) (holding group's efforts to protect public lands conferred a sufficient interest in a case affecting those lands).

[5] *See* Hanceford Decl. ¶¶ 7, 11, 18-19; McGee Decl. ¶¶ 7-8, 17-19; Bloxham Decl. ¶¶ 6-7; Mintzes Decl. ¶ 6.
[6] *See* Hanceford Decl. ¶¶ 11, 16; McGee Decl. ¶ 17; Bloxham Decl. ¶ 8.
[7] Hanceford Decl. ¶¶ 18-19; McGee Decl. ¶¶ 18-19; Bloxham Decl. ¶¶ 6-7; Mintzes Decl. ¶ 6.

The Conservation Groups' members use and enjoy public lands that are affected (or at risk of being affected) by oil and gas leasing and development.[8] As a result, they have an interest in ensuring that oil and gas development does not occur in unspoiled or inappropriate places, and that BLM minimizes the impacts from drilling where it does occur.[9] Indeed, the Conservation Groups' members use and enjoy some of the specific public lands affected by the postponed lease sales challenged in WEA's Complaint. For example, several Conservation Groups filed an administrative appeal of BLM's proposal to offer leases in January 2015 in the area around the Chaco Culture National Historical Park. BLM subsequently deferred offering the leases in order to conduct further analysis, which is one of the actions WEA objects to in its Complaint.[10] Further, the Conservation Groups' members use and enjoy other public lands that are currently proposed for leasing, and which BLM has the discretion not to offer unless WEA prevails in this case.[11]

Minimizing the impacts from oil and gas on public lands and the environment requires a transparent and thorough review process where BLM fully considers how development will affect other resources, and retains the discretion to limit leasing and development based on that review. The Conservation Groups work extensively through advocacy, written comments,

[8] McGee Decl. ¶¶ 9-11; Bloxham Decl. ¶¶ 2-3; Mintzes Decl. ¶¶ 2, 22-26; Silbert Decl. ¶ 3; Nichols Decl. ¶¶ 20-22, 24; Eisenfeld Decl. ¶¶ 1-2, 7; McKinnon Decl. ¶¶ 3-4, 7-8; Moffitt Decl. ¶¶ 5-6.
[9] McGee Decl. ¶¶ 10-11, Bloxham Decl. ¶ 3; Mintzes Decl. ¶¶ 2, 5, 11-13, 25-26; Silbert Decl. ¶ 3; Nichols Decl ¶ 23; Eisenfeld Decl. ¶ 10; McKinnon Decl. ¶¶ 32-35; Moffitt Decl. ¶¶ 6, 8.
[10] *See* Complaint ¶ 24; Eisenfeld Decl. ¶¶ 7-8; Mintzes Decl. ¶ 4; Nichols Decl. ¶ 9. Conservation Groups also have filed protests in connection with several other lease sales listed in WEA's Complaint, such as a February 2016 Wyoming sale, a February 2016 Colorado sale; and a July 2016 New Mexico sale. *See* Nichols Decl. ¶ 9; Moffitt Decl. ¶ 7; McKinnon Decl. ¶¶ 16, 25; Complaint ¶¶ 31, 52, 65.
[11] Nichols Decl. ¶ 24.

administrative appeals, and litigation, to ensure that BLM does so.[12] As noted above, some of the lease sales WEA raises in its Complaint involved lease parcels where Conservation Groups submitted administrative protests or comments identifying issues that required additional review by BLM.[13]

These impacts and activities clearly qualify as legally-protectable interests under Rule 24. *See San Juan Cty.*, 503 F.3d at 1199; *Utah*, 2008 WL 4571787, at *6.

C. The Conservation Groups' Interests May Be Impaired as a Result of this Litigation.

The impairment element of Rule 24(a) requires a showing that the litigation "may, as a practical matter, impair or impede the movant's interest." *Nat'l Park Serv.*, 604 F.3d at 1198. This is a "minimal burden" and requires the movant to show "only that impairment of its substantial legal interest is possible if intervention is denied." *Id.* at 1199 (quotation omitted).

This case threatens to impair the Conservation Groups' interests in several ways. First, WEA asks this Court to strike down BLM's Leasing Reform Policy. *See* Complaint at Prayer for Relief No. 4. Rescinding that policy would directly harm the Conservation Groups and their members, who have advocated for years to improve the leasing process.[14] Such an outcome would eliminate the Conservation Groups' opportunities for public involvement provided by the Leasing Reform Policy.[15] Additionally, removing the more detailed review required by IM

[12] *See* Hanceford Decl. ¶¶ 9-11, 14-16, 18, 22-24; McKinnon Decl. ¶¶ 10-29; Bloxham Decl. ¶¶ 5-8, 12; Silbert Decl. ¶¶ 4-5; McGee Decl. ¶¶ 4, 6-8, 11, 14, 17; Moffitt Decl. ¶¶ 7-8; Eisenfeld Decl. ¶¶ 4-5, 8-10; Mintzes Decl. ¶¶ 4-10, 16-21; Nichols Decl. ¶¶ 5, 9-17; *supra* pp. 8-12.
[13] *See supra* p. 16 n. 10; Bloxham Decl. ¶ 5; Silbert Decl. ¶ 5.
[14] *See* Hanceford Decl. ¶¶ 18-21; McGee Decl. ¶¶ 7, 19; Bloxham Decl. ¶13.
[15] Hanceford Decl. ¶¶ 13, 17, 26; McGee Decl. ¶ 17; Bloxham Decl. ¶ 13.

2010-117 ensures that BLM will overlook important environmental issues.[16] Striking down the Leasing Reform Policy also would throw BLM's development of MLPs—along with the landscape-wide protections they provide—into jeopardy.[17] This possibility for impairment of the Conservation Groups' interests is more than sufficient for intervention. *See UAC*, 255 F.3d at 1253–54 (where it was undisputed that the challenged management plan was more environmentally protective than the prior plan, it was "not speculative" that the intervenors' interest in the land would be diminished if the protective management plan were set aside).

Second, WEA's request for declaratory relief would fundamentally change the federal oil and gas leasing system in a way that severely harms the Conservation Groups. WEA alleges that under BLM regulations: (a) "[l]ands included in <u>any</u> expression of interest" submitted by a company proposing to lease them are deemed "available for leasing," and (b) "all lands available for leasing <u>shall be offered</u> for competitive leasing" on a quarterly basis. Complaint ¶¶ 18-19, 22-23 (emphasis added, quotation omitted). This legal theory runs counter to well-established case law, as well as the plain language of applicable statutes and regulations. *See, e.g.*, *Tallman*, 380 U.S. at 4; *Roy G. Barton*, 188 IBLA 331, 334-37 (2016). But if WEA prevails, it could transform BLM's broad discretion over oil and gas leasing into a legal mandate to offer new leases whenever proposed by oil and gas companies.

At a minimum, WEA's view of the law appears to require that when oil and gas companies propose to lease public lands, BLM must rush to complete its NEPA and other environmental reviews to meet a quarterly leasing schedule. As BLM recognized in issuing the

[16] *See* IM 2010-117 § III; Hanceford Decl. ¶¶ 10, 16; McGee Decl. ¶¶ 17, 20.
[17] *See* IM 2010-117 § II; Hanceford Decl. ¶¶ 20-21; McGee Decl. ¶ 19; Bloxham Decl. ¶ 13; Mintzes Decl. ¶¶ 12-13.

Leasing Reform Policy, such tight deadlines necessarily compromise the quality of the environmental review.[18] Moreover, those deadlines would sharply restrict BLM's ability to get input from other agencies, local and tribal governments, and members of the public.

The rushed leasing approvals sought by WEA would also harm the Conservation Groups' interests by increasing the amount of leasing and drilling on public lands. WEA seeks to end what it views as "unnecessary and illegal delays" in its members' ability to acquire more leases on public lands, which WEA claims limit oil and gas development there. Complaint ¶¶ 76-77. If WEA succeeds, the expansion of (ill-considered) leasing and drilling on public lands—and the resulting impacts to other natural resources—will harm the Conservation Groups' interests in protecting those resources.[19] These impacts are clearly sufficient to show possible impairment of the Conservation Groups' interests. *UAC*, 255 F.3d at 1253-54.

Further, WEA's legal theory would appear to force BLM to offer public lands for lease when proposed by industry, regardless of the findings of the agency's environmental review. As noted above, controlling case law establishes that BLM has discretion not to offer an oil and gas tract for leasing. *Tallman*, 380 U.S. at 4; *Barton*, 188 IBLA at 334-37. But WEA argues BLM regulations require that "[a]ll lands available for leasing"—which WEA interprets as any lands for which a company has submitted an expression of interest—"shall be offered for competitive leasing" on a quarterly basis. Complaint ¶¶ 18-19, 22-23. This appears intended to sharply limit the agency's discretion not to lease particular lands. *See WEA I*, 2011 WL 3737520, at *1-*4, *7

[18] *See* IM 2010-117 § III(A); Hanceford Decl. ¶¶ 24-26; McGee Decl. ¶¶ 14, 20; Mintzes Decl. ¶ 11; Eisenfeld Decl. ¶ 10; Moffitt Decl. ¶ 8; McKinnon Decl. ¶¶ 32-33.
[19] *See* Moffitt Decl. ¶ 8; Nichols Decl. ¶¶ 18-25; McKinnon Decl. ¶¶ 31-36; Hanceford Decl. ¶¶ 16-17; Bloxham Decl. ¶ 13; McGee Decl. ¶¶ 9-11, 14, 20; Eisenfeld Decl. ¶¶ 7-10; Silbert Decl. ¶¶ 3, 5; Mintzes Decl. ¶¶ 16-26.

(rejecting similar claim by WEA that Mineral Leasing Act required BLM to issue leases regardless of pending administrative appeals). If WEA's claim prevails, it could prevent BLM from deciding not to offer leases for certain parcels based on what it learns during its review, or in response to public input. As noted above, the Conservation Groups have submitted many comments and protests objecting to the issuance or terms of particular leases.[20] The Conservation Groups' interests would be impaired if WEA succeeds in rendering their involvement a meaningless exercise.

D. The Conservation Groups' Interests Are not Adequately Represented by BLM.

The final requirement to intervene as of right under Rule 24(a) is that the movant's interests may not be adequately represented by the existing parties. This is a "minimal burden," and the movant need only show "the possibility that representation may be inadequate." *Nat'l Park Serv.*, 604 F.3d at 1200.

Moreover, the Tenth Circuit repeatedly has held that it is generally "impossible for a government agency to protect both the public's interests and the would-be intervenor's private interests." *N.M. Off-Highway Vehicle All.*, 540 F. App'x at 880; *see also Nat'l Park Serv.*, 604 F.3d at 1200*; WildEarth Guardians*, 573 F.3d at 996; *UAC*, 255 F.3d at 1255. Even where both entities take the same position at the outset of the litigation, "in litigating on behalf of the general public, 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." *N.M. Off-Highway Vehicle All.*, 540 F. App'x at 880-81 (quoting *UAC*, 255 F.3d at 1255-56). As such, the inadequacy of

[20] *See* Hanceford Decl. ¶¶ 11-13; Moffitt Decl. ¶¶ 7-8; Eisenfeld Decl. ¶¶ 5, 8-10; Bloxham Decl. ¶¶ 4-9; McKinnon Decl. ¶¶ 15-29, 36; Silbert Decl. ¶ 5; Mintzes Decl. ¶¶ 4-5, 9-10; Nichols Decl. ¶¶ 9, 13, 16, 18-25.

representation requirement is satisfied "[w]here a government agency may be placed in the position of defending both public and private interests." *Nat'l Park Serv.*, 604 F.3d at 1200.

This case presents precisely the circumstance where representation by a government agency is inadequate. BLM manages public lands under a "multiple use" mandate that requires balancing a wide variety of interests, including "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values." 43 U.S.C. § 1702(c); *see also Norton v. SUWA*, 542 U.S. 55, 58 (2004) ("'Multiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put."). In striking that balance, BLM often compromises environmental protection in favor of oil and gas development and other land uses. *See, e.g.*, *supra* p. 7 n. 4 (Interior Department report on Utah leasing); *supra* pp. 5-6 (collecting cases).

By contrast, the Conservation Groups have a narrower interest: protecting public lands and other natural resources from harm, and ensuring a robust public process and thorough environmental review for oil and gas leasing. Because BLM must balance other uses—such as oil and gas development—that may directly conflict with these conservation interests, the agency cannot adequately represent the Conservation Groups. *Coal. of Ctys.*, 100 F.3d at 845 ("We have here . . . the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible.") (quoting *Nat'l Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977)); *see also UAC*, 255 F.3d at 1255-56.[21]

[21] *See* Hanceford Decl. ¶¶ 27-29; Bloxham Decl. ¶ 14, McKinnon Decl. ¶ 35-36.

Because each of the four requirements are satisfied, the Court should grant the Conservation Groups intervention as of right.

II. ALTERNATIVELY, THIS COURT SHOULD GRANT THE CONSERVATION GROUPS PERMISSIVE INTERVENTION.

In addition to qualifying for intervention as of right, the Conservation Groups satisfy the requirements for permissive intervention under Rule 24(b). 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). Courts will also consider whether the intervenor will "significantly contribute to the underlying factual and legal issues." *Utah v. Kennecott Corp.*, 801 F. Supp. 553, 572 (D. Utah 1992).

Here, the Conservation Groups intend to address the same question of law that is at the heart of this litigation: the legality of BLM's Leasing Reform Policy, and the agency's discretion over lease sales. *See* Proposed Answer, attached as Ex. 2. In addition, this motion to intervene is timely and intervention will not cause undue delay or prejudice to the existing parties. *See supra* p. 13. As such, if the Court does not grant intervention as of right, permissive intervention is warranted.

CONCLUSION

For the foregoing reasons, the Court should grant the Conservation Groups intervention as a matter of right under Rule 24(a). Alternatively, the Court should allow permissive intervention under Rule 24(b).

Respectfully submitted this 19th day of October, 2016,

/s/ Robin Cooley_____
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CERTIFICATION REGARDING NON-MEMBER ATTORNEYS

I hereby certify that I am a member of the New Mexico District Federal Bar in good standing and that non-member attorneys Michael S. Freeman and Michael Saul are in good standing with the Supreme Court of Colorado.

/s/ Robin Cooley
Robin Cooley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of October, 2016, I filed the foregoing **CONSERVATION GROUPS' MOTION TO INTERVENE** using the United States District Court CM/ECF which caused all counsel of record to be served by electronically.

/s/ Robin Cooley
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