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COUNSEL FOR PROPOSED INTERVENOR – DEFENDANT
STATE OF MONTANA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

CITIZENS FOR CLEAN ENERGY,)	
ECOHEYENNE, MONTANA)	Case No.4:17-cv-00030-BMM
ENVIRONMENTAL INFORMATION)	
CENTER, CENTER FOR BIOLOGICAL)	
DIVERSITY, DEFENDERS OF THE)	
WILDLIFE, SIERRA CLUB, and)	
Plaintiffs,)	STATE OF MONTANA’S
)	MEMORANDUM IN SUPPORT
and)	OF UNOPPOSED MOTION TO
THE NORTHERN CHEYENNE TRIBE,)	INTERVENE AS A MATTER
Plaintiff,)	OF RIGHT, OR
)	ALTERNATIVELY,
v.)	PERMISSIVELY
)	
U.S. DEPARTMENT OF THE)	
INTERIOR, U.S. SECRETARY OF THE)	
INTERIOR; AND U.S. BUREAU OF)	
LAND MANAGEMENT,)	
Defendants,)	
)	
and)	
)	
THE STATE OF WYOMING,)	
Defendant-Intervenor.)	
)	

I. INTRODUCTION

The State of Montana has moved for leave to intervene in the above-captioned case as a matter of right under Fed. R. Civ. P. 24(a)(2) or, in the alternative, permissively under Fed. R. Civ. P. 24(b). In so doing, Montana agrees to abide by the schedule set forth in this Court's Order dated June 2, 2017. (Doc. 34). Montana offers this memorandum in support of its unopposed motion.

II. BACKGROUND

On March 29, 2017, Ryan Zinke, Secretary of the Interior, issued Secretarial Order 3348, overturning the previous administration's 2016 moratorium on federal coal leasing by the Bureau of Land Management. *See* Secretarial Order No. 3348, Concerning the Federal Coal Moratorium (March 29, 2017), *available at*: https://www.doi.gov/sites/doi.gov/files/uploads/so_3348_coal_moratorium.pdf

Plaintiffs Citizens for Clean Energy *et al.* (hereinafter "Interest Groups"), and the States of California, New Mexico, New York, and Washington (hereinafter "Plaintiff States"), are challenging Secretarial Order No. 3348 by alleging it was issued in violation of the National Environmental Policy Act (NEPA), the Administrative Procedures Act (APA), the Mineral Leasing Act (MLA), and the Federal Land Policy and Management Act (FLPMA). The Interest Groups and Plaintiff States have requested declaratory relief and seek an injunction barring

Defendants from taking any further actions regarding federal coal leasing until the Secretary has complied with the NEPA, the MLA, FLPMA and the APA.

Montana seeks to intervene in this case because it has a significant interest in ensuring that federal coal leasing located within the State continues. Montana would be grievously harmed if the Interest Groups and Plaintiff States prevail. Thus, Montana meets the requirements for intervention under Fed. R. Civ. P. 24, and respectfully requests that the Court grant Montana's unopposed motion to intervene.

III. ARGUMENT

A. Montana meets the Requirements for Intervention as of Right Pursuant to Fed. R. Civ. P. 24(a)

Fed. R. Civ. P. 24(a)(2) authorizes anyone to intervene in an action as of right when the applicant demonstrates: (1) the application is timely; (2) the applicant has a "significant protectable interest" in the action; (3) "the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest;" and (4) "the existing parties may not adequately represent the applicant's interest." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). The Ninth Circuit maintains a liberal policy in favor of intervention. *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011). Such a policy allows for "both efficient resolution of issues and

broadened access to the courts." *Id.* (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002)). It follows that if Fed. R. Civ. P. 24(a) is to be "construed broadly in favor of intervention, the four part test should also be construed broadly." *Wildlands CPR Inc. v. U.S. Forest Service*, CV 10-104-M-DWM, 2011 WL 578696 (D. Mont. 2011).

In evaluating whether the requirements are met, courts are "guided primarily by practical considerations, not technical distinctions." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). As the Ninth Circuit has explained:

A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, [courts] often prevent or simplify future litigation involving related issues; at the same time, [they] allow an additional interested party to express its views before the court.

U.S. v. City of Los Angeles, 288 F.3d 391, 397-98 (9th Cir. 2002).

The State meets all four parts of the test and is entitled to intervene as of right.

i. Montana's Application is Timely.

Whether a motion to intervene – permissive or otherwise – is considered timely is ultimately up to the discretion of the court. *NAACP v. New York*, 413 U.S. 345, 366 (1973) ("Timeliness is to be determined from all the circumstances.

And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review."). In the Ninth Circuit "[t]imeliness is measured by reference to '(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for the length of the delay.'" *United States v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002) citing *County of Orange v. Air Calif.*, 799 F.2d 535, 537 (9th Cir. 1986).

Montana has filed its unopposed motion to intervene well before an answer is due. A motion to intervene at such an early stage of the proceedings is timely. *Citizens for Balanced Use*, 647 F.3d. at 897 (motion to intervene was timely when filed less than three months after the complaint and less than two weeks after an answer).

Furthermore, Montana has agreed to abide by the schedule set forth in this Court's Order dated June 2, 2017, which sets the deadline for an answer by Intervenor-Defendants for July 25, 2017. (Doc. 34, ¶ 2) Timeliness is thus conclusively established.

ii. Montana Has a Protectable Interest Relating to the Subject of the Action.

Whether an applicant has a "significantly protectable" interest necessary for intervention depends on: (i) whether the interest is protectable under some law; and

(ii) whether there is a relationship between the legally protected interest and the claims at issue. *Wilderness Soc.*, 630 F.3d at 1179. The two prongs of the "significantly protectable" interest test are closely related because an applicant "has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006). "Although an applicant cannot rely on an interest that is wholly remote and speculative, the intervention may be based on an interest that is contingent upon the outcome of the litigation." *City of Emeryville v. Robinson*, 621 F.3d 1251, 1259 (9th Cir. 2010) (quoting *United States v. Union Elec. Co.*, 64 F.3d 1152, 1162 (8th Cir. 1995)).

One need look no further than the Complaints in this case for Montana's significantly protectable interest. First, the Plaintiff States' Complaint provides that venue in the District of Montana is proper because "federally-owned coal that is subject to the federal coal leasing program lies in this District." States' Compl. at 4 (May 9, 2017). The Interest Groups' Complaint likewise asserts that "land affected by the challenged action is within the District of Montana" as its basis for venue. Interest Groups' Compl. at 5 (Mar. 29, 2017).

According to the U.S. Energy Information System Administration, as of the end of 2015, Montana contains nearly one-fourth of the remaining coal reserve base in the United States. *See* U.S. Energy Information System Administration's

Montana State Profile and Energy Estimates webpage, available at <https://www.eia.gov/state/?sid=MT>. In 2015, Montana was the sixth-largest coal-producing state, producing 4.7% of all U.S. coal. *Id.*

Additionally, Montana has a significant interest in protecting and preserving the continued federal coal leasing located within the State because it generates millions of dollars in annual revenues for the State. In fiscal year 2016 alone, Montana received over \$22 million in federal mineral royalties. *See*, Montana Dept. of Revenue, "Natural Resources Biennial Report", attached as Ex. B to Schlichting Decl., pg. 129, also *available at* https://revenue.mt.gov/Portals/9/publications/biennial_reports/2014-2016/2016-Biennial-Report-Natural-Resources.pdf.

In fiscal year 2016, the Department of Interior Office of Natural Resources Revenue reported a total of \$31,549,246.81 as coal royalties from federal lands within Montana. *See* Ex. A, Schlichting Decl. Pursuant to 30 U.S.C. § 191, 49% (\$15,459,130.90) of the federal coal royalties are paid to the State. Thus, a majority (\$15,459,130.90) of the total federal mineral royalties (\$22,345,284) received by Montana in fiscal year 2016 are derived from coal mined on federal lands.

Pursuant to Mont. Code Ann. § 17-3-240, 25% of the federal mineral leasing revenue is deposited annually into the mineral impact account to be distributed to

counties from which the minerals were produced. The remaining 75% of the federal mineral leasing revenue is deposited into the State general fund which is used to pay for essential state programs like education, child and family services, public safety, and infrastructure. *See*, Mont. Code Ann. § 17-3-240. Montana clearly meets the "significantly protectable interest" prong for intervention.

iii. Montana's Interests Would Be Impaired or Impeded by the Outcome of the Litigation.

A proposed intervenor need only demonstrate that the outcome of litigation "may" "impair or impede" its legally protectable interests, not that impairment is certain to occur. Fed. R. Civ. P. 24(a)(2); *U.S. v. City of Los Angeles*, Cal., 288 F.3d 391 (9th Cir. 2002). As described above, the Interest Groups and Plaintiff States requested injunctive relief that, if granted, would significantly impact the revenues Montana currently receives from federal coal leasing, thus adversely impacting the citizens of Montana by reducing funding of State government programs that rely on such revenues.

iv. Other Defendants Cannot Adequately Represent Montana's Interests.

Lastly, the fourth requirement of Fed. R. Civ. P. 24(a)(2) – that Montana's interests are not adequately represented by an existing party – is satisfied if it can demonstrate that the representation of its interests "may be" inadequate. *See*

Citizens for Balanced Use, 647 F.3d at 898 (citing *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). "[T]he burden of showing inadequacy is 'minimal.'" *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822-23 (citations omitted).

In determining the adequacy of representation, the Court examines three factors: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Id.* quoting *Arakaki*, 324 F.3d at 1086. Montana meets this minimal burden.

The federal defendants and State of Wyoming cannot adequately represent Montana's sovereign interests. Here, federal defendants have no duty to represent the personal or economic interests of a single group or state. *See Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) ("The government is required to represent a broader view than the more narrow, parochial interests of a proposed state or county intervenor), *abrogated on other grounds by Wilderness Soc'y*, 630 F.3d at 1173, 1177-78, 1180. Thus, federal defendants cannot adequately represent the interests of Montana.

Likewise, the State of Wyoming cannot adequately represent the interests of Montana. Although Wyoming and Montana have a common interest in seeing that

the coal moratorium remains lifted, only Montana can explain to the Court the effects that an adverse ruling would have on its economy. Moreover, no other state can adequately express Montana's sovereign interests, thus, Montana has met this minimal burden for intervention.

B. Montana Meets the Requirements for Permissive Intervention.

If this Court denies Montana's request to intervene as of right, the State respectfully requests, in the alternative, to be allowed to intervene permissively under Fed. R. Civ. P. 24(b). This Court may grant permissive intervention pursuant to Rule 24(b)(1) when an applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely, and (3) the applicant's claim or defense, and the main action have a question of law or fact in common. *See* Fed. R. Civ. P. 24(b)(1); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1109-1111 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc'y*, 630 F.3d at 1173, 1177-78, 1180; *see also Friends of the Wild Swan, et al. v. Jewell, U.S. Fish and Wildlife Service, et al.*, Case No. CV-13-61-M-DWM, (D. Mont. July 1, 2013) [Doc. 16] (granting permissive intervention to State agencies).

First, Montana need not establish independent grounds for jurisdiction because Interest Groups and Plaintiff States have established federal-question jurisdiction under 28 U.S.C. § 1331, and Montana raises no new claims. *See Freedom From Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843-844 (9th Cir.

2011) ("We therefore clarify that the independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims.").

Second, as explained above, the State's motion is timely because it is at an early stage of the proceedings – before any defendant filed an answer. *See Fund for Animals v. Norton*, 322 F.3d 728, 735 (9th Cir. 2003) (motion to intervene was timely when filed "less than two months after the plaintiffs filed their complaint and before the defendants filed an answer.").

Third, the commonality requirement of Rule 24(b)(1)(B) "does not specify any particular interest that will suffice for permissive intervention," and "it plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *Kootenai Tribe of Idaho*, 313 F.3d at 1108), (quoting 7C Wright, Miller & Kane, *Federal Practice and Procedure* § 1911, 357-63 (2d. ed. 1986)).

Here, the State has a significant financial interest in ensuring that federal coal leasing continues, as discussed in Section III(B) above, demonstrates a legally protectable interest directly relating to the subject of the action, and thus, easily meets the "common question of law and fact" requirement for permissive intervention.

Finally, in exercising its discretion to allow permissive intervention (Fed. R. Civ. P. 24(b)), a court must also consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b)(3); *See also Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. Cal. Nov. 19, 2009) ("Rule 24(b)(3) also *requires* that the court 'consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.'" (quoting Fed. R. Civ. P. 24(b)(3)).

Montana's motion is timely and will not prejudice any party or cause undue delay. Both Interest Groups and Plaintiff States do not object to Montana's motion, and no defendant has filed an answer. Accordingly, Montana's participation will not unduly delay the case or prejudice the original parties.

IV. CONCLUSION

For the reasons stated herein, the Attorney General requests that the Court grant the State of Montana leave to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2) or, in the alternative, permissively under Fed. R. Civ. P. 24(b).

Respectfully submitted this 29th day of June, 2017.

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