Michael S. Freeman, Colo. Bar #30007 (*Pro Hac Vice Pending)*
R. Benjamin Nelson, Cal. Bar #300274 (*Pro Hac Vice Pending)*
EARTHJUSTICE
633 17th Street, Suite 1600
Denver, CO 80202
(303) 623-9466 (phone)
(303) 623-8083 (facsimile)
mfreeman@earthjustice.org
bnelson@earthjustice.org

Nathan Maxon, WY Bar #7-4588
MAXON LAW OFFICE
945 S. 4th Street
P.O. Box 898
Lander, WY 82520
(307) 438-9823 (phone)
nate.maxon@gmail.com

Attorneys for Applicants for Intervention Sierra Club, Earthworks, The Wilderness Society, Western Resource Advocates, Conservation Colorado Education Fund and Southern Utah Wilderness Alliance

Nathan Matthews, Cal. Bar # 264248 (*Pro Hac Vice Pending*)
SIERRA CLUB
85 Second Street, 2nd Floor
San Francisco, CA 94105
(415) 977-5695 (phone)
nathan.matthews@sierraclub.org

Attorney for Applicant for Intervention Sierra Club

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

STATE OF WYOMING, et al., **Petitioners,** **v.** **UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; and NEIL KORNZE, in his official capacity as Director of the Bureau of Land Management,**	)	**2:15-CV-00043-SWS** **Assigned: Judge Scott W. Skavdahl** **MEMORANDUM IN SUPPORT OF CITIZEN GROUPS' UNOPPOSED MOTION TO INTERVENE AS RESPONDENTS**

Respondents,	)
	)
SIERRA CLUB, EARTHWORKS, WESTERN RESOURCE ADVOCATES, CONSERVATION COLORADO EDUCATION FUND, THE WILDERNESS SOCIETY, and SOUTHERN UTAH WILDERNESS ALLIANCE,	)
	)
Applicants for Intervention.	)

INTRODUCTION

This case concerns the Bureau of Land Management's (BLM) recently-promulgated hydraulic fracturing rule (the Rule). The Rule revises federal oil and gas regulations, which have not been updated since 1988, addressing drilling operations on over 750 million acres of lands within numerous western states. Specifically, the Rule requires operators to obtain BLM approval for hydraulic fracturing operations; follow best practices when constructing wells; monitor cementing operations when constructing wells and perform remedial operations when necessary; conduct mechanical integrity tests prior to hydraulic fracturing operations; monitor well pressure during hydraulic fracturing operations; generally store recovered fluids in above-ground tanks instead of in pits; disclose hydraulic fracturing chemicals to the BLM and the public; and provide documentation of all of these actions to the BLM. 80 Fed. Reg. 16128, 16129–30 (Mar. 26, 2015).

Petitioners Wyoming, Colorado, and North Dakota (collectively, the States) seek to invalidate the Rule. The Sierra Club, Earthworks, The Wilderness Society, Conservation Colorado Education Fund, Western Resource Advocates, and Southern Utah Wilderness Alliance (collectively, the Citizen Groups) seek intervention in order to defend the Rule and preserve the important environmental benefits that the Rule provides their members.

ARGUMENT

I. THE CITIZEN GROUPS ARE ENTITLED TO INTERVENE AS OF RIGHT.

A party may intervene as of right if: (1) the motion is "timely;" (2) the movant "claims an interest relating to the property or transaction that is the subject of the action;" (3) "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest;" and (4) that interest is not "adequately represent[ed]" by existing parties. Fed. R. Civ. P. 24(a)(2). The Rule 24(a) factors are "not rigid, technical requirements," but rather are "intended to capture the circumstances in which the practical effect on the prospective intervenor justifies its participation in the litigation." San Juan Cty., Utah v. United States, 503 F.3d 1163, 1195 (10th Cir. 2007) (en banc). The Tenth Circuit "follow[s] a somewhat liberal line in allowing intervention." Nat'l Farm Lines v. Interstate Commerce Comm'n, 564 F.2d 381, 384 (10th Cir. 1977); accord WildEarth Guardians v. Nat'l Park Serv., 604 F.3d 1192, 1198 (10th Cir. 2010). The Citizen Groups are entitled to intervene in this action as a matter of right because they satisfy each of the requirements of Rule 24(a).

A. The Motion to Intervene Is Timely.

The Rule 24(a) "timeliness" requirement focuses on prejudice to existing parties resulting from the passage of time between the initiation of the litigation and the motion to intervene. See Utah Ass'n of Ctys. v. Clinton, 255 F.3d 1246, 1250–51 (10th Cir. 2001).

Here, Wyoming filed its petition for review on March 26th, Dkt. # 1, North Dakota moved to intervene on April 1st, Dkt. # 6, and Colorado joined as a petitioner on April 22nd, Dkt. # 29. On May 29th, Colorado and Wyoming filed a motion for a preliminary injunction to enjoin implementation of the Rule, but the BLM has not yet responded, and the Court has not issued a ruling on this motion. Dkt. # 32. The Citizen Groups' intervention at this early stage where "no scheduling order has been issued, no trial date set, and no cut-off date for motions set"

would not prejudice any existing party, and it is clearly timely. See Utah Ass'n of Ctys., 255 F.3d at 1251 (allowing intervention where "all that had occurred prior to the motion to intervene were document discovery, discovery disputes, and motions by defendants seeking dismissal on jurisdictional grounds"). The lack of opposition to intervention by other parties confirms this point.

B. The Citizen Groups Have an Interest in the Subject Matter of This Litigation.

The second requirement of Rule 24(a) is that an intervenor have an interest related to the property or transaction in dispute. Fed. R. Civ. P. 24(a)(2). There is no "rigid formula" or "mechanical rule" for determining whether an interest is sufficient to justify intervention. San Juan Cty., 503 F.3d at 1199. Courts apply "practical judgment" to determine "whether the strength of the interest and the potential risk of injury to that interest justify intervention." Id. When litigation raises issues of significant public interest—rather than solely private rights—"the requirements for intervention may be relaxed." Id. at 1201.

It is "indisputable" that Citizen Groups that use public lands and advocate for their protection have a legally protectable interest in agency actions that impact those lands. See id. at 1199; see also Nat'l Park Serv., 604 F.3d at 1200 (environmental organization's interest in conservation of wildlife on public lands entitled it to intervene to challenge an agency's proposal to reduce the population of that wildlife); Utah Ass'n of Ctys., 255 F.3d at 1252 (environmental organization's conservation interest in particular public lands was sufficient to intervene to defend those lands' inclusion within a national monument). The Citizen Groups can demonstrate such interests in this case.

1. The Citizen Groups Were Directly Involved in the Adoption of the Rule.

The Citizen Groups have an interest in this litigation because they worked extensively to support promulgation of the Rule. Courts have recognized that "[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995); see also Coal. of Az./N.M. Ctys. for Stable Econ. Growth v. Dep't of the Interior, 100 F.3d 837, 841 (10th Cir. 1996) (activist's "persistent record of advocacy" for environmental protections adopted by an agency that were subsequently challenged in court had a "direct and substantial interest" sufficient "for the purpose of intervention as of right").

The Citizen Groups campaigned for many years for BLM to update and strengthen its regulations for hydraulic fracturing. The Citizen Groups submitted numerous comment letters on drafts of the Rule, turned out the public to testify at public hearings, and presented testimony at Congressional hearings. See Baizel Decl. ¶ 8 (all declarations are attached as Exhibit 1); Curtiss Decl. ¶ 7; Epstein Decl. ¶ 9; Nardone Decl. ¶ 9.

2. The Rule Will Help Protect the Interests of the Citizen Groups and Their Members from the Impacts of Oil and Gas Development.

The Rule requires a number of measures to protect aquifers and reduce spills and accidents associated with oil and gas development. For example, it generally requires hydraulic fracturing flowback to be stored in tanks rather than pits. Operators are also required to identify subsurface faults and existing wells (including oil, gas, or water) located near wells that will be fractured. Identifying and evaluating these features is critical because they can serve as pathways for contaminants to reach groundwater or cause surface blowouts from "frack hits." In addition, operators will be required to demonstrate that wells have been properly cemented and that usable water is protected before any hydraulic fracturing occurs. 80 Fed. Reg. at 16128–30.

Reducing surface spills and groundwater contamination from oil and gas development will benefit the Citizen Groups and their members. The Citizen Groups' members live and recreate on or near public lands throughout the country that are affected by oil and gas development. See Baizel Decl. ¶ 4; Curtiss Decl. ¶ 4; Epstein Decl. ¶ 3–4; Goldin-Dubois Decl. ¶ 3; Nardone Decl. ¶ 7. Many members also use domestic water wells or streams for drinking water, stock watering, or other purposes that may be impacted by nearby federal oil and gas development. Baizel Decl. ¶ 4; Epstein Decl. ¶ 6.

Moreover, the Rule will increase the transparency of hydraulic fracturing operations on public lands and thus help Citizen Groups' members better protect their interests. New information on "the proposed operation, including wellbore geology, the location of faults and fractures, the depths of all usable water, estimated volume of fluid to be used, and estimated direction and length of fractures;" chemical disclosure requirements; and FracFocus improvements will make much more information available to the public. See 80 Fed. Reg. at 16129–30. In addition, by requiring the BLM's prior approval of hydraulic fracturing operations for the first time, the Rule will enhance the public's ability to participate in the oil and gas development process.

These steps will provide the Citizen Groups' members additional tools to protect their homes and water supplies. For example, better information about the length and direction of fractures, fractures' proximity to aquifers, and the chemicals used will help the Citizen Groups' members and government agencies uncover risky hydraulic fracturing operations in advance and identify the responsible company when spills or accidents do occur.

C. The Citizen Groups' Interests May Be Impaired as a Result of This Litigation.

The third requirement under Rule 24(a) for intervention as of right is that the litigation "may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2). Meeting this "impairment" requirement presents only a "minimal burden" to prospective intervenors. Nat'l Park Serv., 604 F.3d at 1199. A movant for intervention "'must show only that impairment of its substantial legal interest is possible if intervention is denied.'" Utah Ass'n of Ctys., 255 F.3d at 1253 (emphasis added) (quoting Grutter v. Bollinger, 188 F.3d 394, 399 (6th Cir. 1999)).

If the Petitioners succeed in this case, the benefits that the Rule provides to the Citizen Groups' members "will be lost." Baizel Decl. ¶ 7; Goldin-Dubois Decl. ¶ 5. The States of Colorado, Wyoming, and North Dakota have asked this Court to "[s]et aside and vacate the BLM's hydraulic fracturing rule," Dkt. # 26-1 at 6, and Colorado and Wyoming have already moved to enjoin implementation of the rule, see Dkt. # 32. If the Petitioners prevail in their lawsuits, then the Rule will be enjoined or set aside, leaving over 750 million acres of land more vulnerable to water contamination and other impacts from oil and gas development.

D. The Federal Defendants Do Not Adequately Represent the Interests of the Citizen Groups.

The final prong of the intervention as-of-right test is "satisfied if the applicant shows that representation of his interest [by existing parties] 'may be' inadequate." Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972) (quoting 3B James Wm. Moore et al., Moore's Federal Practice ¶ 24.09-1 (4) (1969)). The "inadequate representation" requirement also imposes a "minimal burden," particularly when parties seek to intervene in support of the government. Nat'l Park Serv., 604 F.3d at 1200. A prospective intervenor "must show only the possibility that representation may be inadequate." Id.

In most circumstances "the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor." Utah Ass'n of Ctys., 255 F.3d at 1256. As a result, the Tenth Circuit "ha[s] repeatedly recognized that it is 'on its face impossible' for a government agency to carry the task of protecting the public's interests and the private interests of a prospective intervenor." Nat'l Park Serv., 604 F.3d at 1200 (quoting Utahns for Better Transp. v. U.S. Dep't of Transp., 295 F.3d 1111, 1117 (10th Cir. 2002)). "[T]he burden of showing inadequacy of representation is satisfied," "[w]here a government agency may be placed in the position of defending both public and private interests." Id.

That is the case here. BLM cannot adequately represent the Citizen Groups' interests because the agency operates under a statutory mandate to manage public lands for "multiple use"—a standard that involves balancing both mineral extraction and environmental protection. See 43 U.S.C. § 1712(c)(1) (BLM land use plans shall apply multiple use standard); id. § 1702(c) (defining "multiple use" to include combination of resource uses that includes "minerals" as well as recreation and environmental protection). In adopting the Rule, BLM pointed out its multiple use role in balancing environmental protection with mineral development. See 80 Fed. Reg. at 16137. In contrast, the Citizen Groups are focused solely on advancing environmental conservation, health, and safety.

Indeed, BLM has already compromised the Citizen Groups' interests in the adoption of the Rule. On a number of issues, BLM struck a balance that weakened environmental protection in favor of oil and gas development. See Baizel Decl. ¶ 9; Curtiss Decl. ¶ 8; Epstein Decl. ¶ 10; Goldin-Dubois Decl. ¶ 6; Nardone Decl. ¶ 18. For example:

- BLM's initial draft rule covered not just hydraulic fracturing, but also other well stimulation techniques such as "acidization" or "acidizing" (a process where acid is used to break up underground formations to release oil and gas). 77 Fed. Reg. 27691 (May 11, 2012). In the face of industry opposition, BLM excluded acidization from regulation under the final Rule. 80 Fed. Reg. at 16144.
- The Rule allows BLM to issue "variances" exempting all hydraulic fracturing operations on federal leases in an entire state from specific provisions of the new rules "if the BLM determines that the proposed alternative meets or exceeds the objectives of the regulation" that the BLM is waiving. 80 Fed. Reg. at 16221 (to be codified at 43 C.F.R. § 3162.3-3(k)(3)). This provision creates the potential for the protections of the Rule to be significantly diluted if variances are abused.
- While the Rule requires disclosure of chemicals used in hydraulic fracturing operations, as well as a variety of other information, it allows companies to withhold information based on a claim that it represents a "trade secret." 80 Fed. Reg. at 16192. The Rule's terms for claiming trade secrets, however, are quite lenient and could readily be abused. Nardone Decl. ¶ 18.
- The Citizen Groups advocated for BLM to use this Rule to make sensitive areas, such as wilderness areas, drinking water sources, critical habitat for endangered species, and others, off-limits to drilling. Curtiss Decl. ¶ 8. BLM's Rule does not address this issue.

In short, while the Rule is an important step, it represents a balance struck by BLM that significantly compromises environmental protections.

Now, BLM finds itself as the defendant in a lawsuit brought by parties advocating for one of the interests the agency is charged with balancing. Without the Citizen Groups' participation

as intervenors, BLM will only have to address the arguments and demands of the States—and not the Citizen Groups—when briefing the merits of this case, during any litigation over a remedy, and in settlement negotiations. It is entirely foreseeable that such a scenario will lead BLM to further compromise the Citizen Groups' interests in favor of the States seeking to weaken or eliminate the Rule. For example, several states are seeking "variances" that would allow existing state rules to apply instead of the federal Rule. See 80 Fed. Reg. at 16221 (variance provision of Rule); An OAG360 Exclusive: Interview with Matt Mead, Governor of Wyoming, Oil & Gas 360 (Apr. 10, 2015) (quoting the Wyoming Governor as stating that the "optimal outcome" of the lawsuit would be "for the federal government to say, 'hey, if we're going to have this rule . . . we're going to give a waiver to the entire state based upon the state rules you already have in place'") (attached as Exhibit 2). In fact, BLM has already begun negotiations with the states of Wyoming, Utah, and North Dakota over memoranda of understanding for enforcement of the Rule. See Mike Lee, Western states wary of enforcement role in BLM fracking rules, EnergyWire (May 20, 2015) (attached as Exhibit 3).

It is also foreseeable that BLM could sign a settlement with Petitioners agreeing with a substantial number of their legal claims and backing away from the Rule. See Utah Ass'n of Ctys., 255 F.3d at 1256 (granting intervention and noting that "'it is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts'" (quoting Kleissler v. U.S. Forest Serv., 157 F.3d 964, 974 (3d Cir. 1998)); Mausolf v. Babbitt, 85 F.3d 1295, 1296–97 (8th Cir. 1996) (recognizing the concern the agency "might settle with the [plaintiffs] or back away from the rules" as a basis for intervention).

Given BLM's multiple use role in balancing environmental protection and oil and gas development, the Citizen Groups cannot rely on the agency to represent their interests any more

than the Petitioners could. The Citizen Groups should be allowed to intervene in order to protect their interests in environmental protection and in the health and safety of their members.

II. ALTERNATIVELY, THIS COURT SHOULD GRANT THE CITIZEN GROUPS PERMISSIVE INTERVENTION.

In addition to qualifying for intervention as of right, the Citizen Groups satisfy the prerequisites for permissive intervention. Permissive intervention is appropriate where a movant can show that: (1) its motion is timely; (2) it "has a claim or defense that shares with the main action a common question of law or fact;" and (3) the intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(1)(B), (b)(3). Courts allow permissive intervention to "assist the court in its orderly procedures leading to the resolution of th[e] case." Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1111 (9th Cir. 2002).

In this case, the Citizen Groups' defenses share common questions of law and fact with the main action. The Citizen Groups seek to defend the BLM's authority to promulgate the Rule and to argue that the Rule was promulgated in accordance with applicable law. This motion is timely, and the Citizen Groups' intervention will not prejudice the rights of the existing parties. See supra p. 2. Because of their role in crafting the Rule, the Citizen Groups will assist the Court in resolving this case. Accordingly, even if the Court concludes that the Citizen Groups are not entitled to intervene as of right, permissive intervention is warranted here.

CONCLUSION

For the foregoing reasons, the Court should grant the Citizen Groups intervention as a matter of right under Rule 24(a). Alternatively, permissive intervention should be allowed under Rule 24(b).

Dated: June 2, 2015

s/Nathan Maxon
Nathan Maxon
MAXON LAW OFFICE
945 S. 4th Street
P.O. Box 898
Lander, WY 82520
(307) 438-9823 (phone)
nate.maxon@gmail.com

s/Michael S. Freeman
Michael S. Freeman
R. Benjamin Nelson
EARTHJUSTICE
633 17th Street, Suite 1600
Denver, CO 80202
(303) 623-9466 (phone)
(303) 623-8083 (facsimile)
mfreeman@earthjustice.org
bnelson@earthjustice.org

Attorneys for Applicants for Intervention Sierra Club, Earthworks, The Wilderness Society, Western Resource Advocates, Conservation Colorado Education Fund and Southern Utah Wilderness Alliance

Nathan Matthews
SIERRA CLUB
85 Second Street, 2nd Floor
San Francisco, CA 94105
(415) 977-5695 (phone)
nathan.matthews@sierraclub.org

Attorney for Applicant for Intervention Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2015, I filed a true and correct copy of **MEMORANDUM IN SUPPORT OF CITIZEN GROUPS' UNOPPOSED MOTION TO INTERVENE AS RESPONDENTS** via the court's ECF system, with notification sent to those listed below.

Nicholas Vassallo US ATTORNEY'S OFFICE P O Box 668 Cheyenne, WY 82003-0668 Telephone: (307) 772-2124 Fax: (307) 772-2123 Email: nick.vassallo@usdoj.gov Attorney for Respondents Sally Jewell, Neil Kornze, United States Department of the Interior and United States Bureau of Land Management	William E Gerard US DEPARTMENT OF JUSTICE ENVIRONMENT & NATURAL RESOURCES DIVISION WILDLIFE & MARINE RESOURCES Benjamin Franklin Station PO Box 7611 Washington, DC 20044-7611 Telephone: (202) 305-0475 Facsimile: (202) 305-0274 Email: william.gerard@usdoj.gov Attorney for Respondents Sally Jewell, Neil Kornze, United States Department of the Interior and United States Bureau of Land Management
Jeremy A Gross Michael James McGrady WYOMING ATTORNEY GENERAL'S OFFICE Natural Resources Division 123 State Capitol Cheyenne, WY 82002 Telephone: (307) 777-6946 Facsimile: (307) 777-3542 Email: mike.mcgrady@wyo.gov Email: jeremy.gross@wyo.gov Attorneys for Petitioner State of Wyoming	Andrew J Kuhlmann WYOMING ATTORNEY GENERAL'S OFFICE 123 Capitol Building Cheyenne, WY 82002 Telephone: (307) 777-3537 Facsimile: (307) 777-3542 Email: andrew.kuhlmann@wyo.gov Attorney for Petitioner State of Wyoming Frederick R. Yarger COLORADO ATTORNEY GENERAL'S OFFICE 1300 Broadway 10th Floor Denver, CO 80203 Telephone: (720) 508-6168 Email: fred.yarger@state.co.us Attorneys for Petitioner State of Colorado

Andrew C Emrich HOLLAND & HART 6380 South Fiddlers Green Circle Suite 500 Greenwood Village, CO 80111 Telephone: (303) 290-1621 Facsimile: (866) 711-8046 Email: ACEmrich@hollandhart.com Attorney for Intervenor Petitioner State of North Dakota	Lauren R Caplan HOLLAND & HART LLP 975 F Street NW Suite 900 Washington, DC 20004 Telephone: (202) 654-6919 Email: lrcaplan@hollandhart.com Attorney for Intervenor Petitioner State of North Dakota
Paul M Seby HOLLAND & HART 555 Seventeenth Street Suite 3200 Denver, CO 80202 Telephone: (303) 295-8430 Email: pmseby@hollandhart.com Attorney for Intervenor Petitioner State of North Dakota	Wayne Stenehjem NORTH DAKOTA ATTORNEY GENERALS OFFICE 600 E Boulevard Avenue #125 Bismarck, ND 58505 Telephone: (701)328-2210 Email: ndag@nd.gov Attorney for Intervenor Petitioner State of North Dakota
Hope Hogan Matthew A Sagsveen NORTH DAKOTA ATTORNEY GENERALS OFFICE 500 North 9th Street Bismarck, ND 58501 Telephone: (701) 328-3640 Email: hhogan@nd.gov Email: masagsve@nd.gov Attorney for Intervenor Petitioner State of North Dakota	

/s/ Nathan Maxon