Shannon Anderson
Powder River Basin Resource Council
934 N. Main Street
Sheridan, WY 82801
307-763-0995
sanderson@powderriverbasin.org
Attorney for Proposed Respondent-Intervenors Natural Resources Defense Council, et al.
(additional counsel listed on signature page)

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

CLOUD PEAK ENERGY INC.; NATIONAL MINING ASSOCIATION; and WYOMING MINING ASSOCIATION, et al.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Respondents,

and

NATURAL RESOURCES DEFENSE COUNCIL; NORTHERN PLAINS RESOURCE COUNCIL; POWDER RIVER BASIN RESOURCE COUNCIL; THE WILDERNESS SOCIETY; and WESTERN ORGANIZATION OF RESOURCE COUNCILS,

Proposed Respondent-Intervenors.

Consolidated Case No. 19-cv-120-SWS

MOTION TO INTERVENE AS RESPONDENTS

Natural Resources Defense Council, Northern Plains Resource Council, Powder River Basin Resource Council, The Wilderness Society, and Western Organization of Resource Councils (collectively, Conservation Groups), by and through their counsel, respectfully move to intervene as Respondents in the above-captioned matter. The Conservation Groups move to intervene as of right, or alternatively, to intervene permissively, consistent with Federal Rule of Civil Procedure 24 and Local Rule 83.6(e).

Pursuant to Local Rule 7.1, counsel for Conservation Groups has conferred with counsel for all parties in this case. Federal-Respondents have represented that they oppose the motion; Petitioners take no position on the motion.

INTRODUCTION

This case concerns the fair valuation of coal, oil, and natural gas produced from federal leases. Lessees must make royalty payments on these mineral resources using valuation methods set by the Office of Natural Resources Revenue (ONRR). In 2016, following years of public engagement, ONRR issued a final rule—known as the Valuation Rule—adopting much-needed changes to the valuation system.

Soon thereafter several industry groups, including Petitioners, worked to halt the rule's implementation. In addition to filing petitions against the Valuation Rule in this Court, which were ultimately dismissed without prejudice, industry lobbied ONRR to postpone the rule's effective date, then pushed for the rule's wholesale repeal. Both the postponement and repeal were overturned in court. Industry has now revived its original petitions seeking to invalidate the Valuation Rule. The Conservation Groups move to intervene in the litigation to defend the rule and protect their significant interests in it.

BACKGROUND

On July 1, 2016, ONRR, a division of the U.S. Department of the Interior, published the Valuation Rule, which modified the regulations that govern royalty payments on coal, oil, and gas extracted from public lands. 81 Fed. Reg. 43338 (July 1, 2016). This long-overdue measure responded in part to public criticism, including criticism from the Conservation Groups, that existing royalty valuation methodologies significantly undervalued these resources, depriving taxpayers of millions of dollars of additional revenue each year. *See* Decl. of Robert McEnaney (McEnaney Decl.), Ex. 1, ¶¶ 3, 5; Decl. of Chase Huntley (Huntley Decl.), Ex. 2, ¶¶ 3-4, 8-11; Decl. of Sara Kendall (Kendall Decl.), Ex. 3, ¶¶ 5-6, 8. The final rule reflected input received during a 120-day comment period and six public workshops, including 1,000 pages of written comments from over 300 commenters and 190,000 petition signatories. 81 Fed. Reg. at 43338.

Several months later, in December 2016, industry groups filed three petitions in this Court alleging that the Valuation Rule is unlawful. *See* Case Nos. 16-cv-315-NDF, 16-cv-316-NDF, 16-cv-319-NDF. Three of the Conservation Groups—Powder River Basin Resource Council, Western Organization of Resource Councils, and The Wilderness Society—intervened in Case No. 16-cv-315-NDF, ECF No. 37.

In February 2017, following the change in presidential administrations and at industry's request, ONRR improperly postponed the Valuation Rule's effective date. 82 Fed. Reg. 11823 (Feb. 27, 2017) (postponement); *Becerra v. U.S. Dep't of the Interior*, 276 F. Supp. 3d 953, 966 (N.D. Cal. 2017) (holding postponement was contrary to law).

On April 4, 2017, ONRR sought comment on an advance notice of proposed rulemaking asking whether a new valuation rule was needed and, if so, what issues it should

address. 82 Fed. Reg. 16325, 16326 (Apr. 4, 2017). ONRR simultaneously sought comment on a proposal to repeal the Valuation Rule in its entirety. 82 Fed. Reg. 16323 (Apr. 4, 2017). ONRR finalized the repeal just three months later. 82 Fed. Reg. 36934 (Aug. 7, 2017). In response, the industry groups voluntarily dismissed their petitions before this Court without prejudice. Case No. 16-cv-315-NDF, ECF No. 42; Case No. 16-cv-316-NDF, ECF No. 23; Case No. 16-cv-319-NDF, ECF No. 23.

The States of California and New Mexico, as plaintiffs, and the Conservation Groups, as plaintiff-intervenors, subsequently challenged the Valuation Rule's repeal in the U.S. District Court for the Northern District of California. That court vacated the repeal, finding that ONRR failed to give a reasoned explanation for its actions and provided inadequate notice and opportunity for public comment, in violation of the Administrative Procedure Act. *California v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153, at *8, *18-19 (N.D. Cal. 2019). Petitioners then filed three lawsuits, which have been consolidated.

ARGUMENT

I. The Conservation Groups are entitled to intervene as a matter of right

To intervene as of right under Federal Rule of Civil Procedure 24(a)(2), an applicant must establish: (1) timeliness, (2) an interest in the subject of the action, (3) possible impairment of that interest, and (4) inadequate representation by existing parties. *Kane Cty. v. United States (Kane II)*, No. 18-4122, 2019 WL 2588524, at *6 (10th Cir. June 25, 2019). All four elements are satisfied here.

A. The motion is timely

The Conservation Groups filed this motion in a timely manner. Timeliness is assessed "in light of all the circumstances," but particularly the length of time the applicant

knew of her interest in the case, the prejudice to the existing parties, and the prejudice to the applicant. *W. Energy All. v. Zinke*, 877 F.3d 1157, 1164 (10th Cir. 2017) (quoting *Okla. ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232 (10th Cir. 2010)).

Here, the litigation is at an early stage. Petitioners filed their case less than two months ago, and the administrative record is not due until mid-September. *See* Local Rule 83.6(b)(2). Additionally, the Conservation Groups filed their motion to intervene as quickly as possible upon learning of Petitioners' motion for a preliminary injunction, which was filed just six days ago on July 19. *See* ECF No. 22; *see also Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 251 (D.N.M. 2008) (concluding that motion to intervene was timely when it was filed at an early stage of the case, just a week after plaintiffs' motion for a preliminary injunction). The government's opposition is due by August 16. *See* ECF No. 27. The Conservation Groups wish to be heard on Petitioners' motion, and would file their opposition by the same deadline (or lodge a proposed opposition, if their intervention status has not yet been decided). Thus, the Conservation Groups' motion is timely and will not prejudice the existing parties.

B. The Conservation Groups have significant interests in the Valuation Rule

The Conservation Groups easily demonstrate significant interests in the Valuation Rule. To satisfy this requirement, "an applicant 'must have an interest that could be adversely affected by the litigation.'" *Kane II*, 2019 WL 2588524, at *8 (quoting *San Juan Cty. v. United States*, 503 F.3d 1163, 1199 (10th Cir. 2007)). Courts apply "practical judgment" to "determin[e] whether the strength of the interest and the potential risk of injury to that interest justify intervention." *Id.* (quoting *San Juan Cty.*, 503 F.3d at 1199).

The Conservation Groups have two related interests in the Valuation Rule. First, they seek to minimize the environmental impacts associated with the extraction of coal, oil, and gas from public lands. Second, they seek to retain the valuation reforms they spent years advocating for and defending. Both interests are legally protectable under Rule 24(a)(2). *See Zinke*, 877 F.3d at 1165.

The Conservation Groups are environmental, public health, and landowner organizations with hundreds of thousands of members nationwide. *See* McEnaney Decl. ¶ 2; Huntley Decl. ¶ 2; Kendall Decl. ¶¶ 1-3. Many of these members live, work, and recreate on or near public lands that are directly affected by fossil fuel development. *See* McEnaney Decl. ¶ 3; Huntley Decl. ¶¶ 2, 11; Kendall Decl. ¶¶ 1-3, 8. The Conservation Groups thus have a significant interest in mitigating the environmental and social impacts of these activities, and in preserving their members' access to undisturbed land, clean air, and clean water. *See* McEnaney Decl. ¶¶ 3, 5; Huntley Decl. ¶¶ 3, 11-12; Kendall Decl. ¶¶ 1-3, 8; *see also Zinke*, 877 F.3d at 1165 (determining that applicants' interest in "obviating and/or minimizing the environmental impact of oil and gas development on public lands" is a protectable interest). The Conservation Groups also have a significant interest in ensuring that their members and other members of the public receive a fair return on federal mineral resources, as required by statute. *See, e.g.*, 43 U.S.C. § 1701(a)(9) (stating that the United States must "receive fair market value of the use of the public lands and their resources"); 30 U.S.C. § 1711(a) (requiring the Secretary of Interior to "establish a comprehensive inspection, collection and fiscal and production accounting and auditing system . . . to accurately determine oil and gas royalties . . . and other payments owed").

The Valuation Rule furthers these interests. By addressing a loophole in the valuation scheme that yielded artificially low royalties, the rule aims to eliminate the *de facto* subsidization of the fossil fuel industry and its destructive extraction practices. *See* McEnaney Decl. ¶¶ 3, 5; Huntley Decl. ¶¶ 11-13; Kendall Decl. ¶¶ 5, 8-9. And by enabling the more accurate valuation of public resources, the rule will generate additional royalty revenue that funds important public-education programs, infrastructure projects, and other local and regional initiatives. *See* McEnaney Decl. ¶¶ 3, 5; Huntley Decl. ¶ 11; Kendall Decl. ¶ 8. These programs are particularly important to Conservation Group members who live in states like Montana and Wyoming and are disproportionately burdened by the local environmental harms from resource extraction. *See* McEnaney Decl. ¶ 3; Huntley Decl. ¶¶ 2, 11-12; Kendall Decl. ¶¶ 1-3, 8. The Conservation Groups thus have substantial environmental interests in the Valuation Rule.

The Conservation Groups also have a protectable interest in the Valuation Rule because they spent years advocating for and defending it. *See Zinke*, 877 F.3d at 1165 (finding that conservation groups had an interest sufficient to support intervention because they spent years negotiating and litigating over the leasing reform policy at issue); *see also Kane II*, 2019 WL 2588524, at *9 (considering environmental organization's "decades-long history of advocating" for the protection of public lands in granting intervention in a related land title dispute). During the rulemaking process, the Conservation Groups submitted detailed public-comment letters in support of the Valuation Rule and in opposition to the rule's repeal. McEnaney Decl. ¶ 4; Huntley Decl. ¶¶ 4, 7; Kendall Decl. ¶¶ 6-7. In addition to these letters, the Conservation Groups endorsed the Valuation Rule in numerous meetings with federal officials and in congressional testimony, organized member support

for the Rule, and raised public awareness over it in the press and through other media channels. *See* McEnaney Decl. ¶ 4; Huntley Decl. ¶¶ 5-6, 9; Kendall Decl. ¶ 6. Collectively, the Conservation Groups also intervened in litigation twice to protect the Valuation Rule—first to defend against industry challenges to the rule, then to contest ONRR's repeal of it. *See supra* pp. 2-3; McEnaney Decl. ¶ 4; Huntley Decl. ¶¶ 6, 8; Kendall Decl. ¶ 7. The Conservation Groups' environmental interests in, and history of support for, the Valuation Rule are well established.

C. Disposition of this case may impair the Conservation Groups' interests

The burden to show impairment is well met here. That burden is minimal; an applicant need only show that her interests "may" be impeded by the pending litigation. *See Zinke*, 877 F.3d at 1167.

As discussed above, the Valuation Rule benefits the Conservation Groups and their members by ensuring that fossil-fuel companies pay fair-market value on coal, oil, and gas produced on federal lands. This, in turn, could reduce the harmful environmental effects of these activities and would generate millions of dollars of additional taxpayer revenue each year. A ruling in this case that sets aside the Valuation Rule would undoubtedly impair the Conservation Groups' interests and the interests of their members. *See Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1253-54 (10th Cir. 2001) (finding that if plaintiffs succeeded in setting aside a land management plan, land comprising a national monument would be subject to unrestricted off-road travel, thereby impairing the intervenors' environmental and conservationist interests).

D. The Conservation Groups' interests are inadequately represented by existing parties

The Conservation Groups meet the final requirement for intervention as of right: inadequate representation. "The burden to satisfy this condition is minimal," and "the possibility of divergence of interest need not be great" to satisfy that burden. *Zinke*, 877 F.3d at 1168 (quoting *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009)) (internal quotation marks and alterations omitted).

Although the federal government presumably shares the same ultimate objective as the Conservation Groups—defending the Valuation Rule against industry challenge—that shared goal does not ensure adequate representation.[1] The Tenth Circuit has "repeatedly pointed out" that the government's task of protecting not only the public interest but also the private interest of an intervenor is "'on its face impossible' and creates the kind of conflict" that constitutes inadequate representation. *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1117 (10th Cir. 2002) (quoting *Clinton*, 255 F.3d at 1255).

Here, ONRR must balance competing interests of state governments, individual taxpayers, public interest organizations, and industry groups, *see* 81 Fed. Reg. at 43338 (stating that ONRR received thousands of comments from these and other stakeholders on the proposed Valuation Rule), as well as its own internal interests, *see Kane II*, 2019 WL 2588524, at *11. The Conservation Groups, in contrast, have a more narrow, parochial interest in safeguarding their members' significant environmental interests and ensuring a

[1] Because of this shared goal, the Conservation Groups need not independently establish Article III standing. *See Town of Chester, N.Y., v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (holding that intervenor of right must have Article III standing "when it seeks additional relief beyond that which the plaintiff requests"); *accord Kane II*, 2019 WL 2588524, at *4-5 (confirming that a defendant-intervenor need not demonstrate Article III standing so long as it seeks the same relief as the original defendant).

fair return on the use of public resources. *See* McEnaney Decl. ¶¶ 2-3, 5; Huntley Decl. ¶¶ 2, 11-13; Kendall Decl. ¶¶ 1-3, 8-9; *see also Clinton*, 255 F.3d at 1255-56 ("[T]he government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation.").

ONRR's interest in defending the Valuation Rule could also change in the future. *See Zinke*, 877 F.3d at 1168-69 (asserting that courts "do not assume that the government agency's position will stay 'static or unaffected by unanticipated policy shifts,'" particularly following a change in presidential administration (quoting *Clinton*, 255 F.3d at 1256)). For example, the government could seek a stay of the litigation to pursue a settlement or otherwise weaken or amend the Valuation Rule—as it did in response to Petitioners' previous challenge to the Valuation Rule. *See, e.g.*, Case No. 16-cv-315-NDF, ECF Nos. 29, 32; *see also Kane II*, 2019 WL 2588524, at *12 (finding that the government's newfound willingness to settle weighed in favor of intervention). The existing parties cannot adequately protect the Conservation Groups' substantial interests in the Valuation Rule.

The Conservation Groups meet Rule 24(a)(2)'s requirements, particularly in light of this Circuit's "liberal approach to intervention" and its "relaxed" standard in cases like this one that "rais[e] significant public interests." *Kane II*, 2019 WL 2588524, at *13 (citations and internal quotation marks omitted). Accordingly, the Conservation Groups respectfully request that the Court grant their motion to intervene as of right.

II. Alternatively, the Conservation Groups may intervene permissively

To intervene permissively under Federal Rule of Civil Procedure 24(b)(1), an applicant must have a claim or defense that shares a common question of law or fact with

the main action. *Kane Cty. v. United States (Kane I)*, 597 F.3d 1129, 1135 (10th Cir. 2010). Once this threshold requirement is met, a court may exercise its discretion to grant permissive intervention, taking into account whether intervention would cause undue delay or prejudice existing parties. *Id*.

Here, the Conservation Groups intend to address the same questions of law as the existing parties: whether ONRR complied with the Administrative Procedure Act and its governing statutes when it promulgated the Valuation Rule. *See* ECF No. 1 at 8-9. Given their extensive subject-matter expertise on environmental and public-health issues and years of engagement on royalty valuation issues, the Conservation Groups will contribute a unique and valuable perspective on these questions. *See* McEnaney Decl. ¶¶ 1-2, 4; Huntley Decl. ¶¶ 2-3, 9; Kendall Decl. ¶¶ 1-4, 6-7; *see also, e.g.*, *Romero v. Bd. of Cty. Comm'rs*, 313 F.R.D. 133, 147 (D.N.M 2016) (granting permissive intervention in part based on intervenor's ability to contribute significantly to the case). Additionally, intervention will not unduly delay the case or prejudice the parties, as described above. *See supra* p. 4. The Court should exercise its discretion and allow Applicants to intervene permissively in this litigation. *See* Case No. 16-cv-315-NDF, ECF No. 37 (order granting permissive intervention to conservation groups in prior Valuation Rule case).

CONCLUSION

For the foregoing reasons, the Conservation Groups respectfully request that the Court grant their motion to intervene as of right, or, alternatively, permissively.

Dated: July 25, 2019

/s/ Shannon Anderson
Shannon Anderson
Powder River Basin Resource Council
934 N. Main Street
Sheridan, WY 82801
307-763-0995

sanderson@powderriverbasin.org

/s/ Cecilia D. Segal
Cecilia D. Segal (*pro hac vice* applicant)
Natural Resources Defense Council
111 Sutter Street, Floor 21
San Francisco, CA 94104
415-875-6100
csegal@nrdc.org

Aaron Colangelo (*pro hac vice* applicant)
Natural Resources Defense Council
1152 15th Street, NW, Suite 300
Washington, DC 20005
202-289-2376
acolangelo@nrdc.org

Attorneys for Proposed Respondent-Intervenors Natural Resources Defense Council, Northern Plains Resource Council, Powder River Basin Resource Council, The Wilderness Society, and Western Organization of Resource Councils

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July 2019 I served the foregoing **MOTION TO INTERVENE AS RESPONDENTS** on all counsel of record via the Court's CM/ECF system.

/s/ Shannon Anderson
Shannon Anderson