IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, *et al.*,

Plaintiffs,

v. 1:19-cv-00703-WJ-JFR

DAVID BERNHARDT, *et al*.,

Defendants.

ORDER DENYING INTERVENOR NAVAJO ALLOTTEES' MOTION FOR INTERVENTION OF ADDITIONAL, SIMILARLY SITUATED ALLOTTEES

THIS MATTER is before the Court on Intervenor Navajo Allottees' Motion for Intervention of Additional, Similarly Situated Allottees (**Doc. 78**). The Court, having considered the parties' submissions and the applicable law, finds that the Motion is not well-taken and is, therefore, **DENIED**.

BACKGROUND

This is an environmental case wherein Plaintiffs seek injunctive relief to prevent oil and gas drilling and production on 255 applications for permits to drill ("APDs") in the Mancos Shale. (*See* Doc. 5.) Navajo Allottees are owners of mineral rights whose royalty incomes could be adversely affected if and when Plaintiffs obtain the injunctive relief they seek in this case. (Doc 23-1.) Navajo Allottees sought intervention for eight individuals, Delora Hesuse, Alice Benally, Lilly Comanche, Virginia Harrison, Samuel Harrison, Verna Martinez, Lois Phoenix, and Mabel C. Senger (collectively, "Navajo Allottees"), via an unopposed motion. (Doc. 23). The Court granted the motion on August 22, 2019. (Doc. 50.) Six weeks later, counsel for the Navajo Allottees filed a "Notice of Joinder of Similarly Situated Allottees," (Doc. 75), purporting to join,

under Federal Rule of Civil Procedure 20(a)(2), an additional 196 allottees ("Additional Allottees") who also claim that their royalty incomes could be adversely affected by the outcome of this case. Plaintiffs filed a response in opposition, noting that Additional Allottees' "Notice" under Rule 20(a)(2) is improper and arguing that even by motion under the appropriate rule, Rule 24, Additional Allottees failed to satisfy the requirements of both intervention as of right and permissive intervention. (Doc. 76).

The Court, having concluded that Navajo Allottees/Additional Allottees' "Notice" was inappropriately and inaccurately filed as a notice, rather than a motion, struck the Notice without prejudice and granted Navajo Allottees/Additional Allottees leave to re-file and move appropriately for their requested relief. (Doc. 77.) In its Order, the Court made explicitly clear that the burden was on the Navajo Allottees/Additional Allottees to persuade the Court that "adding 196 more Navajo Allottee Intervenors [was] in the best interest of justice and judicial economy and [was] not merely unnecessary cumulative support for the interests already represented in this litigation." (Doc. 77 at 3.) The Court pointed out that the "similarly situated" language in the "Notice" seemed to imply that the interests of the 196 Additional Allottees were aligned with the original 8 Navajo Allottees and thus their intervention seemed cumulative. (*Id.*) Navajo Allottees/Additional Allottees then filed the instant motion.

In their motion, Navajo Allottees/Additional Allottees made no attempt to explain to the Court why it should permit 196 individuals whose interests are identical to the existing intervenors to intervene. Indeed, Navajo Allottees/ Additional Allottees stated that "there is substantial factual and legal overlap among the issues presented by all Intervenor Navajo Allottees." (Doc. 78 at 8.) Their brief focused mainly on the potentially devastating effect halting oil and gas production in the area could create. (*Id.*) It did not focus, or even address, how the interests of the Additional

Allottees was not already adequately represented by the Navajo Allottees. Plaintiffs responded, again in opposition, pointing out Navajo Allottees/Additional Allottees failure to develop a cogent argument for why intervention under Rule 24 should be granted. They also pointed to the undue delays already caused by intervention, as well as the fact that whatever interest the Navajo Allottees/Additional Allottees have, that interest does not inform the Court as to the discrete issue in this case, namely, whether Defendants complied with federal law in approving the Mancos Shale APDs. Navajo Allottees/Additional Allottees replied, raising for the first time issues of federal Indian allotment policy, Diné cultural traditions, and Navajo Fundamental Law. (Doc. 81.) They argue that under these policies and customs, Indians must be treated as unique individuals, and, as such, each individual should be afforded the opportunity to be heard. (*Id.* at 5.)

DISCUSSION

I. Additional Allottees have failed to establish that they have a right to intervene.

The Federal Rules of Civil Procedure recognize two types of intervention: as of right and permissive. Fed. R. Civ. P. 24. To intervene as a matter of right, the burden is on the applicant to show: "(1) the movant claims an interest relating to the property or transaction that is the subject of the action; (2) the disposition of the litigation may, as a practical matter, impair or impede the movant's interest; and (3) the existing parties do not adequately represent the movant's interest." *WildEarth Guardians v. National Park Service*, 604 F.3d 1192, 1198f (10th Cir. 2010). Where the interests of the proposed intervenor are already adequately represented, intervention is unwarranted. *See Nat. Res. Def. Council, Inc. v. N.Y. State Dep't of Envtl. Conservation*, 834 F.2d 60, 61–62 (2d Cir. 1987). The burden to satisfy the inadequate representation condition is "minimal" and "[t]he possibility of divergence of interest need not be great in order to satisfy the burden of the applicants." *Coal. of Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of*

Interior, 100 F.3d 837, 844 (10th Cir. 1996). But "where the objective of the applicant for intervention is identical to that of one of the parties," there is no divergence of interest to support a finding of inadequate representation, and representation is presumed adequate. *See Tri-State Generation & Transmission Ass'n, Inc. v. N.M. Public Regulation Comm'n*, 787 F.3d 1068, 1072 (10th Cir. 2015) (internal quotation marks omitted) (citing *City of Stilwell, Okla. v. Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1042 (10th Cir.1996); *see also Kane County, Utah v. United States*, 928 F.3d 877, 892 (10th Cir. 2019). Under those circumstances, only when an applicant can make a "concrete showing" that representation is inadequate should intervention be permitted. *Tri-State Generation & Transmission Ass'n, Inc.*,787 F.3d at 1073.

As an initial matter, the Court notes that by raising the issues of federal Indian policy, Diné custom, and Navajo law for the first time in their Reply, Navajo Allottees/Additional Allottees deprived Plaintiffs of a chance to respond to this argument. However, even assuming Navajo Allottees/Additional Allottees' representation with respect to these issues is accurate, this argument fails to address the prongs of the intervention analysis. *See* Fed. R. Civ. P. 24(a). In any case, the Court need not address all prongs of that analysis here, because even conceding for purposes of argument that the Additional Allottees have a cognizable legal interest (*i.e.*, oil and gas royalty income) which may be impaired or impeded by this litigation, their application is fatally flawed because that interest is already adequately represented in this matter by the Navajo Allottees. *See San Juan Cnty., Utah v. United States*, 503 F.3d 1163, 1203 (10th Cir.2007) (en banc) (quoting Fed.R.Civ.P. 24(a)(2)) ("Even if an applicant satisfies the other requirements of Rule 24(a)(2), it is not entitled to intervene if its 'interest is adequately represented by existing parties.'").

Additional Allottees have failed to explain how their interests are in any way divergent from the existing Navajo Allottees. Indeed, in doubling-down on the "similarly situated" argument from their now stricken Notice of Joinder (Doc. 75), Additional Allottees are conceding that whatever particularized harm they may suffer, in general the interest of each Allottee is identical to the others. In other words, while each Allottee may have a distinct and individual property interest to protect, (Doc. 81 at 4), the common objective of the Navajo Allottees and Additional Allottees, who are all represented by the same counsel, is to prevent Plaintiffs from halting drilling leading to the cessation of royalty payments. Additional Allottees have "neither demonstrated [n]or argued any other objective." (Doc. 79 at 4.) This point is clearly illustrated in the declarations submitted by Additional Allottees, which are identical in form and nearly identical in substance to those of Navajo Allottees. *Compare* Doc. 78-1 at 115–16 (Declaration of Additional Allottee Lily Comanche), *with* Doc. 78-1 at 178–79 (Declaration of Navajo Allottee Virginia Harrison). This might be a different matter altogether if Navajo Allottees had not already been granted permission to intervene on their unopposed motion. (Doc. 23.) But the Court is hard pressed to find any reason to permit intervention by additional, "similarly-situated" intervenors whose interests are identical to those of existing intervenors. Because their interests are already adequately represented, Additional Allottees cannot demonstrate they are entitled to intervene as of right.

II. Additional Allottees Have Not Met Their Burden to Show Permissive Intervention is Appropriate in this Case.

Even if an applicant cannot meet the requirements for intervention as of right, it can still move for permissive intervention under Rule 24(b) by asserting it "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). The Court is authorized to deny permissive intervention where it will "unduly delay or prejudice the

adjudication of the original parties' rights." *Id.* Additionally, while Rule 24(b) does not explicitly contemplate adequacy of representation, the Tenth Circuit has "affirmed denial of permissive intervention on such grounds." *Id.* at 1075 (citing cases). Denial of permissive intervention is reviewed for abuse of discretion. *Tri-State Generation & Transmission Ass'n, Inc.*, 787 F.3d at 1075.

Here, the Court has no trouble concluding that the addition of nearly 200 intervenors would complicate and delay these proceedings. In fact, given that six weeks passed from the time Navajo Allottees moved to intervene to the time Additional Allottees filed their "Notice," these proceedings already have been delayed in that the Court had to take time away from the merits of this case to consider the intervention issue. Further, if the Court permits these additional 196 individuals to intervene, it would, in fairness, need to permit all other "similarly situated" individuals to do so as well, which would cause even further delay.

Moreover, as pointed out by Plaintiffs, the substance of Navajo Allottees/Additional Allottees' Motion suggests an effort to turn the attention of the Court to the general issue of oil and gas development in the area, rather that the narrow issue of the approval of a discrete number of permits. (Doc. 79 at 7.) Such diversion is prejudicial to Plaintiffs, as it creates an undue burden to respond to arguments that do not inform the question of whether Defendants have complied with the law—the only legal issue in this case. And, as discussed at length above, there is no reason to believe that Navajo Allottees will not adequately represent the interest of Additional Allottees, especially since those interests are not just aligned, but in fact identical. For these reasons, permissive intervention is not warranted in this case.

CONCLUSION

There is nothing in Navajo Allottees/Additional Allottees' Motion to suggest that their interests are not already adequately represented in this litigation. The addition of 196 more intervenors whose interests are identical those already in the case would be needlessly cumulative and create undue burdens on the Plaintiffs. Accordingly, Navajo Allottees' Motion for Intervention of Additional, Similarly Situated Allottees (**Doc. 78**) is **DENIED**.

IT IS SO ORDERED.

CHIEF UNITED STATES DISTRICT JUDGE