

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL)
DIVERSITY, *et al.*,)
)
 Plaintiffs,)
)
 v.)
)
 U.S. DEPARTMENT OF THE INTERIOR,)
 et al.,)
)
 Defendants,)
)
 and)
)
 PEAK POWDER RIVER RESOURCES,)
 LLC,)
)
 Proposed Defendant-Intervenor)
 _____)

Case No. 1:22-cv-01716-TSC

**PEAK POWDER RIVER RESOURCES, LLC’S UNOPPOSED MOTION TO
INTERVENE AS A DEFENDANT**

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Pursuant to Rule 24 of the Federal Rules of Civil Procedure, Peak Powder River Resources, LLC (“PPRR”) respectfully moves for leave to intervene as a defendant in the above-captioned matter. Before filing this motion, counsel for PPRR contacted counsel for the parties to this case. Neither Plaintiffs nor Federal Defendants take a position on this motion. Plaintiffs reserve the right to file a response.

BACKGROUND

This case involves a challenge to all federal applications for permit to drill oil and gas wells (“drilling permits”) issued by the federal Bureau of Land Management (“BLM”) between January 21, 2021 and May 31, 2022 for Wyoming’s Powder River Basin and New Mexico’s Permian Basin. Compl. ¶ 97. Plaintiffs seek a declaratory judgment that each of these permits violates the National Environmental Policy Act (“NEPA”), the Endangered Species Act (“ESA”), and the Federal Land Policy Management Act (“FLPMA”). *Id.* at 61, Relief Requested, ¶¶ A-C. Plaintiffs also request that the Court vacate each of the challenged permits and enjoin Federal Defendants from approving any additional drilling permits pending further environmental review. *Id.* at ¶¶ D-E.

PPRR, which is a wholly owned subsidiary of Peak Exploration & Production, LLC, is engaged in significant oil and gas operations in the Powder River Basin and holds a number of the challenged drilling permits and has non-operating interests in many more. Ex. A (Decl. of Jack Vaughn) at ¶¶ 3, 5-6. If granted, Plaintiffs’ requested relief would severely disrupt PPRR’s operations, would result in significant sunk costs, and would cost PPRR tens of millions of dollars in lost revenue. In order to protect its substantial interests at stake in this litigation, PPRR moves to intervene as a defendant as a matter of right pursuant to Federal Rule of Civil Procedure 24(a). In the alternative, PPRR moves to intervene permissively pursuant to Federal Rule of Civil Procedure 24(b).

ARGUMENT

I. PPRR IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Rule 24(a) of the Federal Rules of Civil Procedure provides, in pertinent part, that:

[o]n 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 the existing parties adequately represent that interest.

FED. R. CIV. P. 24(a)(2).

[Q]ualification for intervention as of right depends on the following four factors: (1) the timeliness of the motion; (2) whether the applicant claims an interest relating 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 existing parties.

Fund for Animals, 322 F.3d 728, 731 (D.C. Cir. 2003) (internal quotations and citations omitted); *see also Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008) (same). Because PPRR satisfies each of these requirements, it is entitled to intervene as of right.

A. This Motion Is Timely.

Timeliness is evaluated based on a “consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case.” *United States v. British Am. Tobacco Austl. Servs., Ltd.*, 437 F.3d 1235, 1238 (D.C. Cir. 2006) (quoting *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980)). A motion to intervene is generally deemed timely when it is filed in the early stages of litigation. *See, e.g., Fund for Animals*, 322 F.3d at 735 (motion timely when filed “less than two months after the plaintiffs filed their complaint and before the defendants filed an answer”); *Navistar, Inc. v. Jackson*, 840 F. Supp. 2d

357, 361 (D.D.C. 2012) (motion timely when filed “less than two weeks after Defendants filed their responsive pleadings, and before any discovery or substantive process had been made in the case”); *WildEarth Guardians v. Salazar*, 272 F.R.D. 4, 15 (D.D.C. 2010) (motion timely when “the administrative record is yet to be filed with the Court and no briefing schedule for dispositive motions has been set”).

PPRR easily satisfies the timeliness requirement. The Complaint in this action was filed on June 15, 2022, and the Federal Defendants have not filed an answer or other responsive pleading. The administrative record has not been filed, and no scheduling order or briefing schedule has been established. There have likewise been no preliminary hearings and the Court has not yet issued any substantive orders. In short, this motion is filed while this action is still in its infancy, and no party is prejudiced by the timing of this filing.

B. PPRR Has Legally Protected Interests at Stake in This Action.¹

The second requirement for intervention of right is that the intervenor must demonstrate “an interest relating to the property or transaction that is the subject of the action.” FED. R. CIV. P. 24(a)(2). Courts apply a “liberal approach” in evaluating a proposed intervenor’s interest under Rule 24(a). *S. Utah Wilderness All. v. Norton*, Civil Action No. 01-2518 (CKK), 2002

¹ The D.C. Circuit has held that a party seeking to intervene as of right as a defendant must also satisfy the basic standing requirements of Article III of the Constitution—injury in fact, causation, and redressability. *Fund for Animals*, 322 F.3d at 731-33. The D.C. Circuit has recognized that “the standards for constitutional standing and the second factor of the test for intervention as of right are the same.” *Crossroads Grassroots Pol’y Strategies v. Fed. Election Comm’n*, 788 F.3d 312, 320 (D.C. Cir. 2015) (citing *Fund for Animals*, 322 F.3d at 735). Thus, for the reasons set forth in this section, PPRR has Article III standing. Put simply, PPRR has benefited from Federal Defendants’ issuance of the drilling permits because the permits allow PPRR to develop its oil and gas leases. A decision in Plaintiffs’ favor would deprive PPRR of this benefit, thereby causing an injury in fact. A decision against Plaintiffs, on the other hand, would preserve PPRR’s benefit from the issuance of the permits. *See Crossroads*, 788 F.3d at 316-17.

U.S. Dist. LEXIS 27414, at *16 (D.D.C. June 28, 2002). “[T]he ‘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 v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967). As bluntly put by the D.C. Circuit, “[a]n intervenor’s interest is obvious when he asserts a claim to property that is the subject matter of the suit.” *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981).

Economic or financial interests are also generally sufficient for intervention as of right. *See, e.g., Navistar*, 840 F. Supp. 2d at 361 (recognizing intervenor’s interest as the manufacturer and seller of engines that plaintiff sought to have government agency recall); *WildEarth Guardians*, 272 F.R.D. at 14 (recognizing intervenor’s interest in bidding on coal mining leases that would allow intervenor to extend operations); *County of San Miguel, Colorado v. MacDonald*, 244 F.R.D. 36, 46-47 (D.D.C. 2007) (recognizing intervenors’ members’ economic interest in lands that were the subject of litigation under the ESA); *Dimond v. Dist. of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986) (recognizing prospective intervenor’s “financial interest” in the litigation).

PPRR has a significant interest in this litigation. PPRR currently operates 102 horizontal wells in the Powder River Basin and is among the top ten largest oil producers in that region. Ex. A (Decl. of Jack Vaughn) at ¶ 3. PPRR holds 16 of the drilling permits challenged by Plaintiffs in this action—15 of which were issued by BLM’s Buffalo Field Office and the other one of which was issued by BLM’s Casper Field Office. *Id.* at ¶ 5. Each of these permits is for a well to be horizontally drilled from private or State of Wyoming lands. *Id.* In light of its property interest in the “subject matter of the suit,” PPRR’s interest in this litigation is “obvious.” *Foster*, 655 F.2d at 1324.

In addition to holding many of the challenged permits, PPRR has already drilled and operates a well (the “INOT Well”) pursuant to one of these permits. *Id.* at ¶ 7. PPRR and its working interest partners have incurred nearly \$10 million in costs related to planning, drilling, completing, and operating the INOT Well. *Id.* at ¶ 8. The INOT Well was drilled from a well pad on private surface lands and is subject to extensive conditions aimed at minimizing environmental impacts. *Id.* at ¶¶ 9-10. The INOT Well began producing in January 2022 and has already generated total gross revenues of nearly \$8 million. *Id.* at ¶¶ 7-8.

PPRR has incurred over \$600,000 in expenses—including costs for permitting, surveying, and title work—preparing to drill horizontal wells for its other 15 permits subject to Plaintiffs’ challenge. *Id.* at ¶ 11. PPRR intends to drill most, if not all, of these wells within the next eighteen months. *Id.* PPRR also intends to apply for additional drilling permits in the Powder River Basin in the coming months. *Id.* at ¶ 15.

Finally, PPRR holds non-operating interests in another 51 wells in the Powder River Basin that were authorized by the challenged drilling permits but for which PPRR is not the permit holder. *Id.* at ¶ 6. These wells are operated by EOG Resources Inc., Ballard Petroleum Holdings, LLC, and Anschutz Exploration Corp. *Id.* Seven of those 51 wells are currently in the process of being drilled or completed. *Id.* at ¶ 14.

In sum, PPRR holds a variety of significant interests in the drilling permits that are directly challenged by Plaintiffs in this case. These interests are plainly sufficient to satisfy the interest prong for intervention as of right.

C. PPRR’s Interests Would Be Adversely Affected if Plaintiffs Prevail.

Rule 24 requires prospective intervenors to show that they are “so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest.” FED. R. CIV. P. 24(a)(2). It is irrelevant whether the applicant “could reverse an

unfavorable ruling” in subsequent proceedings because “there is no question that the task of reestablishing the status quo if the [plaintiff] succeeds . . . will be difficult and burdensome.”

Fund for Animals, 322 F.3d at 735.

As explained above, Plaintiffs seek vacatur of 16 drilling permits held by PPRR and 51 more permits for wells in which PPRR holds an interest. Vacatur of these permits would significantly harm PPRR’s interests by stranding millions of dollars of capital investment and precluding millions of dollars in expected revenues. *Id.* at ¶¶ 12-14. If the permits are vacated, PPRR will be unable to drill the 14 wells it currently plans to drill within the next year, which would result in PPRR forfeiting the \$634,000 in sunk costs PPRR has already invested in these wells and foreclosing over \$120 million in the present value of expected future profits. *Id.* at ¶ 13.

In addition, given that PPRR’s drilling plan, surface use of operations, and reclamation plan all were approved as part of the drilling permit for the INOT Well, vacatur of that permit would jeopardize the continued viability of the INOT Well, which is a significant source of revenue for PPRR and its partners. *Id.* at ¶ 12. Vacatur of the challenged permits would also result in lost sunk costs and lost revenues for the 51 wells in which PPRR holds an interest but is not the holder of the drilling permit. *Id.* at ¶ 14.

Plaintiffs’ requested injunction of the issuance of future drilling permits would further disrupt PPRR’s operations by impairing its ability to obtain additional permits, thereby impairing PPRR’s ability to develop its leases in the Powder River Basin. *Id.* at ¶ 15. Finally, due to a shortage of materials and labor for oil and gas operations in the Powder River Basin, any court-imposed delay of PPRR’s ability to exercise its rights under the drilling permits could significantly delay production of PPRR’s wells. *Id.* at ¶ 16.

In short, PPRR has devoted considerable time, effort, and financial resources to drill and complete its producing INOT well, to develop wells pursuant to PPRR's 15 other drilling permits for which PPRR is the operator, and to develop its 51 other non-operated drilling permits. *Id.* at ¶ 17. A resolution of this action in Plaintiffs' favor would materially undermine these expenditures and would preclude PPRR from realizing a return on its investment. For all these reasons, PPRR's interests would be adversely affected if Plaintiffs prevail in this action.

D. PPRR's Interests Are Not Adequately Represented by the Existing Parties.

The final element for intervention as of right "requires that the [applicants] show that their interests are not adequately represented by the existing parties." *Foster*, 655 F.2d at 1325. "[T]his factor does not present a high bar." *Friends of the Earth v. Haaland*, 2021 U.S. Dist. LEXIS 258266, *4 (citing *Fund for Animals*, 322 F.3d at 736-37 & n.6). In order to satisfy it, "the proposed intervenors need only show that the representation of their interests by the other parties may be inadequate, and this burden is a minimal one." *Env'tl. Def. Fund, Inc. v. Costle*, 79 F.R.D. 235, 239 (D.D.C. 1978) (citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). Moreover, a prospective intervenor's "interests need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate." *Nuesse*, 385 F.2d at 703.

Courts have generally concluded that "governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals*, 322 F.3d at 736; *id.* at 736 n.9 (collecting cases); *Dimond*, 792 F.2d at 193 (noting that the government defendant "would face a potential conflict of interest were it to represent both the general interests of its citizens and the financial interests of" the proposed intervenor); *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (finding the intervenors' interest "more narrow and focused than [the government party], being concerned primarily with the regulation that affects *their* industries")

(emphasis in original)); *Navistar*, 840 F. Supp. 2d at 362 (finding the federal agency was “unlikely to, and arguably should not, afford the movant’s ‘discrete and particularized interests the same primacy’ as movants would themselves” (quoting *WildEarth Guardians*, 272 F.R.D. at 15)); *County of San Miguel*, 244 F.R.D. at 48 (contrasting the Fish & Wildlife Service’s obligation of representing the general public with intervenors’ members’ interests in protecting their livelihoods and business operations).

Defendants in this case are government agencies and officials. The interests of these parties in representing the general public do not sufficiently align with PPRR’s narrower business interests.

At the time of this filing, no party has been granted intervention in this action. Even assuming that other parties are eventually granted intervention, none of them will adequately represent PPRR’s interests. PPRR is the sole owner of 16 drilling permits in the Powder River Basin. PPRR’s interests in those drilling permits, as well as the producing INOT Well, are unique to PPRR. Moreover, PPRR has its own unique drilling plans, surface use plans of operations, and reclamation plans. *See* Ex. A at ¶ 12. No other party—including no other permittee or trade association—is situated to defend PPRR’s unique interests as permit-holder in PPRR’s drilling permits. PPRR’s intervention is essential to representing these unique interests.

II. IN THE ALTERNATIVE, PPRR SHOULD BE GRANTED PERMISSIVE INTERVENTION.

Pursuant to Rule 24(b), “[o]n timely motion, the court may permit anyone to intervene who . . . 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). “[P]ermissive intervention is an inherently discretionary enterprise.” *Aristotle Int’l, Inc. v. NGP Software, Inc.*, 714 F. Supp. 2d 1, 18 (D.D.C. 2010) (quoting *EEOC v. Nat’l Children’s Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998)). “The requirements for permissive intervention are to be construed liberally, with all doubts resolved in

favor of permitting intervention.” *In re Vitamins Antitrust Litig.*, Nos. 99-197 (TFH), 1285, 2001 U.S. Dist. LEXIS 25068, at *29 (D.D.C. Mar. 19, 2001) (quotations and citation omitted). “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).

Here, PPRR’s motion is timely, and intervention will not entail undue delay or prejudice. In addition, PPRR’s defenses involve the same questions of law and fact that have already been raised in Plaintiffs’ Complaint. As a result, permissive intervention is warranted.

A. This Motion Is Timely.

As explained above, *see supra* at Section I.A, the instant motion is being filed during the infancy of this action—during the pleading stage and before any substantive court orders have been issued or hearings have been scheduled. As a result, this motion is timely and not prejudicial to any party.

B. PPRR’s Proposed Defense Shares Common Questions of Law and Fact with this Action.

PPRR’s proposed defense involves questions of law (including the standards imposed by NEPA, ESA and FLPMA) and facts (including the Federal Defendants’ fulfillment of their obligations under those statutes) that are raised in Plaintiffs’ Complaint. Where Plaintiffs seek to vacate all the challenged drilling permits (including those held by PPRR), PPRR seeks to defend its drilling permits in order to protect its significant financial and operational interests. Due to the factual and legal overlap of PPRR’s defenses with Plaintiffs’ allegations, permissive intervention should be granted.

CONCLUSION

For the foregoing reasons, PPRR respectfully moves the Court for leave to intervene in this matter.

Respectfully submitted this 5th day of August, 2022.

/s/ Thomas L. Sansonetti

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2022, I caused a true and correct copy of the foregoing Motion to Intervene as a Defendant and all attachments to be filed with the Court electronically and served by the Court's CM/ECF system upon all counsel of record.

/s/ Thomas L. Sansonetti
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