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

UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT, SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, NATIONAL PARKS CONSERVATION ASSOCIATION, GRAND CANYON TRUST, and WILDEARTH GUARDIANS,

Plaintiffs,

v.

U.S. BUREAU OF LAND MANAGEMENT; U.S. DEPARTMENT OF THE INTERIOR, JOSEPH R. BALASH, and DAVID BERNHARDT,

Defendants, and

STATE OF UTAH,

Proposed Intervenor-Defendant.

STATE OF UTAH'S MOTION TO INTERVENE AS A DEFENDANT AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

Case No.2:19-cv-00256-CW-PMW

Judge Clark Waddoups

Magistrate Paul M. Warner

The State of Utah ("State") respectfully moves this court to grant the State intervention as a matter of right in this case under Federal Rule of Civil Procedure 24(a) or, in the alternative, permissively under Rule 24(b). Counsel for the federal defendants has stated that they take no position on this motion. Counsel for the plaintiffs, Utah Physicians for a Healthy Environment, Sierra Club, Natural Resources Defense Council, National Parks Conservation Association, Grand Canyon Trust, and WildEarth Guardians have been contacted but have not yet responded as to their anticipated position on this motion. Counsel for Intervenor defendant Alton Coal Development supports this motion.

INTRODUCTION

Plaintiffs, Utah Physicians for a Healthy Environment, Sierra Club, Natural Resources Defense Council, National Parks Conservation Association, Grand Canyon Trust, and WildEarth Guardians, allege that the Federal Defendants, the Bureau of Land Management (BLM), the Department of the Interior (DOI), Joseph R. Balash, in his official capacity as Assistant Secretary for Land and Minerals within the DOI, and David Bernhardt, in his official capacity as Secretary of the DOI, failed to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq*., in approving the sale of a federal coal lease pursuant to the Alton Coal Tract Lease by Application, which will expand the Alton's Coal Hollow Mine in Kane County, Utah. *See* DOI-BLM-UT-C040-2015-0011-EIS; Dkt. No. 2. The State participated in the scoping of the environmental analysis and subsequent decision-making process for the lease sale. *See* DOI-BLM-UT-C040-2015-0011-EIS.

The State is entitled to intervene as a matter of right in this case. Its motion is timely, as Defendants only recently filed a responsive pleading and no party has filed a dispositive motion or conducted discovery. The State has protectable interests in this litigation, given that the mine in question is the source of a significant stream of revenue to the State and that the State has a

sovereign interest in regulating mining that takes place in Utah. The State's ability to protect these interests would be impaired by a disposition of this case favorable to plaintiffs, due to the State's interest in the continued operation of the coal mine in question and the continued regulation of said mine by the State. The Federal Defendants are not capable of adequately representing the unique interests of the State as a sovereign.

A Proposed Statement Denying Arbitrary or Capricious Agency Action is attached hereto as Exhibit A and the State should be granted leave to file the same upon intervention.

BACKGROUND

In August of 2018, the BLM concluded the process of approving and issuing the Alton Coal Tract Lease to Alton Coal Development, LLC, the owner and operator of the Coal Hollow Mine. *See* DOI-BLM-UT-C040-2015-0011-EIS. ECF No. 2 at ¶¶ 27-30. The NEPA process that led to this decision included a Draft Environmental Impact Statement (DEIS) published on November 4, 2011, a Supplemental Draft Environmental Impact Statement (SDEIS) published in June 2015, a Final Environmental Impact Statement (FEIS) published on July 12, 2018, and a Record of Decision (ROD) published on August 29, 2018. The area of the Alton Coal Tract Lease is adjacent to and would enable the expansion of the Coal Hollow Mine, located in Kane County, Utah, 0.10 mile south of the town of Alton and 2.9 miles east of U.S. Highway 89. FEIS, at 2-2.

On April 16, 2019, Plaintiffs, Utah Physicians for a Healthy Environment, Sierra Club, Natural Resources Defense Council, National Parks Conservation Association, Grand Canyon Trust, and WildEarth Guardians, filed the Complaint herein alleging that the Secretary of the DOI, the Assistant Secretary for Land and Minerals of the DOI, the BLM, and the DOI failed to comply with NEPA prior to approving and issuing and the Alton Coal Tract Lease. ECF No. 2. This Complaint is one of a several challenges by certain Plaintiffs to the sufficiency of the NEPA

analyses conducted by the Secretary of the Department of the Interior prior to issuing authorizations to operate coal mines in various western states. *See, e.g., WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation and Enforcement*, Civ. No. 1:13-cv-00518, 2014 WL 503635 (D. Colo. Feb. 7, 2014) (Kane, J.) (granting motion to sever and transfer claims brought by Petitioner related to mines located outside of Colorado). Plaintiffs' broad intention in pursuing this case and others similar to it is to challenge and oppose with greenhouse gas emission arguments the BLM's approvals of mining plans throughout the western United States. It is clear that environmental NGO's will claim that the Federal Defendants have violated NEPA whenever and wherever coal mining plans and leases are approved or issued. *See, e.g. WildEarth Guardians v. Jewell*, 1:15-cv-02026-WJM (D. Colo. Sept. 15, 2015) Dkt No. 1 at ¶ 4.

ARGUMENT

I. THE STATE OF UTAH IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Courts permit intervention by any party who: (1) timely applies to intervene; (2) has a significantly protectable interest related to the subject of the action; (3) is situated such that disposition of the matter may practically impair its ability to protect that interest; and (4) shows that the existing parties do not adequately represent that interest. Fed. R. Civ. P. 24(a)(2); *see also Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1231 (10th Cir. 2010). The courts "follow 'a somewhat liberal line in allowing intervention.'" *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010) (internal citation omitted). The Tenth Circuit has stated that the Rule 24(a)(2) "factors are not rigid, technical requirements." *San Juan Cnty., Utah v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007) (en banc) (plurality). Instead, they are merely "intended to capture the circumstance in which the practical effect on the

prospective intervenor justifies intervention." *Id*. Based on these factors, the State of Utah is entitled to intervene as a matter of right..

A. The State's motion to intervene in the early stages of this case is timely.

District courts evaluate the timeliness of a motion to intervene "in light of all of the circumstances." *Tyson Foods*, 619 F.3d at 1232 (quoting *Sanguine, Ltd. v. U.S. Dep't of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984)). Three key factors the courts consider regarding timeliness are the length of time the movant knew of its interests in the case, prejudice to existing parties, and prejudice to the movant. *Id*.

The State learned of this action during the months after it was filed, and immediately undertook to evaluate its position on intervention. It now seeks intervention as the matter is still in its early stages. The Federal Defendants were issued summons electronically on May 9, 2019 and filed their answer on July 12, 2019. Intervenor defendant Alton Coal Development filed a motion to intervene on August 9, 2019, which was recently granted by this Court. No party has filed a dispositive motion or conducted discovery, and there have been no hearings on the merits of Plaintiffs' claims. Accordingly, there should be no prejudice to any of the other parties if the State is allowed to intervene. The motion is, therefore, timely.

B. The State of Utah has a significantly protectable interest related to the subject of this action.

In *WildEarth Guardians, supra*., the Tenth Circuit stated that "[t]he interest element is a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." 604 F.3d at 1198. The proposed intervenor's interest is "measured in terms of its relationship to the property or transaction that is the subject of the action, not in terms of the particular issue before the district court." *Id*. A sovereign's interest in seeing its laws applied constitutes a sufficient interest for purposes of Rule 24(a)(2).

See Sierra Club v. City of San Antonio, 115 F.3d 311, 315 (5th Cir. 1997) (holding that the State of Texas has an "important sovereign interest in protecting the self-governing authority" under its state law). Additionally, "[t]he threat of economic injury from the outcome of litigation undoubtedly gives a petitioner the requisite interest." *Utahns for Better Transp. v. U.S. Dep't of Transp*., 295 F.3d 1111, 1115 (10th Cir. 2002). The State meets the protectable interest requirement because it has regulatory interests in, and derives an economic benefit from, coal mining activities at the Coal Hollow Mine, which is the subject of this litigation, as well as all coal mining activities within its borders that may be significantly affected by the Plaintiffs' avowed broader efforts to challenge and oppose approvals of mining plans throughout the western United States.

1. The State's Regulatory Interest

The State is the primary regulator of mining activities within its borders. 30 U.S.C. § 1253; 30 C.F.R. § 950.20. The State has an independent interest in ensuring that the development of coal resources in Utah is conducted in an environmentally responsible manner. Utah Code Annotated §40-10-2(3). The State has a legitimate concern that an adverse ruling or decision in this case will have a negative impact on the State's regulatory authority in Utah.

A mining company must obtain approval from both State and federal authorities before it can mine coal on federal land. 30 C.F.R. §§ 740.4, 740.13, 746.13, 746.14, 746.17, 950.20. State approval for coal mining is a prerequisite to federal approval. 30 C.F.R. §§ 746.10(f) and 950.20, art. V (Cooperative Agreement). An operator first applies to the State for a permit to conduct coal mining. 30 C.F.R. § 950.20, art. V(6). The State makes certain that the operator's application includes all of the information necessary for the State and the Secretary of the Interior to approve mining operations. *Id*., art. V(6); Utah Code Annotated §40-10-9 through 19.

The information includes information the State and the Secretary may need to separately review environmental impacts from the anticipated mining operations. 30 C.F.R. §§ 740.4(c)(7), 950.20, art. V(6), (7); Utah Code Annotated §40-10-9 through 19.

Federal agencies review the application documents provided by the State for compliance with federal law, 30 C.F.R. §§ 740.4(c)(7), 950.20, art. V(6), (7), (9) and (10), and prepare the mining plan for review and approval by the Secretary. *Id*. §§ 740.4(b)(1), 746.13, 950.20, art. V(10). The mine plan documents reviewed include the State's analysis and initial decision on the operator's application. *Id*. §§ 746.13, 950.20, art. V(10). The Secretary reviews the State's analysis when deciding to approve mine plans. *Id*. §§ 746.13, 950.20, art. V(10).

While the Secretary reviews the proposed mine plan, the State can issue the operator a permit to mine coal. *Id*. § 950.20, art. V(10)(f). The State permit requires compliance with: (1) the BLM's terms and conditions outlined in the coal lease; (2) applicable federal laws and regulations; and (3) the State's environmental protection performance standards. 30 C.F.R. §§ 740.13(c)(1), 950.20, art. V(7)(c). The operator cannot conduct mining operations until the Secretary approves the mine plan. 30 C.F.R. § 950.20, art. V(10)(f).

Upon the commencement of mining operations, the State assumes primary authority to inspect mining operations and enforce the State's regulatory program approved by the Department. 30 C.F.R. § 950.20, arts. VI(13) and VII(18). The Department of the Interior retains authority to conduct similar inspection and enforcement actions, but must notify the State so that the two entities can coordinate their actions. 30 C.F.R. § 950.20, arts. VI(15) and (16), VII(19)-(21). The State retains primary enforcement responsibility for any violations found by either entity. *Id*., art. VII(19).

Utah has a protectable interest as a sovereign in regulating mining operations at the Coal Hollow Mine, including any expansion into the area of the Alton Coal Tract Lease.

2. Utah's Economic Interest

Plaintiffs seek to have this court prevent mining operations in the area of the Alton Coal Tract Lease as part of the Coal Hollow Mine. The resulting economic loss to Utah would be substantial. According to the United States Energy Information Administration, in 2017 the Coal Hollow Mine employed approximately 28 individuals and produced 723,944 tons of coal. www.eia.gov.

The DOI estimates that approximately 160 people would be employed to conduct mining operations, likely residents of Kane and Garfield Counties. FEIS, at 4-134-35. These direct jobs would benefit Kane County residents in terms of wages, benefits, and job security, and would benefit the State and local governments in terms of increased tax revenues. *Id* at 135. Further, coal mining operations would generate 240 to 480 indirect jobs in the local economy relating to the wholesale and retail trade, local government, and service sectors, including employment opportunities in Iron County's Cedar City area in mining related services such as fuel, equipment purchases and repairs, food, and retail . *Id.* The total annual wages for direct employment would be approximately $6.65 million, totaling $107 million over the life of the mine. *Id.*

In addition, assuming a $1.1 billion annual recovery value for the coal produced at the Alton Coal Tract Lease, the State would receive approximately 50% of total federal royalty revenue, amounting to $66 million in state royalties. *Id* at 4-137. The State typically appropriates more than 75% of these State-disbursed mineral royalties to state agencies. As such, the Utah Permanent Community Impact Fund Board would expect to receive $21.5 million (32.5%), the Utah Department of Transportation would expect to receive $26.4 million (40%), and the Utah

Department of Community and Culture would expect to receive $3.3 million (5%). *Id.* Further, the State would receive 50% of the bonus bid payments submitted by companies conducting the mining activity, amounting to $4.5-$6.8 million. *Id* at 4-138.

The Plaintiffs' requested relief in this action has the potential to directly impact the jobs of over 600 people employed in Utah as well as a significant revenue stream for State and local governments for years to come. The State meets the protectable economic interest standard for intervention.

C. A disposition of this case favorable to petitioner would impair the ability of the State of Utah to protect its interests.

The burden of showing that disposition of a case will impair a prospective intervenor's ability to protect its interests is "minimal." *WildEarth Guardians*, 604 F.3d at 1199 (internal citation omitted). In evaluating the impairment element, "the court is not limited to consequences of a strictly legal nature." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001) (internal citation and quotation omitted). "[A] would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied." *Id*. (internal citation and quotation omitted). The possible "impairment must result from a pending action or judgment of the court." *United States v. N. Colo. Water Conservancy Dist*., 251 F.R.D. 590, 598 (D. Colo. 2008) (emphasis and citation omitted).

The Court's denial of the State's intervention in this case could impair the State's ability to protect its sovereign interests in the continued operation of the Coal Hollow Mine and an uninterrupted revenue stream that is vital to the economy of the State. Accordingly, the State has met the minimal burden of showing that disposition of this matter will likely impair its ability to protect its interests if the State is not allowed to intervene.

D. The Federal Respondents cannot adequately represent the interests of the State of Utah.

A proposed intervenor "need make only a minimal showing to establish that its interests are not adequately represented by existing parties." *San Juan Cnty., Utah*, 503 F.3d at 1203; *Utah Ass'n of Cntys*., 255 F.3d at 1254. Generally, a governmental party charged with representing the public interest cannot adequately represent another party with different or narrower interests. *See, e.g., N.M. Off-Highway Vehicle Alliance v. U.S. Forest Serv.*, 540 Fed. Appx. 877, No. 13-2116, 2013 WL 5952142 at *2-3 (10th Cir. 2013) (internal citation omitted); *see also Atl. Sea Island Group LLC v. Connaughton*, 592 F. Supp. 2d 1, 7 (D.D.C. 2008) (finding federal defendants inadequately represented state interests); *Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (per curium) (holding federal agency inadequately represented state interests).

The Federal Defendants' interests are clearly not the same as the interests of the State. The State's interests as a Sovereign in regulating the mining operations and protecting State revenue, differ from the Federal Defendants' interest in defending the adequacy of their NEPA analysis. The Department of the Interior and BLM cannot adequately represent the State's interests in this litigation. *Id*. The State of Utah meets the inadequacy of representation element of the intervention inquiry.

II. In the alternative, the State of Utah should be allowed to intervene permissively.

If the Court does not allow the State to intervene as a matter or of right, the Court should allow the State to intervene permissively. Federal Rule of Civil Procedure 24(b)(1)(B) provides that, "[o]n timely motion, the court may permit to intervene anyone who has a claim or defense that shares with the main action a common question of law or fact." The decision whether to allow permissive intervention "lies within the discretion of the district court," *Kane Cnty., Utah*

v. United States, 597 F.3d 1129, 1135 (10th Cir. 2010) (internal citation omitted), and "the court must consider whether the intervention will unduly delay or prejudice adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

The defenses of the State share common questions of law and fact with the main action. Furthermore, the motion is timely, and intervention by the State will neither unduly delay nor prejudice adjudication of the claims in this matter. Accordingly, if the Court does not allow the State to intervene as a matter of right, it should allow the State to intervene permissively, for the reasons already discussed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court grant its motion for intervention and permit the filing of the attached Statement Denying Arbitrary or Capricious Agency Action.

Respectfully submitted this 28th day of August, 2019.

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