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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

WILDEARTH GUARDIANS and GRAND CANYON TRUST,

Plaintiffs,

v.

SALLY JEWELL, in her official capacity as Secretary of the U.S. Department of the Interior, UNITED STATES BUREAU OF LAND MANAGEMENT, and UNITED STATES FOREST SERVICE

Defendants,

STATE OF UTAH

Proposed Intervenor

CANYON FUEL COMPANY, LLC

Proposed Intervenor.

CANYON FUEL COMPANY'S REPLY IN SUPPORT OF MOTION TO INTERVENE

Civil Case No. 2:16-cv-00168-DN

The Honorable David Nuffer

I. INTRODUCTION

Canyon Fuel Company, LLC ("CFC") is the holder of the Flat Canyon federal coal lease. Plaintiffs WildEarth Guardians and Grand Canyon Trust ("Plaintiffs") seek to void that lease, claiming that the 2015 issuance of the Flat Canyon Lease was inconsistent with federal law and the environmental policies of the current Administration. CFC therefore moved to intervene to protect its interests. Plaintiffs oppose intervention on the grounds that CFC has not demonstrated that: (1) holding the Flat Canyon Lease constitutes an "interest" within the meaning of Fed. R. Civ. P. 24(a), (2) that this interest "may be impaired" if the lease is voided, or (3) that the Federal Defendants "may not" be able to adequately represent CFC's interests, even though Plaintiffs' entire theory is that issuance of the lease is contrary to federal policy. Plaintiffs provide no case law to support any of these propositions, which is unsurprising given that precedent is overwhelmingly to the contrary. What is truly astonishing, however, is that Plaintiff WildEarth Guardians was *a party* to many of these cases, and surely knows its position here is untenable.

II. ADDITIONAL BACKGROUND

It would be an understatement to say that CFC was surprised by the nature of Plaintiffs' opposition to CFC's (and Utah's) Motions to Intervene. Since the 2009 intervention decision in *WildEarth Guardians v. U.S. Forest Service*, 573 F.3d 992 (10th Cir. 2009) ("*Mountain Coal Company*"), and an intervention decision in the District of Columbia in 2010, *WildEarth Guardians v. Salazar*, 272 F.R.D. 4 (2010) ("*West Antelope II*") (discussed further below), CFC is not aware of any plaintiff contesting a coal company's motion to intervene related to an ongoing mining operation, at least as to the interest, impairment-of-interest, or adequacy-of-representation criteria of Rule 24(a). These include both mining plan challenges as in *Mountain*

Coal, and litigation related to coal leases and coal leasing policy. Coal leasing cases alone include seven separate actions, in every one of which the relevant mining companies and interests were summarily granted intervention as of right. These are summarized in Exhibit A. Plaintiff WildEarth Guardians was a party to most of these cases. In communicating with Plaintiffs regarding CFC's intervention in advance of the motion, CFC did not have any indication that the interest, impairment-of-interest, or adequacy-of-representation criteria might now be contested in this litigation. This led to CFC's characterization of the motion as unopposed, and CFC's relatively cursory discussion of the requirements of Rule 24(a). CFC's counsel apologizes for any mischaracterization of Plaintiffs' true position that CFC may have conveyed in its opening brief.

III. ARGUMENT

A. Plaintiffs' Allegations in the Complaint and Other Filings

Before diving into the cases, it is important to note that Plaintiffs frame their arguments in the form of "CFC has failed to show" contentions, implying that a federal coal lease might on occasion be a potentially-impairable interest within the meaning of Rule 24(a), and might not be adequately defended by the government, but that CFC has not shown that *this lease* constitutes such an interest, or that *these* Agency officials might not be up to the task of protecting CFC. Plaintiffs thus allege a failure of evidence rather than a categorical exclusion. As CFC will show, Plaintiffs wholly misapprehend the standard of Fed. R. Civ. P. 24(a). Nevertheless, even if that was the standard, it is worth revisiting the allegations in the Petition for Review of Agency Action ("Petition") because there is no need to supply extrinsic evidence to support propositions Plaintiffs themselves assert. The Petition itself establishes the facts for intervention as of right.

CFC's Interest in the Flat Canyon Lease: The Petition acknowledges that CFC, through its parent Bowie Resource Partners, LLC, presently holds the Flat Canyon Lease. Petition ¶ 43. Plaintiffs allege that the Flat Canyon lease will extend the life of the Skyline Mine. *Id.* ¶¶ 31, 48. The Petition further contends that the lease will "expand the Skyline Mine," resulting in the "inevitable" "mining, transport, and burning of coal." *Id.* Both WildEarth Guardians and Grand Canyon Trust contend that they "have been, are being, and will continue to be" irreparably harmed by the Federal Defendants' approvals of the Flat Canyon lease and the expansion of mining that will result. *Id.* ¶¶ 12, 14. The Petition thus establishes that CFC has a lease with the federal government to mine coal, and Plaintiffs' understanding that the leased coal will be mined by CFC.

Potential Impairment of that Interest: The Petition seeks the following relief:

- Declarations that the Federal Defendants violated NEPA and the MLA;
- Vacatur of all federal approvals of the Flat Canyon Lease;
- Injunctions against the Federal Defendants precluding any further authorizations under the Flat Canyon Lease until new NEPA and MLA proceedings are completed; and
- A directive that the Federal Defendants inform CFC that the Flat Canyon Lease has been voided and "new operations on the Flat Canyon Lease are prohibited" until the Federal Defendants "demonstrate compliance" with NEPA and the MLA.

Petition at 30-31, Prayer for Relief. To the extent that a federal coal lease constitutes a protectable legal interest within the meaning of Rule 24, there can be no doubt from this catalog of requested relief that Plaintiffs seek to impair that interest.

Imminency of that Potential Impairment: Before this Court, Plaintiffs suggest that vacatur of the Flat Canyon Lease will not harm CFC's interests because CFC has not shown that CFC will be mining the Flat Canyon tract in the near future. Yet in prior filings Plaintiffs

stressed the imminency of such mining. Plaintiffs' originally filed their Petition in the District Court for the District of Colorado. When the Federal Defendants moved to transfer venue to Utah, Plaintiffs' opposed the motion in part because of their view that the district court in Utah is slower than the district court in Colorado, and mining might soon commence. "The permitting process for the Flat Canyon Lease is marching forward, increasing the risk that Bowie begins mining coal . . . Thus, expeditious resolution of this case would best be served by keeping it in the existing forum." ECF #16 at 10. The imminency of mining the Flat Canyon Lease is therefore not at issue.[1]

Adequacy of Representation: A key theme of the Petition is that the Federal Defendants are suffering from a form of false consciousness, failing to appreciate that the issuance of the Flat Canyon Lease is contrary to the public interest generally and the Federal Defendants' own environmental objectives. *See* Petition at ¶ 52 (citing Interior Secretarial Order calling for greenhouse gas reductions); ¶ 53 (Executive Order by President Obama calling for same); ¶¶ 96-98 (alleged failure to show the Flat Canyon lease is in the public interest). Thus Plaintiffs' own theory of the case is that the interests of the Federal Defendants and CFC are not aligned.

Collectively, these allegations and averments form the backdrop against which CFC moved to intervene. CFC did not provide further evidence because all the facts necessary to a show a right to intervene were apparent from the four corners of Plaintiffs' own filings.

B. Plaintiffs' Misconstrue *Mountain Coal Company*

The first great hurdle to Plaintiffs' opposition is *Mountain Coal Company*, which held

[1] CFC could also supply declarations to this effect. CFC is hesitant to do so given the lack of need for such testimony, and because declarations were not provided with CFC's opening brief.

that the mere request for declaratory judgment invalidating a coal mining plan constituted sufficient potential impairment of a legally protectable interest to justify intervention under Fed. R. Civ. P. 24(a). 573 F.3d at 995-96. Plaintiffs distinguish *Mountain Coal Company* on the basis that a mining plan is "a different type of approval issued by a different federal agency" and therefore apparently not probative of intervention in a challenge to a federal coal lease. Plaintiffs are being willfully obtuse, because they know full well the inter-relationship between a lease and a mine plan. Indeed, just four days after filing this action, Plaintiff WildEarth Guardians challenged an array of mine plans in the federal district of Colorado, including a Bowie mine plan at a Colorado mine. They described the relationship between leases and mine plans, explaining that a "legally compliant Mining Plan is a prerequisite to an entity's ability to mine leased federal coal." *See* Exhibit 2 to Exhibit A. As recognized by WildEarth Guardians, a federal mine plan rests upon the foundation of a federal coal lease. Invalidation of a lease will prohibit implementing a mine plan just as surely as invalidating the mine plan itself. Consequently, a mining company has as much of an interest in the validity of a coal lease as it does for a mining plan – both are essential to mining operations. Plaintiffs' observation that a mining plan is a different approval by a different agency is technically true, but completely irrelevant as to the nature of a company's interests under Fed. R. Civ. P. 24(a), and the Tenth Circuit's recognition that a mining plan is a sufficient legal interest is dispositive as to the question whether a lease is also such an interest.

Plaintiffs' appear to further read *Mountain Coal Company* as imposing a requirement that the intervenor-applicant show that the lawsuit threatens to imminently shut down the mine, asserting that CFC "provides no explanation or supporting evidence that vacating the lease

would require the Skyline Mine to close." Opposition at 12. This interprets the concept of impairment far too narrowly. A federal coal lease is a property interest. *Rosebud Coal Sales Co. v. Andrus*, 667 F.2d 949, 951-53 (10th Cir. 1982). Vacating the lease impairs that interest, regardless of the immediate consequences for mining. Although *Mountain Coal Company* observed that the relief sought in that case would clearly disrupt mine operations, the Court further noted that an applicant need only show a practical impairment, including a "threat of economic injury." 573 F.3d at 996. Even if operations at Skyline Mine would not be immediately affected by vacatur of the Flat Canyon Lease (which is contradicted by Plaintiffs' own filings), CFC would be forced to undergo another expensive environmental review, bidding, and leasing process. In addition to the outright costs of starting over, CFC could be subject to new and more onerous lease terms, and potential denial of the lease altogether.[2] Plaintiffs' crabbed interpretation of *Mountain Coal Company* is at odds with the text of the decision, as well as the overarching principle that the test for intervention as of right is minimal. *Id.* at 995.

C. Precedent in Leasing Cases is Clear that Mining Company Intervention May be Had as of Right

Even if *Mountain Coal Company* was not by itself dispositive of CFC's interest and potential impairment, there is ample precedent specific to coal leasing cases establishing mining interests' right to intervene. In *West Antelope II*, as here, WildEarth Guardians and other plaintiffs challenged the adequacy of NEPA analysis for a federal coal lease. Among others, Antelope Coal Company ("Antelope") moved to intervene. The district court had little difficulty

[2] On January 15, 2016, Interior Secretary Jewell announced a multi-year moratorium on issuance of new federal coal leases, pending completion of a comprehensive review of the federal coal program. https://www.doi.gov/pressreleases/secretary-jewell-launches-comprehensive-review-federal-coal-program (last visited April 29, 2016).

finding Antelope had a right to intervene, *even though the lease had not yet been issued.* The court found that Antelope's mere *intent to bid on the lease*, coupled with the prospect that without the lease, Antelope's reserves would be depleted in "little over a decade," constituted a sufficient legal interest. 272 F.R.D. at 14-15. Compare this posture with CFC's, where CFC already holds Flat Canyon Lease, and the lease will similarly extend the life of the mine over approximately time period. *See* Petition at ¶ 48 (alleging that present reserves at the Skyline Mine will be exhausted in the mid-2020s). It is not possible to conclude that if Antelope had the requisite interest, CFC does not.

As to potential impairment, the District of D.C. Court explained in *West Antelope II*:

> Simply put, the Bureau's decision below was favorable to Antelope and the present action is a direct attack on that decision. Plaintiffs seek, among other things, an order vacating the Bureau's decision to allow the leasing of the West Antelope II tracts and precluding any future leasing of those tracts until such time as the Bureau [complied with the referenced regulations] and conducted environmental analyses in the manner envisioned by Plaintiffs. It is impossible to predict whether the same outcome would be reached upon remand. Furthermore, an adverse decision in this action would, at a bare minimum, prevent Antelope from bidding on, securing, and developing the West Antelope II tracts in the foreseeable future. With Antelope's current coal reserves having a horizon of little more than a decade, this action may have the "practical consequence" of Antelope's ability to remain competitive in the national coal market in both the short and long term, . . . and an adverse decision in this action would, "as a practical matter," threaten to impair Antelope's interests, Fed. R. Civ. P. 24(a)(2).

Id. at 14-15. This is exactly the type of relief and risks presented in this litigation.

Plaintiffs make no claim that Rule 24(a) is interpreted more leniently in the Tenth Circuit than in the D.C. Circuit, cite no contrary authority, and do not even acknowledge the existence of *West Antelope II*. If anything, the test for intervention is *more stringent* in the D.C. Circuit than in the Tenth Circuit, because in addition to satisfying Rule 24, the D.C. Circuit requires an additional showing that the intervenor-applicant have Article III standing. *Id.* at 13.

Other courts are in lockstep with *West Antelope II*. Not only did each of the Colorado, Wyoming, and District of Columbia federal courts referenced in Exhibit A grant intervention to industry intervenors in coal leasing challenges, all those that did not simply rely on plaintiffs' non-opposition specifically found that the intervenors met the requirements of Fed. R. Civ. P. 24(a). *See* Exh. A, Exhs. 1-3, 5, 7. The fact that most of these related only to *prospective* coal leases or coal leasing regulation generally highlights that CFC as an actual leaseholder is well within the universe of entities entitled to intervention as of right in a coal leasing action.

D. The Federal Defendants May Not Adequately Represent CFC's Interests.

Continuing their practice of turning *Mountain Coal Company* on its head, Plaintiffs assert that CFC has failed 'show the possibility of inadequate representation.'" Opposition at 13 (*quoting Mountain Coal Company*, omitting the emphasis on *possibility* in the original). According to the Plaintiffs, and without citing further case law, because the Federal Defendants and CFC are pursuing the same objective in this litigation, CFC needs to show that the Federal Defendants will have different goals, that they will not vigorously defend this action, or that their interests could diverge in this case. *Id.* But such a showing is not required. *Mountain Coal Company* explained that "the intervenor's showing is easily made when the party upon which the intervenor must rely is the government, whose obligation is to represent not only the interests of the intervenor, but the public interest generally, and who may not view the interest as coextensive with the intervenor's particular interest." 573 F.3d at 996. In other words, the mere configuration of parties satisfies the inadequate representation criterion for this type of case.[3] In

[3] Explaining *San Juan County v. United States*, 503 F.3d 1163 (10th Cir. 2007), *Mountain Coal Company* acknowledged that the government might be able to represent a private entity where they shared a single clear objective and no others. "Here, in contrast, the government has

Utah Association of Counties v. Clinton, the Tenth Circuit went so far as to say that it was "impossible" for a governmental agency to seek to protect both the interests of the public and the private interests of petitioners. 255 F.3d 1246, 1254-55 (10th Cir. 2001) ("We have here also 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 petitions in intervention, a task *which is on its face impossible*.") (emphasis added). Thus, the fact that the government is the party that would otherwise be tasked with protecting CFC's interests is sufficient to satisfy CFC's minimal burden.

Finally, Plaintiffs contend that because the Federal Defendants have not changed their leasing decision in the face of Plaintiffs' suit, "there is no reason to believe that Federal Defendants' representation of the 'public generally' will prevent the agencies from adequately representing [CFC] in this lawsuit." Opposition at 14. Again, this completely goes against Tenth Circuit precedent, which explicitly recognizes that governmental agencies may change positions—even during the course of litigation. *See* *Mountain Coal Company*, 573 F.3d at 997; *Utah Ass'n of Ctys.*, 255 F.3d at 1256 ("it is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts"). This potential is especially applicable in this case, in light of this Administration's recent decision to halt the coal leasing program altogether, and the certainty that there will be a new President-elect in seven months.

Accordingly, pursuant to Tenth Circuit precedent, the presence of the governmental agencies as the parties tasked with protecting CFC's interests necessarily satisfies this element.

E. Plaintiffs Provide No Legitimate Basis to Refuse Permissive Intervention

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multiple objectives and could well decide to embrace some of the environmental goals of WildEarth." 573 F.3d at 997.

Plaintiffs only stated reason for denying permissive intervention is their erroneous contention that the Federal Defendants adequately represent CFC's interests. Consequently, they provide no sound reason to deny permissive intervention, if the Court finds that CFC has not satisfied any of the other criteria of Rule 24(a). In that vein, Plaintiffs also lose sight of the policy underlying the *minimal* burdens associated with intervention—parties with a stake in litigation should be allowed to participate. It is inconceivable that CFC does not have such a stake overall, and for that reason the Court should put aside any reservations it might have as to any of the specific elements intervention as of right, and grant permissive intervention.

F. The Court Should Reject Plaintiffs' Arbitrary Page Limit Request

CFC does not object to, and fully intends to coordinate with the Federal Defendants and the State of Utah upon being granted intervention. CFC objects to the arbitrary 10-page briefing limit requested by Plaintiffs, for which they provide no rationale other than a generic invocation of "efficiency." Plaintiffs have filed a 30+ page Petition for Review involving multiple counts and statutory authorities. No administrative record has yet been produced. In addition, the ability of CFC to coordinate with the Federal Defendants is constrained by the fact that Justice Department policy generally does not permit the sharing of draft work product. To the extent that the Court is concerned with efficient briefing, an appropriate measure is to provide for Intervenor filings to be submitted 14 days after the Federal Defendants, which would allow CFC to focus on those issues not fully addressed by the Federal Defendants.

IV. CONCLUSION

For the reasons expressed herein and in CFC's Motion to Intervene, CFC requests that the Court grant it leave to intervene in this matter.

DATED this 2nd day of May, 2016.

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