IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-2563-REB

SAVE THE COLORADO,
SAVE THE POUDRE: POUDRE WATERKEEPER,
WILDEARTH GUARDIANS,
LIVING RIVERS,
WATERKEEPER ALLIANCE, and
SIERRA CLUB.

Petitioners,

v.

UNITED STATES BUREAU OF RECLAMATION, and
UNITED STATES ARMY CORPS OF ENGINEERS.

Respondents.

PETITIONERS' RESPONSE TO MOTION TO INTERVENE BY COLORADO DEPARTMENT OF NATURAL RESOURCES

On May 9, 2018, the Colorado Department of Natural Resources filed a Motion to Intervene (ECF No. 35) in the above captained matter under Fed. R. Civ. P. 24(a)(2), or in the alternative, permissively under Fed. R. Civ. P. 24(b). The Department has not explained what its interests are in sufficient detail or how they would be impacted by this litigation, and it has not overcome the presumption that other parties would not adequately represent its interests. Therefore Petitioners oppose intervention by the Department.

LEGAL BACKGROUND

A. Intervention as a Matter of Right – Fed. R. Civ. P. 24(a)(2)

The Tenth Circuit takes a somewhat liberal approach to intervention and has cautioned against mechanical application of the requirements of Rule 24(a)(2). *San Juan Cnty. v. United States*, 503 F.3d 1163, 1199 (10th Cir. 2007). Thus, an applicant for intervention must have an interest that could be adversely affected by the litigation. *Id.* Yet those interests must be sufficiently concrete, rather than speculative. *Id.* at 1202. As a result, intervention may be denied if it the interest is "*too* contingent, *too* speculative, and hardly substantial." *Id.* (citing *City of Stilwell v. Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038 (10th Cir. 1996)) (emphasis in original). And intervention is not granted when the applicant has not shown that its interest would be "impeded by the disposition of the action." *Allard v. Frizzell*, 536 F.2d 1332 (10th Cir. 1976). Finally, the "opportunity to offer extraneous evidence" beyond the scope of the issues before the court is not a protectable interest. *Alameda Water & Sanitation Dist. v. Browner*, 9 F.3d 88, 91 (10th Cir. 1993). These Tenth Circuit cases are in accord with numerous cases from other jurisdictions discussed in a leading treatise on federal court practice. *See* Wright & Miller, 7C Fed. Prac. & Proc. Civ. § 1908.1 n.49 (3d. ed.).

In addition to demonstrating impairment of a protected interest, a party must show that its interests are not adequately represented by the existing parties to the action. Fed. R. Civ. P. 24(a)(2). A movant "is not entitled to intervene if its 'interest is adequately represented by existing parties.'" *Tri-State Generation and Transmission Ass'n, Inc. v N.M. Pub. Regulation Comm'n*, 787 F.3d 1068, 1072 (10th Cir. 2015)

(quoting *San Juan Cnty. v. United States*, 503 F.3d 1163, 1204 (10th Cir. 2007)). The Tenth Circuit presumes that representation is adequate when the "objectives of the applicant for intervention is identical to that of one of the parties." *Id.* (quoting *City of Stilwell v. Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996)). This presumption holds true even when a party has "different ultimate motivations from the government agency. . . ." *San Juan Cnty.*, 503 F.3d at 1073.

Representation is presumed adequate if parties have "identical litigation objectives." *Tri-State*, 787 F.3d at 1073. A good indicator of adequate representation is when a movant raises nearly identical affirmative defenses in their proposed responses to a complaint. *Id.* at 1074. Furthermore, courts examine whether the movant possesses "unique knowledge or expertise beyond that of a government agency." *Id.*

When a case involves binary issues, and parties have identical objectives in the dispute, representation is presumed adequate unless the movant makes a "concrete showing of circumstances that [current] representation is inadequate." *Tri-State*, 787 F.3d at 1073. (citation omitted) (alteration in original). This showing can be made by "showing that there is collusion between the representative and an opposing party, that the representative has an interest adverse to the applicant, or that the representative failed to represent the applicant's interest." *Id.*

B. Permissive Intervention – Fed. R. Civ. P. 24(b)

When deciding whether to grant permissive intervention, courts "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Permissive intervention is inappropriate when

existing parties adequately represent the movant's interest. *Tri-State*, 787 F.3d at 1074–75. While Rule 24(b) does not directly dictate that adequate representation is a factor courts should consider, the Tenth Circuit has denied permissive intervention on these grounds. *Id.* at 1075; *Ozarks*, 79 F.3d at 1043. Furthermore, the Tenth Circuit has upheld denials of permissive intervention on the grounds that "intervention would unduly delay and prejudice the adjudication of the rights of the parties" if the proposed intervener would interject additional issues. *Ozarks*, 79 F.3d at 1043.

ARGUMENT

A. The Department has not identified any specific interest that would be impaired by the litigation.

The Department has not identified any concrete interests related to this litigation. The Department never clearly or consistently outlined what its interests are, instead including only vague references to sovereign interests and a desire to participate in the litigation. *See, e.g.*, ECF No. 35 at 8 ("CDNR has a sovereign interest in participating in proceedings that implicate directives and policies of the State" and "an interest in protecting its sovereign power over intrastate water matters"); *id.* ("CDNR has an interest in challenges to [decisions] pertaining to projects that align with the policies of the State"); *id.* at 9 ("CDNR has an interest in the outcome of any challenge"); id. at 11 ("sovereign interests in management of these water resources"); id. at 12 ("the State's interests in decision making and administrative authorities"). The Department never explains what its sovereign interests are, or why its sovereign interests in participating in the proceeding are any different from other interests in participating in a proceeding. However, being interested in the outcome of litigation, standing alone, cannot be

enough to justify intervention of right, otherwise every request for intervention would be granted. *Cf. San Juan Cnty. v. U.S.*, 503 F.3d 1163, 1202 (10th Cir. 2007) (rejecting as "bizarre" a rule that would "bar almost all interventions"). In contrast, the Tenth Circuit has rejected more concrete interests than desire to participate in litigation, holding that a desire to present extra-record evidence in an administrative appeal was insufficient to confer standing. *See Alameda Water & Sanitation Dist. v. Browner*, 9 F.3d 88, 91 (10th Cir. 1993). Although the test for impairment of interest under Rule 24(a)(2) is not a particularly demanding one, the Department does not meet even this low bar.

Mere reference to sovereign interests, without explaining what those sovereign interests are or how they would be affected by the outcome of litigation, is also insufficient. The Department's reliance on *Massachusetts v. EPA* for this point is misplaced because unlike Massachusetts, here the Department has not identified any concrete interests or how they would be impacted. ECF No. 35 at 7-12. Nor did the Department submit any affidavits or other evidence to explain in concrete terms what its interest is. In contrast, Massachusetts owned a great deal of territory that was alleged to be affected by rising sea levels attributable to climate change, in addition to its broader interest in all the "earth and air within its domain." *Massachusetts v. EPA*, 549 U.S. 497, 518-20 (2007). Here, the Department has pointed to no territory or other property that it owns[1] and explained how it might be affected by the outcome of this

[1] Any related property interests that can be said to be owned by the state would actually be owned by the Municipal Subdistrict, which is a separate quasi-municipal subdivision of the State. ECF No. 23 at 1 n.1. Petitioners did not oppose intervention by the Subdistrict. ECF No. 24. The Department's conflation of itself with the state of

case. Other cases have shown that states and their subdivisions have to do more than merely assert vague sovereign interests in order to demonstrate standing. *See, e.g.*, *W. Expl., LLC v. U.S. Dep't of the Interior*, No. 3:15-cv-00491-MMD-VPC, 2017 WL 1237971, at *6 (D. Nev. Mar. 31, 2017) (state and counties failed to allege sufficiently specific injury to support standing); *Otter v. Jewell*, 227 F. Supp. 3d 117, 124 (D.D.C. 2017) (rejecting Idaho's general references to sovereign authority over wildlife to demonstrate injury for standing). The Department's vague references to its sovereign interests in this case is much more analogous to the latter cases than to *Mass. v. EPA*. Finally, it should also be noted that the standing inquiry, although similar in some ways to the injury in fact and redressability prongs of standing, is a different standard and therefore not entirely analogous to the impairment of interest test for intervention. *See San Juan Cnty.*, 503 F.3d at 1171-72 (distinguishing standing from the intervention analysis).

The problems with the vague statements of interest by the Department are compounded when it attempts to demonstrate how those interests would be impaired by the litigation. ECF No. 35 at 10-11. The Department never explains how a decision in Petitioners' favor would actually impair whatever its interests are, instead simply making conclusory assertions. The Department argues that impairment might occur if the court were to "overturn the existing [decisions] and direct the Federal Respondents to issue new [decisions] in a manner inconsistent or conflicting with State water administration

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Colorado confuses the matter, and begs the question of why two different organs of state government should participate independently in this litigation.

and State water planning goals and needs." *Id.* at 10. Yet the Department never explains how a court ruling requiring compliance with federal law would actually conflict with state goals, and the Department has not raised any claims in its answer that enforcement of the Clean Water Act or National Environmental Policy Act would infringe on state sovereignty. The Department also contends that its interests would be impaired if further environmental reviews "would likely require the State to expend even greater time and resources to contribute to a new environmental assessment or impact statement," *id.*, yet this argument proves too much. Every party seeking to intervene to defend against NEPA claims would be able to argue that it would be required to spend time and money on subsequent environmental reviews. *Cf. San Juan Cnty.*, 503 F.3d at 1202 (rejecting as "bizarre" a rule that would "bar almost all interventions"). Finally, the state refers to potential significant implications without ever explaining how this litigation might cause them. ECF No. 35 at 10. The Department does not explain, for example, how this litigation might implicate "how the state can work with water users or the federal government to bring about the greater utilization of waters of the State," *id.*,[2] and frankly Petitioners cannot see how this litigation would possibly frustrate attempts by the state to work with either water users or the federal government. Instead, this case will simply resolve whether two federal agencies complied with federal law in taking two specific final agency actions; therefore, this case will have no effect on how

[2] The Department also does not explain how this litigation would affect the other implications it refers to, "how the State administers and manages such projects under its sovereign powers, and how the State may be able to successfully implement essential elements for the Colorado Water Plan." ECF No. 35 at 10-11.

the state can work with water users or the federal government. As a result, the Department has not identified any interests that might be impaired as a result of this litigation.

B. The Department has not rebutted the presumption that its interests are adequately represented by other parties to the litigation.

The Department's objective in this case is identical to that of the federal defendants – they all seek a ruling affirming the federal agencies' decisions. The Department's motion fails to even address the requirement that when the objective of the prospective intervenor is identical to that of one of the parties, representation is presumed to be adequate. This was a key issue in both the most important and most recent Tenth Circuit intervention decisions. *See San Juan Cnty. v. U.S.*, 503 F.3d 1165, 1203-07 (10th Cir. 2007) (en banc); *Tri-State Generation and Transmission Ass'n, Inc. v N.M. Pub. Regulation Comm'n*, 787 F.3d 1068, 1072 (10th Cir. 2015). Those cases were both decided more recently than the cases cited by the Department for the proposition that its sovereign interests cannot be adequately represented. ECF No. 35 at 11 (citing *Utahns for Better Transp.. v. U.S. Dep't of Transp.*, 295 F.3d 1111 (10th Cir. 2002) and *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246 (10th Cir. 2001)). The Department has not even attempted to rebut the presumption of adequate representation or to explain why the presumption does not apply, and therefore its request for intervention must be denied.

This lawsuit presents two binary issues for the court to decide, whether the Bureau of Reclamation violated the National Environmental Policy Act (encompassing Claims 1-6) and whether the Army Corps of Engineers violated the Clean Water Act

(Claim 7). On both of those binary issues, the Department has the same objective as the federal agencies – they all wish to have the Records of Decision upheld. Just as in *San Juan County*, this case is narrowly framed by the causes of action to be about whether the federal government complied with the applicable federal laws. *San Juan Cnty.*, 503 F.3d at 1206 (litigation was focused on title to the road). This case is also similar to the *Tri-State* case, where the Tenth Circuit held that the objective of the applicant was identical to one of the parties. *Tri-State*, 787 F.3d at 1073 (case involved a binary issue of whether state authority over rates violated Commerce Clause). For this case, the Department's interests all tie back to approval of the Records of Decision in this case. The Department wants those Records of Decision to stand. So do Reclamation and the Corps. There is no room between the Department and the federal agencies on this point, and thus their objectives are identical.

The Department makes no attempt to overcome the presumption with a "concrete showing of circumstances" that the federal government agencies would not adequately represent its interests in this case. *Tri-State*, 787 F.3d at 1073. The Department has not made a "showing that there is collusion between the representative and an opposing party, that the representative has an interest adverse to the applicant, or that the representative failed to represent the applicant's interest." *Id.* Instead, the Department simply argues that it has broader interests than the existing parties, rather than arguing that the interests are adverse. And the Department suggests that it should be able to introduce extra-record evidence about the state's "roles and responsibilities," ECF No. 35 at 12, even though such desire is not sufficient grounds in this circuit for

intervention. *Alameda Water*, 9 F.3d at 91. Yet, there is no reason to think that the federal government cannot adequately explain the contents of the administrative record, or that it will vigorously defend its records of decision. *Tri-State*, 787 F.3d at 1074 ("no reason to think that [state agency] will not vigorously argue in favor of its statutory authority"). And the Department has not argued that it has any special expertise beyond that of the federal agencies regarding the issues in this case – whether the federal agencies complied with the National Environmental Policy Act and the Clean Water Act. *Id.* (distinguishing cases where "intervention applicants possessed unique knowledge or expertise beyond that of the governmental agency"). In fact, Reclamation and the Corps are much more expert on those topics than the Department.

In addition to being immaterial, the Department's claims that the motivations behind its objections is different from the other parties is incorrect, at least with respect to the Municipal Subdistrict.[3] The Municipal Subdistrict was created by the State of Colorado in order to construct and operate the Windy Gap Project, the continued expansion of which is the subject of this litigation. ECF No 23 at 4. The Department bases its interest in the case on its support of the same project. Thus, the interest and motivations of the Municipal Subdistrict and the Department are the same with respect to this litigation. The Department's meager attempt to distinguish its interest ignores that this case is not about "on a State-wide level, to protect development, preservation, and enhancement of the State's natural resources." ECF No. 35 at 12. Instead this

[3] Although the court has not yet ruled on the Municipal Subdistrict's request for intervention (ECF No. 23), Petitioners did not oppose that intervention.

case is narrowly focused on the Windy Gap Firming Project, and specifically whether federal government procedures for approval followed applicable federal law. Thus, the Municipal Subdistrict and the Department have not only an identical objective in this litigation, but their motivations *with respect to this case* are also identical.

The proposed answer filed by the Department also supports the conclusion that its interests will be adequately represented by existing parties. The answers to factual allegations are not particularly helpful in a case reviewed on an administrative record, such as this one. The Department's first affirmative defense is that "Petitioners fail to state a claim upon which relief can be granted." ECF No. 35-2 at 29. Yet this defense, based in Federal Rule of Civil Procedure 12, is not relevant in a case brought pursuant to the Administrative Procedure Act, which is instead processed as an appeal from a final agency action. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994) (explaining that such cases are governed by the Federal Rules of Appellate Procedure and that common district court filings such as motions for summary judgment are not compatible). The Department's second affirmative defense is the same as that raised by the Municipal Subdistrict. *Compare* ECF No. 35-2 at 29 *with* ECF No. 23-4 at 31. Thus, intervention by the Department would not add anything to the representation by the other parties, which is adequate.

There is also no good reason for two different entities formed by the Colorado state legislature to participate separately in this litigation. If both are allowed to intervene, then what is to stop other subdivisions of the state from seeking intervention,

such as the municipal governments that would utilize the water from the project?[4] Each of these state government entities can adequately represent the interests of the others, they all have the same objective in the litigation, and there is no suggestion of any collusion between the parties and an opposing party, of adverse interests, or of failure to represent the applicant's interest. *Tri-State*, 787 F.3d at 1073 (laying out ways to overcome presumption with concrete showing of inadequate representation).

C. The Department should not be granted permissive intervention.

Denial of permissive intervention is appropriate where existing parties will adequately represent the applicant's interests, as is the case here. *Tri-State*, 787 F.3d at 1075. For all the reasons already discussed, the Department's interests are adequately represented in this case. Participation by the Department would also not aid the court in any way, because the Department has no particular expertise in this administrative record or in compliance with the National Environmental Policy Act or the Clean Water Act. The Department has even revealed that state endorsement of the project in this case occurred *after* Reclamation issued its record of decision, ECF No. 35 at 5 (noting formal endorsement in 2016, after record of decision issued in 2015), and thus such information is not appropriately part of the administrative record because Reclamation did not have the information at the time it made its decision. Finally, participation by yet another state entity would only add to the burden on Petitioners in responding to more briefs from the other side or additional delays over attempts to cite

[4] In contrast to the duplicative parties representing the state of Colorado, Petitioners joined together in this litigation under representation by the same counsel, and have committed to joint filings.

extra-record evidence. Intervention would also result in even more pages of briefing for the court to review, without adding any benefit. Therefore, the request for permissive intervention should likewise be denied.

Dated: May 29, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on May 29, 2018, I electronically filed the foregoing motion with the Clerk of Court using the ECF system, which will send notification of such filing to all Counsel of Record.

/s/ Kevin J. Lynch
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