IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

POWDER RIVER BASIN RESOURCE COUNCIL, at al., Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, et al., Defendants and STATE OF WYOMING, et al. Defendant-Intervenors.	Case No. 1:22-cv-2696-TSC

PLAINTIFFS' MOTION TO DISMISS
CONTINENTAL AND DEVON'S COUNTERCLAIM AND CROSSCLAIM

Plaintiffs Powder River Basin Resource Council and Western Watersheds Project ("Citizen Groups") respectfully move to dismiss the counterclaim and crossclaim brought by Defendant-Intervenors Continental Resources, Inc. ("Continental"), and Devon Energy Production, L.P. ("Devon"), pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

INTRODUCTION

This is an Administrative Procedure Act (APA) case brought by Citizen Groups against the U.S. Department of Interior and Bureau of Land Management for their violations of various environmental laws in approving 407 oil and gas drilling permits and preceding programmatic decisions for the Converse County Project. Oil and gas producers Continental and Devon (collectively "Companies") have intervened to defend these agency actions.

Upon answering the Citizen Groups' First Amended Complaint, ECF No. 44, the Companies asserted a counterclaim against Citizen Groups and crossclaim against Defendants, both under the Declaratory Judgment Act. ECF No. 50-1 at 20–26. The claims seek identical relief: a declaration that their permits to drill "Fee/Fee/Fed Wells were lawfully issued without BLM imposing additional surface use requirements on operations to be conducted solely on private, non-federally owned lands, because BLM lacks statutory and/or constitutional authority to do so." *Id.* at 23, 26. Both include a request for attorney fees. *Id.*

The Companies cannot maintain these claims. First, they fail to state a claim for relief. The Declaratory Judgment Act does not itself provide a cause of action, so a party cannot seek relief under that Act without identifying some independent cause of action that could otherwise have been brought between the parties in federal court, which the Companies failed to do. Second, the Court lacks jurisdiction over these claims because they do not establish an Article III case or controversy. No actual controversy exists between the Companies and Defendants, because they all defend the validity of the permits, or between the Companies and Citizen Groups, because there is no possibility of legal action or liability between them. Third and finally, these constitute "mirror image" claims that must be dismissed because they serve no useful purpose, but rather merely restate an issue that will be fully resolved by Citizen Groups'

Fifth Claim for Relief. According, in lieu of an answer, Plaintiffs respectfully bring this motion to dismiss the declaratory counterclaim and crossclaim under Rules 12(b)(1) and 12(b)(6).

LEGAL STANDARDS

I. Federal Rule of Civil Procedure 12(b)(1)

Rule 12(b)(1) allows a party to challenge the existence of subject matter jurisdiction. "Federal [district] courts are courts of limited jurisdiction," and it is "presumed that a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "[T]he burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* When deciding a Rule 12(b)(1) motion, the court must "assume the truth of all material factual allegations in the complaint," *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011), but "may undertake an independent investigation" that examines "facts developed in the record beyond the complaint" to "assure itself of its own subject matter jurisdiction." *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1107 (D.C. Cir. 2005) (quotation marks omitted).

II. Federal Rule of Civil Procedure 12(b)(6)

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of a pleading. To survive a Rule 12(b)(6) motion, a complaint—or in this case counterclaim and crossclaim—must contain factual matter sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Well-pleaded factual allegations are "entitled to [an] assumption of truth," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), and the court construes the complaint "in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged," *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012) (quotation marks omitted). "The same standards govern a motion to dismiss

with respect to an opposing party's counterclaims." *Wharf, Inc. v. District of Columbia*, 232 F. Supp. 3d 9, 16 (D.D.C. 2017).

III. Declaratory Judgment Act

The Declaratory Judgment Act provides that, "[i]n a case of actual controversy within its jurisdiction," a federal court "may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. 2201(a). The "actual controversy" requirement of the Act is equivalent to the "case or controversy" requirement of Article III. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). It exists when "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* (citation omitted). The case-or-controversy requirement "is no less strict when a party is seeking a declaratory judgment than for any other relief." *Fed. Express Corp. v. Air Line Pilots Ass'n*, 67 F.3d 961, 963 (D.C. Cir. 1995) (citation omitted).

Importantly, the Declaratory Judgement Act does not itself "provide a cause of action." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011). A party bringing an action for declaratory judgment must therefore assert some underlying federal cause of action that could otherwise have been brought between the parties in federal court. *See id.* ("[P]laintiffs have not alleged a cognizable cause of action and therefore have no basis upon which to seek declaratory relief."); *see also City of Reno v. Netflix, Inc.*, 52 F.4th 874, 878–79 (9th Cir. 2022) (collecting cases from other circuit courts of appeals holding the same). In effect, an action seeking declaratory relief "borrows the underlying cause of action" that could otherwise have been brought between the parties. *City of Reno*, 52 F.4th at 879.

Even where jurisdiction exists, courts enjoy broad discretion in deciding whether to entertain a request for declaratory relief. *See* 28 U.S.C. 2201(a) (courts "may declare"); *Morgan*

Drexen, Inc. v. Consumer Fin. Prot. Bureau, 785 F.3d 684, 696–97 (D.C. Cir. 2015). One key factor in determining whether a court will hear a declaratory judgment action is the usefulness of a declaration. *See Morgan Drexen*, 785 F.3d at 697; *President v. Vanc*e, 627 F.2d 353, 364 n.76 (D.C. Cir. 1980). A declaration "will not be issued where it does not serve a useful purpose." *President*, 627 F.3d at 364 n.76 (citation omitted).

ARGUMENT

I. The Court Should Dismiss the Counterclaim and Crossclaim Under Rule 12(b)(6) for Failure to State a Claim.

The Companies' declaratory counterclaim and crossclaim must be dismissed under Rule 12(b)(6) for failure to state a claim because the Companies have no underlying cause of action. As explained above, the Declaratory Judgment Act does not itself "provide a cause of action." *Ali*, 649 F.3d at 778. Accordingly, a party cannot seek relief under that Act without asserting some independent cause of action that could otherwise have been brought between the parties in federal court. *See id.*; *Schilling v. Rogers*, 363 U.S. 666, 677 (1960) (explaining that the Declaratory Judgment Act "presupposes the existence of a judicially remediable right").

The Companies fail to identify a cause of action that could have been brought between them and Defendants or Citizen Groups and thus "have no basis upon which to seek declaratory relief." *Ali*, 649 F.3d at 778. The only other statutes they cite—the general federal question statute, 28 U.S.C. § 1331, and the supplemental jurisdiction statute, 28 U.S.C. § 1367—supply jurisdiction, not a cause of action. *See B.D. ex rel. Davis v. District of Columbia*, 817 F.3d 792, 802 (D.C. Cir. 2016) (noting that a "jurisdictional statute in no way helps" a plaintiff lacking a cause of action); *Marciano v. Shulman*, 795 F. Supp. 2d 35, 38 (D.D.C. 2011) (explaining that 28 U.S.C. § 1331 "does not create any causes of action").

Although they do not invoke the APA, the Companies have no underlying cause of action under that statute either. The APA allows a person "aggrieved" by a federal agency action to seek judicial review. 5 U.S.C. § 702. Neither the Companies nor Defendants could have brought an APA claim because they were not "aggrieved" by the agency actions at issue in this case. An APA claim could not have been maintained against the Companies or Citizen Groups because actions under the APA may only be brought only against federal agencies. *See Shell Gulf of Mexico Inc. v. Ctr. for Biological Diversity, Inc.*, 771 F.3d 632, 636–37 (9th Cir. 2014). Accordingly, because there is no cause of action to support their request for declaratory relief, the Court must dismiss the Companies' crossclaim and counterclaim pursuant to Rule 12(b)(6) for failure to state a claim.[1]

II. The Court Should Dismiss the Counterclaim and Crossclaim Under Rule 12(b)(1) for Lack of Subject Matter Jurisdiction.

The counterclaim and crossclaim must also be dismissed for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1). Article III's case-or-controversy requirement applies equally to a claim for declaratory relief. *See MedImmune*, 549 U.S. at 127; *Fed. Express Corp.*, 67 F.3d at 963 ("The requirement of a case or controversy is no less strict when a party is seeking a declaratory judgment than for any other relief."). To meet this jurisdictional requirement, a party must show that "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a

[1] Courts generally treat this as a Rule 12(b)(6) problem, *see e.g.*, *Manning v. Garland*, 20-cv-664-TJK, 2021 WL 1209282, at *4 (D.D.C. Mar. 31, 2021), but the absence of an underlying federal cause of action also deprives this Court of subject matter jurisdiction, *see, e.g.*, *Welsh v. U.S. Dep't of State*, 21-cv-1380-TJK, 2022 WL 343552, at *3 (D.D.C. Feb. 4, 2022). For their claims to "arise under" federal law within the meaning of 28 U.S.C. § 1331, it is not enough that the Companies seek a ruling on a question of federal law; the federal question must be an element of some cause of action. *See Gunn v. Minton*, 568 U.S. 251, 257–58 (2013). However the problem is framed, dismissal is warranted.

declaratory judgment." *MedImmune*, 549 U.S. at 127; *see also* 10B Charles Alan Wright et al., *Federal Practice and Procedure* § 2757, at 443 (3d ed. 2016) ("For there to be an actual controversy the defendant must be so situated that the parties have adverse legal interests.").

The crossclaim runs afoul of this requirement because there is no controversy or adversity between the Companies and Defendants. Defendants approved their permits, are now defending them, and have taken the same legal position as the Companies on the Fee/Fee/Fed issue the Companies present for declaratory relief.

The counterclaim does not present a justiciable controversy for a somewhat different reason: Article III requires adverse legal interests to arise from a cognizable legal claim, and there is no such claim between the Companies and Citizen Groups here, as explained above. *See* C*ertainteed Corp. v. Knauf Insulation, SPRL*, 849 F. Supp. 2d 67, 75 (D.D.C. 2012) (finding that a declaratory action presented no Article III case or controversy where the parties could not maintain an action against one another); *Collin Cnty.. v. Homeowners Ass'n for Values Essential to Neighborhoods, (HAVEN)*, 915 F.2d 167, 171 (5th Cir. 1990) ("A party's legal interest must relate to an actual 'claim arising under federal law that another asserts against him[.]'"); *Shell Gulf of Mexico*, 771 F.3d at 636 ("[T]he adverse legal interests required by Article III must be created by the authority governing the asserted controversy between the parties.") (quoting *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1179 (5th Cir. 1984)); *King Pharmaceuticals, Inc. v. Eon Labs., Inc.*, 616 F.3d 1267, 1282–83 (Fed. Cir. 2010) (explaining that where a party has no cause of action there exists no case or controversy); 10B Charles Alan Wright et al., Federal Practice & Procedure § 2751 (3d ed. 2016) (explaining that declaratory relief is available "in cases in which a party [] could sue for coercive relief [but] has not yet done so").

The Ninth Circuit's decision in *Shell Gulf of Mexico*, 771 F.3d 632, speaks directly to this point. In that remarkably similar case, a group of petroleum companies sought a declaratory judgment against environmental groups that a federal agency's approval of their oil spill response plans did not violate the APA. *Id.* at 634. The district court denied the environmental groups' motion to dismiss for lack of jurisdiction, but the Ninth Circuit reversed, holding that the petroleum companies failed to satisfy Article III's "case or controversy" requirement. *Id.* at 636–38. The court explained that although the parties "have opposing legal positions" regarding the lawfulness of the agency's approval, they lacked "adverse legal interests" because the petroleum companies "cannot possibly have any legal obligations under the APA to the environmental groups[.]" *Id.* at 636. The Court explained that the "the only entities with adverse legal interests are the Bureau and the environmental groups." *Id.* So too here: without any threat of a coercive action or liability between them, there is no justiciable controversy between the Companies and Citizen Groups.

In sum, the counterclaim and crossclaim do not present an Article III case or controversy, requiring dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction. *See Hoffman v. District of Columbia*, 643 F. Supp. 2d 132, 139–40 (D.D.C. 2009).

III. The Court Should Dismiss the Counterclaim and Crossclaim as Superfluous Under the "Mirror Image" Rule.

These two serious defects aside, the "mirror image" rule also requires dismissal of the Companies' counterclaim and crossclaim. Courts have long held that a declaratory counterclaim should be refused if "it is being sought merely to determine issues which are involved in a case already pending and can be properly disposed of therein." *Yellow Cab Co. v. City of Chicago*, 186 F.2d 946, 950 (7th Cir. 1951). "[W]hen a counterclaim merely restates the issues as a 'mirror image' to the complaint, the counterclaim serves no purpose." *Fed. Deposit Ins.*

Corp. v. Project Dev. Corp., No. 86-5490, 819 F.2d 289, 1987 WL 37188 at *3 (6th Cir. May 27, 1987) (unpublished table decision); *see also, e.g.*, *Biltmore Co. v. NU U, Inc.*, 1:15-cv-00288-MR, 2016 WL 7494474, at *2 (W.D.N.C. Dec. 30, 2016); *Sliding Door Co. v. KLS Doors, LLC*, 13-cv-00196-JGB, 2013 WL 2090298, at *4 (C.D. Cal. May 1, 2013); *Arista Records LLC v. Usenet.com., Inc.*, 07-cv-8822 (HB), 2008 WL 4974823 at *4-5 (S.D.N.Y. Nov. 24, 2008); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 269 F. Supp. 2d 1213, 1226 (C.D. Cal. 2003) (all dismissing redundant counterclaims for declaratory relief).

That is the case here. The Companies request a declaration that BLM lawfully approved their permits to drill Fee/Fee/Fed wells without attaching surface-use requirements because BLM lacked authority to do so. *See* ECF No. 50-1 at 23, 26. This issue is already subsumed by Citizen Groups' Fifth Claim for Relief. *See* ECF No. 44 ¶¶ 144–50. The Companies will have a full and fair opportunity to litigate this issue through that corresponding claim, and a resolution of Citizen Groups' Fifth Claim for Relief will necessarily render the Companies' request for a declaratory judgment moot.

In sum, because the Companies' mirror-image counterclaim and crossclaim are redundant, and do not serve a useful purpose, they should be dismissed. *See President*, 627 F.2d at 364 n.76 (explaining that a declaration generally "will not be issued where it does not serve a useful purpose"); *Boone v. Mountainmade Found.*, 684 F. Supp. 2d 1, 11–12 (D.D.C. 2010) (dismissing mirror-image claim for declaratory relief).

CONCLUSION

For the foregoing reasons, the Court must dismiss Continental and Devon's crossclaim and counterclaim pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

Dated: January 18, 2023

Respectfully submitted,

/s/ Sarah Stellberg
Sarah Stellberg (ID Bar # 10538)*
Hannah A. Goldblatt (OR Bar # 205324)*
Todd C. Tucci (D.C. Bar # ID0001)
**admitted pro hac vice*
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83702
(208) 342-7024
sstellberg@advocateswest.org
hgoldblatt@advocateswest.org
ttucci@advocateswest.org

Attorneys for Plaintiffs