UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, and PROJECT GUTPILE, Plaintiffs, vs. LISA P. JACKSON and ENVIRONMENTAL PROTECTION AGENCY, Defendants.	Case No. 1:10-cv-02007-EGS
ASSOCIATION OF BATTERY RECYCLERS, INC., Movant-Intervenor.	

REPLY IN SUPPORT OF ASSOCIATION OF BATTERY RECYCLERS, INC.'S MOTION TO INTERVENE IN SUPPORT OF DEFENDANTS

Plaintiffs Center for Biological Diversity, Public Employees for Environmental Responsibility, and Project Gutpile (collectively referred to as "CBD") seek a ban of lead shot, bullets, and fishing sinkers under the Toxic Substances Control Act ("TSCA") and, in this action, request the Court order EPA to issue regulations to control the use and manufacture of these products. Compl. ¶¶5, 7. CBD opposes the intervention of the Association of Battery Recyclers Inc. ("ABR"), whose members manufacture these products and/or use them in their recycling business, because CBD asserts the Court cannot order a ban of these products, and that it can only order EPA to regulate them. While admitting that ABR can challenge the subsequent regulation issued by EPA, CBD apparently contends that those that will be subject to and harmed

by the regulation have insufficient interest to support intervention in a case that will decide whether EPA has the authority to regulate or that regulation is appropriate in the first place. This extraordinary contention is against the purposes of intervention and antithetical to notions of due process. Indeed, each of CBD's claims imposes a higher standard for intervention than is warranted under the liberal interpretation of intervention of Federal Rule of Civil Procedure 24 in this Circuit, and are easily dismissed.

In addition to seeking to impose a higher burden for intervention than required under Rule 24, CBD then attempts to limit ABR's intervention asserting intervention would "only delay litigation and result in prejudice to the original parties." CBD Opp'n to ABR Mot. to Intervene ("CBD Opp'n") at 2. CBD provides no basis for such an assertion, and provides no support for the conditions and limitations it seeks to impose on ABR's intervention. Its request undermines the purposes of intervention under Rule 24, and should be summarily rejected.

Because its members will be directly impacted by the requested relief, ABR has a substantial interest in the outcome of this litigation and respectfully requests that the Court grant its motion to intervene as of right, or alternatively permissively, without limitation.[1]

[1] ABR is filing this response within the time required under Local Rule 7(d) and Federal Rule of Civil Procedure 6 based on the date of service noted in CBD's certificate of service. However, ABR's counsel of record was not served with the reply by CBD, but obtained the opposition by separately accessing the Court's docket through PACER.

ARGUMENT

I. ABR is Entitled to Intervene as of Right.[2]

A. Because CBD seeks to change the regulatory scheme of ABR's members, ABR has standing, and more than adequate interest to participate in this Action that will be impaired if intervention is not granted.

CBD first claims that ABR does not have standing to intervene, and, similarly, does not have a protectable interest in this litigation for purposes of intervention. CBD Opp'n at 6-9. CBD then claims that this action will not impair or impede ABR's ability to protect its interests or those of its members. *Id.* at 9-11. These claims are based on CBD's assertion that any subsequent regulation, *which this Court will require if CBD prevails*, will undergo notice and comment rulemaking and can subsequently be challenged. CBD's claims are meritless. CBD asks this Court to make fundamental findings regarding EPA's authority to regulate certain lead products under TSCA, and to *require* EPA to regulate those products. It is indisputable that, but for this litigation, the current status of these products under TSCA would go unchanged and there would be no such rulemaking proceeding. It is not speculative to find that ABR's members, who use and manufacture these products, will be affected by the requested change in the current regulatory regime.

First, CBD contends that ABR's alleged injuries to its members are too speculative to support standing.[3] CBD asserts that the Declaration of Earl Cornette, attached to ABR's motion,

---

[2] CBD does not contend that ABR's motion is untimely. *See* Mem. in Support of ABR Mot. to Intervene ("ABR Mem.") at 4-5.

[3] CBD does not dispute that finding constitutional standing "is alone sufficient to establish that [ABR] has 'an interest relating to the property or transaction which is the subject of the action.'" *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (quoting Fed. R. Civ. P. 24(a)(2)); *see also Am. Horse Prot. Ass'n v. Veneman*, 200 F.R.D. 153, 157 (D.D.C. 2001); *County of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 46 (D.D.C. 2007). As such, the same arguments that support a finding of standing apply to CBD's claim that ABR does not have a legally protected interest under Rule 24.

is insufficient evidence that ABR's members manufacture and use lead shot, bullets or fishing sinkers. *See* CBD Opp'n at 6 n.1. Mr. Cornette's declaration, however, is based on his own personal knowledge as Chairman of ABR. Cornette Decl. ¶1. Mr. Cornette has been associated with ABR for many years and is familiar with the operations of ABR's members and the lead industry. In particular, Mr. Cornette's declaration states that ABR members recycle "other lead products, including recovered lead shots," "[t]he lead produced and processed by ABR members are sold for use in products sold to consumers, including lead bullets and shots and lead fishing sinkers . . . [and] *Members of ABR also manufacture these products*." *Id.* ¶¶7-8 (emphasis added).[4] It is inconceivable how parties that use and manufacture the products at issue will not be directly affected by regulation sought to control those very activities.

CBD's claims that the injuries are speculative are based on the assertion that the parameters of the ultimate regulation will not be determined by the Court, but by EPA in a subsequent rulemaking. This is beside the point. CBD requests "that the Court order the EPA to initiate the petitioned action, namely to develop and implement regulations to prevent poisoning of wildlife by spent lead shot, bullets and lead containing fishing tackle." Compl. at 13. It is indisputable that, if the Court rules in ABR's favor, no regulation will be required at all. On the other hand, if CBD prevails and receives its requested relief, ABR's members will be subject to even more regulation, including the regulation of lead shot and bullets under TSCA that EPA has found it has no authority to regulate in the first place.

[4] Mr. Cornette's declaration cites to publicly available information to support his statements, and CBD presents no evidence to question these statements. *See, e.g.*, Cornette Decl. ¶8 (citing America's Battery Recyclers, http://www.americasbatteryrecyclers.org/technology.html; Gopher Resources, *Answers to Your Questions*, http://www.gopherresource.com/lead_faq.asp; Mayco Industries, Inc., *Lawrence Brand Lead Shot/West Coast Magnum Shot*, http://www.maycoindustries.com/lead_shot.htm).

As outlined in ABR's memorandum in support of its motion to intervene, the Supreme Court, the D.C. Circuit and courts within this Circuit have consistently found that the entities that are or will be regulated can establish standing. ABR Mem. at 7-9. That there may be a subsequent rulemaking that outlines the parameters of that regulation does not eliminate the fact that ABR's members will be regulated and that ABR has standing to protect its members' interests now. *See S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 895-96 (2006), *reh'g denied*, 489 F.3d 1245 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1140 (2008) (finding association had standing to challenge EPA rule where future state implementation plans would actually impose requirements on its members) (citations omitted); *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 43 (1st Cir. 1992) (finding proposed intervenors' "interests are not speculative simply because the explicit terms of the consent decree do not implement [changes requested by plaintiff], but merely begin the process through which they would come about").

Second, CBD asserts that the impacts on regulated entities do not fall within the "zone of interests" of TSCA because the specific provision CBD relies on to assert this Court's jurisdiction only confers authority for the party that petitioned EPA to seek judicial review. CBD Opp'n at 8. This claim also must be rejected.

The provision under which CBD brought its claim merely gives this Court authority to hear CBD's claims. Nowhere in the provision is there any limitation on intervention in such proceedings. Therefore, intervention is governed by Federal Rule of Civil Procedure 24, and CBD cites to no authority that Rule 24 requires intervenors also must meet the requirements of the specific provision used by plaintiffs to invoke jurisdiction. *See Jones v. Prince Georges County, Md.*, 348 F.3d 1014, 1017-18 (D.C. Cir. 2003) ("In a motion to intervene under Rule

24(a)(2), the question is not whether the applicable law assigns the prospective intervenor a cause of action. Rather, the question is whether the individual may intervene in an already pending cause of action.") (citation omitted). Indeed, under CBD's theory, members of the targeted industry would not have rights to intervene in any case challenging a denial of a petition asking an agency to take certain actions affecting that industry, including petitions for rulemakings under the Administrative Procedure Act, 5 U.S.C. §553(e), because they were not the petitioning party. But, this Court and the D.C. Circuit have taken a liberal approach to intervention, and such limits as asserted by CBD are inconsistent with notions of due process with respect to those entities that will be regulated or harmed by the petitioned actions. *See Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 12, 18 (D.D.C. 2000) (citing *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 910-11 (D.C. Cir. 1977)); *see also Am. Horse Prot. Ass'n*, 200 F.R.D. at 157 (The "interest test" is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.") (citations omitted).

Even assuming this prudential test for standing must be met for intervenors who have not invoked the Court's jurisdiction, the zone of interests test is met in this case. The zone of interests test seeks to ensure that the plaintiff's grievance falls within "the zone of interests protected or *regulated* by the statutory provision . . . invoked." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (emphasis added) (citations omitted); *see also GasPlus, L.L.C. v. U.S. Dep't of the Interior*, 510 F. Supp. 2d 18, 26 (D.D.C. 2007) ("[I]n addition to covering those entities whose interests Congress intended to protect, the zone-of-interest test also covers entities whose interests Congress intended to regulate.") (citations omitted).

In addition, CBD's complaint acknowledges that economic consequences of the rule must be evaluated in determining whether there is a reasonable basis to conclude that the chemical substances at issue "present an unreasonable risk of injury to health and or the environment." Compl. ¶20 (citing 15 U.S.C. §2605(a), (c)); *see also* 15 U.S.C. §2620(b)(4)(B)(ii). In its Opposition, CBD also admits that economic interests are valid considerations for purposes of TSCA regulation, CBD Opp'n at 10, and does not dispute that economic interests are within the zone of interests of TSCA generally. *See* ABR Mem. at 8-9. In fact, CBD acknowledges that ABR can sue on any ultimate regulation. CBD Opp'n at 10. It only follows that ABR similarly can intervene in support of EPA's decision that it has no authority to regulate or that no regulation at all is warranted.

Finally, CBD asserts that, even if ABR's members would be regulated by the requested regulations, ABR's ability to protect the interests of its members is not impaired or impeded by resolution of this action because it "can result only in an order from the Court that the EPA initiate a rulemaking." CBD Opp'n at 9. Again, CBD's claims are meritless.

CBD's focus on ABR's ability to provide comments on economic impacts of regulation and seek review on any subsequent regulation is irrelevant and unavailing. ABR does not seek to intervene in an essentially procedural matter, but in the substantive determinations required for CBD to obtain its requested relief. The harm asserted by ABR stems from the fact that, if CBD obtains its requested relief, the activities of its members *will be* regulated under TSCA, changing the current regulatory scheme for lead shot, bullets and fishing sinkers. CBD presumably does not contend that, if the Court finds an unreasonable risk of injury to health and to the environment and orders initiation of a rulemaking as requested by CBD, such rulemaking can result in no actual control on the use or manufacture of these products (*i.e.*, no regulation). As

such, the outcome of this case will necessarily restrict the ability of ABR's members to use and manufacture lead shot, bullets and fishing sinkers. While ABR may be able to comment on the extent of that regulation, CBD would prohibit ABR from participating in litigation that could stop that regulation from occurring at all.

The only cases cited by CBD in support of its claims are inapposite. In *Alternative Research & Development Foundation v. Veneman*, the plaintiff and defendant agency entered into a stipulation to initiate a rulemaking, and the D.C. Circuit found that the proposed intervenor's "concerns about the terms of the stipulated dismissal are insufficient to constitute an interest requiring intervention." 262 F.3d 406, 411 (D.C. Cir. 2001). In that case, however, the agency could still decline to issue a final rule, and the court found the stipulation did "not bind the agency in its rulemaking."[5] *Id.* Here, CBD requests that this Court find EPA has authority to regulate lead shot and bullets, and that lead shot, bullets and fishing sinkers present an unreasonable risk of injury to health or the environment, requiring regulation under TSCA. Compl. ¶57. If the Court grants such a request, EPA will be limited in its ability to revisit these issues in any subsequent regulatory proceedings, and the Court's ruling is likely to be raised as precedent in any court challenge to the subsequent regulations. *See Akiachak Native Cmty. v. Dep't of the Interior*, 584 F. Supp. 2d 1, 6-7 (D.D.C. 2008) (recognizing intervenor's interests may be impaired "even where the possibility of future challenge to the regulation remains

[5] In *Environmental Defense v. Leavitt*, also cited by CBD, the plaintiff and EPA entered into a consent decree outlining the timetable for EPA to meet requirements imposed by the Clean Air Act. 329 F. Supp. 2d 55 (D.D.C. 2004). This Court found the proposed intervenor had insufficient interest in the consent decree because the consent decree did not address the substance of the Act's requirements at issue, but only set a timetable for promulgation of the required regulations. *Id.* at 67-69. Here, it is the requested Court ruling that would require EPA to regulate. Thus, ABR has a significant interest in the outcome of the litigation.

available") (quoting *Fund for Animals, Inc.*, 322 F.3d at 735); *see also Nuesse v. Camp*, 385 F.2d 694, 701 (D.C. Cir. 1967).

This Court's findings would likely also be cited by CBD in petitions seeking regulation of other lead products and EPA's consideration of those petitions. In its Opposition, CBD does not dispute that any determinations in this case may influence subsequent proceedings regarding the regulation of lead under TSCA. *See* ABR Mem. at 10. Thus, ABR's ability to challenge EPA's authority to issue *any* regulations and to protect its members interests regarding regulation of lead under TSCA will be impaired or impeded by the outcome of this case.

The outcome of the case has significant implications for the lead industry in general and for users and manufacturers of the consumer products that CBD seeks to have banned specifically, including members of ABR. As such, ABR has standing and a significant protectable interest that will be impaired or impeded by the outcome of this case. Therefore, ABR is entitled to intervene as of right.

B. It is well-settled in this and other Circuits, that the government does not adequately represent the interests of the regulated industry.

Citing to one 1985 case from this Court, CBD asserts that ABR's interests are adequately represented by the federal government. CBD Opp'n at 11-12. But, cases in this and other Circuits are clear -- a government agency obligated to "represent the interests of the American people" does not adequately represent intervenor where it could not give intervenor's interests "the kind of primacy that [the intervenor] would given them." *Fund for Animals, Inc.*, 322 F.3d at 736; *see also* ABR Mem. at 11-13. None of these cases requires a showing that "EPA is not willing to defend its position," as asserted by CBD. CBD Opp'n at 12. Indeed, such a requirement would essentially eliminate any party's ability to intervene in support of a defendant federal agency.

Nonetheless, as also explained in ABR's initial memorandum, consideration of a petition under Section 21 of TSCA involves consideration of various issues, such as whether TSCA regulation is more appropriate than other regulation. ABR Mem. at 12-13 (citing 50 Fed. Reg. 46,825, 46,827 (Nov. 13, 1985)). Moreover, as noted above, CBD admits that economic impacts are considered in determining whether there is a reasonable basis to regulate under TSCA. *See supra* at 7. CBD does not and cannot dispute that ABR and EPA may have a fundamentally different position on the extent and impact of regulation on the lead industry in assessing whether there is a reasonable basis to regulate under TSCA. *Cf. Humane Soc'y of the U.S. v. Clark*, 109 F.R.D. 518, 520 (D.D.C. 1985) (finding "there is no evidence of any disagreement of any sort between the federal defendants and the WLFA or the NRA which might justify intervention" where federal defendant did not seek to re-weigh factors considered in issuing regulations).[6] This is more than sufficient to meet ABR's "minimal" burden to establish that "inadequacy of representation is satisfied." *County of San Miguel, Colo.*, 244 F.R.D. at 48 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)); *Am. Horse Prot. Ass'n*, 200 F.R.D. at 159.

II. Alternatively, ABR Should Be Granted Permissive Intervention.

CBD also asserts that this Court must deny ABR permissive intervention. CBD Opp'n at 13. Again, each of CBD's claims is easily dismissed.

Rule 24 gives this Court discretion to grant intervention when the movant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P.

[6] CBD asserts many of the same arguments against ABR's intervention that it asserted against another proposed intervenor -- the National Shooting Sports Foundation ("NSSF"). ABR notes that the responses to those arguments by NSSF also support ABR's intervention. Moreover, CBD does not contend that NSSF adequately represents ABR's interests. Nor can it. *See* ABR Mem. at 13 n.4.

24(b)(1)(B). CBD asserts that "ABR offers no defense that shares common questions of law or fact with the main action." CBD Opp'n at 13. In the very same paragraph, however, CBD also contends that "ABR does not raise any defense that EPA is unlikely to raise." *Id.* Despite these apparent contradictory statements, because ABR also has "an interest in keeping the agencies' rules in place," which CBD essentially admits, ABR raises a "defense that shares with the main action a common question of law or fact."[7] *Earthworks v. Dep't of the Interior*, No. 09-1972, 2010 U.S. Dist. LEXIS 77894, at *5 (D.D.C. Aug. 3, 2010) (quoting Fed. R. Civ. P. 24(b)(1)(B)).

Contrary to CBD's assertions, ABR also would have independent grounds for subject matter jurisdiction. Again CBD relies on the provision in Section 21 of TSCA that gives Section 21 petitioners the right to challenge a denial of their petition to bar all other participants in the litigation. Although ABR is not raising any new claims requiring a separate basis for subject matter jurisdiction, this Court would have jurisdiction over ABR's defenses that EPA's action was not arbitrary and capricious and was consistent with TSCA under its federal question jurisdiction pursuant to 28 U.S.C. §1331. *See Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 10 (D.D.C. 2007).

Finally, CBD contends that ABR's intervention will unduly delay or prejudice the existing parties based on a misrepresentation of ABR's intent in intervening in this case. ABR's request to intervene is not to "interject its concerns about prospective, speculative impacts to its

[7] Again contradicting itself, and misrepresenting ABR's claims, CBD states that ABR "seeks to have this Court entertain its concerns about speculative impacts to its economic interests that may come about as a result of a future rulemaking." CBD Opp'n at 13. By seeking intervention, ABR seeks to protect the interests of its members in litigation asking this Court to rule that EPA has authority to regulate certain lead products under TSCA, that those products present an unreasonable risk to human health and the environment, and that EPA must regulate those products.

interests," CBD Opp'n at 13, but to protect the interests of its members on the issues before this Court. Barring permissive intervention on the grounds asserted by CBD ignores the potential impacts of an adverse decision in this case and turns the rules regarding intervention on its head. One of the core purposes of intervention is to protect the interests of those who will be affected by the outcome of the litigation and whose interests differ from those of the parties. *See Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977) (one purpose of rule authorizing intervention is to protect nonparties from having their interests adversely affected by litigation conducted without their participation); *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 971 (3d Cir. 1998) (one premise of intervention is "the protection of third parties affected by pending litigation). As previously noted, CBD does not challenge the timeliness of ABR's motion. Nor can it. It simply is not prejudiced by ABR's intervention in the early stages of this case. *See Bossier Parish School Bd. v. Reno*, 157 F.R.D. 133, 135 (D.D.C. 1994) (finding "intervention shall not cause any undue delay or prejudice to any other party" where "proposed Intervenors sought intervention early in this litigation"). *Cf. Earthworks*, 2010 U.S. Dist. LEXIS 77894, at *5-6 n.2 ("Because this case is still at a preliminary stage and because the Court will require the Associations to submit joint briefing with the other Intervenors, no delay or prejudice will result from the Court's order."). CBD's only real complaint is that it must respond to ABR's arguments, which are adverse to CBD, but this does not constitute prejudice and cannot outweigh the benefits of allowing intervention here. Thus, this Court should, in the alternative to intervention as of right, grant ABR permissive intervention.

III. CBD Provides No Support for the Limitations it Seeks to Impose on ABR's Intervention.

After making meritless and unsupported claims to deny ABR's intervention, CBD then asserts that this Court should limit ABR's rights to intervene. CBD provides no bases for any of the limitations it seeks.

Of particular concern is CBD's request that the Court "require consolidated briefing among *all defendant parties*" and limit ABR "to filing one opposition brief during the briefing on the merits and not permitted to file any cross-motion for summary judgment or additional reply briefs." CBD Opp'n at 14 (emphasis added).[8] CBD cites to no authority to impose such restrictions even on the federal government. *See WildEarth Guardians v. Salazar*, -- F.R.D. --, 2010 U.S. Dist. LEXIS 128203, at *41-46 (D.D.C. Dec. 6, 2010) (rejecting request to consolidate briefing; "[g]iven the institutional constraints associated with joint briefing, including the understandable reluctance to share work product, a court should not mandate complete joint briefing lightly"). Moreover, this Court has rejected requests to impose similar limitations on intervention, finding the "purposes of Rule 24 are best served by permitting the prospective intervenor to engage in all aspects of the litigation." *Wilderness Soc'y*, 104 F. Supp. 2d at 18.[9]

The limits CBD seeks to impose on briefing are within the Court's control, and can be addressed in the context of the briefing schedule. ABR has already agreed to abide by any

[8] CBD also requests that ABR "not be permitted to engage in any discovery, except if granted leave of the Court." CBD Opp'n at 14. But, this case is an administrative record review case, and, in any event, ABR will abide by any discovery schedule provided by this Court.

[9] In the only case cited by CBD in support of its request to impose limits on ABR's intervention, this Court simply required that new intervenors join in the briefs of existing intervenors, all of which represented participants in the mining industry. *Earthworks*, 2010 U.S. Dist. LEXIS 77894, at *5. Here the other proposed intervenor does not represent the lead industry, but the firearms and ammunition industry.

briefing schedule the Court approves. *See* ABR Mem. at 14. Accordingly, there is no reason for the Court to impose the restrictions CBD seeks on ABR's intervention.

III. CONCLUSION

For the reasons described in its memorandum in support of its motion to intervene and as stated above, ABR respectfully requests that the Court enter an order granting ABR leave to intervene as defendant in this case, without limitation.

Respectfully submitted,

/s/ Robert N. Steinwurtzel

Robert N. Steinwurtzel
Sandra P. Franco
Bingham McCutchen LLP
2020 K Street, NW
Washington, DC 20006
(202) 373-6000 (telephone)
(202) 373-6001 (facsimile)

Counsel for Movant-Intervenor
Association of Battery Recyclers, Inc.

Dated: January 11, 2011

A/73632318.1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, and PROJECT GUTPILE, Plaintiffs, vs. LISA P. JACKSON and ENVIRONMENTAL PROTECTION AGENCY, Defendants.	Case No. 1:10-cv-02007-EGS
ASSOCIATION OF BATTERY RECYCLERS, INC., Movant-Intervenor.	

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 2011, I caused to be electronically filed the foregoing Reply in Support of Association of Battery Recyclers, Inc.'s Motion to Intervene in Support of Defendants with the Clerk of the Court for the United States District Court for the District of Columbia by using the Court's CM/ECF system.

The following participants in the case are registered CM/ECF users and will be served by the Court's CM/ECF system:

Madeline P. Fleisher	madeline.fleisher@usdoj.gov
Adam F. Keats	akeats@biologicaldiversity.org
Jaclyn Lopez	jlopez@biologicaldiversity.org

Roger R. Martella, Jr.	rmartella@sidley.com
William J. Snape , III	billsnape@earthlink.net

/s/ Robert N. Steinwurtzel

Robert N. Steinwurtzel

ADDENDUM

LEXSEE 2010 U.S. DIST. LEXIS 77894

Caution
As of: Jan 11, 2011

EARTHWORKS, et al., Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, et al., Defendants.

Civil Action 09-01972 (HHK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2010 U.S. Dist. LEXIS 77894

August 3, 2010, Decided
August 3, 2010, Filed

PRIOR HISTORY: *Earthworks v. United States DOI, 2010 U.S. Dist. LEXIS 77890 (D.D.C., Aug. 3, 2010)*

COUNSEL: [*1] For EARTHWORKS, HIGH COUNTRY CITIZENS' ALLIANCE, GREAT BASIN RESOURCE WATCH, SAVE THE SCENIC SANTA RITAS, WESTERN SHOSHONE DEFENSE PROJECT, Plaintiffs: Edward S. Scheideman, LEAD ATTORNEY, DLA PIPER LLP (US), Washington, DC; Jeffrey C. Parsons, Roger Flynn, LEAD ATTORNEYS, PRO HAC VICE, WESTERN MINING ACTION PROJECT, Lyons, CO.

For U.S. DEPARTMENT OF THE INTERIOR, U.S. DEPARTMENT OF AGRICULTURE, U.S. BUREAU OF LAND MANAGEMENT, U.S. FOREST SERVICE, Defendants: Gregory D. Page, LEAD ATTORNEY, US DEPARTMENT OF JUSTICE-FEDERAL, Washington, DC.

For BARRICK NORTH AMERICA HOLDING CORPORATION, ABX FINANCECO INC., Intervenor Defendants: Stephen A. Fennell, LEAD ATTORNEY, STEPTOE & JOHNSON, LLP, Washington, DC.

For NATIONAL MINING ASSOCIATION, Intervenor Defendant: R. Timothy McCrum, LEAD ATTORNEY, Joseph Michael Klise, CROWELL & MORING LLP, Washington, DC.

For ROUND MOUNTAIN GOLD CORPORATION, Intervenor Defendant: John S. Irving, IV, LEAD ATTORNEY, HOLLAND & KNIGHT, LLP, Washington, DC; Steven R. Milch, LEAD ATTORNEY, CROWLEY-FLECK PLLP, Billings, MT.

For NORTHWEST MINING ASSOCIATION, ALASKA MINER ASSOCIATION, INC., Movants: Richard H. Bryan, LEAD ATTORNEY, LIONEL SAWYER & COLLINS, Las Vegas.

For [*2] STATE OF ALASKA, Movant: Rebecca Kruse, LEAD ATTORNEY, STATE OF ALASKA, Department of Law, Anchorage, AK.

For STATE OF NEVADA, Movant: Charles W. Howle, OFFICE OF THE ATTORNEY GENERAL, Carson City, NV.

JUDGES: Henry H. Kennedy, Jr., United States District Judge.

OPINION BY: Henry H. Kennedy, Jr.

OPINION

MEMORANDUM OPINION AND ORDER

Before the Court is a motion to intervene filed by the Northwest Mining Association and Alaska Miners Association (collectively "Associations") [# 21]. Upon consideration of the motion, the opposition thereto, and the record of this case, the Court concludes that the motion shall be granted but the Associations shall be required to submit joint motions and memoranda with the existing mining association intervenors.

I

In this action, Earthworks, High Country Citizens' Alliance, Great Basin Resource Watch, Save the Scenic Santa Ritas, and Western Shoshone Defense Project (collectively "plaintiffs") challenge two rules [1] regarding mining claims and mining sites promulgated by defendant federal agencies the Department of the Interior, Bureau of Land Management, Department of Agriculture, and Forest Service. If plaintiffs are successful in this suit, using federal lands for mining operations would [*3] become more expensive and the amount of federal land a person or company could claim for mining would become more restricted.

> 1 These rules are "Mining Claims Under the General Mining Laws," *73 Fed. Reg. 73,789-794 (Dec. 4, 2008)*, and "Locating, Recording, and Maintaining Mining Claims or Sites," *68 Fed. Reg. 61,046-81 (Oct. 24, 2003)*.

On December 22, 2009, the Court granted motions to intervene as defendants filed by Barrick North America Holding Corporation, ABX Financeco Inc., National Mining Association, and Round Mountain Gold Corporation (collectively "Intervenors") [# 22]. Each party represents the interests of participants in the mining industry, and the Court determined that they were entitled to intervention as of right under *Rule 24(a) of the Federal Rules of Civil Procedure*. The Court's order required these parties to submit joint motions and memoranda in this case.

II

Now before the Court is an additional motion to intervene as defendants by the Associations. They seek to intervene as of right, or, in the alternative, by permissive intervention. *Rule 24(a) of the Federal Rules of Civil Procedure*, "[i]ntervention of right," provides:

> On timely motion, the court must permit anyone [*4] to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). Rule 24(b) provides that a court may allow permissive intervention where a party "has a claim or defense that shares with the main action a common question of law or fact." *Fed. R. Civ. P. 24(b)(1)*.

Plaintiffs do not contest that the Associations meet the requirements of *Rule 24(a)(2)* that the motion be timely and that the movant have a protectable interest in the subject of the action. They oppose the Association's motion because, they argue, existing parties--the Intervenors--adequately represent the Associations' interests. The Associations respond that unlike the Intervenors, which are or which represent large mining companies, their membership is composed nearly exclusively of individuals and small companies that focus on prospecting and exploration rather than the operation of mines.

Plaintiffs have the better argument. The Associations have not explained [*5] how the size of their member companies or those companies' participation in a preliminary stage of mining operations renders their interests in regard to the agency rules at issue in this case distinguishable from those of large mining companies. They even concede in their briefing that some of those large mining companies also engage in exploration of new mining sites. Therefore, the Court concludes that the Associations' interests are adequately represented and they are not entitled to intervention as of right.

Nevertheless, because the Associations have an interest in keeping the agencies' rules in place and

therefore have a "defense that shares with the main action a common question of law or fact," *Fed. R. Civ. P. 24(b)(1)(B)*, [2] the Court will allow permissive intervention. In order to prevent excessive briefing in this case, however, the Associations must submit joint motions and memoranda with the existing Intervenors.

2 Pursuant to *Rule 24(b)(3)*, the Court has considered whether intervention by the Associations would "unduly delay or prejudice the adjudication of the original parties' rights." *Fed. R. Civ. P. 24(b)(3)*. Because this case is still at a preliminary stage and because [*6] the Court will require the Associations to submit joint briefing with the other Intervenors, no delay or prejudice will result from the Court's order.

III

For the foregoing reasons, it is this 3rd day of August 2010, hereby

ORDERED that the motion to intervene [# 21] is **GRANTED**; and it is further

ORDERED that the Northwest Mining Association and Alaska Miners Association shall submit joint motions and memoranda with Barrick North America Holding Corporation, ABX Financeco Inc., National Mining Association, and Round Mountain Gold Corporation in the course of briefing this case.

Henry H. Kennedy, Jr.

United States District Judge

LEXSEE 2010 U.S. DIST. LEXIS 128203

WILDEARTH GUARDIANS, DEFENDERS OF WILDLIFE, and SIERRA CLUB, Plaintiffs, v. KEN SALAZAR, Secretary, U.S. Department of Interior, U.S. BUREAU OF LAND MANAGEMENT, and U.S. FISH AND WILDLIFE SERVICE, Defendants, ANTELOPE COAL LLC, NATIONAL MINING ASSOCIATION, and STATE OF WYOMING, Intervenors/Defendants.

Civil Action No. 10-01174 (CKK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2010 U.S. Dist. LEXIS 128203

December 6, 2010, Decided
December 6, 2010, Filed

COUNSEL: [*1] For WILDEARTH GUARDIANS, DEFENDERS OF WILDLIFE, SIERRA CLUB, Plaintiffs: Matt G. Kenna, LEAD ATTORNEY, Public Interest Environmental Law, Durango, CO; Adam M. Kron, DEFENDERS OF WILDLIFE, Washington, DC; Samantha Ruscavage-Barz, PRO HAC VICE, WILDEARTH GUARDIANS, Santa Fe, NM.

For KEN SALAZAR, Secretary, U.S. Department of Interior, U.S. BUREAU OF LAND MANAGEMENT, U.S. FISH AND WILDLIFE SERVICE, Defendants: Coby Howell, LEAD ATTORNEY, U.S. DEPARTMENT OF JUSTICE, Enivornment & Natural Resources Division, Wildlife & Marine Resources Section, Portland, OR; John S. Most, LEAD ATTORNEY, DEPARTMENT OF JUSTICE, ENVIRONMENT & NATURAL RESOURCES DIVISION, Washington, DC.

For ANTELOPE COAL LLC, Movant: John Alan Bryson, LEAD ATTORNEY, HOLLAND & HART, Washington, DC; Andrew C. Emrich, PRO HAC VICE, HOLLARD & HART, LLP, Cheyenne, WY.

For STATE OF WYOMING, Movant: James Kaste, LEAD ATTORNEY, STATE OF WYOMING, Cheyenne, WY; Affie Ellis, STATE OF WYOMING - ATTORNEY GENERAL'S OFFICE, Cheyenne, WY.

For NATIONAL MINING ASSOCIATION, Movant: Jay Christopher Johnson, LEAD ATTORNEY, DORSEY & WHITNEY, L.L.P., Washington, DC.

JUDGES: COLLEEN KOLLAR-KOTELLY, United States District Judge.

OPINION BY: COLLEEN KOLLAR-KOTELLY

OPINION

MEMORANDUM [*2] **OPINION**

Plaintiffs Wildearth Guardians, Defenders of Wildlife, and the Sierra Club (collectively, "Plaintiffs") commenced this action on July 13, 2010, challenging the U.S. Department of Interior's decision to authorize the leasing of certain public lands in northeastern Wyoming for coal mining operations. Named as defendants are Ken Salazar, in his official capacity as Secretary of the U.S. Department of Interior, the U.S. Bureau of Land Management (the "Bureau"), and the U.S. Fish and

Wildlife Service (collectively, the "Federal Defendants"). Presently before the Court are three separate motions -- one by [11] Antelope Coal LLC ("Antelope"), a second by [28] the National Mining Association ("NMA"), and a third by [14] the State of Wyoming ("Wyoming") -- to intervene as defendants in this action (collectively, the "Putative Intervenors" or, simply, the "Intervenors"). Plaintiffs contest the three motions to intervene, albeit only in part and in a severely limited fashion; the Federal Defendants, for their part, take no position on the Putative Intervenors' participation in this action. For the reasons set forth below, the Court shall grant all three motions, subject to certain limitations [*3] and conditions.

I. PRELIMINARY MATTERS

For purposes of resolving the motions to intervene presently before the Court, the well-pleaded allegations in the Complaint are assumed to be true. [1] *Secs. & Exch. Comm'n v. Prudential Secs. Inc., 136 F.3d 153, 156 n.4 (D.C. Cir. 1998)* (citing *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd., 840 F.2d 72, 75, 268 U.S. App. D.C. 192 (D.C. Cir. 1988))*. Additionally, where appropriate, the Court shall refer to the non-conclusory allegations and record evidence offered by the Putative Intervenors in support of their motions to intervene. *See Foster v. Gueory, 655 F.2d 1319, 1324, 211 U.S. App. D.C. 89 (D.C. Cir. 1981)* ("motions to intervene are usually evaluated on the basis of well pleaded matters in the motion, the complaint, and any responses of opponents to intervention."); *Sw. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 820 (9th Cir. 2001)* ("Courts are to take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true absent sham, frivolity or other objections."). While the Court shall cite only to those portions of the record immediately relevant to its disposition [*4] today, the Court notes that it has considered each of the parties' submissions and the attachments thereto, including, but not limited to, the following documents:

- **Antelope's Motion to Intervene**: Antelope's Unopposed Mot. to Intervene as Def. ("Antl.'s Mem."), Docket No. [11]; Antelope's Reply to Pls.' Resp. to Wyoming's Mot. to Intervene ("Antl.'s 1st Reply"), Docket No. [24]; Antelope's Reply to Pls.' Resp. to NMA's Mot. to Intervene ("Antl.'s 2d Reply"), Docket No. [31]; Antelope's Not. of Suppl. Authority in Supp. of its Unopposed Mot. to Intervene, Docket No. [36]. [2]

- **NMA's Motion to Intervene**: NMA's Mot. to Intervene as Def. with Supp. Stmt. of P. & A. ("NMA's Mem."), Docket No. [28]; Decl. of Katie Sweeney in Supp. of NMA's Mot. to Intervene as Def. ("Sweeney Decl."), Docket No. [28-1]; Pls.' Resp. to Mot. to Intervene by NMA ("Pls.' Opp'n to NMA's Mot."), Docket No. [30]; Reply Stmt. of P. & A. in Supp. of NMA's Mot. to Intervene as Def., Docket No. [32].

- **Wyoming's Motion to Intervene**: Mem. of Law in Supp. of Wyoming's Mot. to Intervene ("Wyo.'s Mem."), Docket No. [14-1]; Aff. of Harold D. Kemp ("Kemp Aff."), Docket No. [14-2]; Pls.' Resp. to Mot. to Intervene by Wyoming [*5] ("Pls.' Opp'n to Wyo.'s Mot."), Docket No. [17]; Wyoming's Reply to Pls.' Resp. to Wyoming's Mot. to Intervene ("Wyo.'s Reply"), Docket No. [19]; Pls.' Not. of Suppl. Authority, Docket No. [25].

1 While this action is in its early stages, Plaintiffs have twice revised the Complaint in this action. *See* Compl., Docket No. [1]; First Am. Compl., Docket No. [18]; Supplemented Compl. ("3d Compl."), Docket No. [34].

2 Although two of Antelope's submissions are styled as replies to Plaintiffs' oppositions to the other Putative Intervenors' motions to intervene, they are substantively directed towards the merits of Antelope's motion to intervene. *See generally* Antl.'s 1st Reply; Antl.'s 2d Reply.

Before proceeding further, the Court pauses to make an overarching observation about the nature of Plaintiffs' opposition to the present motions, which is limited. Significantly, although the motions now before the Court are contested in part, Plaintiffs have completely failed to rebut or otherwise dispute, in any meaningful sense, the factual showing made by each of the Putative Intervenors

in support of their respective applications to intervene in this action. Accordingly, unless otherwise noted, the [*6] Court shall treat the Putative Intervenors' description of the relevant facts as conceded for purposes of resolving the present motions. *See Tanter v. Dep't of Interior, 432 F. Supp. 2d 58, 62 (D.D.C. 2006)* (treating factual allegations as conceded based upon party's failure to contest those allegations); *Cobell v. Norton, 355 F. Supp. 2d 531, 543 (D.D.C. 2005)* (same). This observation may be unnecessary, as there appears to be relatively little disagreement on the underlying facts; nevertheless, the Court notes that it renders its decision, as it must, upon the record created by the parties, to which Plaintiffs' contributions have been few.

II. BACKGROUND

Given the procedural posture of the case, nothing in the Court's opinion today should be construed as opining on the ultimate merits of the parties' respective legal claims and defenses or the likelihood that Plaintiffs will be able to secure the relief requested, nor as taking any factual assertions to be conclusively established for purposes of this litigation.

A. The Leasing of Public Lands for Coal Mining Operations

The present action touches upon the Bureau's practice and procedure with respect to the leasing of public lands for [*7] coal mining operations, of which only the broadest contours require discussion here. The relevant federal regulations contemplate two distinct coal leasing processes, commonly referred to as the "Competitive Leasing" process and the "Lease-by-Application" process. 3d Compl. ¶ 28; *see generally* 43 C.F.R. pt. 3420 (regulations governing the two processes). [3] The two processes may be described more fully as follows:

- **The Competitive Leasing Process**: The Competitive Leasing process applies in areas designated as "Coal Production Regions," the boundaries of which the Bureau is empowered to alter after publication of an appropriate notice. 3d Compl. ¶¶ 28, 30. Primarily an agency-driven process, the Competitive Leasing process begins when the Bureau identifies public lands for potential use for coal mining operations and offers competitive coal leases for sale. *Id.* ¶¶ 27-28. When operating under the Competitive Leasing process, the Bureau is required to consider the regional environmental impacts of prospective coal mining operations and consider such impacts when setting leasing levels on a region-wide basis. *Id.* ¶¶ 28-29.

- **The Lease-by-Application Process**: In contrast to the Competitive [*8] Leasing process, the Lease-by-Application process is animated primarily by coal companies, which assume responsibility in the first instance for identifying public lands for potential use and proposing specific tracts for leasing. *Id.* ¶¶ 5, 32. As characterized by Plaintiffs, the more site-specific Lease-by-Application process inhibits the Bureau's ability to limit coal mining operations based upon the cumulative environmental impacts caused by region-wide coal mining activities. *Id.*

3 Strictly speaking, both processes are forms of competitive leasing, as both contemplate an open, public, and competitive sealed-bid process and preclude the Bureau from issuing a coal lease unless the highest bid received meets or exceeds fair market value. *See 43 C.F.R. §§ 3422.1, 3422.2, 3425.4*. Nevertheless, consistent with the parties' usage, the Court shall employ the "Competitive Leasing" terminology to refer to the specific process applicable in areas designated as "Coal Production Regions."

B. The Decertification of the Powder River Basin

At one point in time, a total of six regions across the United States were designated as Coal Production Regions, within which the Competitive Leasing process [*9] applied. NMA's Mem. at 6; *see also Public Participation in Coal Leasing, 64 Fed. Reg. 52239*-02, 52240 (Sept. 28, 1999) (identifying the six Coal Production Regions). By the late 1980s, however, the Bureau started decertifying Coal Production Regions due to a declining demand for coal and perceived inefficiencies attendant to the Competitive Leasing

process. NMA's Mem. at 6; *see also Public Participation in Coal Leasing, 64 Fed. Reg. at 52240* (noting that, "[f]or a number of years, [the Bureau] has competitively leased Federal coal exclusively through the leasing-on-application process."). The Powder River Basin, an area covering approximately 24,000 square miles across northeastern Wyoming and southeastern Montana, was the last of the six regions to be decertified. 3d Compl. ¶¶ 1, 23; NMA's Mem. at 6; *see also* Proposed Decertification of All or a Portion of the Powder River Coal Production Region ("Decert. Not."), 54 Fed. Reg. 6339-01 (Feb. 9, 1989).

The Powder River Basin, the single largest source of coal in the United States, was first designated as a Coal Production Region in November 1979. 3d Compl. ¶¶ 1, 26; *see also* Identification of Coal Production Regions, 44 Fed. Reg. 65196 (Nov. 9, 1979). [*10] For the next decade, leasing within the Powder River Basin occurred pursuant to the Competitive Leasing process. On January 9, 1990, however, the Bureau decertified the region, thereby replacing the Competitive Leasing process with the Lease-by-Application process. 3d Compl. ¶¶ 6, 31. The Bureau's stated rationales for decertification included the administrative efficiencies associated with the Lease-by-Application process and the then-limited leasing interest in the region. *Id.* ¶ 31; *see also* Decert. Not., 54 Fed. Reg. at 6340 ("The reason for . . . decertification is to allow for an accommodation of the limited leasing potential within the subject areas, during the current soft coal market, and with the maximum administrative efficiency"). In the twenty years since decertification, coal production in the Powder River Basin has increased significantly, and at a higher rate than other domestic coal production. 3d Compl. ¶ 33. To this day, coal leasing in the Powder River Basin remains subject to the Lease-by-Application process.

C. The Bureau's Decision Authorizing the Leasing of the West Antelope II Tracts

Although this action unquestionably implicates broader issues concerning the [*11] leasing of public lands for coal mining operations, the immediate dispute is actually quite narrow. On April 6, 2005, pursuant to the Lease-by-Application process, Antelope filed an application with the Bureau requesting that certain public lands containing federal coal reserves in the Wyoming portion of the Powder River Basin -- namely, approximately 4,746 acres of land immediately adjacent to Antelope's pre-existing coal mining operations in Campbell and Converse Counties, Wyoming -- be offered up for competitive lease sale to interested parties. *Id.* ¶ 35; *see also* Not. of Intent to Prepare an *Envtl. Impact Stmt., 71 Fed. Reg. 61064*-02 (Oct. 17, 2006). Ultimately, the Bureau authorized the sale of leases covering the designated area. 3d Compl. ¶¶ 7, 34; *see also Not. of Availability of Record of Decision, 75 Fed. Reg. 16502*-01 (Apr. 1, 2010); Record of Decision ("Rec.") (Mar. 25, 2010), *available at* http://www.blm.gov/wy/st/en/info/NEPA/cfodocs/West_Antelope_II.html.

More specifically, the Bureau decided to divide the land identified by Antelope into two separate tracts -- designated as the "West Antelope II" tracts -- reasoning that the northernmost tract would be of greater interest [*12] to companies other than Antelope. 3d Compl. ¶¶ 63-64; Rec. at 6. Each tract would be offered for lease at separate, competitive sealed-bid sales. Rec. at 6. In the event the highest bid received at each sale met or exceeded the fair market value for the leases and all other leasing requirements were met, the leases would be issued to the successful qualified bidder or bidders. *Id.*

Notably, in the course of reaching this decision, the Bureau prepared an Environmental Impact Statement (the "EIS"), a subject of considerable dispute among the parties. 3d Compl. ¶ 63; *see also* Not. of Availability of Final Envtl. Impact Stmt., 74 Fed. Reg. 4228-01 (Jan. 23, 2009); Final Envtl. Impact Stmt. (Dec. 8, 2008), *available at* http://www.blm.gov/wy/st/en/info/NEPA/cfodocs/West_Antelope_II.html. The EIS, designed to provide agency decision-makers and the public with a complete and objective evaluation of the environmental impacts associated with the contemplated leasing of the West Antelope II tracts, is several hundred pages in length and took over two years to prepare. Rec. at 9-10; Not. of Intent to Prepare an *Envtl. Impact Stmt., 71 Fed. Reg. 61064*-02 (Oct. 17, 2006); Final Envtl. Impact Stmt.

D. [*13] *The Contours of the Present Action*

Plaintiffs challenge the Bureau's decision to authorize the leasing of the West Antelope II tracts on four principal fronts.

First, Plaintiffs allege, in essence, that the Bureau acted arbitrarily, capriciously, or otherwise not in accordance with law by authorizing the leasing of the

West Antelope II tracts without first re-certifying the Powder River Basin as a Coal Production Region. 3d Compl. ¶¶ 5-7, 98-105. By Plaintiffs' account, if the Powder River Basin had been re-certified as a Coal Production Region, any coal leasing -- including the future leasing of the West Antelope II tracts -- would have to be approved pursuant to the Competitive Leasing process, which imposes upon the Bureau an obligation to evaluate the regional environmental impacts of prospective coal mining operations when setting regional leasing levels, as opposed to the more site-specific Lease-by-Application process actually used to approve the leasing of the West Antelope II tracts.

Second, Plaintiffs contend that the Bureau violated the National Environmental Policy Act, *42 U.S.C. §§ 4321 et seq.*, by, *inter alia*, failing to adequately analyze the direct and indirect effects of [*14] carbon dioxide emissions that would result from leasing the West Antelope II tracts (including the ultimate combustion of the coal mined from those tracts), as well as the cumulative environmental impacts from other past, present, and reasonably foreseeable activities in the Powder River Basin. 3d Compl. ¶¶ 8, 106-118.

Third, Plaintiffs assert that the Bureau violated the Federal Land Policy and Management Act, *43 U.S.C. §§ 1701 et seq.*, by failing to appropriately analyze the impact of leasing the West Antelope II tracts pursuant to federal air quality standards. 3d Compl. ¶¶ 9, 119-128. For example, Plaintiffs allege that the Bureau failed to properly account for permissible levels of ambient ozone concentrations. *Id.* ¶ 9.

Fourth, and finally, Plaintiffs allege that the Bureau and the U.S. Fish and Wildlife Service violated their obligations under the Endangered Species Act, *16 U.S.C. §§ 1531 et seq.*, by failing to conduct an appropriate formal consultation regarding the potential impact of leasing the West Antelope II tracts upon threatened and endangered wildlife. *Id.* ¶¶ 10, 129-135.

III. LEGAL STANDARD

Rule 24(a) of the Federal Rules of Civil Procedure governs intervention as a matter [*15] of right. [4] That provision provides, in relevant part, that "[o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." *Fed. R. Civ. P. 24(a)(2)*. Consistent with this language, the D.C. Circuit Court of Appeals has identified four requirements for intervention as a matter of right:

> (1) **Timeliness**: First, an application to intervene in a pending action must be timely. *Karsner v. Lothian, 532 F.3d 876, 885, 382 U.S. App. D.C. 275 (D.C. Cir. 2008)*. Whether a given application is timely is a context-specific inquiry, and courts should take into account (a) the time elapsed since the inception of the action, (b) the probability of prejudice to those already party to the proceedings, (c) the purpose for which intervention is sought, and (d) the need for intervention as a means for preserving the putative intervenor's rights. *Id. at 886*.
>
> (2) **Interest**: Second, the putative intervenor must have a "legally protected" [*16] interest in the action. *Id. at 885*. The test operates in large part as a "practical guide," with the aim of disposing of disputes with as many concerned parties as may be compatible with efficiency and due process. *United States v. Morten, F. Supp. 2d , 2010 U.S. Dist. LEXIS 92500, 2010 WL 3069060, at * 5 (D.D.C. Aug. 4, 2010)*.
>
> (3) **Impairment of Interest**: Third, the action must threaten to impair the putative intervenor's proffered interest in the action. *Karsner, 532 F.3d at 885*. The inquiry is not a rigid one: consistent with the Rule's reference to dispositions that may "as a practical matter" impair the putative intervenor's interest, *Fed. R. Civ. P. 24(a)(2)*, courts look to the "practical consequences" of denying intervention, *Fund for Animals, Inc. v. Norton, 322 F.3d 728, 735, 355 U.S. App. D.C. 268 (D.C. Cir. 2003)* (citing *Natural Res. Def. Council v. Costle, 561 F.2d 904, 909, 183 U.S. App. D.C. 11 (D.C. Cir. 1977))*.
>
> (4) **Adequacy of Representation**:

> Fourth, and finally, no existing party to the action may adequately represent the putative intervenor's interests. *Karsner, 532 F.3d at 885*. Significantly, the putative intervenor's burden here is *de minimis*, and extends only to showing that there is a possibility that its interests may not be adequately [*17] represented absent intervention. *Fund for Animals, 322 F.3d at 735*.

4 The Federal Rules of Civil Procedure contemplate two types of intervention: permissive intervention and intervention as a matter of right. *Fed. R. Civ. P. 24*. Because the Court concludes that the Putative Intervenors are each entitled to intervene in this action as a matter of right, the Court shall omit discussion of the standard governing permissive intervention. *See Am. Horse Prot. Assoc., Inc. v. Veneman, 200 F.R.D. 153, 156 (D.D.C. 2001)* (concluding that movant was entitled to intervene as of right and declining to reach question of permissive intervention).

In addition to these four requirements, which emanate from the text of *Rule 24(a)* itself, a putative intervenor in this Circuit must further establish that it has constitutional standing to participate in the action. *United States v. Philip Morris USA Inc., 566 F.3d 1095, 1146, 386 U.S. App. D.C. 49 (D.C. Cir. 2009), cert. denied, U.S. , 130 S. Ct. 3501, 177 L. Ed. 2d 1090 (2010)*; *but see Roeder v. Islamic Republic of Iran, 333 F.3d 228, 233, 357 U.S. App. D.C. 107 (D.C. Cir. 2003)* (noting that "[r]equiring standing of someone who seeks to intervene as a defendant runs into the doctrine that the standing inquiry is [*18] directed at those who invoke the court's jurisdiction.") (internal citations omitted), *cert. denied, 542 U.S. 915, 124 S. Ct. 2836, 159 L. Ed. 2d 287 (2004)*. Where a party seeks to intervene as a defendant in order to uphold or defend agency action, it must establish (a) that it would suffer a concrete injury-in-fact if the action were to be set aside, (b) that the injury would be fairly traceable to the setting aside of the agency action, and (c) that the alleged injury would be prevented if the agency action were to be upheld. *Am. Horse Prot. Assoc., 200 F.R.D. at 156*; *see also Friends of Animals v. Kempthorne, 452 F. Supp. 2d 64, 68 (D.D.C. 2006)* (identifying requirements for constitutional standing in an action involving agency action). [5]

> 5 In most instances, the standing inquiry will fold into the underlying inquiry under *Rule 24(a)*: generally speaking, when a putative intervenor has a "legally protected" interest under *Rule 24(a)*, it will also meet constitutional standing requirements, and *vice versa*. *See Roeder, 333 F.3d at 233* ("any person who satisfies *Rule 24(a)* will also meet Article III's standing requirement."); *Fund for Animals, 322 F.3d at 735* (conclusion that putative intervenor has constitutional standing [*19] is alone sufficient to establish that it has a legally protected interest in the action).

Once a district court concludes that a party has a right to intervene, the inquiry is not necessarily at an end. Even where intervention is a matter of right, district courts may impose appropriate conditions or restrictions upon the intervenor's participation in the action. *Fund for Animals, 322 F.3d at 737 n.11* (citing favorably to *Fed. R. Civ. P. 24* advisory committee's note to 1966 amendment); *see also Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 383, 107 S. Ct. 1177, 94 L. Ed. 2d 389 (1987)* (Brennan, J., concurring) ("restrictions on participation may also be placed on an intervenor of right and on an original party"). The district court's discretion to impose reasonable restrictions on participation is consonant with its inherent power to manage the litigation before it, *Beauregard, Inc. v. Sword Servs. LLC, 107 F.3d 351, 353 (5th Cir. 1997)*, as well as a necessary instrument in accommodating the two conflicting goals of intervention: *i.e.*, "to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending," [*20] *Smuck v. Hobson, 408 F.2d 175, 179, 132 U.S. App. D.C. 372 (D.C. Cir. 1969)*.

IV. DISCUSSION

The Court's discussion here proceeds in two steps: the Court first addresses the merits of each of the three motions to intervene on an individual basis; thereafter, the Court considers what conditions or restrictions should be imposed upon all the Putative Intervenors' participation in this action.

A. The Putative Intervenors are Entitled to Intervene as a Matter of Right

1. Antelope's Motion to Intervene

Antelope seeks to intervene in this action as a matter of right under *Rule 24(a)(2)* or, alternatively, permissively under *Rule 24(b)*. Antl.'s Mem. at 1. Notably, Plaintiffs have chosen not to oppose Antelope's intervention in this action, with the proviso that Plaintiffs have requested that certain conditions and restrictions be placed upon all the Putative Intervenors' participation in this action. [6] *See generally* Pls.' Opp'n to NMA's Mot.; Pl.'s Opp'n to Wyo.'s Mot. Therefore, apart from considering whether Antelope's participation in this action should be subject to any limitations, Antelope's motion to intervene as a matter of right in this action stands conceded. *See Twelve John Does v. District of Columbia, 117 F.3d 571, 577, 326 U.S. App. D.C. 17 (D.C. Cir. 1997)* [*21] (a district court may in its discretion "rel[y] on the absence of a response as a basis for treating [a] motion as conceded"); *see also Phrasavang v. Deutsche Bank, 656 F. Supp. 2d 196, 201 (D.D.C. 2009)* (where party fails to respond to arguments in opposition papers, the court may treat them as conceded) (citing *Fed. Deposit Ins. Co. v. Bender, 127 F.3d 58, 68, 326 U.S. App. D.C. 390 (D.C. Cir. 1997))*. In any event, even considering the merits of Antelope's motion, it is clear that Antelope satisfies each of the four requirements for intervention as a matter of right under *Rule 24(a)*.

> 6 Technically, Plaintiffs made their request only in the context of their oppositions to the motions to intervene by NMA and Wyoming. Nevertheless, as framed therein, Plaintiffs' request extends to Antelope as well, and Antelope has clearly construed it in this way. *See generally* Antl.'s 1st Reply; Antl.'s 2d Reply.

a. Timeliness

The first factor, the timeliness of the motion, requires little discussion: Antelope filed its motion to intervene on August 16, 2010, eighty-five days before Plaintiffs filed the current iteration of the Complaint in this action and ninety-nine days before the Federal Defendants filed an answer to that [*22] iteration. Under these circumstances, Plaintiffs cannot credibly claim (nor have they) that they would be prejudiced by Antelope's intervention at this juncture. Considered alongside Antelope's demonstrated interest in intervening as a defendant in this action, the Court concludes that the motion is timely.

b. Interest

The agency decision challenged in this action has its origins in Antelope's request that the West Antelope II tracts immediately adjacent to its current coal mining operations be offered up for competitive lease sale to interested parties; unsurprisingly, Antelope intends to bid on the leases when they are put up for sale. 3d Compl. ¶ 35; Antl.'s Mem. at 1-2. Indeed, in rendering its decision, the Bureau assumed that Antelope would be the successful bidder on both tracts, and that the mineable federal coal on those lands would be used to extend the life of Antelope's existing coal mining operations. Rec. at 6. The Bureau specifically found that, were the application rejected, Antelope's current coal reserves would be depleted in little over a decade, rendering it incapable of operating competitively in the national coal market. *Id.* at 8; *see also* Antl.'s Mem. at 5. These [*23] interests suffice to support intervention as a matter of right.

c. Impairment of Interest and Standing

Simply put, the Bureau's decision below was favorable to Antelope, and the present action is a direct attack on that decision. Plaintiffs seek, among other things, an order vacating the Bureau's decision to allow the leasing of the West Antelope II tracts and precluding any future leasing of those tracts until such time as the Bureau has re-certified the Powder River Basin as a Coal Production Region and otherwise conducted environmental analyses in the manner envisioned by Plaintiffs. It is impossible to predict whether the same outcome would be reached upon remand. Furthermore, an adverse decision in this action would, at a bare minimum, prevent Antelope from bidding on, securing, and developing the West Antelope II tracts in the foreseeable future. With Antelope's current coal reserves having a horizon of little more than a decade, this action may have the "practical consequence" of threatening Antelope's ability to remain competitive in the national coal market in both the short and long term, *Fund for Animals, 322 F.3d at 735*, and an adverse decision in this action would, "as a [*24] practical matter," threaten to impair Antelope's interests, *Fed. R. Civ. P. 24(a)(2)*. Similarly, were this Court to vacate the Bureau's decision below, Antelope would suffer a concrete injury-in-fact fairly traceable to that disposition; accordingly, Antelope also has standing to intervene in this action. *Am. Horse Prot. Assoc., 200 F.R.D. at 156*.

d. Adequacy of Representation

Antelope has met its burden of establishing that no other current or contemplated party would necessarily adequately represent its interests in this action. With respect to the Federal Defendants and Wyoming, it is well-established that governmental entities generally cannot represent the "more narrow and parochial financial interest" of a private party. *Fund for Animals, 322 F.3d at 737* (internal quotation marks omitted). Meanwhile, as described in greater detail below, NMA has broader regional and national interests in this action, and is unlikely to afford Antelope's more discrete and particularized interests the same primacy as would Antelope itself.

2. NMA's Motion to Intervene

Plaintiffs have opposed NMA's motion to intervene in this action, but only insofar as NMA seeks to intervene in this action as a matter [*25] of right under *Rule 24(a)*. *See generally* Pls.' Opp'n to NMA's Mot. Plaintiffs do not oppose NMA's request, made in the alternative, that it be permitted to intervene in this action permissively under *Rule 24(b)*. However, even as regards intervention as a matter of right, Plaintiffs' opposition is confined to addressing the "adequacy of representation" prong of the *Rule 24(a)* inquiry. *Id.* at 1-3. Accordingly, Plaintiffs effectively concede that NMA has met the remaining three requirements for intervention as a matter of right -- *i.e.*, timeliness, interest, and impairment of interest -- and the only question is whether NMA's interests in this action would be adequately represented by other current or contemplated parties. *See Phrasavang, 656 F. Supp. 2d at 201* (where party fails to respond to arguments in opposition papers, the court may treat them as conceded). Nevertheless, even considering the merits of NMA's motion, the record created by the parties supports only one conclusion: NMA has satisfied each of the four requirements for intervention as a matter of right under *Rule 24(a)*.

a. Timeliness

The first factor -- the timeliness of the motion -- again requires little discussion: NMA filed [*26] its motion to intervene on October 13, 2010, twenty-seven days before Plaintiffs filed the current iteration of the Complaint in this action and forty-one days before the Federal Defendants filed an answer to that iteration. This action remains in its early stages: the administrative record is yet to be filed with the Court and no briefing schedule for dispositive motions has been set. As before, Plaintiffs cannot credibly claim (nor have they) that they would be prejudiced by NMA's intervention at this juncture. Considered alongside NMA's demonstrated interest in intervening as a defendant in this action, the Court concludes that the motion is timely.

b. Interest and Standing

Although there are myriad reasons to conclude that NMA has standing to participate as a defendant in this action, only two need be mentioned here. NMA is the national trade organization for the mining industry, and the only national organization representing mining interests, which indisputably extend to the availability and regulation of coal leasing on federal lands. Sweeney Decl. ¶ 2. NMA's membership includes nearly every coal company doing business in the Powder River Basin. *Id.* ¶ 3. As such, its membership [*27] includes the universe of entities that would benefit from a competitive lease sale of the West Antelope II tracts and suffer a concrete injury-in-fact in the event the Bureau's decision were to be set aside. *Am. Horse Prot. Assoc., 200 F.R.D. at 156*. At the same time, these entities constitute the class most likely to benefit from various similar lease applications currently pending in the Powder River Basin, [7] and the breadth of Plaintiffs' challenge may very well have practical implications for the approval of those applications. Sweeney Decl. ¶ 5; *see also* Rec. at 3; Wyo.'s Mem. at 11. Because these entities would have standing to sue in their own right, because the availability and regulation of coal leasing on federal lands are germane to NMA's purpose, and because neither the Plaintiffs' claims nor the relief requested requires the individual corporate entities to participate in this action, NMA has standing to sue on behalf of its members. *See Military Toxics Project v. Envtl. Prot. Agency, 146 F.3d 948, 953-54, 331 U.S. App. D.C. 7 (D.C. Cir. 1998)* (outlining requirements for associational standing) (citing *Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)*). For the same reasons, [*28] NMA has an interest sufficient to support intervention as a matter of right under *Rule 24(a)*. *See Fund for Animals, 322 F.3d at 735* (conclusion that putative intervenor has constitutional standing is alone sufficient to establish that it has a legally protected interest in the action).

7 For example, in July and August of this year,

the Bureau issued decisions resolving two other applications in the Powder River Basin, known as "Belle Ayr North" and "Caballo West" tracts. *See Not. of Availability, 75 Fed. Reg. 44980*-01 (July 30, 2010) (Belle Ayr North); *Not. of Availability, 75 Fed. Reg. 47623*-01 (Aug. 6, 2010) (Caballo West). Both applications were filed by NMA members. Sweeney Decl. ¶ 4.

c. Impairment of Interest

Although styled as a discrete challenge to the leasing of the West Antelope II tracts, this action carries with it potentially broad implications for the leasing of public lands for coal mining operations, and, for various reasons, an adverse decision in this action threatens to impair the local, regional, and national interests of NMA and its members. The Court shall only mention some of those reasons here, which serve to illustrate NMA's unique position in this litigation.

First, [*29] an adverse decision in this action may have implications for coal leasing across the Powder River Basin, separate and part from the resolution of Antelope's discrete application. Plaintiffs plainly seek a broad-based order precluding any future leasing in the Powder River Basin until such time as the Bureau has re-certified it as a Coal Production Region. Presently, there are multiple lease applications pending in the Wyoming portion of the Powder River Basin, all seeking approval pursuant to the Lease-by-Application process. If accepted, Plaintiffs' contentions that decertification is no longer appropriate and that the Lease-by-Application process is invalid would cast substantial doubt on the validity of these other pending applications, and may have the practical consequence of delaying or preventing the approval of similar pending lease applications in the Wyoming portion of the Powder River Basin. 3d Compl. ¶¶ 102, 104-105; Sweeney Decl. ¶ 5. Indeed, in rendering its decision, the Bureau considered the effect of rejecting similar coal leasing applications across the Powder River Basin, predicting that many existing mines in the region would cease operations after depleting their [*30] current reserves (within eight to sixteen years), and would thereafter be unable to compete with other mining interests to meet future coal demand. Rec. at 9. Therefore, as the representative of the universe of potential bidders for leases made available in the Powder River Basin, an adverse decision in this action would, "as a practical matter," threaten to impair NMA's interests. *Fund for Animals, 322 F.3d at 735*.

Second, certain aspects of Plaintiffs' suit carry with them potential implications for federal coal leasing nationally. Simply by way of example, Plaintiffs press in this action a particular view of the required environmental analyses. Plaintiffs contend that the Bureau was required to consider, among other things, both the direct and indirect effects of carbon dioxide emissions that would result from leasing the West Antelope II tracts (including the ultimate combustion of the coal mined from those tracts), as well as the cumulative environmental impacts from other past, present, and reasonably foreseeable activities. If Plaintiffs' position were accepted, it would likely be of concern to domestic coal producers generally. Because NMA's membership includes every significant [*31] coal company operating in the United States, Sweeney Decl. ¶ 3, an adverse decision in this action may have practical consequences for its members' interests.

In the same vein, in rendering its decision, the Bureau considered the impact that rejecting similar coal leasing applications across the Powder River Basin (which, by Plaintiffs' own account, is the single largest source of coal in the United States) would have on coal producers nationally. Rec. at 9. In this regard, the Bureau found that producers in the Powder River Basin have secured an increasing share of the national market primarily because production in the region has been less costly, more environmentally compliant, and more successful in terms of post-mining reclamation projects. *Id*. at 8-9. Accordingly, the Bureau concluded that limiting production in the Powder River Basin would likely result in increased production by other domestic (and, potentially, international) coal producers, resulting in more costly coal production with a greater residual environmental impact. In short, the Bureau thought a contrary decision might have potential reverberations across the national coal market.

d. Adequacy of Representation

NMA [*32] has met its minimal burden of establishing that no other current or contemplated party would necessarily adequately represent its interests in this action. With respect to the Federal Defendants and Wyoming, governmental entities generally cannot represent the "more narrow and parochial financial interest" of a private party that is not burdened with the responsibility of balancing multiple competing public

interests. *Fund for Animals, 322 F.3d at 737* (internal quotation marks omitted). Antelope, meanwhile, has a more narrow focus on protecting the specific decision below, and does not share NMA's concern with the regional and national implications that may emanate from Plaintiffs' action. For example, Plaintiffs maintain that decertification is no longer appropriate in the Powder River Basin given the levels of coal production in the region. 3d Compl. ¶ 102. The other five former Coal Production Regions have been decertified for a similar period of time, but have not experienced the same rate of increase in coal production. *Id.* ¶ 33. As such, Antelope might be inclined to defend the Bureau's decision below on the grounds that re-certification of the Powder River Basin is inappropriate [*33] given the increased leasing interest in the region arising since decertification. NMA, meanwhile, may be inclined to defend the Bureau's decision with an argument that would more broadly support the continued decertification of all six former Coal Production Regions. Accordingly, although the Court does not doubt that Antelope and NMA share certain concerns, it is not difficult to imagine how their interests "might diverge during the course of litigation." *Fund for Animals, 322 F.3d at 736*.

In opposing NMA's intervention as a matter of right on the ground that its interests are already adequately represented, Plaintiffs rely exclusively upon *Earthworks v. U.S. Dep't of Interior, No. 09 Civ. 1972 (HHK), 2010 U.S. Dist. LEXIS 77894, 2010 WL 3063139 (D.D.C. Aug. 3, 2010)*. Plaintiffs offer no analysis or explanation, and make no attempt to respond to NMA's detailed showing of how its interests diverge from the interests of the Federal Defendants and the other Putative Intervenors. In any event, *Earthworks* does not support, as Plaintiffs' contend, the proposition that "where existing mining interests have already intervened . . . new mining interests may not intervene as of right since their interests are already adequately [*34] represented." Pl.'s Opp'n to NMA's Mot. at 2. In *Earthworks*, the Court first granted the motions to intervene as a matter of right brought by representatives of participants in the mining industry, including NMA. *Earthworks, 2010 U.S. Dist. LEXIS 77894, 2010 WL 3063139, at *1*. Only later, when two regional mining associations also sought to intervene, did the Court find intervention as a matter of right inappropriate (but even then, the Court granted leave to intervene permissively). *2010 U.S. Dist. LEXIS 77894, [WL] at *1-2*. Significantly, the only divergence in interests articulated by the second set of intervenors was that they represented individuals and small companies, as opposed to the larger mining interests represented by the first set of intervenors. *2010 U.S. Dist. LEXIS 77894, [WL] at *1*. The Court merely held that such a slight divergence, without more, was insufficient to establish that the second set of intevernors' interests were inadequately represented. *2010 U.S. Dist. LEXIS 77894, [WL] at *2*. For the reasons set forth above, NMA's interests sufficiently diverge from those of the other parties in this action, and therefore NMA simply is not similarly situated to the second set of intervenors in *Earthworks*.

3. Wyoming's Motion to Intervene

As with Antelope's motion to intervene, Plaintiffs [*35] do not oppose Wyoming's intervention in this litigation either permissively or as of right. Pls.' Opp'n to Wyo.'s Mot. at 1. Instead, Plaintiffs' opposition focuses exclusively on the propriety of imposing conditions and restrictions upon Wyoming's intervention. *Id.* at 1-3. Therefore, apart from considering whether Wyoming's participation in this action should be subject to any limitations, Wyoming's motion to intervene as a matter of right in this action stands conceded. In any event, even considering the merits of Wyoming's motion, it is clear that Wyoming satisfies each of the four requirements for intervention as a matter of right under *Rule 24(a)*.

a. Timeliness

Wyoming's motion to intervene is timely. Wyoming filed its motion to intervene on August 30, 2010, seventy-one days before Plaintiffs filed the current iteration of the Complaint in this action and eighty-five days before the Federal Defendants filed an answer to that iteration. Plaintiffs cannot credibly claim (nor have they) that they would be prejudiced by Wyoming's intervention at this juncture. When considered alongside Wyoming's interest in intervening as a defendant in this action, the Court concludes that the motion [*36] is timely.

b. Interest

Wyoming has at least three interests in intervening in the present action, any one of which would alone suffice to support intervention.

First, Wyoming has an interest in supporting the Bureau's decision to authorize the leasing of the West

Antelope II tracts. The West Antelope II tracts are in the Wyoming portion of the Powder River Basin, and Wyoming participated as an advisor-member of the team charged with reviewing Antelope's application, as well as in the preparation of the accompanying EIS. 3d Compl. ¶ 35; Wyo.'s Mem. at 2-3; *see also* Kemp. Aff. ¶ 4. Indeed, the Bureau expressly identified two divisions of the Wyoming Department of Environmental Quality (the "WDEQ") as "cooperating agencies" in the development of the EIS -- namely, the Land Quality Division, which regulates surface coal mining operations on both federal and non-federal lands in Wyoming, and the Air Quality Division (the "WDEQ-AQD"), which regulates air borne emissions and administers federal air quality standards in Wyoming. Rec. at 2. Both agencies expended significant time and energy in assisting the Bureau in preparing the EIS. Wyo.'s Mem. at 4.

Second, Wyoming has an interest in preserving [*37] its role in regulating environmental quality within its borders, and ensuring that the development of coal mining operations within its territory continues in a safe and environmentally responsible manner. Wyoming's involvement in the West Antelope II application process is merely illustrative of its broader role in regulating the environmental impacts of coal development activities within its borders. Simply by way of example, the WDEQ-AQD, which regulates air borne emissions and administers federal air quality standards in Wyoming, was charged with considering permit applications and air quality analyses submitted by Antelope to ensure that the proposed use of the West Antelope II tracts would comply with federal and state standards. Wyo.'s Mem. at 10.

Third, and finally, Wyoming has an interest in protecting its financial and socioeconomic stake in the development of coal mining operations in Wyoming. As noted by the Bureau in rendering its decision, the leasing of federal coal reserves provides Wyoming and affected county governments with income in the form of lease bonus payments, lease royalty payments, and tax payments. Rec. at 9. Over the last ten years, the total receipts from [*38] these revenue sources have been substantial. Kemp. Aff. ¶¶ 1-3. Indeed, coal production in the Powder River Basin is one of the largest contributors to the welfare of Wyoming, and a large component of local economies. Wyo.'s Mem. at 11-12.

c. Impairment of Interest and Standing

For at least three reasons, an adverse decision in this action would, "as a practical matter," threaten to impair each of Wyoming's interests. *Fed. R. Civ. P. 24(a)(2)*. These same reasons support the conclusion that Wyoming has standing to intervene in this action: were the Bureau's decision below to be set aside, Wyoming would suffer a concrete injury-in-fact fairly traceable to that disposition. *Am. Horse Prot. Assoc., 200 F.R.D. at 156*.

First, Wyoming participated in the preparation of the current EIS, which is several hundred pages in length and took over two years to prepare. The setting aside of the Bureau's decision below would require the preparation of a new EIS in order to lease the West Antelope II tracts for coal mining operations and, by extension, would require Wyoming to expend additional time and resources, with the ultimate outcome uncertain.

Second, although framed in part as a targeted challenge [*39] to the leasing of the West Antelope II tracts, this action carries with it potentially broad implications for the leasing of public lands for coal mining operations in Wyoming. By way of example, Plaintiffs contend that the Bureau could not authorize the West Antelope II tracts without first analyzing both the direct and indirect effects of carbon dioxide emissions that would result from leasing the West Antelope II tracts (including the ultimate combustion of the coal mined from those tracts), as well as the cumulative environmental impacts from other past, present, and reasonably foreseeable activities in the Powder River Basin. If Plaintiffs' position prevails, it would surely have "practical consequences" for Wyoming's interest in preserving its role in regulating environmental quality within its borders. *Fund for Animals, 322 F.3d at 735*.

Third, and finally, setting aside the Bureau's decision below would, at the very least, delay the timetable for the leasing of the West Antelope II tracts and prevent Wyoming from securing mineral bonus payments, federal mineral royalties, and severance taxes on the use of those lands in the near future. Plaintiffs' arguments, moreover, may very [*40] well have the practical consequence of delaying or preventing the approval of multiple similar pending lease applications in the Wyoming portion of the Powder River Basin. Indeed, Plaintiffs seek a broad-based declaration that the entire Powder River Basin must be re-certified as a Coal Production Region. In short, without opining on the merits of Plaintiffs'

arguments or the likelihood that they will be able to secure the relief requested, there is little doubt that resolution of this action in Plaintiffs' favor would affect Wyoming's financial and socioeconomic stake in the development of coal mining operations within its borders.

d. Adequacy of Representation

Wyoming has met its *de minimis* burden of establishing that neither the current nor contemplated parties would necessarily adequately represent its interests in this action. Recently, in *Earthworks v. U.S. Dep't of Interior, No. 09 Civ. 1972 (HHK), 2010 U.S. Dist. LEXIS 77890, 2010 WL 3063143 (D.D.C. Aug. 3, 2010)*, the district court addressed a similar set of facts in an action challenging a regulation promulgated by the Bureau and other federal agencies in connection with mining claims. In granting the State of Alaska's motion to intervene as a matter of [*41] right, the court concluded that "[b]ecause Alaska's interests in the natural resources within state borders and the economic effects on the state of mining regulation are not necessarily represented by federal agencies or private companies," Alaska had shown that its interests may not have been adequately represented by existing parties, which include both federal defendants and private intervenors. *2010 U.S. Dist. LEXIS 77890, at *2*. Likewise, here, although there are certainly shared concerns, it is not difficult to imagine how the interests of Wyoming and the other defendants "might diverge during the course of litigation." *Fund for Animals, 322 F.3d at 736*. The mere fact that other defendants might hypothetically take Wyoming's interests into account when shaping their arguments does not mean that they would afford the same primacy to Wyoming's interests in, for instance, maintaining its unique role in regulating coal mining operations and environmental quality or its financial and social economic interests in the development of coal mining operations within its borders.

B. Conditions upon Intervention

As described above, even where the Court concludes that intervention as a matter of right is appropriate, [*42] its inquiry is not necessarily at an end: district courts may impose appropriate conditions or restrictions upon the intervenor's participation in the action. *Fund for Animals, 322 F.3d at 737 n.11*; *see also San Juan Cnty., Utah v. United States, 503 F.3d 1163, 1189 (10th Cir. 2007)* (en banc) (practical considerations may "justify limitations on the scope of intervention [as of right]"); *Beauregard, 107 F.3d at 352-53* ("it is now a firmly established principle that reasonable conditions may be imposed even upon one who intervenes as of right."). Having concluded that Antelope, NMA, and Wyoming (hereinafter, the "Intervenors") may each intervene in this action as defendants under *Rule 24(a)*, the Court now considers what conditions, if any, to impose upon their participation.

The inquiry is necessarily context-specific, and the conditions should be tailored to fit the needs of the particular litigation, the parties, and the district court. In the past, courts have barred intervenors from injecting collateral issues into the litigation. *See, e.g., Brady Campaign to Prevent Gun Violence v. Salazar, 612 F. Supp. 2d 1, 11 n.8 (D.D.C. 2009)* (granting intervention of right but prohibiting intervenors [*43] from raising new claims or collateral issues); *Cnty. of San Miguel, Colorado v. MacDonald, 244 F.R.D. 36, 48 n.17 (D.D.C. 2007)* (limiting intervention of right to claims within the scope of the complaint, but declining to impose other conditions). Other courts have required intervenors to consult with one another prior to filing papers with the Court and restricted their presentations to non-cumulative arguments. *See, e.g., Earthworks, 2010 U.S. Dist. LEXIS 77890, 2010 WL 3063143, at *2* (granting intervention as a matter of right but requiring consultation with federal defendants and restricting presentation to arguments not advanced by other parties). In the end, the primary limitation on the district court's discretion is that any conditions imposed should be designed to ensure the fair, efficacious, and prompt resolution of the litigation. *See United States v. S. Florida Water Mgmt. Dist., 922 F.2d 704, 710 (11th Cir.)* (district court may condition intervention "on such terms as will be consistent with the fair, prompt conduct of this litigation."), *cert. denied, 502 U.S. 953, 112 S. Ct. 407, 116 L. Ed. 2d 356 (1991)*; *United States v. Duke Energy Corp., 171 F. Supp. 2d 560, 565 (M.D.N.C. 2001)* ("Applicants have an unconditional right to intervene, [*44] but this does not prevent the imposition of reasonable limitations on [their] participation to ensure the efficient adjudication of the litigation."). To achieve this salutary purpose, the district court should remain attuned to the two conflicting goals of intervention: *i.e.*, "to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending." *Smuck, 408 F.2d at 179*.

Although it shares the concern that the scope of this

action risks multiple, duplicative presentations, the Court declines Plaintiffs' invitation to require the Intervenors to consolidate all motions, responsive filings, and briefs. Given the institutional constraints associated with joint briefing, including the understandable reluctance to share work product, a court should not mandate complete joint briefing lightly. Mindful of the divergence of the Intervenors' interests in this action, and confident that the efficient adjudication of this action may be met through the imposition of less onerous conditions, the Court considers such a restriction to be inappropriate in this case. Nevertheless, in order to ensure the [*45] fair and efficacious resolution of this action, the Court shall require the Intervenors to comply with the following conditions:

> o The Intervenors shall meet and confer prior to the filing of any motion, responsive filing, or brief to determine whether their positions may be set forth in a consolidated fashion -- separate filings by the Intervenors shall include a certificate of compliance with this requirement and briefly describe the need for separate filings;
>
> o The Intervenors shall confine their arguments to the existing claims in this action and shall not interject new claims or stray into collateral issues;
>
> o Memoranda of points and authorities filed by the Intervenors in support of or in opposition to any motion in this action shall not, without further leave of the Court and good cause shown, exceed twenty-five (25) pages, and reply memoranda shall not exceed ten (10) pages; and
>
> o In the event that a motion for summary judgment is filed in this action, the Intervenors shall file a joint statement of facts with references to the administrative record consistent with Local Rule LCvR 7(h)(2) -- to the extent the Intervenors cannot agree on the inclusion of particular facts in their [*46] joint statement, they may identify such additional facts in bullet-point format in their respective memoranda of points and authorities.

The Court finds that the foregoing conditions strike the appropriate balance between ensuring the expedient resolution of this action while preserving a space for the Intervenors to articulate their respective positions and interests.

V. CONCLUSION

For the foregoing reasons, the Court shall GRANT the motions by [11] Antelope, [28] NMA, and [14] Wyoming to intervene in this action as defendants as a matter of right pursuant to *Rule 24(a) of the Federal Rules of Civil Procedure*, subject to the conditions and limitations described above. An appropriate Order accompanies this Memorandum Opinion.

Date: December 6, 2010

/s/

COLLEEN KOLLAR-KOTELLY

United States District Judge