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Enefit American Oil Co.

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

LIVING RIVERS; GRAND CANYON TRUST; CENTER FOR BIOLOGICAL DIVERSITY; NATURAL RESOURCES DEFENSE COUNCIL; SIERRA CLUB; WATERKEEPER ALLIANCE, INC.; COLORADO RIVERKEEPER; and UTAH PHYSICIAN FOR A HEALTHY ENVIRONMENT; Plaintiffs , v. DAVID BERHARDT, Secretary of the Interior; JOSEPH BALASH, Assistant Secretary for Land and Mineral Management; U.S. DEPARTMENT OF THE INTERIOR; U.S. BUREAU OF LAND MANAGEMENT; U.S. FISH & WILDLIFE SERVICE; and LARRY CRIST, Field Supervisor of the U.S. Fish & Wildlife Service's Utah Field Office; Defendants.	**MOTION TO INTERVENE BY ENEFIT AMERICAN OIL CO., AND MEMORANDUM IN SUPPORT THEREOF** Civil No. 4:19-CV-00041-DN-PK Judge David Nuffer Magistrate Judge Paul Kohler

MOTION TO INTERVENE

Pursuant to Fed. R. Civ. P. 24, Enefit American Oil Co. ("Enefit") moves to intervene as a defendant in this action. As set forth more fully in the supporting Memorandum below and the accompanying Declaration of Ryan Clerico, and in accordance with Rule 24(a), Enefit is entitled to intervene as of right because (1) this motion is timely, (2) Enefit has a legally protectable interest relating to the property or transaction which is the subject of this action, (3) Enefit's interest may as a practical matter be impaired by the outcome of this action, and (4) Enefit's interest may not be adequately represented by the existing parties. In accordance with Rule 24(c), this Motion is also accompanied by a copy of the Complaint filed in this action.

Alternatively, in accordance with Rule 24(b), Enefit requests permissive intervention as its defenses have questions of law and fact in common with those raised in this action and intervention will not unduly delay or prejudice the adjudication of the rights of the other parties.

Enefit's counsel has contacted counsel for all parties to this litigation regarding this motion. The named Defendants do not oppose this motion, and Plaintiffs reserve their position.

MEMORANDUM IN SUPPORT THEREOF

As a wholly-owned subsidiary of Eesti Energia AS, the national energy company of the republic of Estonia, Enefit, together with its parent company, bring more the 80 years of commercial knowledge and operating experience in developing oil shale resources in an environmentally responsible manner. Enefit owns and leases land located in Utah's Uintah Basin which contains extensive oil shale reserves, and is developing an oil shale mine and processing facility to access those reserves (the "Facility" or "Oil Shale Project"). Although the operations associated with the Facility will be located primarily on private land, those operations

are anticipated to have improved environmental and social performance with the provision of various industrial-scale utility services to the Facility, including a paved road to provide access to the Facility; transmission lines to provide and distribute electricity; supply pipelines to transport water and natural gas to the Facility, and another pipeline to transport oil product from the Facility to market terminals (collectively, "Utility Services"). The most safe, reliable and efficient means for providing those five Utility Services to the Facility would be through the installation of a limited utility corridor across federal public land ("Utility Corridor").

Enefit submitted applications to the U.S. Bureau of Land Management ("BLM") for five rights-of-way (collectively, "ROWs") on which to construct such a Utility Corridor. After extensive environmental reviews conducted by BLM and the U.S. Fish and Wildlife Service ("FWS") (together, the "Federal Defendants"), pursuant to the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"), BLM granted the ROWs. On May 16, 2019, Plaintiffs filed their Complaint for Declaratory and Injunctive Relief, attempting to undermine the proposed Utility Corridor by claiming that BLM and FWS's reviews of the potential environmental impacts of the underlying ROWs were inadequate, and seeking to "[v]acate and set aside" the ROWs (the "Litigation").[1] Enefit seeks to intervene because that relief requested threatens to impair Enefit's interest in developing its private land holdings.

BACKGROUND FACTS

I. Enefit's Oil Shale Project

The Facility will be located primarily on private land owned by Enefit. To maximize the safety, reliability and efficiency of its Oil Shale Project, Enefit applied for the ROWs across

[1] *See* Dkt. 2 (Complaint) at 48.

adjacent BLM lands to facilitate the proposed Utility Corridor to the Facility. Because the ROWs are located on federal land BLM was required under NEPA to review the potential environmental effects of the ROWs,[2] and was required under the ESA to consult with FWS regarding the potential effects on certain species listed or proposed to be listed under the ESA.[3] BLM's extensive review process spanned six years and culminated with the issuance of it 1,000+ page Final Environmental Impact Statement ("FEIS") and an associated Record of Decision ("ROD").[4]

Plaintiffs take issue with BLM's conclusion under NEPA that the ROWs will adequately avoid and minimize environmental impacts,[5] and FWS's conclusion under ESA that the ROWs will not likely jeopardize the continued existence of certain species listed or proposed to be listed.[6] As a result, Plaintiffs have initiated this Litigation seeking to vacate the ROWs.

II. Enefit's Interest in this Litigation[7]

Utah's Uintah Basin holds extensive oil shale reserves. Enefit has spent significant time and resources exploring the feasibility of mining and processing those reserves, adapting its technology to the Uintah Basin's unique reserves, and securing the necessary land, leaseholds, personnel, permitting and funding to begin its mining and processing operations. Because Enefit

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[2] *See* 42 U.S.C. § 4332; 40 C.F.R. 1501.4.
[3] Bureau of Land Management, Vernal Field Office, Biological Assessment (Feb. 2018) ("BA")); U.S. Dep't of Interior, Bureau of Land Mgmt., Biological Opinion (July 19, 2018) ("BiOp").
[4] U.S. Dep't of Interior, Bureau of Land Mgmt., Final Environmental Impact Statement (May 2018) (FEIS); U.S. Dep't of Interior, Bureau of Land Mgmt., Record of Decision (Sept. 2018) (ROD).
[5] ROD at 16.
[6] BiOp at 1 & 5.
[7] Unless otherwise noted, the facts stated in this subsection are supported by the Declaration of Ryan Clerico.

intends to continue with its planned Oil Shale Project even if the ROWs were vacated, the ROWs are not critically essential to the viability of the Oil Shale Project. The ROWs would, however, significantly enhance the safety, reliability and efficiency of the Oil Shale Project.

Enefit has an interest in protecting the substantial investment it has made in obtaining the ROWs, which was made on the basis of reasonable expectations. Enefit has expended significant resources in planning the road, transmission lines and pipelines, engineering the individual utilities, designing the optimal alignments, assessing the cost and feasibility, evaluating the potential environmental impacts, securing the required permits, and ultimately obtaining the ROWs for the Utility Corridor. To date, Enefit has spent several million dollars in those efforts to obtain the ROWs. If the Court were to now vacate the ROWs, Enefit's significant investment would be wasted.

Enefit also has an interest in avoiding the necessity of investing yet additional resources in finding alternative sources for the needed Utility Services ("Alternative Utility Sources"). If the ROWs were vacated, Enefit would have to find and arrange for Alternative Utility Sources. The additional resources required to conduct the necessary planning, designing, engineering, evaluating, assessing, permitting and obtaining approvals for such Alternative Utility Sources would be burdensome, especially in contrast to the current proposal wherein all five of the needed Utility Services could be accommodated together in the same Utility Corridor. For example, if Enefit had to provide access by an alternative road alignment, provide electricity by an alternative transmission line alignment or by diesel-burning generators, and transport water, natural gas and oil product by alternative pipeline alignments or by trucking, the additional time and resources required to conduct the associated designing, planning, assessing, evaluating,

permitting and obtaining approvals for such Alternative Utility Sources would be even more than was required for the subject ROWs within the proposed single Utility Corridor.

Enefit also has an interest in deploying its proprietary technology, which it developed and adapted to process the Uintah Basin's unique oil shale properties. Because Enefit has planned the Oil Shale Project based on that technology, Alternative Utility Sources may result in reduced safety, reliability and efficiency for this technology. For example, alternative water sources may result in less available and/or lower quality water, which may be inadequate for the contemplated production under the adapted technology; alternative electricity and/or natural gas sources may result in less available power and/or fuel, which may be inadequate to generate the contemplated shale oil and hydrotreatment process conditions. Accordingly, Alternative Utility Sources may be incompatible with Enefit's adapted technology, or may require Enefit to spend yet additional resources to further adapt its technology to the limitations of Alternative Utility Sources.

Finally, Enefit has an interest in ensuring the safety, reliability and efficiency of its Oil Shale Project. A ruling to vacate the ROWs would compel Enefit to find Alternative Utility Sources for the needed Utility Services to service its private land development, and such Alternative Utility Sources are anticipated to be less safe, reliable, and efficient than the subject ROWs. For example, having to provide some of those needed Utility Services (*e.g.*, water, natural gas, and/or oil product delivery) by trucking would increase the traffic risk to nearby rural communities; having to provide some of those Utility Services by trucking on an unpaved access road would be less protective of the environment; having to provide some of those Utility Services by trucking would subject deliveries to weather delays; having to provide electricity by onsite generators would be disruptive as a result of mechanical breakdowns; having to manage

the availability of water, natural gas and oil product from on-site inventories rather than more reliable pipeline sources would be disruptive as a result of human error, etc.

ARGUMENT

I. Enefit is Entitled to Intervene as of Right.

The Tenth Circuit has adopted a four-part test to determine whether a movant can intervene as of right pursuant to Fed. R. Civ. P. 24(a): it must (1) make a "timely motion," (2) claiming a "legally protectable" interest relating to the property or transaction, (3) that "may as a practical matter be impaired or impeded," (4) if that interest is not "adequately represented" by the existing parties.[8] This test is to be applied liberally in favor of intervention.[9]

A. Enefit's Motion is Timely.

The Tenth Circuit considers timeliness "in light of all of the circumstances," including "(1) the length of time since the movant knew of its interests in the case, (2) prejudice to the existing parties, and (3) prejudice to the movant."[10] This Litigation was just recently commenced on May 16, 2019. The named Defendants have not even filed their answers, which are not due until July 16, 2019. Enefit has acted swiftly to seek intervention. Because the Litigation is still in its early preliminary stage, there will be no delay or inefficiency resulting from Enefit's intervention, and no prejudice to the existing parties. Conversely, based on its interests in this Litigation, as addressed above, there would be significant prejudice to Enefit if it

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[8] *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010).
[9] *Western Energy All. v. Zinke*, 877 F.3d 1157, 1164 (10th Cir. 2017).
[10] *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232 (10th Cir. 2010) (holding motion to intervene filed 19 days before trial untimely when movant knew of litigation for more than four years prior) (*quoting* *Sanguine, Ltd. v. U.S. Dep't of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984)).

were not allowed to intervene and to directly protect its interests. Accordingly, in light of those circumstances, the first element of the test for intervention as of right is satisfied.

B. Enefit has a Legally Protectable Interest Relating to the Property or Transaction.

A protectable interest exists where the movant has an interest in the "property or transaction that is the subject of the action."[11] When a movant has an economic interest in the outcome, potential "economic injury is certainly sufficient for intervention as of right."[12]

As described above, Enefit has substantial economic and other interests directly at stake in this Litigation. Enefit has made a significant investment of resources to obtain the ROWs. A ruling to vacate the ROWs would wipe out that investment and force Enefit to expend additional resources to find Alternative Utility Sources, may require Enefit to expend additional resources to further adapt its technology to any limitations of Alternative Utility Sources, and would significantly diminish the safety, reliability and efficiency of the Oil Shale Project. Accordingly, as Enefit has a legally protectable interest, the second element of the test is satisfied.

C. Enefit's Interest May as a Practical Matter be Impaired.

The test for impairment under Rule 24 focuses on potential practical effects. This requirement "'presents a minimal burden,'"[13] and only requires a movant "to show it is 'possible'"[14] that its interest "may as a practical matter be impaired or impeded."[15] The purpose of Plaintiffs' action is to vacate the ROWs that would provide the Utility Services for Enefit's

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[11] *WildEarth Guardians*, 604 F.3d at 1198.
[12] *United States v. Albert Inv. Co.*, 585 F.3d 1386, 1398 (10th Cir. 2009) (intervenor's right to contribution from defendants for environmental liability is a protectable interest).
[13] *Western Energy All.*, 877 F.3d at 1164 (citing *WildEarth Guardians*, 604 F.3d at 1199).
[14] *Id.* (citing *WildEarth Guardians*, 604 F.3d at 1199 and Utah Ass'n of Ctys v. *Clinton* , 255 F.3d 1246, 1253).
[15] *Id.* (citing *Albert Inv. Co.*, 585 F.3d at 1391).

private land development activities. A ruling to vacate the ROWs would wipe out Enefit's investment in obtaining the ROWs and force it to expend additional resources to find Alternative Utility Sources. Although such Alternative Utility Sources are available, they would be more expensive, and they would be less safe, reliable and efficient. Accordingly, as it is certainly possible that Enefit's interest may as a practical matter be impaired, the third element is satisfied.

D. Enefit's Interest May Not be Adequately Represented by the Existing Parties.

The Tenth Circuit has held that "the *inadequate representation* element of Rule 24(a)(2) also presents a minimal burden," and that "[t]he movant must show only the possibility that representation may be inadequate."[16] Because the government must "consider [the] broad spectrum of views" held by the general public, courts recognize that the government "cannot adequately represent the interests of a private intervenor *and* the interests of the public," and therefore are disposed to favor intervention by private intervenors.[17] Enefit's interest is sufficiently different from those of the named Defendants to warrant intervention because all of the named Defendants are federal government agencies or officers. In contrast, Enefit is a private enterprise with unique interests, concerns and perspectives that the named Federal Defendants cannot adequately represent. The Federal Defendants would not be able to adequately present the operational and technical details relating to Enefit's proposed mining and processing operations, the specifics as to how those operations may or may not impact the environment, or the particulars as to how the proposed mitigation measures will interact with Enefit's operations to mitigate the environmental impacts. Accordingly, as it is possible that

[16] *WildEarth Guardians*, 604 F.3d at 1200 (citing *Utahns For Better Transp. v. DOT*, 295 F.3d 1111, 1117 (10th Cir. 2002).
[17] *Western Energy Alliance*, 877 F.3d at 1168 (quoting *Clinton*, 255 F.3d at 1256).

Enefit's interest may not be adequately represented by the existing parties, the fourth element is also satisfied, and therefore Enefit is entitled to intervene as of right.

II. **Alternatively, Permissive Intervention Should be Allowed.**

Under Fed. R. Civ. P. 24(b), a court may permit anyone to intervene who, (1) "on timely motion," (2) can show it "has a claim or defense that shares with the main action a common question of law or fact;" and (3) the court must consider in its discretion whether the intervention will "unduly delay or prejudice the adjudication of the original parties' rights."[18]

As addressed in above, Enefit's motion is timely because this Litigation was only just recently commenced on May 16, 2019, and intervention will not delay or prejudice Plaintiffs' or the named Defendants' rights. Enefit's defenses share with the main action numerous common questions of law and of fact, such as the required scope of the NEPA and ESA reviews relating to the ROWs, and the factual thoroughness of those reviews. Moreover, as addressed above, because the Litigation is still in its preliminary stage, intervention will not unduly delay or prejudice the original parties' rights. Accordingly, even if the Court were to deny Enefit's motion to intervene as of right, it should grant permissive intervention.

CONCLUSION

For the foregoing reasons, Enefit respectfully requests that the Court grants its motion to intervene, allowing Enefit's intervention as of right, or alternatively permissive intervention.

[18] Fed. R. Civ. P. 24(b); *see also DeJulius v. New Eng. Health Care Emps. Pension Fund*, 429 F.3d 935, 942 (10th Cir. 2005).

Respectfully submitted,

Dated: June 26, 2019

STOEL RIVES LLP

By: /s/ *Martin K. Banks*
MARTIN K. BANKS

Attorneys for Enefit American Oil Co.

CERTIFICATE OF SERVICE

I certify that on June 26, 2019, I filed a copy of the foregoing document with the Clerk of the Court for the U.S. District Court of Utah by using the CM/ECF system. Participants in this Case No. 4:19-CV-00041-DN-PK who are registered CM/ECF users will be served by the CM/ECF system. A copy was also served upon the following via email:

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