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Attorneys for Proposed Defendant-Intervenor NAH Utah, LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILDEARTH GUARDIANS; and PHYSICIANS FOR SOCIAL RESPONSIBILITY, Plaintiffs. vs. DEBRA A. HAALAND,[1] Secretary, U.S. Department of the Interior; and U.S. BUREAU OF LAND MANAGEMENT, Defendants, and STATE OF WYOMING; and AMERICAN PETROLEUM INSTITUTE, Defendant-Intervenors.	Case No. 1:21-cv-00175-RC **NAH UTAH, LLC'S MOTION TO INTERVENE**

[1] Pursuant to Fed. R. Civ. P. 25(d), Secretary of the Interior Debra A. Haaland has been automatically substituted for former Secretary David L. Bernhardt.

Pursuant to Rules 24(a)(2) and 24(b)(2) of the Federal Rules of Civil Procedure, Applicant Defendant-Intervenor NAH Utah, LLC ("NAH Utah") respectfully moves this Court for leave to intervene, as a Defendant, in this case. This Motion is supported by the accompanying memorandum of points and authorities and supporting declaration (attached hereto as **Exhibits 1 and 2**, respectively). NAH Utah seeks leave to intervene in this action to defend against all the claims asserted and relief requested as set forth in the Answer attached hereto as **Exhibit 3**. A proposed order granting this Motion is attached hereto for this Court's convenience as **Exhibit 4**.

Pursuant to Local Civil Rule 7(m), counsel for NAH Utah has consulted with counsel for the Plaintiffs and the Defendants prior to filing this Motion to Intervene to ascertain these parties' respective positions. Counsel for Plaintiffs indicated that they take no position on the Motion and reserve the right to file a response. Counsel for Federal Defendants indicated that they take no position on the Motion. Counsel for Defendant-Intervenor State of Wyoming indicated that the State does not object to the Motion. Finally, counsel for Defendant-Intervenor American Petroleum Institute ("API") indicated that API consents to the Motion.

Accordingly, in light of the significant interests NAH Utah has at stake in this litigation, NAH Utah respectfully requests that this Court grant its Motion to Intervene.

Respectfully submitted this 30th day of April, 2021

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WILDEARTH GUARDIANS; and PHYSICIANS FOR SOCIAL RESPONSIBILITY, Plaintiffs. vs. DEBRA A. HAALAND,[1] Secretary, U.S. Department of the Interior; and U.S. BUREAU OF LAND MANAGEMENT, Defendants, and STATE OF WYOMING; and AMERICAN PETROLEUM INSTITUTE, Defendant-Intervenors.	Case No. 1:21-cv-00175-RC **NAH UTAH, LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO INTERVENE**

[1] Pursuant to Fed. R. Civ. P. 25(d), Secretary of the Interior Debra A. Haaland has been automatically substituted for former Secretary David L. Bernhardt.

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INTRODUCTION AND BACKGROUND

Pursuant to Rules 24(a)(2) and 24(b) of the Federal Rules of Civil Procedure, Applicant Defendant-Intervenor NAH Utah, LLC ("NAH Utah") has moved this Court for leave to intervene, as a Defendant, in this case. In the Amended Complaint, Plaintiffs WildEarth Guardians and Physicians for Social Responsibility (collectively, "Plaintiffs") have challenged the issuance of 1,153 oil and gas leases in Colorado, New Mexico, Utah, and Wyoming by the Bureau of Land Management ("BLM") and the Secretary of the Interior (collectively, "Federal Defendants") based on alleged violations of the National Environmental Policy Act ("NEPA") and its implementing regulations. ECF No. 13, Am. Compl. ¶¶ 1, 138-161. Plaintiffs have asked this Court for declaratory and injunctive relief, including asking the Court to vacate the lease authorizations and supporting NEPA analyses, to set aside and vacate the leases issued pursuant to BLM's lease authorizations, and to enjoin BLM from approving or otherwise taking action on any applications for permits to drill ("APDs") for the challenged oil and gas leases. *Id*., Relief Requested ¶¶ A-E.

NAH Utah seeks to intervene in this action to defend BLM's Environmental Assessment ("EA"), Finding of No Significant Impact ("FONSI"), and Decision Record authorizing the issuance of leases held by NAH Utah, as well as the Supplemental EA and FONSI issued by BLM on January 14, 2021, and BLM's January 14, 2021 decision to lift the suspension of NAH Utah's leases.[2] NAH Utah has a unique interest in this litigation because its leases will produce

[2] The Amended Complaint challenges the issuance of the following leases held by NAH Utah: UTU93466, UTU93468, UTU93469, UTU93470, UTU93471, UTU93473, UTU93474, UTU93475, UTU93476, UTU93477, UTU93478, UTU93479, UTU93480, UTU93481, UTU93482, UTU93483, UTU93484, UTU93485, UTU93486, UTU93487, UTU93500, UTU93501, UTU93503, and UTU93504. These leases were offered at the September 2018 lease sale held by the BLM Price Field Office, included in Table A of Plaintiffs' Amended Complaint.

helium, not oil and gas. Exhibit 2, Declaration of Donna Bowles ("Bowles Decl."), ¶ 6. Helium is a non-toxic, colorless, odorless, tasteless, inert, monatomic gas used in advanced medical imaging equipment, advanced scientific research, and has defense and manufacturing applications. *Id*. ¶ 4. Plaintiffs' requested relief would impose substantial harm on NAH Utah and the public by preventing or delaying the development of a critical mineral important to our nation's supply chain and President Biden's policy objectives to support domestic production of critical minerals.[3] *See S. Utah Wilderness All. v. Bernhardt*, 2021 WL 106384, at *6 (D.D.C. Jan. 12, 2021) (recognizing that "helium is a critical resource in short supply globally"). NAH Utah's intervention is particularly important because no other party can adequately represent its helium interests, including the other Defendant-Intervenors who will participate on behalf of oil and gas exploration and production companies and the State of Wyoming and its citizens. Given the significant adverse economic impact that would result from NAH Utah's inability to develop its leases for helium, or significant delays in its ability to produce helium, NAH Utah is entitled to intervention in this case.

[3] Executive Order 13953 (Sept. 30, 2020) (recognizing the Secretary of the Interior's identification of helium as a critical mineral that is "essential to the economic and national security of the United States"), *available at* https://www.federalregister.gov/documents/2020/10/05/2020-22064/addressing-the-threat-to-the-domestic-supply-chain-from-reliance-on-critical-minerals-from-foreign (last visited Apr. 28, 2021); Executive Order 14017 (Feb. 24, 2021), *available at* https://www.govinfo.gov/app/details/DCPD-202100163 (last visited Apr. 28, 2021); White House Statements and Releases, FACT SHEET: Securing America's Critical Supply Chains, February 24, 2021 (identifying "[c]ritical minerals [as] an essential part of defense, high-tech, and other products"), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/24/fact-sheet-securing-americas-critical-supply-chains/ (last visited Apr. 28, 2021).

STANDARDS FOR INTERVENTION

Federal Rule of Civil Procedure 24(a) governs intervention as a matter of right. It provides, in relevant part, that:

> On timely motion, the court must permit anyone to intervene who . . . 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.

Fed. R. Civ. P. 24(a)(2).

Courts have developed the following four-part test to determine whether a party may intervene as a matter of right: (1) whether the motion is timely; (2) whether the applicant claims an interest related to the property or transaction which is the subject of the action; (3) whether the applicant is so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) whether the applicant's interest is adequately represented by the existing parties. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). The D.C. Circuit also requires parties seeking to intervene under Federal Rule of Civil Procedure 24(a) to demonstrate standing under Article III of the Constitution. *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015).

ARGUMENT

NAH Utah should be granted intervention because it satisfies the substantive requirements for intervention. NAH Utah's motion is timely; it has a clear, significantly protectable interest in the subject matter of the litigation; its interests will be impaired if the Plaintiffs prevail; and its interests are not adequately represented by existing parties. Federal Rule of Civil Procedure 24 provides for intervention as a matter of right under subsection (a),

and permissive intervention under subsection (b). NAH Utah readily satisfies both of these standards and therefore, intervention is appropriate.

A. NAH Utah is Entitled to Intervene as of Right

1. The Motion is Timely.

First, NAH Utah's motion is timely. Courts evaluate the following factors to determine whether a motion to intervene is timely: (1) the amount of time elapsed since the suit was filed; (2) the purpose of intervention; (3) the need to preserve the applicant's rights; and (4) the probability of prejudice to existing parties. *Amador Cty. v. U.S. Dep't of the Interior*, 772 F.3d 901, 903 (D.C. Cir. 2014). The timeliness of an intervention motion should be considered in light of all of the circumstances surrounding the case. *Id*.

This case is in the earliest stages. The Federal Defendants have not answered, and no substantive briefing has occurred. *See* Mar. 26, 2021 Order (granting Federal Defendants an extension of time to file their response to the Amended Complaint until June 28, 2021). Plaintiffs' Amended Complaint was filed on February 17, 2021, less than three months ago. The State of Wyoming and the American Petroleum Institute have also filed motions to intervene (ECF Nos. 15 and 20), which the Court granted on April 20, 2021. ECF Nos. 21-22. NAH Utah's participation will not delay the proceedings or require the Court to alter the schedule. Thus, intervention will not prejudice the parties, and NAH Utah's motion is timely.

2. NAH Utah Has a Significant Protectable Interest.

The D.C. Circuit's approach to "determining whether a potential intervenor as of right satisfies the 'interest' requirement under Rule 24(a)(2) has been to look to the 'practical consequences' of denying intervention.'" *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 105 F.R.D. 106, 109 (D.D.C. 1985) (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). No specific legal or equitable interest must be demonstrated. *Id*. Indeed, the "interest

test" is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse*, 385 F.2d at 700.

NAH Utah has directly benefitted from BLM's lease authorizations at issue in this litigation, under which NAH Utah now holds twenty-four oil and gas leases. *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) (holding that "[a]n intervenor's interest is obvious when he asserts a claim to property that is the subject matter of the suit"). NAH Utah has a significant protectable interest in these leases as the necessary first step toward the exploration and development of helium resources. NAH Utah's ability to exercise its lease rights is crucial to its goal of developing new sources of helium supply in North America, the world's largest helium market, for use in advanced medical imaging equipment, advanced scientific research, and defense and manufacturing applications. Bowles Decl. ¶¶ 3, 13. To date, NAH Utah has invested $3,000,000 to acquire its leases and approximately $1,000,000 toward obtaining APDs so that it can proceed with the exploration, and subsequent development, of helium resources. *Id*. ¶ 11. NAH Utah has taken concrete steps toward exploration of its leases (*id*. ¶¶ 11-12) and stands ready to continue progressing toward the development of helium, which has been identified as a critical mineral by the Department of the Interior under national policy. *See supra* at 2, n.3.

The outcome of this litigation poses a direct and substantial threat to NAH Utah's property rights in its leases and its economic interests in the timely production of helium resources. Bowles Decl. ¶¶ 10-13. These economic and operational interests represent cognizable interests that warrant intervention as a matter of right. *See, e.g., Theodore Roosevelt Conservation P'ship v. Salazar*, 605 F.Supp.2d 263, 269 (D.D.C. 2009) (describing intervention by operators of natural gas project in support of BLM's decision); *Kleissler v. U.S. Forest Serv.*,

157 F.3d 964, 972 (3d Cir. 1998) ("Timber companies have direct and substantial interests in a lawsuit aimed at halting logging or, at a minimum, reducing the efficiency of their method of timber-cutting."); *Utahns for Better Transp. v. Dep't of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002) (threat of economic injury provides requisite interest).

3. NAH Utah's Interests Could be Impaired or Impeded by the Disposition of this Action.

Third, in determining impairment of an applicant's interest, NAH Utah need only show that the disposition of this action "may as a practical matter impair or impede [NAH Utah's] ability to protect its interest." Fed. R. Civ. P. 24(a)(2). Courts in the D.C. Circuit look to the "practical consequences" of denying intervention, even where the possibility of future challenges to the outcome of the lawsuit remains an available option for the intervenor. *Fund for Animals*, 322 F.3d at 735 (quoting *Nat. Res. Def. Council v. Costle*, 561 F.3d 904, 909 (D.C. Cir. 1977)).

NAH Utah's interests may be substantially affected by the outcome of this litigation. If the Plaintiffs prevail, the Court could vacate or suspend the leases, require Federal Defendants to conduct additional NEPA analyses, and/or enjoin BLM from approving APDs pending compliance with NEPA, thereby preventing NAH Utah from exercising its lease rights. Am Compl., Requested Relief ¶¶ C-E. Plaintiffs' lawsuit presents a danger to NAH Utah's substantial investment in developing its leases and its expectation of future helium production from those leases. Bowles Decl. ¶ 11.

At a minimum, an unfavorable ruling could delay NAH Utah's operations and result in longstanding uncertainty and significant economic harm.[4] NAH Utah has concrete plans to develop its leases and has filed APDs with BLM to drill four exploratory helium wells. *Id*.

[4] An adverse ruling could also harm the public given the importance of helium, as a critical mineral, to our nation's supply chain. *See supra* at 2.

¶¶ 11-12. The NEPA process for these APDs is well underway (*id*. ¶ 11) and NAH Utah's production of helium has already been delayed once due to the suspension of its leases for the preparation of supplemental NEPA analysis by BLM in response to a similar lawsuit filed by the Plaintiffs. Supplemental EA, DOI-BLM-UT-0000-2021-0001-EA, at 1 (Jan. 2021), *available at* https://eplanning.blm.gov/public_projects/2002778/200390662/20032939/250039138/2021-01-14-DOI-BLM-UT-0000-2021-0001-EA%20GHG%20Supplemental%20EA_Final.pdf (last visited Apr. 28, 2021). The threat of this lawsuit to the development of NAH Utah's leases constitutes an impaired interest. *Friends of Animals v. Kempthorne*, 452 F. Supp. 2d 64, 70 (D.D.C. 2006) (finding that costs, delays, and uncertainties associated with denial of intervention constituted an impaired interest).

4. NAH Utah's Interests Cannot be Adequately Represented by the Existing Parties.

To satisfy the fourth requirement under Federal Rule of Civil Procedure 24(a)(2), an applicant must show only that representation may be inadequate. This burden is "minimal." *Nat. Res. Def. Council*, 561 F.2d at 911 (citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). Although NAH Utah and Federal Defendants will presumably defend the lease authorizations, this "does not mean that their particular interests coincide so that representation by the agency alone is justified." *Am. Horse Prot. Ass'n, Inc. v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001).

In order to protect its interests, NAH Utah must be afforded the right to formulate an appropriate litigation strategy and present its own legal arguments. NAH Utah has private objectives to protect its lease rights and its investments toward the development of helium from those leases. Notably, NAH Utah intends to develop its leases for helium, not oil and gas, and therefore will have unique knowledge and expertise related to environmental impacts from the

production of helium resources. Bowles Decl. ¶ 6. NAH Utah's helium interests are different than the other Defendant-Intervenors who will represent the interests of oil and gas exploration and production companies and the State of Wyoming and its citizens. Unlike oil and gas, helium is not combusted for consumption and, therefore, there are no downstream greenhouse gas emissions at the time of consumption. *Id*. ¶ 7. Thus, to the extent equitable factors must be considered in fashioning a remedy at some point in this litigation, the calculus for helium leases will require unique and special attention that no other party can adequately represent.

Moreover, the Federal Defendants are tasked with protecting the public interest at large, not the specific economic and property interests of NAH Utah. *Fund for Animals*, 322 F.3d at 736 ("[W]e have often concluded that governmental entities do not adequately represent the interests of aspiring [private] intervenors."). For example, the Federal Defendants must consider a wide spectrum of views when defending this lawsuit and uphold the integrity of federal decision making. The Federal Defendants cannot prioritize preserving NAH Utah's investments and economic interests in this case. Thus, NAH Utah has satisfied its "minimal" burden to demonstrate that inadequate representation by the existing parties warrants NAH Utah's intervention.

For the reasons stated above, NAH Utah requests that this Court allow it to intervene as a matter of right because the motion is timely, NAH Utah has significant protectable interests which would be impaired if the Federal Defendants lose the case, and none of the existing parties can adequately represent NAH Utah's interests.

B. NAH Utah Has Article III Standing

The D.C. Circuit requires parties seeking to intervene as a defendant to satisfy the standing requirements under Article III of the Constitution. *Crossroads*, 788 F.3d at 316; *see also id.* ("[t]he standing inquiry for an intervening-defendant is the same as for a plaintiff: the

intervenor must show injury in fact, causation, and redressability"); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Any party that satisfies the elements of Federal Rule of Civil Procedure 24(a) will also meet the standing requirement under Article III of the Constitution. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003); *see also 100Reporters LLC v. U.S. Dep't of Justice*, 307 F.R.D. 269, 276 (D.D.C. 2014) ("Courts in this circuit generally treat the standing analysis for intervention as of right as equivalent to determining whether the intervenor has a 'legally protected' interest under Rule 24(a)"); *see supra* at 4-6.

In any event, NAH Utah readily satisfies the constitutional standing requirements. In seeking to uphold or defend agency action, an intervenor must establish that it would be "injured in fact by the setting aside of the government's action it seeks to defend, that this injury would have been caused by that invalidation, and the injury would be prevented if the government action is upheld." *Forest Cty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 13 (D.D.C. 2016) (quoting *Am. Horse Prot. Ass'n*, 200 F.R.D. at 156). Courts have "found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *Crossroads*, 788 F.3d at 317.

NAH Utah benefits from its twenty-four oil and gas leases at issue in this litigation, which authorize it to explore for and produce helium resources. Bowles Decl. ¶ 5. A ruling in Plaintiffs' favor would have an adverse effect on NAH Utah's financial interests, including a potential loss of its investment toward exploration and subsequent development of helium from the leases and the loss of future revenue. *Id.* ¶¶ 10-11. An adverse ruling enjoining the approval of APDs would result in substantial delays that would frustrate and impede the recovery of NAH Utah's significant investments. *Id.* ¶ 11. These injuries are "fairly traceable" to Plaintiffs' legal challenge, which seeks to vacate BLM's lease authorizations and the leases issued pursuant to

those authorizations and to enjoin the approval of APDs pending additional NEPA analysis. Am. Compl., Requested Relief ¶¶ B-D; *Red Lake Band of Chippewa Indians v. United States Army Corps of Eng'rs*, 2021 U.S. Dist. LEXIS 4285, at *6 (D.D.C. Jan. 9, 2021) (concluding proposed intervenor-defendant possessed standing where injuries were "fairly traceable" to judicial decision setting aside agency action). A decision in NAH Utah's favor would prevent these harms from occurring. Thus, NAH Utah has standing under Article III of the Constitution.

C. Alternatively, NAH Utah Is Entitled to Permissive Intervention

In the alternative, this Court should grant permissive intervention to NAH Utah. Pursuant to Federal Rule of Civil Procedure 24(b), the Court is authorized to permit intervention of any party that "has a claim or defense that shares with the main action a common question of law or fact." The D.C. Circuit considers three factors for permissive intervention: "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *Equal Emp't Opportunity Comm'n v. Nat'l Childs. Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). In exercising its discretion to allow permissive intervention, "the court must [also] consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

If not permitted to intervene as a matter of right, NAH Utah satisfies the criteria for permissive intervention. With regard to subject matter jurisdiction, "[r]equiring an independent basis for jurisdiction makes sense in cases involving permissive intervention, because the typical movant asks the district court to adjudicate an additional claim on the merits." *Equal Emp't Opportunity Comm'n*, 146 F.3d at 1046. Here, however, NAH Utah does not assert any additional causes of action and all of its defenses relate to the Plaintiffs' claims against the Federal Defendants. Given that NAH Utah will defend against Plaintiffs' challenge for judicial

review of agency action under 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706, NAH Utah has satisfied the independent subject matter jurisdiction requirement. *See, e.g., Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 10 (D.D.C. 2007). For the same reasons discussed above (at 4), NAH Utah's intervention is timely and will not unduly delay or prejudice the adjudication of the original parties' rights. Finally, NAH Utah's defenses will involve common questions of law and fact because NAH Utah seeks to defend against Plaintiffs' claims that the Federal Defendants violated NEPA in approving the challenged lease authorizations, or are entitled to relief that would include vacation or suspension of NAH Utah's leases. *See, e.g., 100Reporters LLC*, 307 F.R.D. at 286 (finding common questions of law and fact based on "similarities between the issues" presented by the defendant and proposed intervenors).

CONCLUSION

For the reasons stated above, NAH Utah respectfully requests that the Court grant its motion and order its intervention in this action (1) as a matter of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure or, in the alternative, (2) permissively pursuant to Rule 24(b).

Respectfully submitted this 30th day of April, 2021

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