No. 17-2005

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WESTERN ENERGY ALLIANCE,
Petitioner-Appellee,
v.
RYAN ZINKE, Secretary, United States Department of the Interior, et al.,
Respondents,

THE WILDERNESS SOCIETY, *et al.*,
Appellants-Applicants for Intervention.

On Appeal from the United States District Court for the District of New Mexico
Civil Action No. 1:16-cv-00912-WJ-KBM
The Honorable Judge William Johnson

OPENING BRIEF OF APPELLANTS-APPLICANTS FOR INTERVENTION

March 6, 2017

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants-Applicants for Intervention The Wilderness Society, Wyoming Outdoor Council, Southern Utah Wilderness Society, San Juan Citizens Alliance, Great Old Broads For Wilderness, Sierra Club, WildEarth Guardians, Center For Biological Diversity, and Earthworks have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT OF RELATED CASES

This case is not related to any prior or pending appeal before this Court.

GLOSSARY

BLM: Defendant Bureau of Land Management.

Conservation Groups: Appellants-Applicants for Intervention 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.

FLPMA: Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1787.

The Act: Mineral Leasing Act, 30 U.S.C. §§ 181–287.

NEPA: National Environmental Policy Act, 42 U.S.C. §§ 4321–4370f.

WEA: Plaintiff-Appellee Western Energy Alliance.

STATEMENT OF JURISDICTION

Plaintiff-Appellee Western Energy Alliance (WEA) asserts that the district court has jurisdiction under 28 U.S.C. § 1331 (federal question), because its claims against Defendants Bureau of Land Management, et al. (collectively, BLM) arise under the laws of the United States, and under the Administrative Procedure Act waiver of sovereign immunity, 5 U.S.C. § 702.

This Court has jurisdiction under 28 U.S.C. § 1291 because Appellants-Applicants for Intervention The Wilderness Society, et al. (collectively, the Conservation Groups) appeal the district court's denial of their motion to intervene. WildEarth Guardians v. U.S. Forest Serv., 573 F.3d 992, 994 (10th Cir. 2009) (USFS). The district court denied intervention on January 13, 2017, and the Conservation Groups timely filed a notice of appeal on January 17, 2017.

ISSUES PRESENTED

WEA's goal in this case is to increase oil and gas leasing and development on public lands by requiring BLM to hold more frequent sales of oil and gas leases. WEA also asks for a court order directing BLM to revise or rescind leasing reforms that resulted from litigation by the Conservation Groups.

1. Did the district court err in denying the Conservation Groups' motion to intervene as of right on the grounds that: (a) the relief sought by WEA would not

impair the Conservation Groups' interests, and (b) BLM adequately represents the Conservation Groups' interests?

2. Did the district court err in denying the Conservation Groups permissive intervention?

STATEMENT OF THE CASE

In this case, an oil and gas industry trade group seeks to turn the federal Mineral Leasing Act into an industry-driven mandate requiring BLM to offer new oil and gas leases for sale every three months on public lands in each state. That outcome would harm the Conservation Groups, who have long worked to protect public lands from the impacts of drilling and who benefit from BLM leasing reforms challenged by WEA. The Conservation Groups seek intervention to defend their interests and oppose WEA's far-reaching claims.

I. Legal Background: BLM's Oil and Gas Leasing Process

BLM manages public lands, including mineral development, under the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1787, and the Mineral Leasing Act (the Act), 30 U.S.C. §§ 181-287. FLPMA requires BLM to oversee oil and gas development on public lands using "multiple use and sustained yield" principles that balance mineral development with protection of water, wildlife, and other resources. 43 U.S.C. §§ 1701(a)(7)-(8), 1732(a). The Supreme Court has described BLM's multiple-use mandate as the "enormously

complicated task of striking a balance among the many competing uses to which land can be put." Norton v. S. Utah Wilderness All., 542 U.S. 55, 58 (2004). "Multiple use" is defined as "the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people . . . and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output." 43 U.S.C. § 1702(c).

Under FLPMA and the Act, BLM uses a three-stage framework for managing oil and gas development on public lands. BLM first develops land-use plans (called resource management plans (RMPs)) that determine "what areas will be open to [oil and gas] development and the conditions placed on such development." N.M. ex rel. Richardson v. BLM, 565 F.3d 683, 689 n.1 (10th Cir. 2009) (New Mexico) (citing 43 U.S.C. § 1712(e)). Second, the agency sells leases for developing specific areas on public lands. Id. Third, after leases are issued, BLM reviews and approves permits for drilling on those leases. Id.

This case involves the second stage: BLM's decisions on whether and when to lease public lands for oil and gas development. Issuing an oil and gas lease represents a critical step because the lease generally gives the lessee a right to use some of the land for oil and gas development. Id. at 716-18; Pennaco Energy, Inc.

v. U.S. Dep't of Interior, 377 F.3d 1147, 1160 (10th Cir. 2004); Sierra Club v. Peterson, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983).

The Mineral Leasing Act gives the agency broad discretion in choosing not to offer leases. See 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) (ruling Act leaves Interior Department with discretion not to lease lands); W. Energy All. v. Salazar, 709 F.3d 1040, 1044 (10th Cir. 2013) (WEA II) (stating BLM has "considerable discretion to determine which lands will be leased").

This case addresses a provision of the Act directing that BLM hold quarterly lease sales in each state "where eligible lands are available." 30 U.S.C. § 226(b)(1)(A). Under BLM's interpretation, the Act gives the agency broad authority to determine which lands are "eligible" and "available," and when leases should be offered for sale. BLM policy provides that lands become "eligible and available" when they "are determined by the state office to be available for leasing" through the agency's pre-leasing review process. See Appendix (Appx) 136 (Instr. Mem. 2010-117 § III.A); id. 185 (BLM Manual MS-3120.41(B)). It is the review process — including the amount of public input and environmental analysis BLM deems appropriate — that results in a determination whether parcels are "available." See Appx 185 (BLM Manual MS-3120.41(A)) (stating the "lease

parcel review process determines the availability" of lands for leasing). Thus, in BLM's view, the Act does not strictly mandate four lease sales every year in every relevant state. Rather, the Act allows BLM to postpone lease sales when necessary to address public input or to do additional analysis as part of the leasing review process.

Additionally, FLPMA gives BLM broad authority to protect public lands from the impacts of mineral development: "It is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses." New Mexico, 565 F.3d at 710 (applying FLPMA to oil and gas development); see also Utah Shared Access All. v. Carpenter, 463 F.3d 1125, 1129 (10th Cir. 2006) (discussing "BLM's duty to protect the environment" under FLPMA).

In offering a lease for sale, BLM must comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f. See New Mexico, 565 F.3d at 703-04; Conner v. Burford, 848 F.2d 1441, 1449-51 (9th Cir. 1988). NEPA requires that agencies take a hard look at environmental impacts prior to taking an action to ensure "that important effects will not be overlooked or underestimated" by the agency. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). In addition, NEPA requires "broad dissemination of relevant environmental information" so that members of the public can comment on and effectively participate in agency decision making. Id. at 349-50. Disputes

often arise over the adequacy of BLM's pre-leasing NEPA analyses. See infra p. 7 (citing cases).

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

The nine Conservation Groups seeking intervention have a long history of working to protect public lands from the impacts of oil and gas development — both by keeping development out of sensitive areas, and by seeking to ensure that where development does occur, harm to the surrounding landscape and climate impacts are limited.[1] Many members of the Conservation Groups use and enjoy public lands that have been impacted (or may be affected in the future) by oil and gas development.[2] To protect their interests the Conservation Groups regularly participate in BLM planning, RMP development, and decision-making processes for oil and gas leasing, including submitting comments on proposed leases.[3]

In making leasing decisions, BLM frequently exercises its multiple-use authority by compromising public lands protection in favor of oil and gas development. As a result, the Conservation Groups sometimes pursue administrative appeals (known as "protests") challenging BLM's decision to lease certain public lands. While some of those appeals are successful, in many other

[1] See Appx 71, 78-79, 90-93, 97-99, 104-05, 110-14, 127-28 (declarations by Conservation Group representatives).
[2] Id. at 71, 78-80, 92-93, 97-99, 102, 104, 107, 110, 122-25, 127.
[3] Id. at 72-74, 84-86, 91, 94-95, 104-05, 127-28.

cases the agency proceeds to sell the leases over the Conservation Groups' protests. See, e.g, Appx 100-03, 116-17 (describing protests and lease sales). For similar reasons, there is a long history of litigation in which the Conservation Groups have challenged BLM decisions to offer oil and gas leases for sale. See, e.g., Mont. Envtl. Info. Ctr. v. BLM, 615 F. App'x 431 (9th Cir. 2015) (unpublished); Ctr. for Biological Diversity v. BLM, 937 F.Supp. 2d 1140 (N.D. Cal. 2013); Colo. Envtl. Coal. v. Salazar, 857 F. Supp. 2d 1233 (D. Colo. 2012); S. Utah Wilderness All. v. Allred, No. 08-2187(RMU), 2009 WL 765882 (D.D.C. Jan. 17, 2009) (unpublished) (Allred); The Wilderness Soc'y v. Wisely, 524 F. Supp. 2d 1285 (D. Colo. 2007); S. Utah Wilderness All. v. Norton, 457 F. Supp. 2d 1253 (D. Utah 2006); Mont. Wilderness Ass'n v. Fry, 310 F. Supp. 2d 1127 (D. Mont. 2004). That litigation continues today, with a number of pending cases brought by Conservation Groups against BLM. See, e.g., Appx 118-19; San Juan Citizens All. v. BLM, No. 1:16-cv-00376-MCA-WPL (D.N.M.).

III. BLM's 2010 Leasing Reform Policy

Many of the Conservation Groups' challenges have addressed BLM's pre-leasing environmental reviews and NEPA compliance. The Groups have long worked to reform the review process, which for many years allowed little public input while the agency considered particular parcels for leasing. Appx 83-85.

Their efforts bore fruit in 2010, when the agency adopted the leasing reforms challenged in this case. Id. at 83.

In response to a successful lawsuit by several Conservation Groups (where a federal court enjoined the issuance of 77 oil and gas leases in Utah), Allred, 2009 WL 765882, at *1-2, the Interior Department conducted a review of its leasing procedures and promulgated Instruction Memorandum (IM) 2010-117 (the Leasing Reform Policy) to improve environmental reviews and provide greater opportunity for meaningful public involvement. The Leasing Reform Policy did not go as far as the Conservation Groups had advocated in this regard. See Appx 344 (noting that policy was a "compromise" by the agency); id. at 401:21-402:11 (discussion at district court hearing). It did, however, make important improvements in public participation and environmental review.

Among other things, the Policy requires pre-leasing 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. Appx 136-38 (Policy § III(C)). The Policy directs that the review team should generally conduct a site visit to evaluate the lands under consideration for leasing. Id. (Policy § III(C)(5)). This is a departure from prior practice, under which many BLM offices offered lands for leasing (based on nominations by oil and gas companies) without agency

staff even seeing the lands they were leasing.[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. (Policy § 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 outweighs 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. (Policy §§ III(C)(2), (4)).

The Leasing Reform Policy also increases the transparency of the leasing process and NEPA reviews. 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. (Policy § III(C)(6)). BLM is directed to identify members of the public "with an interest in

[4] See, e.g., BLM, Final BLM Review of 77 Oil and Gas Lease Parcels Offered in BLM-Utah's December 2008 Lease Sale 15 (Oct. 7, 2009), available at https://collections.lib.utah.edu/details?id=785656&q=*&page=1&rows=50&fd=title_t%2Csetname_s%2Ctype_t&sort=&gallery=0&facet_setname_s=uum_mlds_public (last viewed March 2, 2017) (noting that field office staff "were not afforded the opportunity to visit the specific lease parcels" prior the lease sale in question).

local BLM oil and gas leasing" who should be "kept informed" and invited to comment during the NEPA process. Id. (Policy §§ III(C)(7), (E)).

BLM recognized that conducting better pre-leasing reviews would require time. The Leasing Reform Policy directs BLM state offices (which oversee multiple field offices in each state) to schedule lease sales on a rotating basis in order to allow time for such reviews. Id. (Policy § III(A)); Appx 16 (Complaint ¶ 7). Instead of holding lease sales four times per year with parcels from all across the state, BLM rotates the four sales between the different field offices in the state, with each auction offering parcels only from that field office. See, e.g., id. at 19 (Complaint ¶ 20) (describing New Mexico rotating schedule). As a result, in each field office leases are only offered once per year under the rotating schedule. Id. This gives BLM staff in each field office twelve months between lease sales to conduct environmental review and get public input.

The rotating sale schedule is a linchpin of the reforms because it allows each field office "to devote sufficient time and resources to implementing the" review requirements of the Leasing Reform Policy. Appx 136 (Policy § 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 additional time, the Policy's rotating sale schedule allows for

more thorough environmental reviews and greater public involvement before leases are offered for sale.[5]

While not eliminating administrative appeals and litigation, these reforms have reduced the need for challenges to BLM's leasing decisions. Appx 84-85. However, the Policy's rotating lease sale schedule — and additional agency review — also have resulted in less frequent lease sales, as well as the postponement of some sales. See infra pp. 13-14, 23-25. WEA's lawsuit challenges these impacts and seeks to force BLM to hold more lease sales in order to spur increased oil and gas development on federal land.

IV. Procedural History

A. WEA's Complaint

WEA filed this case in August 2016, charging that BLM has violated the Mineral Leasing Act by failing to hold enough oil and gas lease sales. Appx 14-43 (Complaint). WEA's Complaint alleges BLM has violated the Act's provision directing that lease sales shall be held quarterly in each State "where eligible lands are available." 30 U.S.C. § 226(b)(1)(A); Complaint ¶¶ 111-125 (Appx 39-41).

[5] Many of the requirements of IM 2010-117 have been incorporated into BLM's Handbook and Manual. Appx 160. This brief use the terms "Leasing Reform Policy" or "IM 2010-117" to refer collectively to these agency guidance documents, all of which are challenged by WEA. See Appx 42 (WEA Complaint seeking court order requiring "BLM to revise or rescind all agency guidance and instructional memoranda, including I.M. No. 2010-117, that direct implementation of BLM's lease sale program in a manner contrary to law").

WEA advances a very restrictive reading of the term "where eligible lands are available" that would trigger the Act's quarterly lease sale requirement much more frequently. WEA's Complaint asserts that lands are available for leasing whenever: (a) they have been designated as open for possible leasing under the applicable RMP;[6] and (b) an oil and gas company expresses its interest in leasing any such lands. Complaint ¶¶ 11-14, 18 (Appx 17-20); see also id. ¶¶ 22-23 (alleging that "[o]nce an expression of interest is submitted, these lands become 'available for leasing' under BLM's regulations"). According to WEA, in states where these conditions are met, BLM must hold a minimum of four lease sales per year. Id. ¶¶ 11-14, 18-19, 22-23. WEA alleges that BLM has "regularly" violated this requirement. Id. ¶ 19. In practice, WEA's interpretation of the Act would transform BLM's broad discretion to determine the public lands available for leasing into an industry-driven mandate to offer new leases every three months in most states. See infra pp. 21-29.[7]

[6] In practice, BLM RMPs close only a small fraction of public lands — approximately 10 percent — to leasing. The Wilderness Society, Open for Business (And Not Much Else): How Public Lands Management Favors the Oil and Gas Industry, http://wilderness.org/sites/default/files/TWS%20--%20BLM%20report_0.pdf (last viewed March 2, 2017). As a result, WEA's legal theory threatens the large majority of public lands.

[7] This is not the first case in which WEA has sought to transform BLM's leasing discretion under the Mineral Leasing Act into a mandate requiring the agency to issue leases. See W. Energy All. v. Salazar, No. 10-cv-0226, 2011 WL 3737520, at **1-3, 7 (D. Wyo. June 29, 2011) (unpublished) (WEA) (rejecting claim by WEA that the same statutory subsection requires BLM to issue leases despite

WEA's Complaint alleges that the rotating lease sale schedule required by the Leasing Reform Policy is inconsistent with the Act because it has resulted in fewer than four lease auctions each year in some states. Complaint ¶¶ 16-17, 23, 29, 34-36, 121-123 (Appx 19-23, 41). The rotating schedule grew out of the Conservation Groups' advocacy and was specifically designed to allow time for additional environmental review and public input. See supra pp. 7-8. The Complaint's Request for Relief takes direct aim at the Conservation Groups' gains by asking the court to "[d]irect BLM to revise or rescind all agency guidance and instructional memoranda, including [the Leasing Reform Policy], that direct implementation of BLM's lease sale program in a manner contrary to law." Complaint at 29 (Appx 42). WEA also asks the Court to "[r]equire BLM to immediately abandon" current lease sale schedules implementing the rotating approach, and replace them with new schedules comporting with WEA's view of the Act. Id.

In addition, WEA's Complaint objects to BLM decisions postponing oil and gas lease sales.[8] BLM postponed many of these sales to give the agency sufficient time to address environmental concerns raised by the Conservation Groups, Native

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pending administrative appeals). In the Wyoming WEA case, several of the Conservation Groups were permitted to intervene. Id. at *1.

[8] Complaint ¶¶ 24, 29, 31, 33-34 (sales postponed in New Mexico), 44-46 (Montana/Dakotas), 52 (Wyoming), 57 (Utah), 61, 65 (Colorado), 74 (Arkansas and Michigan) (Appx 20-31).

American tribes, and other members of the public. For example, several Conservation Groups filed an administrative appeal of BLM's proposal to offer leases in January 2015 to drill near New Mexico's Chaco Culture National Historical Park. BLM subsequently deferred the sale in order to conduct further consultation with tribes and to assess potential wilderness lands there, which is one of the actions WEA challenges in its Complaint.[9] The Conservation Groups also have campaigned and filed appeals seeking to protect many other specific lands affected by lease sales addressed in WEA's Complaint.[10]

The Complaint seeks all of this relief to end what WEA views as "unnecessary and illegal delays" in its members' ability to acquire more leases, which WEA claims limit oil and gas development on public lands. Complaint ¶¶ 76-77 (Appx 31-32) (alleging that leasing delays limit development in several ways, including by "prevent[ing] member companies from drilling wells").

B. The Conservation Groups' Motion to Intervene

The Conservation Groups moved to intervene on October 19, 2016. Appx 44. BLM took no position on the request to intervene, but WEA opposed it. Id. at

[9] See Complaint ¶ 24 (Appx 20); Appx 79-80, 104, 116-17 (declarations).
[10] See, e.g., Appx 100-101, 111, 116-17 (declarations); Complaint ¶¶ 31, 52, 65 (Appx 22, 26, 28) (February 2016 Wyoming sale, February 2016 Colorado sale; and July 2016 New Mexico sale); see also, Appx 118-23 (other sales addressed by WEA).

46, 141. Following briefing and oral argument, the district court denied the Conservation Groups' motion on January 13, 2017. Appx 341-62 (the Order).

The court ruled that the Conservation Groups met two of the four Rule 24 requirements for intervention of right. First, the Court held that their motion to intervene was timely. Order at 9. Second, the court recognized that the Conservation Groups have a legally-protectable interest in the subject matter of the case because: (a) they have advocated for the leasing reforms addressed by WEA's Complaint; and (b) they have a well-established "interest in protecting public lands from the impacts of oil and gas drilling." Id.[11] But the district court held that the third and fourth intervention requirements were not satisfied. On the third prong, the district court ruled that even if WEA obtained its requested relief, the Conservation Groups' interests would not be harmed. Id. at 9-17. On the fourth Rule 24 requirement, the court held that BLM would adequately represent the Conservation Groups' interests. Id. at 17-20. The district court also denied the Conservation Groups' alternative request for permissive intervention. Id. at 20-21.

The Conservation Groups appealed the intervention denial on January 17, 2017. Subsequently, the district court granted a motion by the Conservation

[11] WEA did not challenge the timeliness of the Conservation Groups' motion. Id. WEA did claim that because it seeks to enforce "existing law," the Conservation Groups have no legally-protectable interest in the case. Id. The Court correctly rejected this argument: "[j]ust because [WEA allegedly] is not seeking a change in existing law does not mean that the Applicants have no interest in the subject matter of the lawsuit." Id.

Groups to stay proceedings in the case pending resolution of this appeal. Appx 386-87.

SUMMARY OF ARGUMENT

In deciding whether certain public lands should be offered for oil and gas leasing, BLM's multiple-use management responsibility requires it to balance oil and gas development with environmental protection, as well as with other uses of public lands. WEA seeks relief that would put a heavy thumb on the scale in favor of oil and gas by mandating more lease sales. The Conservation Groups request intervention to ensure that the environmental protection side of the scale is fully represented in this case. In denying intervention, the district court ensured that only the pro-development interest — WEA — will be heard.

The district court erred by holding that the Conservation Groups did not satisfy the impairment of interests and inadequate representation requirements for intervention of right. The Conservation Groups' interests will be impaired by the relief WEA seeks: a ruling requiring that BLM hold more frequent lease sales, in order to spur more oil and gas drilling on public lands. Such a ruling would harm the Conservation Groups' interest in protecting those lands. WEA also challenges leasing reforms adopted by BLM that provide greater public participation and more environmental review during the leasing process. If successful, WEA's challenge

plainly will harm the Conservation Groups, who benefit from those leasing reforms.

The district court also erred in holding that BLM — which is charged with balancing different uses of public lands — adequately represents the Conservation Groups' narrower interest in protecting those lands. It is entirely foreseeable that BLM may compromise the Conservation Groups' interests in this litigation, as the agency regularly does when making decisions related to oil and gas leasing. WEA, in fact, expects that the new presidential administration may take a litigation position much more favorable to WEA. For its part, BLM has declined to assure the Court that it will represent the Conservation Groups' interests under the new administration. Even the district court recognized the possibility that the Trump administration will shift positions: the court has stayed all proceedings in the case in part to allow "time for any change in administrative policy" under the new administration to take effect. Infra p. 42. The record shows that BLM may not adequately represent the Conservation Groups, and district court's contrary ruling should be reversed.

Alternatively, this Court should reverse for abuse of discretion the district court's denial of the Conservation Groups' request to permissively intervene.

STANDARD OF REVIEW

This Court reviews de novo the district court's denial of intervention of right under Federal Rule of Civil Procedure 24(a)(2). WildEarth Guardians v. Nat'l Park Serv., 604 F.3d 1192, 1197 (10th Cir. 2010) (Natl. Park Serv.). The denial of permissive intervention under Rule 24(b) is reviewed for abuse of discretion. Kane Cty. v. United States, 597 F.3d 1129, 1133 (10th Cir. 2010).

ARGUMENT

Under the Mineral Leasing Act and FLPMA, BLM must decide where oil and gas leasing should be allowed and under what conditions, and where environmental protection and other uses should get priority. In making these decisions, BLM is guided by its multiple-use mandate, which describes the "enormously complicated task of striking a balance among the many competing uses to which land can be put." Norton, 542 U.S. at 58.

Here, BLM finds itself as the defendant in a lawsuit brought by one of the interests it is charged with balancing: an oil and gas industry trade association. While WEA seeks far-reaching relief that will advance the business interests of its members, the Conservation Groups seek intervention to ensure that the important countervailing interest in protecting public lands and the environment is fully represented in this case.

Under Rule 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 may not be adequately represented by existing parties. See, e.g., Nat'l Park Serv., 604 F.3d at 1196–98. The Tenth Circuit follows "a somewhat liberal line in allowing intervention." USFS, 573 F.3d at 995 (quoting Utah Ass'n of Ctys. v. Clinton, 255 F.3d 1246, 1249 (10th Cir. 2001) (UAC)).

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. This is especially true where an issue of significant public interest — rather than solely private rights — is presented. In such cases, "the requirements for intervention may be relaxed." Id. at 1201.

The Conservation Groups meet all the requirements of Rule 24(a). But by denying intervention, the district court ensured that only the industry side of the multiple-use balancing will be fully represented in this lawsuit. That ruling should be reversed.

I. THE RELIEF WEA SEEKS WILL IMPAIR THE CONSERVATION GROUPS' INTERESTS.

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 (emphasis added); UAC, 255 F.3d at 1253. If an applicant "would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." USFS, 573 F.3d at 995; Fed. R. Civ. P. 24 advisory committee notes (1966 amendments) (same).

That standard is met here because the relief sought by WEA may harm the Conservation Groups in three ways. First, if WEA's claims are successful, increased oil and gas leasing and development on public lands is not only possible, but very likely. Such an outcome is WEA's stated goal in bringing this case, and it would directly impair the Conservation Groups' ability to protect those lands. Second, WEA asks the court to interpret the Act in a manner that will require more frequent lease sales and limit BLM's ability to postpone sales. Such a ruling would restrict the agency's consideration of environmental protection and public input before offering leases for sale. Third, WEA's request to revise or rescind the Leasing Reform Policy would reverse reforms that the Conservation Groups

worked for years to achieve. See Appx 45-46, 60-63, 189-96, 304-07, 392-400 (raising issues below).

A. If WEA's Claims Succeed, the Resulting Increase in Leasing and Development Will Impair the Conservation Groups' Interests.

WEA makes no bones about its objective in bringing this case: to increase oil and gas leasing and development on public lands. The Complaint requests relief that will require BLM to hold more lease sales, supra pp. 11-14, and end what WEA views as "unnecessary and illegal delays" in leasing on public lands that WEA claims limit oil and gas development there. Complaint ¶¶ 76-77 (Appx 31-32) (alleging that leasing delays prevent companies from drilling wells and restrict development in several other ways).

By increasing lease sales, WEA aims to encourage more oil and gas development on public lands. WEA asserted that the "reduction in the amount of federal oil and gas leaseholds and delays in offering leases . . . clearly injures companies whose business involves developing oil and gas resources on federal lands." Appx 216. WEA submitted affidavits and correspondence from its members alleging that lease sale delays have prevented their development projects from moving forward. Appx 296-300. WEA also identified numerous pending expressions of interest (EOIs) filed by its members to propose additional federal lands for leasing. Appx 228-95. WEA argued that the relief it seeks will promote more oil and gas development on federal lands. See Appx 375-76; see also id. at

218-19 (describing how acquiring more leases on public lands will increase WEA members' ability to develop oil and gas).

Such a result would directly conflict with the interests of the Conservation Groups, which (as the district court acknowledged) work to "protect[ ] public lands from the impacts of oil and gas drilling." Order at 9. As WEA predicts, a ruling from the Court that BLM must hold more oil and gas lease sales, and setting aside the Leasing Reform Policy, would make increased leasing and drilling not just "possible," see UAC, 255 F.3d at 1253-54, but very likely. That outcome would seriously impair the Conservation Groups' ability to protect public lands.[12]

The district court, however, ignored this impact. The court's ruling never recognizes the harm to the Conservation Groups from the expanded leasing and development likely to result if WEA succeeds. See Order at 10-17. For this reason alone, the district court's impairment ruling should be reversed.

B. The Relief WEA Requests Will Harm the Conservation Groups by Preventing BLM from Fully Considering Environmental Impacts and Public Input Before Leasing.

If successful, WEA's Mineral Leasing Act theory — including its challenge to the rotating lease sale schedule and BLM's decisions to postpone certain lease sales — would make it more difficult for BLM to fully consider impacts to the environment, public input and other factors, prior to leasing.

[12] See Appx 80-81, 83, 86, 92-95, 102, 105-07, 112, 123-28 (declarations).

First, WEA claims that the rotating lease sale schedule conflicts with the Act because it results in fewer than four sales per year in some states.[13] But eliminating the rotating sale schedule would necessarily limit pre-leasing environmental analysis and opportunities for public involvement that benefit the Conservation Groups. The entire purpose of adopting the rotating schedule was to allow time for more analysis and public input.

If BLM cannot take that time, it will limit the agency's ability to "conduct comprehensive parcel reviews," Appx 136, and consider public input, as contemplated by the Leasing Reform Policy. Accelerating lease sales would deny BLM staff the time needed to prepare robust NEPA analyses, and to schedule site visits where agency review teams can assess the land being considered for leasing. It also would allow less coordination and consultation with non-industry stakeholders and the public. Supra pp. 8-11. These impacts would impair the Conservation Groups' interests. See UAC, 255 F.3d at 1253–54 (granting intervention where relief sought by plaintiffs would eliminate planning provisions that benefitted intervenors); Nat. Res. Def. Council v. U.S. Nuclear Reg. Comm'n,

[13] See Complaint ¶¶ 23, 38-42 (Appx 20, 24); Order at 16; Appx 222-23 (contending that "the schedules BLM State Offices have issued for oil and gas lease sales in the future do not" comply with the Act); id. at 147 (challenging the postponement of lease sales "for lands in a particular field office (despite eligible lands being available in other places within the State)"); id. (arguing that lease sales violate Act because of "BLM's failure to include parcels from all States under a State Office's jurisdiction in which eligible lands are available"); id. at 206 (same); id. at 374-75 (contending various rotating schedules violate Act).

578 F.2d 1341, 1344-45 (10th Cir. 1978) (NRDC) (finding uranium company's interests could be impaired by environmentalist lawsuit challenging streamlined procedure for obtaining uranium mill licenses).

Second, WEA also offered several examples of circumstances where it asserts that the Act's quarterly lease sale provision prevents BLM from postponing lease sales. WEA stated that it challenges BLM's authority to postpone lease sales based on "workload priorities," where the "workload" involves performing additional environmental review and tribal consultation as part of the pre-leasing review process.[14] WEA's objection directly conflicts with the Conservation Groups' interests because such postponements typically occur in response to public comments or administrative appeals. In fact, BLM delayed the sale cited by WEA specifically to address environmental and tribal consultation issues raised by several Conservation Groups. Supra p. 24 n. 14 (BLM notice of postponement); Appx 79-80, 104 (declarations). If BLM may not postpone sales to address valid issues raised by the public, the Conservation Groups' interests would clearly be impaired.

[14] See Appx 147 (WEA citing Complaint ¶ 24); Complaint ¶ 24 (Appx 20) (objecting to postponement of January 2015 lease sale); Appx 195 (January 2015 sale postponed in order to "evaluate public comments regarding potential drainage, tribal consultation, and environmental justice"); BLM Notice (Jan. 5, 2015), https://www.nm.blm.gov/oilGas/leasing/leaseSales/2015/january2015/Notice_of%20Postponed_01212015.pdf (last viewed March 3, 2017).

In addition, WEA challenges the postponement of lease sales while BLM "revise[s] or update[s] . . . resource management plans" (RMPs) that apply to an area. Appx 147; Complaint ¶ 44 (Appx 25) (objecting to BLM decision to postpone lease sale for parcels in Billings, Montana field office until RMP was complete). An RMP is BLM's plan for managing an area, in which the agency determines where to allow mineral development and what terms and stipulations are required on such development to protect natural resources. See 43 U.S.C. § 1712(a); New Mexico, 565 F.3d at 689 n.1. BLM revises or updates an RMP when it concludes that changes are needed because current environmental circumstances are not adequately addressed in the existing plan.[15]

A ruling that BLM must continue to offer leases for sale under an outdated RMP would plainly injure the Conservation Groups. See, e.g., Ctr. for Biological Diversity, 937 F. Supp. 2d at 1144, 1157 (challenging issuance of oil and gas leases under outdated RMP). It would result in the sale of leases with stipulations that do not account for current information on the impacts of drilling on wildlife, water, and the surrounding lands. And it could lead to the sale of leases on lands that BLM now believes should be closed to leasing altogether. That outcome would directly conflict with the Conservation Groups' interests.

[15] See BLM, Land Use Planning, Frequently Asked Questions, https://www.blm.gov/wo/st/en/prog/planning/planning_overview/frequently_asked_questions.print.html (last visited March 2, 2017); Appx 134 (Leasing Reform Policy § I(A)).

The district court dismissed these impacts, stating that WEA's claims will not harm the Conservation Groups because WEA seeks merely to enforce the "when eligible lands are available" requirement of the Act. Order at 6, 10, 14. But this ruling sidesteps the central issue in the case: the meaning of "when eligible lands are available." WEA's interpretation is much more restrictive than BLM's reading of that provision. If WEA prevails, it will harm the Conservation Groups by requiring BLM to hold more lease sales, and allowing less flexibility to postpone sales to consider environmental values and public input.

Moreover, the district court appeared to assume that so long as it was enforcing the Act's requirements, a ruling in the case could not harm any legally-protectable interest held by the Conservation Groups. Order at 10 (noting with approval WEA argument that the Conservation Groups' interests "are not impaired by requiring the BLM to conduct oil and gas sales in a manner consistent with the Mineral Leasing Act"); id. at 12 (finding no impairment because WEA "seeks to hold BLM to its obligations under the Mineral Leasing Act"). This premise improperly conflated the merits of the case with the test for intervention. The Rule 24 standard considers the "practical effect" that a plaintiff's requested relief will have on an intervenor — not whether the plaintiff is legally entitled to that relief. See Nat'l Park Serv., 604 F.3d at 1198-99. Whether WEA's view of the law is right or wrong (and it is wrong), the relief WEA seeks will harm the Conservation

Groups. The groups are entitled to intervene as of right to make the case against claims that would cause serious injury to their interests.

The district court also held that a ruling limiting BLM's ability to postpone lease sales will not impair the Conservation Groups' interests because BLM would still have "discretion to decide which parcels are offered for lease [ ] to oil and gas companies," Order at 7 (emphasis original), and defer offering individual lease parcels for more NEPA analysis. Id. at 10-11, 15. But the decision on whether to hold a lease sale is intertwined with whether individual leases will be offered: many of the lease sale postponements challenged by WEA resulted because BLM decided that more analysis was needed on all the individual parcels that had been scheduled for that sale. See, e.g., Complaint ¶¶ 33 (Oct. 2016 New Mexico sale), 44 (March 2015 Montana sale) (Appx 22-25); Order at 15 (January 2015 Chaco-area sale). It would be nonsensical to allow BLM to defer all the individual leases in a sale for more analysis while still requiring the agency to hold the lease sale.

For example, when BLM postpones a lease sale to accommodate the revision of an outdated RMP, it typically defers all the parcels in the field office rather than just selecting individual parcels to offer. The point of updating the RMP (and the NEPA analysis supporting it) is so that BLM can consider and plan for the cumulative (combined) impact of all the reasonably foreseeable oil and gas development and other activities in the area. See generally New Mexico, 565 F.3d

at 689-91, 703-08 (discussing purpose of RMPs and NEPA); Or. Nat. Desert Ass'n v. BLM, 625 F.3d 1092, 1097-1100, 1109-10 (9th Cir. 2008) (same). As a result, BLM's NEPA analysis and "the public interest [may be] better served by further analysis and planning prior to making any decision whether or not to lease" lands in that area. Appx 134 (Leasing Reform Policy § I(A)). Requiring BLM to select individual parcels to offer under an outdated RMP would undermine BLM's planning effort and thus impair the Conservation Groups' interests.

The district court suggested that where BLM concludes all individual parcels should be deferred from a sale, it could be required to replace them with new parcels from other parts of the state that the agency had not planned to include in that sale. Order at 15-16. Such a mandate would still impair the Conservation Groups' interests. Requiring BLM to find replacement lease parcels to offer for sale would erect a major hurdle before the agency could defer leases in response to public input. That requirement would make it more difficult for BLM to postpone lease sales even when the agency agrees with the Conservation Groups' comments that more analysis is needed. See UAC, 255 F.3d at 1253-54 (eliminating existing protections impairs intervenors' interests, even if less protective options remain for them to advocate for those interests); Nat'l Park Serv., 604 F.3d at 1199 (same).

The district court's approach also would harm the Conservation Groups by sharply limiting public participation in the offering of the replacement leases.

Lease sale postponements often result from public comments or administrative appeals received during BLM's review process. As a result, the decision to postpone a sale usually occurs at a point in time — often only a few weeks before the auction — when it is too late to go through the public review process again in advance of the lease sale date.[16] See, e.g., Complaint ¶¶ 31, 33, 46, 57, 65 (Appx 22-28).

If BLM must offer replacement leases instead of postponing the lease sale, the Conservation Groups and other members of the public would be denied a full opportunity to weigh in on those new parcels before they go to auction. Indeed, this is the very reason the Leasing Reform Policy directed BLM to move to a rotating lease sale schedule: a rotating schedule allows each BLM field office in a state adequate time to consider public input and do all necessary analysis. See Appx 134 (Policy § III(A)) (rotating schedule serves "to balance the workload and to allow each field office to devote sufficient time and resources to implementing

[16] Under the Leasing Reform Policy's rotating sale schedule, each BLM field office typically has 12 months for its parcel review process. See, e.g., Complaint ¶ 20 (Appx 19) (describing New Mexico schedule). As part of that review process, the agency seeks public comment and "coordinate[s] and/or consult[s]" with tribal, local and state governments as well as other stakeholders about parcels being considered for leasing. Appx 136-38 (Policy §§ III(C)(6)-(7)). After considering that public input, BLM announces the leases it proposes to offer at least 90 days before the scheduled lease sale, and allows the public 30 days to submit protests. Id. (Policy §§ III(G), (H)). This schedule allows the agency "at least 60 days to review protests before the oil and gas lease sale." Id. (Policy § III(H)). But it would not permit BLM to add replacement leases and then obtain the same public input in advance of the auction date.

the parcel review" requirements). The district court erred by disregarding these harms.

C. If Successful, WEA's Challenge to the Leasing Reform Policy Will Harm the Conservation Groups.

In addition, WEA challenges BLM's Leasing Reform Policy to the extent it conflicts with WEA's view of the Act. See Complaint ¶¶ 16-17 (Appx 19). WEA's Complaint expressly requests an order "revis[ing] or rescind[ing]" the Leasing Reform Policy and any other agency guidance "that direct implementation of BLM's lease sale program in a manner contrary to law." Id. at 29.

Such an order would harm the Conservation Groups' interests by setting aside reforms that they worked for years to achieve. See Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. Dep't of the Interior, 100 F.3d 837, 841, 846 (10th Cir. 1996) (Coal. of Ctys.) (granting intervention for party with a "persistent record of advocacy for [the environmental] protection[s]" adopted by an agency in case challenging those protections); see also Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995) ("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.").

Despite the plain language of its Complaint, WEA argued in the district court that it does not seek to revise or rescind the Leasing Reform Policy. Order at 7. According to WEA, its request to revise or rescind the Policy is merely

"cosmetic" and included only "in the event the [district court] found any provisions in the policy to be inconsistent with the Mineral Leasing Act." Id. The district court accepted this argument, holding that (notwithstanding the express request for that relief in its Complaint) WEA does not seek revision or rescission of the Leasing Reform Policy. Id.

The district court's ruling is wrong: much of WEA's case attacks the very procedure — the rotating lease sale schedule — established by the Leasing Reform Policy. Supra pp. 10-11, 22-23.[17] Regardless of whether WEA describes its case as a challenge to the Leasing Reform Policy per se, it seeks to set aside the rotating sale schedule that is the linchpin of that policy. Such an outcome would impair the Conservation Groups' interests as a practical matter by eliminating a process that allows more time for public participation and environmental analysis. See supra pp. 10-11; UAC, 255 F.3d at 1253-54 & n. 5 (rejecting argument that intervenors' interests could not be impaired because "the lawsuit does not challenge [national monument] management plan per se" where practical impact of case would be to eliminate environmental protections contained in that management plan).

Moreover, the district court's holding conflicts with Tenth Circuit precedent. This Court looks to the specific relief requested in the complaint to determine

[17] WEA's argument that BLM cannot postpone a lease sale when an RMP needs updating or revision, supra p. 25, also would invalidate a Leasing Reform Policy provision that authorizes BLM to defer leasing in those circumstances. See Appx 134 (Policy § I(A)).

whether a proposed intervenor's interests may be impaired. See, e.g., Utahns for Better Transp. v. U.S. Dep't of Transp., 295 F.3d 1111, 1116-17 (10th Cir. 2002) (determining whether intervenor's interests would be impaired "requires our attention to the [plaintiff's] complaint" and relief requested); Coal. of Ctys., 100 F.3d at 844 (holding that proposed intervenor's interest would be impaired if plaintiff was granted the relief requested in complaint).[18] Allowing litigants to defeat a motion to intervene by re-characterizing their case during intervention briefing "would promote gamesmanship and create uncertainty" for both the court and parties. Nat'l Parks Conservation Ass'n v. U.S. Envtl. Prot. Agency, 759 F.3d 969, 973-74 (8th Cir. 2014) (allowing utility company to intervene in case by conservation group). Unless a court focuses on the complaint, the case "becomes a moving target, eliminating any fixed method . . . to assess whether intervention is appropriate." Id. at 974.

[18] The district court implicitly acknowledged the lack of Tenth Circuit support for its impairment holding by relying on a then-unpublished district court decision from another circuit, Envtl. Integrity Project v. McCarthy, No. 16-842 (JDB), 2016 WL 6833931 (D.D.C. Nov. 18, 2016). Order at 12-14. McCarthy is inapposite because it did not address the Rule 24 requirements at all: instead, it held that a proposed intervenor lacked Article III standing. 2016 WL 6833931, at *3-7. Standing is not required for intervention in the Tenth Circuit, San Juan Cty., 503 F.3d at 1172, and the "Article III standing requirements are more stringent than those for intervention under Rule 24(a)." UAC, 255 F.3d at 1252 n.4. McCarthy also is inapposite because it involved a statutory "deadline" suit where plaintiffs sought to require EPA to make a decision on whether to issue updated regulations. 2016 WL 6833931, at *4. In contrast, WEA seeks to require BLM to offer lease parcels every three months — not just to decide whether to offer them (which BLM is already doing). McCarthy thus has no application to this case.

Tellingly, WEA never sought to amend its Complaint to eliminate the challenge to the Leasing Reform Policy or its rotating lease sale schedule. As one court held, if WEA was "unhappy with [its] complaint, then [it] could have amended it to more carefully tailor its scope." Id. WEA is the master of its own complaint, and that complaint's request for relief demonstrates that harm to the Conservation Groups is possible.

II. THE DISTRICT COURT ERRED IN RULING THAT THE CONSERVATION GROUPS' INTERESTS ARE ADEQUATELY REPRESENTED BY BLM.

The lease sale decisions and Leasing Reform Policy challenged by WEA are textbook examples of BLM balancing mineral development and public lands protection. In cases like this one, the Supreme Court and this Court have repeatedly held that the government's duty to advance a variety of public interests prevents it from representing the narrower interests of a private intervenor.

The record also shows that WEA believes the new presidential administration may take positions much more favorable to WEA in this case. The district court erred by disregarding this evidence in its intervention ruling, and failing to follow controlling Tenth Circuit precedent. See Appx 63-65, 196-200, 307-09, 401-11 (raising issues below).

A. The Conservation Groups Are Required to Meet Only the "Minimal" Burden of Showing a "Possibility" that BLM May Not Represent Their Interests.

The Supreme Court has held that intervenors satisfy Rule 24 where representation of their interests by existing parties "may be" inadequate and that "the burden of making [this] showing should be treated as minimal." Trbovich v. United Mine Workers of Am., 404 U.S. 528, 539 n.10 (1972); Nat'l Park Serv., 604 F.3d at 1200. The proposed intervenor need only show "the possibility that representation may be inadequate." Nat'l Park Serv., 604 F.3d at 1200.

This "minimal" requirement is met where a private party seeks to intervene in litigation against the government and the "agency may be placed in the position of defending both public and private interests." Id.; see UAC, 255 F.3d at 1255-56. It is generally "impossible for a government agency to protect both the public's interest and the would-be intervenor's private interests." N.M. Off-Highway Vehicle All. v. U.S. Forest Serv., 540 F. App'x 877, 880 (10th Cir. 2013) (NMOHVA) (unpublished); see Coal. of Ctys., 100 F.3d at 845 (quoting Nat'l Farm Lines v. Interstate Commerce Comm'n, 564 F.2d 381, 384 (10th Cir. 1977)) ("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." (alteration in original)); Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n, 788

F.3d 312, 321 (D.C. Cir. 2015) (Crossroads GPS) (noting that "we look skeptically on government entities serving as adequate advocates for private parties").

Even where both the government and the intervenor take the same position at the start of litigation, "the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest" of a private intervenor. UAC, 255 F.3d at 1255-56. This is because "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." USFS, 573 F.3d at 996 (quoting UAC, 255 F.3d at 1256). "The possibility that the interests of the applicant and the parties may diverge 'need not be great' in order to satisfy th[e] minimal burden" required by Rule 24. UAC, 255 F.3d at 1254.

The Tenth Circuit has repeatedly recognized this point when allowing both private industry and environmental groups to intervene in cases involving the federal government. See, e.g., Utahns for Better Transp., 295 F.3d at 1117 (holding that Department of Transportation did not adequately represent industry group in challenge to highway project); USFS, 573 F.3d at 996-97 (ruling that Forest Service did not adequately represent mining company in environmentalist lawsuit); UAC, 255 F.3d at 1255 (allowing both tourism businesses and conservation groups to intervene in challenge to national monument designation); Coal. of Ctys., 100 F.3d at 845-46 (allowing conservationist to intervene in case

against Fish & Wildlife Service); NRDC, 578 F.2d at 1345-46 (holding that uranium company not adequately represented by Nuclear Regulatory Commission). Tellingly, WEA does not expect the federal government to adequately represent WEA's own interests in other litigation against the Interior Department. See, e.g., WildEarth Guardians v. Jewel[l], No. 2:14-cv-00833 JWS, 2014 WL 7411857, at *3 (D. Ariz. Dec. 31, 2014) (unpublished) (allowing WEA to intervene in environmentalist lawsuit because WEA's interests are "more narrow and parochial than the interests of the public at large"). The Conservation Groups are in the same position — just on the opposite side from WEA and other industry intervenors.

B. BLM Does Not Adequately Represent the Conservation Groups' Interests.

This case presents precisely the circumstance where a government agency's interests do not wholly align with those of the private intervenor. BLM's multiple-use mandate requires it to balance a wide variety of often conflicting 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, 542 U.S. at 58. In striking that balance, BLM often compromises the Conservation Groups' environmental protection interests in favor of oil and gas development and other land uses. See, e.g., supra pp. 6-8.

The BLM decisions challenged by WEA illustrate this point. WEA objects to the agency's postponement of a number of lease sales. Those decisions required BLM to exercise management judgment about how to balance oil and gas leasing with environmental protection and consideration of other interests. But BLM often strikes that balance in favor of proceeding with the lease sales, and against the interests of the Conservation Groups. Supra pp. 6-7. Even WEA recognizes this point: it conceded that the Conservation Groups "may object to the United States' past (and future) oil and gas leasing decisions generally." Appx 150. As noted above, the Conservation Groups frequently litigate against BLM over the agency's leasing decisions. Supra p. 7.

Moreover, BLM postponed many of the lease sales in WEA's Complaint only after the Conservation Groups filed administrative appeals. See Complaint ¶ 24 (Appx 20); Appx 80. Those postponements often were just temporary: after further review, BLM later went ahead with offering a number of leases over the Conservation Groups' protests. See, e.g., Complaint ¶¶ 31, 52, 57-58 (Appx 22, 26-27); Appx 118-19 (May 2016 Wyoming sale, September 2016 New Mexico sale, and February 2016 Utah sale). Conservation Groups, in fact, are currently litigating to challenge some of the same lease sales addressed in WEA's Complaint. See Complaint ¶¶ 31, 52, 55-58, 61, 64, 66 (Appx 22, 26-29); Appx 118-19.

Similarly, the Leasing Reform Policy (and its rotating lease sale schedule) targeted by WEA seek to balance environmental protection with oil and gas development. BLM issued the Policy only after years of litigation by the Conservation Groups. Supra pp. 7-8. While a significant improvement over past practices, the Policy still compromises the Conservation Groups' goals. Order at 4 (recognizing Policy as a "compromise" by BLM); Appx 401:21-402:11. Its rotating sale schedule provides more time for analysis and public input, but also aims to facilitate leasing. BLM explained that the Policy's purposes include to: "create more certainty and predictability" when selling leases and to "ensur[e] orderly, effective, timely, and environmentally responsible leasing of oil and gas resources on Federal lands." Appx 134.

Given this background, the Conservation Groups "should not need to rely on a doubtful friend to represent [their] interests, when [they] can represent" themselves. Crossroads GPS, 788 F.3d at 321. BLM "has multiple objectives and could well decide to embrace some of [WEA's oil and gas development] goals" as this case proceeds. USFS, 573 F.3d at 997. For example, instead of vigorously defending its postponement of lease sales, BLM could agree to offer more of the delayed lease parcels about which WEA objects. See supra p. 37 (noting that BLM later offered some of the postponed leases). And the agency may choose to revise or rescind its Leasing Reform Policy as WEA demands, rather than defending the

rotating lease sale schedule. See, e.g., Mausolf v. Babbitt, 85 F.3d 1295, 1302-04 (8th Cir. 1996) (noting risk of settlement where snowmobile group challenged agency protections that resulted from earlier litigation by conservationists); South Dakota v. Ubbelohde, 330 F.3d 1014, 1026 (8th Cir. 2003) (holding that agency charged with "balanc[ing] the interests of the upstream and downstream users" when managing Missouri River reservoir could not adequately represent downstream water users in lawsuit by upstream users).

There also is "no guarantee that the [agency] will make all of the environmental groups' arguments" when briefing this case. NMOHVA, 540 F. App'x at 881; see, e.g., WEA, 2011 WL 3737520, at *5 & n.10 (relying on Mineral Leasing Act legislative history provided by intervening conservation groups in rejecting WEA's legal claim). BLM often takes positions on legal issues that differ sharply from the Conservation Groups' stance. See, e.g., New Mexico, 565 F.3d at 710 (rejecting BLM argument that FLPMA's multiple-use mandate did not allow it to close ecologically important area to oil and gas leasing). This is a particular concern in light of the ongoing disputes between BLM and the Conservation Groups over oil and gas leasing. See supra pp. 7, 37. And BLM adopted the 2010 Leasing Reform Policy only in response to litigation by the Conservation Groups, which makes BLM's "ability to adequately represent" the groups "all the more suspect." Coal. of Ctys., 100 F.3d at 845-46 (holding Interior

Department did not adequately represent conservationist where history of litigation existed); Citizens for Balanced Use v. Mont. Wilderness Ass'n, 647 F.3d 893, 899-900 (9th Cir. 2011) (similar).

In addition, "there is no assurance of identical and aligned interests if the [BLM decisions are] not upheld" by the district court. NMOHVA, 540 F. App'x at 881-82. BLM may choose to acquiesce in an adverse ruling that the Conservation Groups want to appeal. See, e.g., Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1107 (9th Cir. 2002) (noting decision by government not to appeal injunction against Forest Service roadless rule), abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011). In addition, if the district court rules in WEA's favor it will need to fashion a remedy, such as requiring changes to the Leasing Reform Policy and BLM's lease sale schedules, taking into consideration the hardships to different parties. See NMOHVA, 540 F. App'x at 881-82. There is no reason to assume that BLM's interests will align with those of the Conservation Groups when it comes to those remedies. Id.

Moreover, under the new presidential administration a BLM change in position is not just a "possibility," Nat'l Park Serv., 604 F.3d at 1200, but something eagerly anticipated by WEA. The Leasing Reform Policy, and the lease sale postponement decisions challenged in this case, were made by the prior presidential administration. WEA recognizes that the new administration has

promised to reverse many of those policies and substantially increase oil and gas production on public lands.

WEA's website predicts that "Trump's victory will hopefully lead to tangible benefits for our industry" by ending efforts "to stall development." Appx 302-03. WEA even points out that the new administration may make policy shifts by "withdraw[ing] or settl[ing]" lawsuits brought by WEA, and promises that WEA "will push the administration to" do so. Id. WEA's predictions demonstrate the "possibility" that BLM will not adequately represent the Conservation Groups' interests. Nat'l Park Serv., 604 F.3d at 1200; see also Kootenai Tribe, 313 F.3d at 1107 (noting decision by George W. Bush administration not to defend challenge to Forest Service roadless rule promulgated by Clinton administration).

BLM also makes no claim that it will represent the Conservation Groups' interests. During a December 2016 oral argument on the intervention motion, counsel for BLM was asked specifically about the impact of the incoming administration. She declined to provide any assurances that BLM would represent the Conservation Groups' interests, stating only that "I'm not sure if there would be any changes further down the road that could affect the merits." Appx 434:1-16; see also id. at 46 (taking no position on the Conservation Groups' motion to intervene). BLM's "silence on any intent to defend the [Conservation Groups'] interests is deafening," and further demonstrates that the groups meet the

requirements for intervention. Utahns for Better Transp., 295 F.3d at 1117 (internal quotation omitted); NMOHVA, 540 F. App'x at 882 (quoting UAC, 255 F.3d at 1256).

Even the district court subsequently acknowledged that the new presidential administration may shift position. After denying intervention, the court stayed further proceedings in the case pending resolution of this appeal. The district court did so in part because the new administration may take a position "that would presumably be more favorable to companies dealing in the energy business." Appx 385-86. The court reasoned that "the impact of a new Presidential administration works neatly in the context of a stay, since a stay would allow a bit of time for any changes in administrative policy which might occur to settle in and take effect" while the intervention appeal is pending. Id.

If a shift by the new administration is likely enough to support a court order staying the case, it also demonstrates the possibility that BLM may not adequately represent the Conservation Groups' interests. And a "possibility" is all the groups are required to show under Rule 24. Nat'l Park Serv, 604 F.3d at 1200; see also Trbovich, 404 U.S. at 539 n.10 (burden is "minimal").

C. The District Court Ruling Conflicts with Tenth Circuit Precedent.

In denying intervention, however, the district court ruled without explanation that BLM "would certainly be expected to share [the Conservation

Groups'] position" of defending the Leasing Reform Policy and BLM's authority over the leasing process. Order at 18. This assumption directly conflicts with its order staying the case in light of a potential shift in position by the new administration. Supra p. 42. Moreover, the court did not attempt to reconcile its statement with the long history of conflict between BLM and the Conservation Groups, or with the numerous examples where BLM decisions have compromised the Conservation Groups' interests.

The court's adequacy ruling also ignored almost all of the controlling Tenth Circuit law (discussed above) recognizing inadequacy of representation in cases like this one. Instead, the district court focused on distinguishing NMOHVA, in which this Court reversed a denial of intervention by the same judge assigned to this case. 540 F. App'x at 882. The district court characterized NMOHVA's adequacy analysis as turning on the "possibility of a 'shift' during litigation in the agency's policy." Order at 18-19. The district court then dismissed NMOHVA because "[c]oncerns about shifts in litigation . . . simply do not exist in this case." Id. According to the court, WEA is not challenging the Leasing Reform Policy or "seeking to diminish BLM's ultimate discretion in lease sales . . . . In other words, BLM has no reason to 'shift' its policy during this litigation because this lawsuit does not seek any change in that policy." Id. This view of the case is wrong. As discussed above, it ignores the face of the Complaint and WEA's own arguments

showing that WEA brings this case to force a major change in BLM's current policy and practice. Supra pp. 12-14, 21-33.

Moreover, the district court's narrow reading of NMOHVA disregarded much of this Court's reasoning in that case. NMOHVA did not turn only on the possibility of an agency policy shift: instead, it found inadequate representation based on several considerations, which are discussed above and well-supported by Tenth Circuit precedent. Supra pp. 34, 39-42 (citing NMOHVA's rulings on several other adequacy issues). The district court's ruling cannot be reconciled with NMOHVA and many other controlling Tenth Circuit decisions. It should be reversed.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PERMISSIVE INTERVENTION.

In the alternative, the district court should have granted permissive intervention by the Conservation Groups. It denied permissive intervention on grounds that were arbitrary and capricious, and thus should be reversed as an abuse of discretion. See Appx 65, 200 (raising issue below).

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 also consider whether the intervenor will "significantly contribute to the underlying factual and

legal issues." See, e.g., Utah v. Kennecott Corp., 801 F. Supp. 553, 572 (D. Utah 1992) (granting intervention to objector that could be adversely affected by proposed Superfund consent decree).

The district court's permissive intervention ruling is reviewed for abuse of discretion. Kane Cty., 597 F.3d at 1133. A district court abuses its discretion where its ruling makes an "arbitrary, capricious, whimsical, or manifestly unreasonable judgement," id. 1136; Nalder v. W. Park Hosp., 254 F.3d 1168, 1174 (10th Cir. 2001), or conflicts with the law. United States v. Lopez-Avila, 665 F.3d 1216, 1219 (10th Cir. 2011) ("[A]n error of law is per se an abuse of discretion.").

Here, the district court did not question that the Conservation Groups satisfy two of Rule 24(b)'s requirements. They raise the same questions of law and fact that lie at the heart of this litigation: the legality under the Act of BLM's postponement of lease sales, and the rotating lease sale schedule required by the Leasing Reform Policy. See Order at 20-21. In addition, the district court held that the Conservation Groups' motion to intervene was timely. Id. at 9. The district court nevertheless denied intervention on two grounds. First, the court reasoned that the Conservation Groups will be adequately represented by BLM, and thus "their participation would be cumulative and . . . not helpful to the Court." Id. at 21. Second, the court held that the Conservation Groups will "cause undue delay" by "overcomplicat[ing] matters" and "inject[ing] their own agenda" into

this case. Id. These grounds were arbitrary and capricious and an abuse of discretion.

First, the district court erred in ruling that the Conservation Groups are adequately represented by BLM. See supra pp. 36-44. In particular, the court's ruling conflicts with well-established Tenth Circuit precedent. See Lopez-Avila, 665 F.3d at 1219 (holding an error of law is abuse of discretion per se) .

Second, the court's ruling that the Conservation Groups will delay the case by "obfuscat[ing]" the issues is arbitrary and capricious because it is unsupported by the record. According to the district court, the Conservation Groups "mischaracteriz[ed]" WEA's claims (by pointing out that WEA challenges the Leasing Reform Policy, for example). See Order at 21. But the Conservation Groups have done nothing more than quote the allegations in WEA's Complaint. Supra pp. 30-33. The district court's contrary ruling conflicts with the record in this case.

Moreover, the district court's objection that the Conservation Groups may raise additional issues in defending this case contradicts its ruling that BLM will adequately represent their interests. If the Conservation Groups need to present arguments or issues not raised by BLM, it demonstrates that the agency does not fully represent their interests. NMOHVA, 540 F. App'x at 881. That the Conservation Groups likely will raise different or additional defenses is a reason to

grant intervention — not to deny it. See Kootenai Tribe, 313 F.3d at 1111 (ruling permissive intervention appropriate because it would assist the court in "the resolution of [the] case, which impacted large and varied interests"); WEA, 2011 WL 3737520, at *5 & n.10 (relying on legislative history provided by intervening conservation groups). The contradiction in the district court's reasoning made its denial of intervention arbitrary and thus an abuse of discretion. See Cure-Land LLC v. U.S. Dep't of Agric., 833 F.3d 1223, 1232 (10th Cir. 2016) (holding that an unexplained contradiction in agency findings is arbitrary and capricious).

Notably, neither the district court nor WEA pointed to any way the Conservation Groups will actually cause undue delay or unfair prejudice to the other parties. In fact, the opposite is true. Nine different Conservation Groups, represented by several different attorneys, seek to defend their interests in this case. Appx 51-55, 66. But for the sake of efficiency, they have coordinated to seek intervention as a single group. Appx 409:23-410:13. And the Conservation Groups are amenable to any reasonable schedule for this case if they are granted intervention. See Kootenai Tribe, 313 F.3d at 1111 n.10 (finding "no issue whatsoever of undue delay" on similar facts). Finally, any concerns for efficiency are properly addressed with conditions on participation — not by denying intervention altogether. See, e.g., WildEarth Guardians v. Jewell, No. 1:15-cv-02026-WJM, 2016 WL 660123, at *3 (D. Colo. Feb. 18, 2016) (unpublished)

(discussing conditions on participation while granting intervention to coal company and State of Wyoming to oppose lawsuit by conservation group).

As such, if the Court does not grant intervention as of right, permissive intervention is warranted. The district court should be reversed.

CONCLUSION

This Court should reverse the ruling denying intervention and direct the district court to grant the Conservation Groups' motion to intervene.

STATEMENT REGARDING ORAL ARGUMENT

The Conservation Groups believe that because of the importance of the issues presented in this case, oral argument would assist the Court in resolving this appeal.

Respectfully submitted March 6, 2017

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Date: March 6, 2017

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I hereby certify that with respect to the foregoing:

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2017 I electronically filed the foregoing **OPENING BRIEF OF APPELLANTS-APPLICANTS FOR INTERVENTION** using the court's CM/ECF system which will send notification of such filing to the following:

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s/ Michael S. Freeman

ADDENDUM

ADDENDUM INDEX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

WESTERN ENERGY ALLIANCE,

Plaintiff,

v. No. CIV 16-0912 WJ/KBM

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.

MEMORANDUM OPINION AND ORDER DENYING MOTION TO INTERVENE

THIS MATTER comes before the Court upon the Motion to Intervene, filed October 19, 2016 **(Doc. 11)** by the Applicants for Intervention ("Applicants"). The Court, after considering the written and oral arguments of the parties and the applicable law, finds that the motion to intervene filed by Applicants is not well-taken and, therefore, is denied because the Applicants

have not shown either that their interests would be impeded by this litigation or that their interests cannot be adequately represented by existing parties.[1]

BACKGROUND

In this case, Plaintiff Western Energy Alliance ("Plaintiff" or "Western Energy") asserts claims in connection with a new Bureau of Land Management ("BLM") policy reforming oil and gas leasing on public lands, referred to in the briefs as "Instruction Memorandum 2010-117" or "IM 2010-117," or "Leasing Reform Policy."[2] The complaint asserts three counts: a Freedom of Information Act ("FOIA") Violation, 5 U.S.C. §552 (Count 1); a request for a declaration that BLM's leasing policies and practices violate the Mineral Leasing Act, 30 U.S.C. §226(b)(1)(A) (Count 2); and an assertion that BLM's actions in scheduling and administering oil and gas lease sales violates the Mineral Leasing Act (Count 3). The Applicants represent environmental groups seeking to protect public lands from the impacts of oil and gas development, *see* Doc. 11 at 8-12, and seek intervention as of right under Fed.R.Civ.P.24(a)(2) or alternatively, permissive intervention under Fed.R.Civ.P. 24(b).[3] Applicants claim that Western Energy seeks to revise or rescind the Leasing Reform Policy in order to minimize BLM's well-established discretion over oil and gas leasing and that Western Energy seeks to replace the Leasing Reform Policy with a legal mandate requiring BLM to continually offer new leases without adequate environmental reviews or full consideration of other resources.

[1] The Court notes for the record that the U.S. Government Defendants take no position on the motion to intervene. Doc. 11 at 3.

[2] A copy of the Leasing Reform Policy is attached as Exhibit 3. The Court's general description of the policy does not include specific citations to the document, since those references are contained in the briefs.

[3] The request to intervene concerns only Counts 2 and 3. BLM has agreed to provide the Applicants with copies of documents released to Western Energy in response to Western Energy's FOIA request, which relates to Count 1. See Doc. 11 at 3. Pending motions to dismiss challenge subject matter jurisdiction, but only as to Counts 2 and 3. *See* Docs. 19 and 20.

The Mineral Leasing Act gives the BLM broad discretion to decide whether to lease lands for oil and gas development. 30 U.S.C. § 226(a). Before deciding to offer a lease for sale, BLM must conduct an environmental review under the National Environmental Policy Act ("NEPA"). *See N.M. ex rel. Richardson v. BLM,* 565 F.3d 683, 703-04 (10th Cir. 2009). 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). 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 Richardson,* 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 prepare a full EIS. *Richardson,* 565 F.3d at 703-04. If an EIS is required, it must describe the environmental impact of the proposed action and evaluate alternatives. *Id.* At all stages of the EIS process, the public must be informed and its comments considered. *Id.* at 704. Under Tenth Circuit precedent, the BLM must complete its environmental analysis of reasonably foreseeable development *before* issuing oil and gas leases. *Richardson*, 565 F.3d at 716-18; *Pennaco Energy v. U.S. Dep't of Interior,* 377 F.3d 1147, 1160 (10th Cir. 2004).

The Applicants claim that for years, BLM allowed little public input or opportunity to comment while the agency considered leasing particular land parcels, in many situations relegating public input to filing administrative appeals after BLM already made its leasing decisions. *See* Ex. 1 (Hanceford Decl), ¶¶14-15. In June 2009, the Department of the Interior conducted a review of BLM's leasing procedures, which eventually led to BLM's issuance of IM 2010-117 on May 17, 2010. This Leasing Reform Policy is intended to improve the agency's environmental reviews and to provide greater opportunity for meaningful public involvement,

including interdisciplinary reviews by a team with expertise in numerous types of natural resources (wildlife, air quality, water, historic and cultural resources); specialists from other agencies where appropriate; and the requirement of a site visit to evaluate the lands under consideration for leasing. The Leasing Reform Policy calls for a consideration of a variety of environmental issues, and increases the transparency of the leasing process in that it directs BLM to consult with groups that may be affected by the leasing decisions, such as other federal agencies, tribal governments and state and local governments. Members of the public "with an interest in local BLM oil and gas leasing" are to be "kept informed" and invited to comment during the NEPA process. Ex. 3, §III(C)(7), (E).

The new Leasing Reform Policy includes a "rotating" sales schedule to allow each field office within a state sufficient time to implement the new parcel review policy. It also provides for a new planning tool called the Master Leasing Plan Process which allows for a better plan in areas where oil and gas companies have expressed interest in development that may conflict with other resources. Ex. 3, §II. A Master Leasing Plan Process identifies resource conflicts and develops approaches that would best address or mitigate these conflicts (such as prohibiting surface occupancy or closing an area to leasing). *Id.*

At oral argument, counsel for Applicants stated that environmental groups had worked to have some input in this new BLM leasing policy, although the end result was a "compromise" between the agency and the various environmental groups.

DISCUSSION

Applicants seek intervention under both Rule 24(a) and 24(b). Western Energy claims that this lawsuit does not threaten, or even implicate, any of the alleged interests of the Applicants.

I. Parties' Positions

Some background on where the parties stand is relevant to whether Applicants should be part of this lawsuit. Western Energy claims that its objective in this lawsuit is to require the BLM to adhere to its obligations under the Mineral Leasing Act to hold lease sales "for each State **where eligible lands are available at least quarterly** and more frequently if the Secretary of the Interior determines such sales are necessary." 30 U.S.C. §226(b) (emphasis added). The complaint alleges that the Secretary of the Interior has failed to meet this obligation because there have been occasions where "eligible lands are available" and the BLM has still declined to conduct quarterly lease sales as required under the Act. Plaintiff notes that IM No. 2010-117, or the Leasing Reform Policy itself, incorporates the requirement that "State Offices **will continue to hold lease sales four times per year**, as required by the Mineral Leasing Act, section 2269b)(1) and 43 CFR 3120.1-2(a), when eligible lands are determined by the state office to be available for leasing." Ex. 3, III(A) (emphasis added). However, Plaintiff asserts that the Leasing Reform Policy offers no guidance for the administration of lease sales that would carry out these terms:

> 121. BLM State Offices frequently schedule, postpone, cancel, delay, or organize lease sales in a manner that results in more than three months passing without any parcel in an individual State being offered for lease. BLM schedules and conducts lease sales without consideration of whether parcels located within each State are available for leasing.
>
> 122. BLM has no policy or guidance in effect prescribing the administration of lease sales in a manner compliant with the Mineral Leasing Act.
>
> 123. The manner in which BLM is presently scheduling and administering oil and gas lease sales violates the express terms of the Mineral Leasing Act.

Compl., ¶¶ 121, 122 & 123.

The Applicants contend that the BLM's Leasing Reform Policy has increased transparency and public input on the agency's leasing decisions, and that Western Energy's

challenge to the policy "threatens to transform" BLM's 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." Doc. 11 at 2. They claim that Western Energy seeks a ruling that BLM *must* offer oil and gas leases for sale every three months "wherever a company expresses interest in leasing public lands." Doc. 11 at 2. The Complaint, however, does not state anywhere that Plaintiff seeks a ruling that oil and gas leases must be sold whenever a company expresses interest. Instead, the Complaint asserts that the BLM must make land "available for lease *if* a parcel is available for oil and gas leasing *and* an expression of interest has been submitted for that parcel." Compl., ¶120 (emphasis added). The Applicants also claim that Plaintiff wishes to "revise or rescind" the Leasing Reform Policy, and are concerned that if Plaintiff prevails, all the work done by the various environmental groups in helping to develop the new reform policy will be undone.

At the hearing on the motion to intervene, Plaintiff clarified on the record what this case is and what it is *not* about, and the Court agrees with Plaintiff that Applicants' description of this case is very different from the case actually before the Court. Western Energy seeks to require BLM to hold lease sales where eligible lands are available; that is, to comply with the provision of the Mineral Leasing Act and BLM's own Leasing Reform Policy which is consistent with the statutory mandate. Under both the Mineral Leasing Act and BLM's Leasing Reform Policy, quarterly lease sales are mandated *unless* no eligible parcels of land are available. Plaintiff alleges that BLM is delaying or cancelling sales for reasons *other* than non-eligibility of available lands, which Plaintiff asserts is illegal under the statute and contrary to BLM's own Leasing Reform Policy.

After hearing from the parties and reviewing the Complaint and other pleadings filed in this case, the Court is convinced that this case is not an attempt to set aside or modify the Leasing Reform Policy, nor is it a challenge to the Leasing Reform Policy. Plaintiff simply seeks to hold BLM to those provisions which track BLM's obligations under the Mineral Leasing Act. Additionally, this case does not challenge BLM's discretion to determine when and how land parcels became "eligible" or BLM's right to withhold parcels, or BLM's discretion to determine when further environmental analysis is necessary for any parcel of land.[4] Thus, while quarterly lease sales of "eligible" lands are mandatory under the Mineral Leasing Act, BLM still has complete discretion to decide *which* parcels are offered for lease sale to oil companies. The Applicants note that the Complaint seeks relief to "revise or rescind" BLM's "guidance and instructional memoranda . . . that direct implementation of BLM's lease sale program in a manner contrary to law." Compl., at 29 (Prayer for Relief). However, at the hearing, Plaintiff's counsel explained that Western Energy was not directly seeking any revisions of the Leasing Reform Policy and that this request for relief was "cosmetic" in nature and was not part of any stated claim. Such language was included as requested relief in the complaint in the event the Court found any provisions in the policy to be inconsistent with the Mineral Leasing Act. Counsel recognized that while no policy has the force of a statute, Plaintiff's position was that the Mineral Leasing Policy should nevertheless be consistent with the Mineral Leasing Act and where it is not, the Court may find it appropriate to "revise or rescind" BLM instructional memoranda which is contrary to that law. *See* Doc. 17 at 6, n.2. Counsel further explained that Plaintiff did not take the position that the Leasing Reform Policy was inconsistent with the Mineral Leasing Act, because in fact, the Leasing Reform Policy *is* consistent with the Act's

[4] At the hearing, counsel for Applicants criticized Plaintiff's interpretation of "eligible" as being very broad, but this observation is pointless because BLM has complete authority to determine leasing eligibility.

quarterly sales mandate for eligible land parcels—which is the prime issue in this case. The Court accepts the representations of Plaintiff's counsel and will hold Plaintiff to those representations.

Thus, the central issue in this case turns out to be fairly discrete. Western Energy seeks a declaration that BLM's practice of canceling or deferring lease sales less frequently than quarterly, for reasons other than lack of eligible parcels, is illegal under the Mineral Leasing Act. Focusing on the central issue in this case, the question then before the Court on this motion is whether the Applicants should be allowed to intervene.

II. Intervention 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.); *Okla. ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1231 (10th Cir. 2010). 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). The Rule 24 factors "are not rigid, technical requirements" and the "determination of a party's right to invervene is, at least in part, a process of equitable balancing. *San Juan County, Utah v. U.S.*, 503 F.3d 1163, 1195 (10th Cir. 2007).

A. Timeliness

Plaintiff does not contest the timeliness of the Applicant's motion, *see* Doc. 17 at 5, and so the Court assumes that this factor has been met, especially considering that this litigation is still in its early stages.

B. Interest in Subject Matter

Applicants claim an interest in the subject matter of this litigation. They have submitted numerous declarations to support their claim to an interest in the leasing reforms they have advocated for, and an interest in protecting public lands from the impacts of oil and gas drilling. Western Energy contends that this lawsuit does not implicate either of these interests because the lawsuit does not seek to change any existing law, regulation, or practice governing the administration of oil and gas leasing but on the contrary, seeks to have existing law enforced in the form of the BLM's current Leasing Reform Policy.

The Court finds that the Applicants do have a legally protectable interest in this litigation. Just because Western Energy is not seeking a change in existing law does not mean that the Applicants have no interest in the subject matter of the lawsuit. *See, e.g., 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); *Coalition of Ariz./N.M Counties for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 841 (10th Cir. 1996) (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").

C. Impairment of Interests

Applicants have the minimal burden of demonstrating "that impairment of [their] substantial legal interest is possible if intervention is denied." *WildEarth Guardians,* 604 F.3d at 1199. Plaintiff contends that Applicant's interests are not impaired by requiring the BLM to conduct oil and gas lease sales in a manner consistent with the Mineral Leasing Act, and they certainly have no legally protectable interest in having BLM cancel lease sales when eligible lands are available, because that position would be contrary to federal statute.

(1) Plaintiff's Actual Claims

The Court agrees with Plaintiff that Applicants appear to be litigating an entirely different lawsuit from the one that is before the Court, based on their description of Plaintiff's claims. Applicants claim that their interests may be impaired as a result of this litigation because Plaintiff "asks this Court to strike down BLM's Leasing Reform Policy" and because Plaintiff's request for declaratory relief "would fundamentally change the federal oil and gas leasing system in a way that severely harms the Conservation Groups." Doc. 11 at 17-18. Plaintiff is seeking neither remedy. If Plaintiff prevails in this case, it will obtain a declaration stating that BLM cannot legally cancel or defer lease sales on a less than quarterly basis for reasons *other* than lack of eligible parcels. Plaintiff is *not* seeking to set aside or modify any part of the Leasing Reform Policy, which the Court acknowledges that Applicants have worked hard to negotiate with BLM, but Plaintiff wants BLM to be required to follow the provisions in the policy which mandate that BLM is to offer *eligible* lands on a quarterly basis. The Applicants claim that Plaintiff's interpretation of "eligible" is very broad, but this is yet another unfounded misrepresentation of Plaintiff's claims because Plaintiff is not challenging any of the criteria BLM uses for determining the "eligibility" of land parcels. Moreover, Plaintiff is *not* challenging BLM's discretionary authority to determine when, what, and how environmental concerns are addressed

on any federal land parcels, nor is Plaintiff challenging BLM's withholding of certain land parcels from sale in order to conduct revisions to Resource Management Plans ("RMP's").

The Court's clarification of the issues in this case turns out to be critical to the "impairment of interests" factors. Applicants cannot claim that their interests are impaired if Plaintiff is not seeking an outcome that could potentially be adverse to their interests. In *N.M.Off-Highway Vehicle Alliance v. United States Forest Service,* 540 F.App'x 877, 882 (10th Cir. 2013), the Tenth Circuit reversed the district court's (the undersigned) denial of a motion to intervene by various environmental groups. In that case, plaintiff ("NMOHVA") challenged the United States Forest Service's final agency action implementing a travel management plan ("the Plan") designating roads and trails in the Santa Fe National Forest allowing motorized vehicles. The Plan significantly reduced the number of roads and trails previously available for motorized vehicle use. NMOHVA sought reimplementation of the prior use policy. In reversing the district court, the Tenth Circuit found in part that the proposed intervenors met their "minimal burden" of the impairment of interest factor. Citing *San Juan County, Utah v. U.S.*, 503 F.3d 1163, 1203 (10th Cir. 2007), the court stated that "intervention may be based on an interest that is contingent upon the outcome of the litigation," explaining that the environmental groups would be impaired "if the outcome of the district court litigation is other than upholding" the Forest Service's Plan. 540 Fed.Appx. at 880. In the *N.M. Off-Highway* case, plaintiff was not interested in keeping the Plan intact, but sought reimplementation of a prior policy that allowed motorized vehicles on more forest roads. The outcome of litigation could have resulted in major changes to the Plan and therefore likely have impaired the interests of the environmental groups that sought to intervene.

This case is different. Western Energy is not interested in changing BLM's Leasing Reform Policy and therefore the "outcome of litigation" will *not* be something other than upholding the policy. The interest "contingent on the outcome of the litigation" is an interest shared by both Western Energy as well as the Applicants. Western Energy seeks to hold BLM to its obligations under the Mineral Leasing Act as it is presented in the provisions of the Leasing Reform Policy, and Applicants likewise want to ensure that the policy is not changed in any way.

(2) Supplemental Authority

At oral argument, Plaintiff referenced a case with analogous facts, where the court's denial of a request to intervene also rested on an accurate understanding of the plaintiff's claims. Because this case was presented for the first time at oral argument, Plaintiff and Applicants were allowed to supplement the record based on this case. *See* Docs. 34 & 35. The Court has reviewed these supplemental pleadings and finds the case to be helpful even though it is not binding precedent. In *Environmental Integrity Project v. McCarthy*, the roles were somewhat reversed. The plaintiffs in *McCarthy* consisted of a coalition of environmental advocacy groups which filed the lawsuit in an attempt to "spur some administrative action" by the Environmental Protection Agency ("EPA") to review or revise federal regulations relating to waste products from oil and gas drilling. The applicants for intervention as of right were several industry trade associations. 2016 WL 6833931 (D.D.C., 2016). Applicants in the instant case argue that the *McCarthy* case has no bearing on the intervention question because in the D.C. Circuit, an applicant for intervention must show Article III standing, which is not required in the Tenth Circuit. *Cmp. San Juan Cty., Utah v. U.S.*, 503 F.3d 1163, 1167 (10th Cir. 2007) (applicants for invention need not establish standing so long as there is standing for the original party on the same side of the litigation as the intervenor). Nevertheless, the Court finds that the well-

reasoned opinion by U.S. District Judge John D. Bates in *McCarthy* is informative because the "concrete harm" analysis for standing is sufficiently close to "impairment of interests" analysis under Rule 24. *McCarthy* is also informative because of the court's treatment of the applicants' hyperbolic description of plaintiffs' claims to be helpful in considering whether intervention by Applicants is appropriate in the case at bar.

The *McCarthy* Plaintiffs claimed that the EPA regulations addressing disposal of solid waste had failed to keep pace with recent developments in the oil and gas industry, such as the advent of hydraulic fracking. 2016 WL 6833931, *1. The State of North Dakota, home to a thriving oil and gas industry, was one of the intervenor-applicants in *McCarthy*. North Dakota claimed important interests in that litigation by arguing that it would have to bear the additional costs of implementing any new federal regulations resulting from the lawsuit. The industry associations were concerned about the "imposition of unnecessary and unduly burdensome" new regulations." 2016 WL 6833931, *2. However, the *McCarthy* Court found that the applicants were trying to "muddy the waters" by mischaracterizing the expanse and substance of the relief sought by the plaintiffs. *4. The *McCarthy* Plaintiffs represented to the court that at most, they were seeking an order setting a "date certain" by which the EPA must make decisions about certain waste classification criteria and state plan guidelines. They were not seeking to dictate the substance or content of any revised federal regulation or trying to prevent the EPA from declining to promulgate a new rule at all, so the litigation would not result in any new federal regulations. *Id.* at *4 (". . . plaintiffs consider the 'substance of any revised federal regulations' to be 'beyond the scope of this action'"). The *McCarthy* Court accepted plaintiffs' representations about the scope of their complaint, finding that "[t]he substantive content of [the EPA's] decisions . . . will not be dictated by this litigation and will therefore remain within the

discretion of the agency." *Id,* at *5. The *McCarthy* Court viewed plaintiffs' request for an order requiring EPA to "issue necessary revisions" as "a request for an order requiring the EPA to initiate a rulemaking and to issue whatever regulations that it, in its discretion, deems necessary. *Id.* The court found this to be the very same relief provided by consent orders sought by the applicants in similar cases. *Id.* The court denied intervention, concluding that the actual focus of the case was on the "scheduling of rulemaking review" and that the "possibility of adverse regulation" was insufficient to allow intervention as of right because it was insufficient to confer Article III standing. *Id.* at *5-6.

The similarity of *McCarthy* to the case before the Court is inescapable. Applicants here have also mischaracterized Plaintiff's actual claims in order to create the impression that Applicants' interests would be impaired if they are not allowed to participate in this case. Just as the *McCarthy* Plaintiffs did not seek to dictate the substance of any oil and gas waste regulation promulgated by the EPA, Plaintiff here does not seek to dictate to BLM how it should determine what parcels are "eligible" for lease sale. Rather, Plaintiff wants BLM to offer for sale "eligible" land parcels within the quarterly time period constraints set forth by statute as well as the Leasing Reform Policy, and Plaintiff seeks a declaration that if BLM cancels or defers these sales for reasons other than the eligibility of the land parcels, such practice is illegal.

At the hearing, Plaintiff stated that it does not request in this lawsuit that any lease be issued *before* any required environmental analysis is conducted, or that the BLM *must* offer lands for lease when no eligible lands are available. Plaintiff envisions and expects that BLM will engage the regulatory mechanisms that are in place in order to allow it to conduct additional review on any specific land parcel. What Plaintiff does challenge is BLM's decision to cancel an entire lease sale when other lands remain eligible. *See* Doc. 17 at 2, & 4 n.1. Plaintiff offered

several examples of such instances when BLM cancelled lease sales for reasons Plaintiff considered to be based on "administrative whim, convenience, or preference," such as "workload priorities," snowstorms," and "lack of public interest in attending the lease sale." Compl., ¶¶ 24, 52 & 57. The Applicants countered that Plaintiff sought to remove BLM's discretion in the lease sales, arguing that BLM's "workload priorities" included instances where the agency withdrew land parcels for additional environmental review. There is really no basis for Applicants' argument. First, it begs the question why land parcels that were *not* being reconsidered for environmental issues were not offered for lease sale, such as in the Chaco Canyon-based lease sale. In that sale, BLM decided to withhold sale on five of those parcels for further environmental review, but the agency made no statement as to why it could not lease other land parcels in Texas, Kansas and Oklahoma that were not subject to that particular RMP. There was no explanation as to why those other parcels were being withdrawn. Second, Applicants repeatedly fall back on their contention that Plaintiff seeks to take away BLM's discretion in offering land parcels for lease sale by requiring BLM to lease parcels of eligible land on a quarterly basis, but by the end of the hearing, the Court lost count of the number of times Plaintiff confirmed that it does not seek to interfere with BLM's discretion to determine what land parcels are "eligible" for lease sale and when parcels become "eligible." Plaintiff's position is just this: if "eligible" parcels exist, then BLM must offer these for lease sale on a quarterly basis. Contrary to the Applicant's contention, this mandate comes from the Mineral Leasing Act and identical provisions in the Leasing Reform Policy, not from the Plaintiff. *See* 30 U.S.C. §226(b)(C) ("Lease sales **shall be held** for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary") (emphasis added).

Plaintiff offered other examples where BLM withdrew parcels of land for lease sale for reasons other than "eligibility," such as a snowstorm in Wyoming where BLM cancelled the entire lease sale, or in Utah because of a lack of public participation where the agency did not attempt to hold the lease sale in a more suitable venue. Plaintiff noted that the Leasing Reform Policy includes a "rotating" sales schedule in order to allow each field office within a state sufficient time to implement the new parcel review policy, yet when no land parcels were available for lease sale in a particular field office, BLM offered no explanation of why "eligible" land parcels were not offered for lease sale through other field offices. The Court accepts the accuracy of these factual allegations for purposes of the intervention question. Even if these examples are not entirely accurate, they are valid examples of conduct by BLM that is contrary to the Mineral Leasing ACT and the Leasing Reform Policy which incorporates the salient provisions dealing with lease sales of eligible land parcels.[5]

The Applicants' interests are environmental in nature. Thus, if Applicants seek to allow BLM to withdraw land parcels for reasons having nothing to do with environmental concerns, then those interests cannot be a basis for intervention as of right. Applicants' environmental interests lie in ensuring that the Leasing Reform Policy remains intact, but Plaintiff does not seek to do away with or modify that policy. No matter how this case is resolved, the outcome will not affect any legally protectable interest the Applicants might espouse. Applicants argue that a ruling in Plaintiff's favor would compromise their conservation interests, but this argument is

[5] The Leasing Reform Policy contains the following language:

> State offices will continue to hold lease sales four times per year, as required by the Mineral Leasing Act, section 226(b)(1)(A), and 43 CFR 3120.1-2(a), when eligible lands are determined by the state office to be available for leasing. . . However, state offices will develop a sales schedule with an emphasis on rotating lease parcel review responsibilities among field offices throughout the year to balance the workload and to allow each field office to devote sufficient time and resources to implementing the parcel review policy established in this IM ["Instructional Memorandum"]. State offices will extend field office review timeframes, as necessary, to ensure there is adequate time for the field offices to conduct comprehensive parcel reviews. Ex. 3, III(A) (Doc. 11-3).

based on a mischaracterization of Plaintiff's claims in this lawsuit. Based on both the allegations in the Complaint and the pleadings, Plaintiff is not seeking to strike down BLM's Leasing Reform Policy or force BLM to rush into leasing land parcels without adequate environmental review or remove the environmental review process from the discretion and control of the BLM. With a proper and accurate understanding of Plaintiff's actual claims (as opposed to the Applicants' gloss on those claims), Applicants cannot meet their "impairment of interest" burden, minimal though it is. However, even assuming the Court found that Applicants did meet this burden, they still fail on the adequate representation factor required to allow intervention as of right under Rule 24(a).

D. Adequate Representation

An applicant is not entitled to intervene if its interest is adequately represented by existing parties, even if that applicant satisfies the other requirements of Rule 24(a)(2). *Kane Cnty., Utah v. U.S.*, 597 F.3d 1129, 1134 (10th Cir. 2010). The Applicants here contend that BLM cannot adequately represent their interests because like all federal agencies, BLM cannot represent both private and public interests. They note that "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 Alliance.,* 540 F.App'x at 882. Applicants also contend that representation by BLM would be inadequate because 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." Doc. 11at 21 (quoting 43 U.S.C. §1702(c)). Relying on the *N.M. Off-Highway* case, Applicants argue that a federal agency cannot adequately represent the interests of environmental groups, and argue that because

such groups have a narrower interest, which is "protecting public lands and other natural resources from harm and ensuring a robust process and thorough environmental review for oil and gas leasing." Doc. 11 at 20.

However, both the facts and the parties' positions in the *N.M. Highway* case were significantly different. In *N.M.Off-Highway,* the environmental groups' interests clearly were not wholly aligned with those of the Forest Service, "as evidenced by [the environmental groups'] comments during the development of the Plan and during their [unsuccessful] administrative appeal." 540 Fed.App'x at 881. For example, the environmental groups were concerned that the route system in the Plan was greater than the Forest Services could afford and that the agency failed to consider water quality impacts and noise, or route density. In this case, however, the Applicants' position (based on their pleadings and their stated position at oral argument) is to prevent any tampering or modifications to the Leasing Reform Policy, and to safeguard BLM's discretion over the environmental review process for federal land parcels as well as determining which parcels become "eligible" for lease sales. BLM would certainly be expected to share that position.

Western Energy contends that this "multiple use" consideration is an irrelevant distinction in this lawsuit, pointing out that there is no real difference in perspective between the Applicants and BLM. In *N.M.Off-Highway,* the majority stated that the "multiple use" concept was important because there was "no guarantee that the Forest Service's policy would not shift during litigation." 540 Fed.Appx. at 881. The possibility of a "shift" during litigation in the agency's policy (for example, one that favored plaintiff by opening more roads to motorized vehicles), meant that the Forest Service could not adequately represent the environmental groups in the lawsuit even if it could at its inception. Even the dissent could not rule out the possibility

that the government's objective would "shift during the litigation or that other rifts might emerge during the life of the case to justify intervention as a matter of right under Rule 24(a)(2). 540 Fed.Appx., at 883 (Gorsuch, J., dissenting) (citing *San Juan County, Utah v. U.S.*, 503 F.3d at 1195)).[6] However, the dissent would postpone any consideration of intervention until such a shift occurred. *Id.*

Concerns about "shifts in litigation" prompting the Tenth Circuit to allow intervention in *N.M. Off-Highway* simply do not exist in this case. Unlike the plaintiffs in *N.M. Off-Highway,* Western Energy is not pushing to revise or rescind BLM's Leasing Reform Policy. Moreover, Western Energy is not seeking to diminish BLM's ultimate discretion in lease sales or to require action by BLM in a way that is not already set forth in the very policy which Applicants seek to preserve. In other words, BLM has no reason to "shift" its policy during this litigation because this lawsuit does not seek any change in that policy. There was some speculative discussion at oral argument about change that may occur at the Department of the Interior and the BLM as a result of the November 2016 election—presumably measures that are more favorable to companies dealing in the energy business—but the Court finds these apprehensions to be misplaced in the context of the motion to intervene. A "shift" in BLM's policy would, as Plaintiff's counsel noted at the hearing, make this a different case altogether, and would probably

[6] Applicants object to Plaintiff's reference to *San Juan County* to support its "adequacy of representation" factor because, as the majority noted in *N.M. Off-Highway*, there was a "single litigation objective" in that case, which was a quiet title action involving ownership of a road. 540 Fed.Appx. at 882 n.7. As a result, the federal defendants were not required "to balance a spectrum of views in furthering the public interest . . . which might cause them to deviate from the private concerns of the would-be intervenors." *Id.* The majority acknowledged the "narrowness of the holding" in *San Juan County* because in that case, there was no reason to believe that the federal defendants' interests "were not entirely identical to the would-be intervenors' interests." *Id.*

Applicants also take issue with *Kane County v. Utah v. U.S.*, 597 F.3d 1129, 1134 (10th Cir. 2010). The Court agrees that the *holdings* in both *San Juan County* and *Kane County* are narrow and limited to its facts. However, the Rule 24 analysis used in that case is still legally accurate, as the Tenth Circuit recognized when citing to *San Juan County* in analyzing the "impairment of interests" factor. *See N.M. Off-Hwy,* 540 Fed.Appx. at 880. The Court therefore does not rely on *San Juan County* for anything more than a reference to the relevant legal inquiry under Rule 24(a).

moot the need for this litigation in the first place. Thus, the only "shift" that matters in regards to this motion is a change in BLM's position during this lawsuit that would favor Plaintiff and prejudice the Applicants, but as the Court has already found, Plaintiff is not seeking any revision or rescission to the Leasing Reform Policy and, as the Court has already stated, Plaintiff will be held to the representations of its counsel that it is now seeking changes or revisions to the BLM's Leasing Reform Policy. For these reasons, the Court finds that the conclusion reached by the Tenth Circuit in *N.M. Off-Highway* allowing intervention does not dictate the result on the intervention issue in this case.[7]

Accordingly, the Court finds that Applicants are not entitled to intervene because they are adequately represented by existing parties.

III. Permissive Intervention

Under Rule 24(b)(1)(B), the Court may grant permissive intervention when a movant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Whether to grant permissive intervention lies within the discretion of the district court, Kane Cnty., 597 F.3d at 1135, "but 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).

Applicants contend that permissive intervention should be granted because they intend to address the same question of law that is at the heart of this litigation, that is, the legality of

[7] In *N.M. Off-Highway*, the Tenth Circuit stated that it has "repeatedly recognized that it is impossible for a government agency to protect both the public's interests and the would-be intervenor's private interests." 546 Fed.Appx. at 880 (citing *Utah Ass'n of Counties v. Clinton,* 255 F.3d 1246, 1256 (10th Cir. 2001). However, if this language is meant to state that a government agency can *never* represent the interests of a would-be intervenor, then intervention requested by environmental groups (or even industry trade associations, as in the *McCarthy* case) would automatically be granted as long as the other three Rule 24 factors were met. While this approach would result in a simpler analysis for a court, it seems to overlook the significance of the facts in each case.

BLM's Leasing Reform Policy, and the agency's discretion over lease sales. They also contend that their participation in the lawsuit will not cause any delay.

The Court agrees with Western Energy that the Applicants have not provided sufficient reason to allow them to intervene permissively. They have not explained why their participation would be helpful to the Court in this action. Having found that Applicants will be adequately represented in this lawsuit, their participation would be cumulative and additional briefing and arguments on the same issues would not be helpful to the Court. Permissive intervention will also cause undue delay and potentially obfuscate the relevant issues in this lawsuit. The Applicants' various mischaracterizations of Plaintiff's claims indicate the potential to overcomplicate matters, particularly if Applicants attempted to inject their own agenda into this case. This would only prejudice the existing parties to this lawsuit trying to resolve the issues that were raised in the Complaint. Accordingly, the motion to intervene is denied under Rule 24(b)(1)(B).

CONCLUSION

In sum, the Court finds and concludes that while Applicants' motion to intervene is timely, and that they have an interest in the subject of this lawsuit, they have not shown an impairment of interests or that their interests are not adequately represented by existing parties in this lawsuit. Applicants request intervention, in part, to ensure that environmental impacts from oil and gas development on public lands are minimized, and that the transparency of the agency's decisions and public input on these decisions is increased. However, these interests are already part of BLM's Leasing Reform Policy, and so the Applicants would not be taking a position or making an argument that is not already included in the Leasing Reform Policy or its objectives. Further, Western Energy is not seeking either revision or rescission of the Leasing Reform

Policy, but rather seeks to hold BLM to its obligations under the policy provisions administering oil and gas lease sales which are also included in the Mineral Leasing Act. Therefore, the motion to intervene as of right under Rule 24(a) is denied.

The Court further finds and concludes that the Applicants' request for permissive intervention is also denied. Applicants have failed to articulate a reason why the Court should exercise its discretion to allow intervention under Rule 24(b) and the Court finds that permissive intervention would cause undue delay and potentially prejudice the existing parties to the lawsuit.

THEREFORE,

IT IS ORDERED that the Applicants' Motion to Intervene **(Doc. 11)** is hereby DENIED for reasons described in this Memorandum Opinion and Order.

UNITED STATES DISTRICT JUDGE

United States Code Annotated
Title 30. Mineral Lands and Mining
Chapter 3A. Leases and Prospecting Permits (Refs & Annos)
Subchapter IV. Oil and Gas

30 U.S.C.A. § 226

§ 226. Lease of oil and gas lands

Effective: December 19, 2014
Currentness

(a) Authority of Secretary

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.

(b) Lands within known geologic structure of a producing oil or gas field; lands within special tar sand areas; competitive bidding; royalties

(1)(A) All lands to be leased which are not subject to leasing under paragraphs (2) and (3) of this subsection shall be leased as provided in this paragraph to the highest responsible qualified bidder by competitive bidding under general regulations in units of not more than 2,560 acres, except in Alaska, where units shall be not more than 5,760 acres. Such units shall be as nearly compact as possible. Lease sales shall be conducted by oral bidding, except as provided in subparagraph (C). Lease sales shall be held for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary. A lease shall be conditioned upon the payment of a royalty at a rate of not less than 12.5 percent in amount or value of the production removed or sold from the lease. The Secretary shall accept the highest bid from a responsible qualified bidder which is equal to or greater than the national minimum acceptable bid, without evaluation of the value of the lands proposed for lease. Leases shall be issued within 60 days following payment by the successful bidder of the remainder of the bonus bid, if any, and the annual rental for the first lease year. All bids for less than the national minimum acceptable bid shall be rejected. Lands for which no bids are received or for which the highest bid is less than the national minimum acceptable bid shall be offered promptly within 30 days for leasing under subsection (c) of this section and shall remain available for leasing for a period of 2 years after the competitive lease sale.

(B) The national minimum acceptable bid shall be $2 per acre for a period of 2 years from December 22, 1987. Thereafter, the Secretary, subject to paragraph (2)(B), may establish by regulation a higher national minimum acceptable bid for all leases based upon a finding that such action is necessary: (i) to enhance financial returns to the United States; and (ii) to promote more efficient management of oil and gas resources on Federal lands. Ninety days before the Secretary makes any change in the national minimum acceptable bid, the Secretary shall notify the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate. The proposal or promulgation of any regulation to establish a national minimum acceptable bid shall not be considered a major Federal action subject to the requirements of section 4332(2)(C) of Title 42.

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(C) In order to diversify and expand the Nation's onshore leasing program to ensure the best return to the Federal taxpayer, reduce fraud, and secure the leasing process, the Secretary may conduct onshore lease sales through Internet-based bidding methods. Each individual Internet-based lease sale shall conclude within 7 days.

(2)(A)(i) If the lands to be leased are within a special tar sand area, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations in units of not more than 5,760 acres, which shall be as nearly compact as possible, upon the payment by the lessee of such bonus as may be accepted by the Secretary.

(ii) Royalty shall be 12 ½ per centum in amount or value of production removed or sold from the lease, subject to subsection (k)(1)(c) [1] of this section.

(iii) The Secretary may lease such additional lands in special tar sand areas as may be required in support of any operations necessary for the recovery of tar sands.

(iv) No lease issued under this paragraph shall be included in any chargeability limitation associated with oil and gas leases.

(B) For any area that contains any combination of tar sand and oil or gas (or both), the Secretary may issue under this chapter, separately--

(i) a lease for exploration for and extraction of tar sand; and

(ii) a lease for exploration for and development of oil and gas.

(C) A lease issued for tar sand shall be issued using the same bidding process, annual rental, and posting period as a lease issued for oil and gas, except that the minimum acceptable bid required for a lease issued for tar sand shall be $2 per acre.

(D) The Secretary may waive, suspend, or alter any requirement under section 183 of this title that a permittee under a permit authorizing prospecting for tar sand must exercise due diligence, to promote any resource covered by a combined hydrocarbon lease.

(3)(A) If the United States held a vested future interest in a mineral estate that, immediately prior to becoming a vested present interest, was subject to a lease under which oil or gas was being produced, or had a well capable of producing, in paying quantities at an annual average production volume per well per day of either not more than 15 barrels per day of oil or condensate, or not more than 60,000 cubic feet of gas, the holder of the lease may elect to continue the lease as a noncompetitive lease under subsection (c)(1) of this section.

(B) An election under this paragraph is effective--

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(i) in the case of an interest which vested after January 1, 1990, and on or before October 24, 1992, if the election is made before the date that is 1 year after October 24, 1992;

(ii) in the case of an interest which vests within 1 year after October 24, 1992, if the election is made before the date that is 2 years after October 24, 1992; and

(iii) in any case other than those described in clause (i) or (ii), if the election is made prior to the interest becoming a vested present interest.

(C) Notwithstanding the consent requirement referenced in section 352 of this title, the Secretary shall issue a noncompetitive lease under subsection (c)(1) of this section to a holder who makes an election under subparagraph (A) and who is qualified to hold a lease under this chapter. Such lease shall be subject to all terms and conditions under this chapter that are applicable to leases issued under subsection (c)(1) of this section.

(D) A lease issued pursuant to this paragraph shall continue so long as oil or gas continues to be produced in paying quantities.

(E) This paragraph shall apply only to those lands under the administration of the Secretary of Agriculture where the United States acquired an interest in such lands pursuant to the Act of March 1, 1911 (36 Stat. 961 and following).

(c) Lands subject to leasing under subsection (b); first qualified applicant

(1) If the lands to be leased are not leased under subsection (b)(1) of this section or are not subject to competitive leasing under subsection (b)(2) of this section, the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding, upon payment of a non-refundable application fee of at least $75. A lease under this subsection shall be conditioned upon the payment of a royalty at a rate of 12.5 percent in amount or value of the production removed or sold from the lease. Leases shall be issued within 60 days of the date on which the Secretary identifies the first responsible qualified applicant.

(2)(A) Lands (i) which were posted for sale under subsection (b)(1) of this section but for which no bids were received or for which the highest bid was less than the national minimum acceptable bid and (ii) for which, at the end of the period referred to in subsection (b)(1) of this section no lease has been issued and no lease application is pending under paragraph (1) of this subsection, shall again be available for leasing only in accordance with subsection (b)(1) of this section.

(B) The land in any lease which is issued under paragraph (1) of this subsection or under subsection (b)(1) of this section which lease terminates, expires, is cancelled or is relinquished shall again be available for leasing only in accordance with subsection (b)(1) of this section.

(d) Annual rentals

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All leases issued under this section, as amended by the Federal Onshore Oil and Gas Leasing Reform Act of 1987, shall be conditioned upon payment by the lessee of a rental of not less than $1.50 per acre per year for the first through fifth years of the lease and not less than $2 per acre per year for each year thereafter. A minimum royalty in lieu of rental of not less than the rental which otherwise would be required for that lease year shall be payable at the expiration of each lease year beginning on or after a discovery of oil or gas in paying quantities on the lands leased.

(e) Primary terms

Competitive and noncompetitive leases issued under this section shall be for a primary term of 10 years: *Provided, however*, That competitive leases issued in special tar sand areas shall also be for a primary term of ten years. Each such lease shall continue so long after its primary term as oil or gas is produced in paying quantities. Any lease issued under this section for land on which, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities.

(f) Notice of proposed action; posting of notice; terms and maps

At least 45 days before offering lands for lease under this section, and at least 30 days before approving applications for permits to drill under the provisions of a lease or substantially modifying the terms of any lease issued under this section, the Secretary shall provide notice of the proposed action. Such notice shall be posted in the appropriate local office of the leasing and land management agencies. Such notice shall include the terms or modified lease terms and maps or a narrative description of the affected lands. Where the inclusion of maps in such notice is not practicable, maps of the affected lands shall be made available to the public for review. Such maps shall show the location of all tracts to be leased, and of all leases already issued in the general area. The requirements of this subsection are in addition to any public notice required by other law.

(g) Regulation of surface-disturbing activities; approval of plan of operations; bond or surety; failure to comply with reclamation requirements as barring lease; opportunity to comply with requirements

The Secretary of the Interior, or for National Forest lands, the Secretary of Agriculture, shall regulate all surface-disturbing activities conducted pursuant to any lease issued under this chapter, and shall determine reclamation and other actions as required in the interest of conservation of surface resources. No permit to drill on an oil and gas lease issued under this chapter may be granted without the analysis and approval by the Secretary concerned of a plan of operations covering proposed surface-disturbing activities within the lease area. The Secretary concerned shall, by rule or regulation, establish such standards as may be necessary to ensure that an adequate bond, surety, or other financial arrangement will be established prior to the commencement of surface-disturbing activities on any lease, to ensure the complete and timely reclamation of the lease tract, and the restoration of any lands or surface waters adversely affected by lease operations after the abandonment or cessation of oil and gas operations on the lease. The Secretary shall not issue a lease or leases or approve the assignment of any lease or leases under the terms of this section to any person, association, corporation, or any subsidiary, affiliate, or person controlled by or under common control with such person, association, or corporation, during any period in which, as determined by the Secretary of the Interior or Secretary of Agriculture, such entity has failed or refused to comply in any material respect with the reclamation requirements and other standards established under this section for any prior lease to which such requirements and standards applied. Prior to making such determination with respect to any such entity the concerned Secretary shall provide such entity with adequate notification and an opportunity to comply with such reclamation requirements and other standards and shall consider whether any administrative or judicial appeal is pending. Once the entity has complied with the reclamation requirement or other standard concerned an oil or gas lease may be issued to such entity under this chapter.

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(h) National Forest System Lands

The Secretary of the Interior may not issue any lease on National Forest System Lands reserved from the public domain over the objection of the Secretary of Agriculture.

(i) Termination

No lease issued under this section which is subject to termination because of cessation of production shall be terminated for this cause so long as reworking or drilling operations which were commenced on the land prior to or within sixty days after cessation of production are conducted thereon with reasonable diligence, or so long as oil or gas is produced in paying quantities as a result of such operations. No lease issued under this section shall expire because operations or production is suspended under any order, or with the consent, of the Secretary. No lease issued under this section covering lands on which there is a well capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same unless the lessee is allowed a reasonable time, which shall be not less than sixty days after notice by registered or certified mail, within which to place such well in producing status or unless, after such status is established, production is discontinued on the leased premises without permission granted by the Secretary under the provisions of this chapter.

(j) Drainage agreements; primary term of lease, extension

Whenever it appears to the Secretary that lands owned by the United States are being drained of oil or gas by wells drilled on adjacent lands, he may negotiate agreements whereby the United States, or the United States and its lessees, shall be compensated for such drainage. Such agreements shall be made with the consent of the lessees, if any, affected thereby. If such agreement is entered into, the primary term of any lease for which compensatory royalty is being paid, or any extension of such primary term, shall be extended for the period during which such compensatory royalty is paid and for a period of one year from discontinuance of such payment and so long thereafter as oil or gas is produced in paying quantities.

(k) Mining claims; suspension of running time of lease

If, during the primary term or any extended term of any lease issued under this section, a verified statement is filed by any mining claimant pursuant to subsection (c) of section 527 of this title, whether such filing occur prior to September 2, 1960 or thereafter, asserting the existence of a conflicting unpatented mining claim or claims upon which diligent work is being prosecuted as to any lands covered by the lease, the running of time under such lease shall be suspended as to the lands involved from the first day of the month following the filing of such verified statement until a final decision is rendered in the matter.

(l) Exchange of leases; conditions

The Secretary of the Interior shall, upon timely application therefor, issue a new lease in exchange for any lease issued for a term of twenty years, or any renewal thereof, or any lease issued prior to August 8, 1946, in exchange for a twenty-year lease, such new lease to be for a primary term of five years and so long thereafter as oil or gas is produced in paying quantities and at a royalty rate of not less than 12 ½ per centum in amount or value of the production removed or sold from such leases, except that the royalty rate shall be 12 ½ per centum in amount or value of the production removed or sold from said leases as to (1) such leases, or such parts of the lands subject thereto and the deposits underlying the

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same, as are not believed to be within the productive limits of any producing oil or gas deposit, as such productive limits are found by the Secretary to have existed on August 8, 1946; and (2) any production on a lease from an oil or gas deposit which was discovered after May 27, 1941, by a well or wells drilled within the boundaries of the lease, and which is determined by the Secretary to be a new deposit; and (3) any production on or allocated to a lease pursuant to an approved cooperative or unit plan of development or operation from an oil or gas deposit which was discovered after May 27, 1941, on land committed to such plan, and which is determined by the Secretary to be a new deposit, where such lease, or a lease for which it is exchanged, was included in such plan at the time of discovery or was included in a duly executed and filed application for the approval of such plan at the time of discovery.

(m) Cooperative or unit plan; authority of Secretary of the Interior to alter or modify; communitization or drilling agreements; term of lease, conditions; Secretary to approve operating, drilling or development contracts, and subsurface storage

For the purpose of more properly conserving the natural resources of any oil or gas pool, field, or like area, or any part thereof (whether or not any part of said oil or gas pool, field, or like area, is then subject to any cooperative or unit plan of development or operation), lessees thereof and their representatives may unite with each other, or jointly or separately with others, in collectively adopting and operating under a cooperative or unit plan of development or operation of such pool, field, or like area, or any part thereof, whenever determined and certified by the Secretary of the Interior to be necessary or advisable in the public interest. The Secretary is thereunto authorized, in his discretion, with the consent of the holders of leases involved, to establish, alter, change, or revoke drilling, producing, rental, minimum royalty, and royalty requirements of such leases and to make such regulations with reference to such leases, with like consent on the part of the lessees, in connection with the institution and operation of any such cooperative or unit plan as he may deem necessary or proper to secure the proper protection of the public interest. The Secretary may provide that oil and gas leases hereafter issued under this chapter shall contain a provision requiring the lessee to operate under such a reasonable cooperative or unit plan, and he may prescribe such a plan under which such lessee shall operate, which shall adequately protect the rights of all parties in interest, including the United States.

Any plan authorized by the preceding paragraph which includes lands owned by the United States may, in the discretion of the Secretary, contain a provision whereby authority is vested in the Secretary of the Interior, or any such person, committee, or State or Federal officer or agency as may be designated in the plan, to alter or modify from time to time the rate of prospecting and development and the quantity and rate of production under such plan. All leases operated under any such plan approved or prescribed by the Secretary shall be excepted in determining holdings or control under the provisions of any section of this chapter.

When separate tracts cannot be independently developed and operated in conformity with an established well-spacing or development program, any lease, or a portion thereof, may be pooled with other lands, whether or not owned by the United States, under a communitization or drilling agreement providing for an apportionment of production or royalties among the separate tracts of land comprising the drilling or spacing unit when determined by the Secretary of the Interior to be in the public interest, and operations or production pursuant to such an agreement shall be deemed to be operations or production as to each such lease committed thereto.

Any lease issued for a term of twenty years, or any renewal thereof, or any portion of such lease that has become the subject of a cooperative or unit plan of development or operation of a pool, field, or like area, which plan has the approval of the Secretary of the Interior, shall continue in force until the termination of such plan. Any other lease issued under any section of this chapter which has heretofore or may hereafter be committed to any such plan that contains a general provision for allocation of oil or gas shall continue in force and effect as to the land committed so long as the lease remains subject to the plan: *Provided,* That production is had in paying quantities under the plan prior to the expiration date of the term of such lease. Any lease heretofore or hereafter committed to any such plan embracing lands that are in part within and in part outside of the area covered by any such plan shall be segregated into separate leases as to the lands

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committed and the lands not committed as of the effective date of unitization: *Provided, however*, That any such lease as to the nonunitized portion shall continue in force and effect for the term thereof but for not less than two years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities. The minimum royalty or discovery rental under any lease that has become subject to any cooperative or unit plan of development or operation, or other plan that contains a general provision for allocation of oil or gas, shall be payable only with respect to the lands subject to such lease to which oil or gas shall be allocated under such plan. Any lease which shall be eliminated from any such approved or prescribed plan, or from any communitization or drilling agreement authorized by this section, and any lease which shall be in effect at the termination of any such approved or prescribed plan, or at the termination of any such communitization or drilling agreement, unless relinquished, shall continue in effect for the original term thereof, but for not less than two years, and so long thereafter as oil or gas is produced in paying quantities.

The Secretary of the Interior is hereby authorized, on such conditions as he may prescribe, to approve operating, drilling, or development contracts made by one or more lessees of oil or gas leases, with one or more persons, associations, or corporations whenever, in his discretion, the conservation of natural products or the public convenience or necessity may require it or the interests of the United States may be best subserved thereby. All leases operated under such approved operating, drilling, or development contracts, and interests thereunder, shall be excepted in determining holdings or control under the provisions of this chapter.

The Secretary of the Interior, to avoid waste or to promote conservation of natural resources, may authorize the subsurface storage of oil or gas, whether or not produced from federally owned lands, in lands leased or subject to lease under this chapter. Such authorization may provide for the payment of a storage fee or rental on such stored oil or gas or, in lieu of such fee or rental, for a royalty other than that prescribed in the lease when such stored oil or gas is produced in conjunction with oil or gas not previously produced. Any lease on which storage is so authorized shall be extended at least for the period of storage and so long thereafter as oil or gas not previously produced is produced in paying quantities.

(n) Conversion of oil and gas leases and claims on hydrocarbon resources to combined hydrocarbon leases for primary term of 10 years; application

(1)(A) The owner of (1) an oil and gas lease issued prior to November 16, 1981, or (2) a valid claim to any hydrocarbon resources leasable under this section based on a mineral location made prior to January 21, 1926, and located within a special tar sand area shall be entitled to convert such lease or claim to a combined hydrocarbon lease for a primary term of ten years upon the filing of an application within two years from November 16, 1981, containing an acceptable plan of operations which assures reasonable protection of the environment and diligent development of those resources requiring enhanced recovery methods of development or mining. For purposes of conversion, no claim shall be deemed invalid solely because it was located as a placer location rather than a lode location or vice versa, notwithstanding any previous adjudication on that issue.

(B) The Secretary shall issue final regulations to implement this section within six months of November 16, 1981. If any oil and gas lease eligible for conversion under this section would otherwise expire after November 16, 1981, and before six months following the issuance of implementing regulations, the lessee may preserve his conversion right under such lease for a period ending six months after the issuance of implementing regulations by filing with the Secretary, before the expiration of the lease, a notice of intent to file an application for conversion. Upon submission of a complete plan of operations in substantial compliance with the regulations promulgated by the Secretary for the filing of such plans, the Secretary shall suspend the running of the term of any oil and gas lease proposed for conversion until the plan is finally approved or disapproved. The Secretary shall act upon a proposed plan of operations within fifteen months of its submittal.

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(C) When an existing oil and gas lease is converted to a combined hydrocarbon lease, the royalty shall be that provided for in the original oil and gas lease and for a converted mining claim, 12 ½ per centum in amount or value of production removed or sold from the lease.

(2) Except as provided in this section, nothing in the Combined Hydrocarbon Leasing Act of 1981 shall be construed to diminish or increase the rights of any lessee under any oil and gas lease issued prior to November 16, 1981.

(o) Certain outstanding oil and gas deposits

(1) Prior to the commencement of surface-disturbing activities relating to the development of oil and gas deposits on lands described under paragraph (5), the Secretary of Agriculture shall require, pursuant to regulations promulgated by the Secretary, that such activities be subject to terms and conditions as provided under paragraph (2).

(2) The terms and conditions referred to in paragraph (1) shall require that reasonable advance notice be furnished to the Secretary of Agriculture at least 60 days prior to the commencement of surface disturbing activities.

(3) Advance notice under paragraph (2) shall include each of the following items of information:

(A) A designated field representative.

(B) A map showing the location and dimensions of all improvements, including but not limited to, well sites and road and pipeline accesses.

(C) A plan of operations, of an interim character if necessary, setting forth a schedule for construction and drilling.

(D) A plan of erosion and sedimentation control.

(E) Proof of ownership of mineral title.

Nothing in this subsection shall be construed to affect any authority of the State in which the lands concerned are located to impose any requirements with respect to such oil and gas operations.

(4) The person proposing to develop oil and gas deposits on lands described under paragraph (5) shall either--

(A) permit the Secretary to market merchantable timber owned by the United States on lands subject to such activities; or

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(B) arrange to purchase merchantable timber on lands subject to such surface disturbing activities from the Secretary of Agriculture, or otherwise arrange for the disposition of such merchantable timber, upon such terms and upon such advance notice of the items referred to in subparagraphs (A) through (E) of paragraph (3) as the Secretary may accept.

(5)(A) The lands referred to in this subsection are those lands referenced in subparagraph (B) which are under the administration of the Secretary of Agriculture where the United States acquired an interest in such lands pursuant to the Act of March 1, 1911 (36 Stat. 961 and following), but does not have an interest in oil and gas deposits that may be present under such lands. This subsection does not apply to any such lands where, under the provisions of its acquisition of an interest in the lands, the United States is to acquire any oil and gas deposits that may be present under such lands in the future but such interest has not yet vested with the United States.

(B) This subsection shall only apply in the Allegheny National Forest.

(p) Deadlines for consideration of applications for permits

(1) In general

Not later than 10 days after the date on which the Secretary receives an application for any permit to drill, the Secretary shall--

(A) notify the applicant that the application is complete; or

(B) notify the applicant that information is missing and specify any information that is required to be submitted for the application to be complete.

(2) Issuance or deferral

Not later than 30 days after the applicant for a permit has submitted a complete application, the Secretary shall--

(A) issue the permit, if the requirements under the National Environmental Policy Act of 1969 and other applicable law have been completed within such timeframe; or

(B) defer the decision on the permit and provide to the applicant a notice--

(i) that specifies any steps that the applicant could take for the permit to be issued; and

(ii) a list of actions that need to be taken by the agency to complete compliance with applicable law together with timelines and deadlines for completing such actions.

(3) Requirements for deferred applications

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(A) In general

If the Secretary provides notice under paragraph (2)(B), the applicant shall have a period of 2 years from the date of receipt of the notice in which to complete all requirements specified by the Secretary, including providing information needed for compliance with the National Environmental Policy Act of 1969.

(B) Issuance of decision on permit

If the applicant completes the requirements within the period specified in subparagraph (A), the Secretary shall issue a decision on the permit not later than 10 days after the date of completion of the requirements described in subparagraph (A), unless compliance with the National Environmental Policy Act of 1969 and other applicable law has not been completed within such timeframe.

(C) Denial of permit

If the applicant does not complete the requirements within the period specified in subparagraph (A) or if the applicant does not comply with applicable law, the Secretary shall deny the permit.

CREDIT(S)

(Feb. 25, 1920, c. 85, § 17, 41 Stat. 443; July 3, 1930, c. 854, § 1, 46 Stat. 1007; Mar. 4, 1931, c. 506, 46 Stat. 1523; Aug. 21, 1935, c. 599, § 1, 49 Stat. 676; Aug. 8, 1946, c. 916, § 3, 60 Stat. 951; July 29, 1954, c. 644, § 1(1) to (3), 68 Stat. 583; June 11, 1960, Pub.L. 86-507, § 1(21), 74 Stat. 201; Sept. 2, 1960, Pub.L. 86-705, § 2, 74 Stat. 781; Nov. 16, 1981, Pub.L. 97-78, § 1(6), (8), 95 Stat. 1070, 1071; Dec. 22, 1987, Pub.L. 100-203, Title V, § 5102(a) to (d)(1), 101 Stat. 1330-256, 1330-257; Oct. 24, 1992, Pub.L. 102-486, Title XXV, §§ 2507(a), 2508(a), 2509, 106 Stat. 3107, 3108, 3109; Nov. 2, 1994, Pub.L. 103-437, § 11(a)(1), 108 Stat. 4589; Dec. 21, 1995, Pub.L. 104-66, Title I, § 1081(a), 109 Stat. 721; Aug. 8, 2005, Pub.L. 109-58, Title III, §§ 350(a), (b), 366, 369(j)(1), 119 Stat. 711, 726, 730; Pub.L. 113-291, Div. B, Title XXX, § 3022(a), Dec. 19, 2014, 128 Stat. 3762.)

Notes of Decisions (119)

Footnotes

1 So in original. Probably should be “subsection (k)(1)(C)”.

30 U.S.C.A. § 226, 30 USCA § 226

Current through P.L. 114-316. Also includes P.L. 114-318 to 114-321, 114-323 to 114-327, and 115-1 to 115-3. Title 26 current through 115-3.

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United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 24

Rule 24. Intervention

Currentness

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) ***In General.*** On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

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