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ATTORNEYS FOR SIGNAL PEAK ENERGY, LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

350 MONTANA, MONTANA
ENVIRONMENTAL INFORMATION
CENTER, SIERRA CLUB,
WILDEARTH GUARDIANS,

Plaintiffs,

vs.

DAVID BERNHARDT, in his official
capacity as Acting Secretary of the
Department of the Interior, UNITED
STATES OFFICE OF SURFACE
MINING, an agency within the U.S.
Department of Interior, et al,

Defendants.

and

SIGNAL PEAK ENERGY, LLC,

Applicant Defendant-
Intervenor.

Case No. 9:19-cv-00012-DWM

**BRIEF IN SUPPORT OF
SIGNAL PEAK ENERGY, LLC'S
UNOPPOSED MOTION TO
INTERVENE**

INTRODUCTION

Pursuant to Rules 24(a)(2) and 24(b)(2) of the Federal Rules of Civil Procedure, Applicant Defendant-Intervenor Signal Peak Energy, LLC (“Signal Peak”) has moved this Court for leave to intervene, as a Defendant, in this case.

FACTS

The Office of Surface Mining Reclamation & Enforcement (the “Office of Surface Mining”) first approved Signal Peak’s proposed mine plan modification, which made available approximately 7000 acres of coal reserves to be added to the Bull Mountain Mine No. 1, in 2015. The Montana Environmental Information Center (“MEIC”) and others filed suit in this Court under the Administrative Procedure Act challenging Office of Surface Mining’s compliance with the National Environmental Policy Act (“NEPA”) in authorizing the mine expansion. *Mont. Env’tl. Info. Ctr. v. Office of Surface Mining*, No. 9:15-cv-00106-DWM (D. Mont.). Montana Environmental Information Center argued that the Office of Surface Mining had failed to satisfy its NEPA obligation because it prepared an environmental assessment (“Environmental Assessment”), and, based on that Environmental Assessment, did not go on to prepare an environmental impact statement (“EIS”). Montana Environmental Information Center argued that the Office of Surface Mining failed to take a hard look at a variety of impacts of expanding the coal mine. Signal Peak moved for and was granted leave to

intervene as of right in the case. *Mont. Env'tl. Info. Ctr. v. Office of Surface Mining*, No. 9:15-cv-00106-DWM, Dkt. No. 12.

In an August 14, 2017 Order on the merits, this Court rejected many of Montana Environmental Information Center's claims in the preceding litigation, but found that the Office of Surface Mining had violated NEPA in three respects: (1) it had not adequately considered the indirect social, economic, and environmental effects of additional coal trains, (2) it failed to address the indirect non-local impacts of non-greenhouse gas emissions associated with burning coal, and (3) it did not quantify the social costs of greenhouse gas emissions associated with burning coal. *See Mont. Env'tl. Info. Ctr. v. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017). The Court's order vacated and set aside the Environmental Assessment and remanded the matter to the Office of Surface Mining for further action consistent with the decision. The court also enjoined all mining of federal coal within the amended permit boundary, pending compliance with NEPA. That injunction was later modified to allow displacement of a limited amount of federal coal so that development work could continue, avoiding imminent layoffs of dozens of miners. *Mont. Env'tl. Info. Ctr. v. Office of Surface Mining*, No. 9:15-cv-00106-DWM, Dkt. Nos. 99, 102.

On remand to the Office of Surface Mining, the agency prepared a new Environmental Assessment to address the NEPA deficiencies identified by the

Court's August 2017 order. In May 2018, the Office of Surface Mining completed the additional environmental review, and in August 2018, the Office of Surface Mining reauthorized the mine plan modification. The Plaintiffs, including Montana Environmental Information Center, now challenge the Office of Surface Mining's Environmental Assessment on remand, alleging it suffers from the same flaws as the original Environmental Assessment, and requesting that the Court vacate and set aside the mine plan modification and enjoin all operations until the Federal Defendants conduct yet another round of NEPA. Complaint, Requests for Relief B, D.

Signal Peak seeks to intervene, as it did in the preceding litigation, on the same grounds as before. Because Signal Peak owns and operates the mine and the relief sought would significantly harm Signal Peak's economic interests by foreclosing development under Signal Peak's valid federal mineral leases, Signal Peak has an interest in the outcome of this litigation that entitles it to intervention.

ARGUMENT

I. THE STANDARD FOR INTERVENTION

Fed. R. Civ. P. 24(a)(2) 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).¹

The Ninth Circuit broadly interprets the requirements for intervention in favor of the applicant for intervention, guided primarily by practical and equitable considerations. *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1148 (9th Cir. 2010); *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002) (“By allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.”) (citation omitted). All well-pleaded, non-conclusory allegations in the motion to intervene and supporting declarations are taken as true absent sham, frivolity, or other valid objections. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001).

A Rule 24(a)(2) motion should be granted if: (1) the application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) disposition of the action may, as a

¹ Signal Peak also satisfies the requirements for permissive intervention under Federal Rule of Civil Procedure 24(b), and reserves the right to request permissive intervention in the event that the Court denies Signal Peak's motion to intervene as of right under Federal Rule of Civil Procedure 24(a).

practical matter, impair or impede the applicants' ability to protect their interests; and (4) the existing parties may not adequately represent the applicants' interests.

In re Estate of Ferdinand E. Marcos, 536 F.3d 980, 984 (9th Cir. 2008). Signal Peak's motion satisfies each of these requirements.

II. SIGNAL PEAK MAY INTERVENE IN THIS ACTION AS A MATTER OF RIGHT.

Signal Peak satisfies all the requirements of Rule 24(a)(2) to intervene as a matter of right.

A. Signal Peak's Motion for Intervention is Timely.

In determining whether a motion to intervene is timely, three factors are considered: (1) the stage of proceedings; (2) prejudice to other parties; and (3) the reason for, and length of, delay. *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007). This determination is to be construed broadly in favor of the applicant for intervention. *In re Marcos*, 536 F.3d at 985.

Signal Peak meets Rule 24's timeliness requirement. This action is in its earliest stages. Plaintiffs filed their Complaint on January 16, 2018, and this motion to intervene is filed three weeks later. The Federal Defendants have not yet answered or filed the administrative record, and the Court has not issued a case management or scheduling order. Signal Peak's participation will not delay the proceedings or require the Court to alter the schedule for any motions. Thus,

intervention will not prejudice the other parties, and Signal Peak's motion to intervene is timely.

B. Signal Peak Has Significant Protectable Interests Relating to the Subject of this Litigation.

The Ninth Circuit has held that an applicant for intervention has a "significant protectable interest" in an action if (1) it asserts an interest that is protected under some law, and (2) there is a "relationship" between its legally protected interest and the plaintiff's claims. *In re Marcos*, 536 F.3d at 984; *Sw. Ctr. for Biological Diversity*, 268 F.3d at 818. Courts find that the applicant meets this relationship requirement if resolution of the plaintiff's claims actually will affect the applicant. "[W]hether an applicant for intervention demonstrates sufficient interest in an action is a practical, threshold inquiry. No specific legal or equitable interest need be established It is generally enough that the interest [asserted] is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 818 (citation omitted).

Here, Signal Peak has an interest in its duly authorized mine plan modification, which is necessary to access and develop coal pursuant to its valid existing lease rights.

C. Signal Peak’s Interests Could be Impaired or Impeded by the Disposition of this Action.

Courts in the Ninth Circuit follow the advisory committee notes to Rule 24:

“If an absentee 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.” *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822; *see also City of Los Angeles*, 288 F.3d at 398 (courts consider and give weight to the “*practical* interest in the outcome of a particular case”). The policy is explained in *Forest Conservation Council v. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995), “if [applicant intervenors] are not made a party to this action, they will have no legal means to challenge [court-ordered relief] while it remains in effect.”

The relief requested by Plaintiffs demonstrates that Signal Peak’s ability to protect its interests would be impaired as a practical matter if Plaintiffs prevail in this case. Plaintiffs seek to invalidate the reauthorization of Signal Peak’s mine plan modification and to enjoin all operations within the modification area. Complaint, Request for Relief ¶¶ B, D. This Court previously acknowledged the significant burdens on Signal Peak and its miners of halting all development of federal coal, *Mont. Env’tl. Info. Ctr. v. Office of Surface Mining*, No. 9:15-cv-00106-DWM, Dkt. No. 102. Here vacating the mine plan modification and shutting down operations in the modification area would have immediate and damaging effects to Signal Peak and its work force. If Signal Peak is not allowed

to intervene, it will be unable to protect its interest in the validity of the new Environmental Assessment and the reauthorized mine plan modification.

D. Signal Peaks' Interests Cannot be Adequately Represented by the Government.

For this factor, the Ninth Circuit considers: (1) whether the interests of the present party are such that it will undoubtedly make all of the intervenors' arguments; (2) whether the present party is capable and willing to make those arguments; and (3) whether the would-be intervenors would offer any necessary elements to the proceedings that other parties would neglect. *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822.

Here, the burden on the movant is minimal. Signal Peak need only show that representation of its interests by existing parties "may be" inadequate. *Id.* at 823; *see also Trbovich v. United Mine Workers*, 404 U.S. 528, 538 (1972). The focus should be on the subject of the action and not merely the particular issues before the court at the time of the motion. *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823. Any presumption of adequate representation due to a shared ultimate objective is rebuttable if Signal Peak and the Office of Surface Mining have incongruent interests. *Id.* Inadequate representation may be found when the applicant asserts a personal interest that does not belong to the general public. *Forest Conservation Council*, 66 F.3d at 1499. Signal Peak meets its minimal burden here.

The potential harm confronting Signal Peak, described above, is separate from and independent of the potential injury to the public interest defended by the Office of Surface Mining. Absent intervention, Signal Peak would have to rely on the Office of Surface Mining to represent its distinct interests. The Office of Surface Mining's obligation to represent the public interest, however, means that it cannot be relied upon to fully represent Signal Peak's private business interests, its monetary investment, and its lease rights. This divergence of interests meets the minimal burden of showing inadequacy of representation. *Cf. Sw. Ctr. for Biological Diversity*, 268 F.3d at 823 ("FWS, a federal agency . . . cannot be expected under the circumstances presented to protect these [other] interests.").

The post-decision motions filed in the preceding litigation illustrate the distinction between Signal Peak's and the Office of Surface Mining's interests. Signal Peak, not the Federal Defendants, moved to tailor the Court's blanket injunction on displacement of all federal coal in the amended permit area. *Mont. Env'tl. Info. Ctr. v. Office of Surface Mining*, 9:15-cv-00106-DWM, Dkt. No. 70. While the Federal Defendants joined in the motion to modify the injunction, they left Signal Peak to argue its case. Given the imminent threat to Signal Peak's workforce, it was up to Signal Peak to assert its rights in equity, a privilege it would not have had if it had not intervened in the matter.

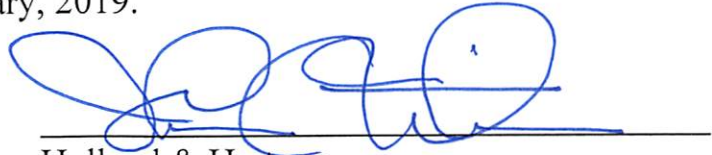
Thus, Signal Peak and the Federal Defendants' common interest in defending the reauthorization of the mine per modification is not sufficient to foreclose Signal Peak's intervention. *See Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) (finding that a union's interests, which were "potentially more narrow and parochial than the interest of the public at large," were not adequately represented by state agencies).

For these reasons, Signal Peak should be allowed to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2).

CONCLUSION

Rule 24 of the Federal Rules of Civil Procedure is to be liberally construed in favor of Signal Peak and guided by practical and equitable considerations rather than technical distinctions. Plaintiffs request declaratory relief invalidating the Environmental Assessment and an injunction to prevent all mining of federal coal in the amended permit area. Accordingly, Signal Peak respectfully requests that the Court grant it intervention as a matter of right.

Dated this 11th day of February, 2019.

A handwritten signature in blue ink, consisting of several loops and a horizontal line at the end, positioned above a solid horizontal line.

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