IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

WESTERN ENERGY ALLIANCE Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, SALLY JEWELL, in her official Capacity as Secretary of the United States Department of the Interior; BUREAU OF INDIAN AFFAIRS and MICHAEL S. BLACK, in his official Capacity as Director of the Bureau of Indian Affairs Defendants.	)	Case No. 16-cv-00050-DLH-CSM

MEMORANDUM IN SUPPORT OF
MOTION OF NEW MEXICO OIL & GAS ASSOCIATION TO INTERVENE

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I. INTRODUCTION.

The New Mexico Oil & Gas Association ("NMOGA"), by and through its undersigned counsel of record, submits this Memorandum in Support of its Motion to Intervene ("Motion"). Intervention is necessary to allow NMOGA to protect its members' direct and substantial interests that will be affected by the implementation of the final rule promulgated by the Bureau of Indian Affairs ("BIA") of the United States Department of the Interior (collectively, the "Agencies"), governing grants of right-of-way ("ROW") on tribally and individually owned lands held in trust by the United States. 80 Fed. Reg. 72492-72549 (Nov. 19, 2015) ("Final Rule"). NMOGA seeks to intervene to support its members' interests in sustaining their important and beneficial working relationships with Native American tribal nations ('Tribes") and tribal members and its members' critical needs for cost-effective ROWs subject to consistent and stable law and regulation.

There are 566 federally recognized Tribes in the United States, and NMOGA members have entered into voluntary agreements with many of them, and such agreements were made in the context of controlling law at the time of contracting. Tribal jurisdiction exists over non-tribal members based on the status of specific lands and agreements. *See Montana v. United States*, 450 U.S. 544, 565 (1981). Controlling decisions of the United States Supreme Court erect strong presumptions against tribal jurisdiction over nonmembers. *See Strate v. A-1 Contractors*, 520 U.S. 438, 451-52 (1997), and other cases have extended this authority to tribal taxation. Current law is silent as to whether assignments or mortgages of a ROW must be consented to by Tribes or tribal member landowners and approved by the BIA. The Final Rule, however, requires tribal or allotted landowner consent and BIA approval whenever an existing grantee enters into any assignment or mortgage of a ROW unless the ROW grant provides otherwise. While arguably

appropriate for prospective grants, the Final Rule applies this rule retroactively, depriving existing grantees of their rights to freely assign or mortgage grants silent on those subjects.

The arguments NMOGA raises in its proposed Complaint-in-Intervention identify errors and legally unfounded aspects of the Final Rule, including some not challenged by plaintiff Western Energy Alliance ("WEA"), and address the impact of the Final Rule specifically on NMOGA's members' businesses in New Mexico and in other States, including North Dakota. As established herein, NMOGA has standing to represent the interests of its members, and satisfies the requirements of Fed. R. Civ. P. 24(a) and (b) and the judicial review provisions of the Administrative Procedures Act, 5 U.S.C. § 702 ("APA"). The Motion should be granted and NMOGA permitted to participate as a plaintiff in this suit.

II. BACKGROUND.

A. The Applicable Statutes:

To supplement earlier authority specifically authorizing rights-of-way ("ROWs") for railroads, pipelines and other uses, *see* 25 U.S.C. §§ 311-321, Congress authorized, in 1948, the Secretary of the Interior ("Secretary") to grant ROWs for "all purposes" across tribal and allotted lands.[1] General Right-of-Way Act, 25 U.S.C. §§ 323-328 ("1948 Act"). Pursuant to the 1948 Act, the Secretary has authority "to prescribe any necessary regulations for the purpose of administering the provisions of this Act." 25 U.S.C. § 328. The 1948 Act does not address tribal

[1] "Tribal lands" are lands of Tribes held in trust by the United States. "Allotted lands" are lands held in trust by the United States or subject to federal restrictions on alienation for the benefit of individual Indians. Allotments arose in an era in which Congress sought to "extinguish tribal sovereignty, erase reservation boundaries, and force assimilation of Indians into the society at large." *Cnty. of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 254 (1992). Accordingly, many allotments were made subject to state law, and in 1901, Congress expressly provided all allotments could be condemned under state laws. *See* 25 U.S.C. § 357. Not contemplated, however, was that the allotment interests frequently would be subdivided in successive generations, frequently resulting in highly fractionated ownership, with dozens or hundreds of small, undivided allotment interests.

adjudicatory, regulatory, or taxation jurisdiction. The 1948 Act requires only the consent of the "owners or owner of a majority of interests" for ROWs crossing allotted lands. The 1948 Act, as relevant to NMOGA's challenges, does not address assignment or mortgaging of ROWs, and does not require consent or BIA approval for assignment or mortgage of ROWs. *Id.* Nor does it impose a requirement that, in addition to current owners of an allotment, remainder interest holders' consent to a ROW. *Id.*

In 1983, Congress enacted the Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2221 ("ILCA"), to address the issue of fractionation of allotted lands. Tribes may acquire interests in allotted lands under the ILCA by gift or purchase, and may acquire an interest by operation of law under the "single heir rule" of the American Indian Probate Reform Act, 25 U.S.C. § 2206(a)(2)(D). With respect to interests acquired by a Tribe under ILCA, Congress provided that a Tribe "*may* as a tenant in common with the other owners of the trust or restricted lands, lease the interest [or] consent to the granting of rights-of-way." 25 U.S.C. § 2213(a) (emphasis added). The BIA can approve a lease across an allotment where a Tribe has a fractional interest, based on the consent of the allotted owners and "even though the Indian tribe did not consent to the lease or agreement." *Id.* § 2213(c)(1); *id.* § 2218(d)(2).

B. The Regulations:

In 1968, the BIA adopted the regulations currently found at 25 C.F.R. Part 169 to implement the 1948 Act ("the current Part 169 regulations"). The current Part 169 regulations do not address assignment or mortgaging and do not require landowner consent or BIA approval for such instruments. The current Part 169 regulations authorize the Secretary to approve a grant when the "land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant." 25 C.F.R. § 169.3. They do not require the consent of

remainder interest holders, nor do they address tribal consent when a Tribe acquires a minority fractional interest in an allotment. They also do not address tribal adjudicatory, regulatory, or taxation jurisdiction over ROWs, and, instead, are silent on those matters.

On June 17, 2014, the Agencies published in the Federal Register a proposed rule entitled: "Rights-of-Way on Indian Land." *See* 79 Fed. Reg. 34455 (the "Proposed Rule"). The BIA received 176 written comments on the Proposed Rule. 80 Fed. Reg. at 72492. Several of NMOGA's member companies submitted comments on the deficiencies of the Proposed Rule, including Encana Oil & Gas USA Inc.; Enterprise Products Operating, LLC and Mid-America Pipeline Company, LLC; Public Service Company of New Mexico; Western Refining Southwest, Inc. and Western Refining Pipeline, LLC; and Xcel Energy. *See* Declaration of Steve Henke ¶ 12, attached hereto as Exhibit A ("Henke Declaration").

On November 19, 2015, the Agencies published the Final Rule in the Federal Register. 80 Fed. Reg. 72492. The Final Rule, and its promulgation, is challenged here.

III. INTEREST OF THE INTERVENOR.

NMOGA is a non-profit association representing oil and gas exploration and production companies, oil and petroleum products refineries, electric utility and transmission companies, environmental consultants, banks, insurance companies, logistics and transportation companies, well service companies, gas station and convenience store owners, among other businesses that produce, transport, and deliver energy products in New Mexico and other States, including North Dakota. Henke Declaration ¶¶ 6-7.

Access across tribal and allotted lands is critical to energy production and transportation in New Mexico. New Mexico is home to nineteen Native American Pueblos and three Tribes, occupying substantial portions of the State. *Id.* ¶ 8. NMOGA's members have facilities on lands

of numerous Tribes, Pueblos, including the Navajo and Jicarilla Apache Reservations and tribal lands of several New Mexico Pueblos, and numerous off-reservation tribal and allotted lands in Northwestern New Mexico. *Id.*

NMOGA's members currently have or have applied for ROW grants across lands of multiple Indian Reservations and tribal and allotted lands outside Reservation boundaries, in New Mexico and several other States. *Id.* ¶ 10. These ROWs are obtained by working with Tribes and allotment owners, and NMOGA members work with Tribes and allotment owners in the ordinary course of business. *Id.* ¶¶ 8, 11. NMOGA's members rely on ROWs across tribal and allotted land to access their owned or leased land, and for the construction, operation, and maintenance of oil and gas pipelines and utility transmission lines. These ROWs have been applied for or obtained from the BIA under the current Part 169 Regulations. *Id.* ¶ 10. The expansion of energy production and transportation in New Mexico will almost certainly require ROWs across at least some additional tribal or allotted lands. NMOGA's members require reliable, cost-effective ROWs across tribal and allotted lands to ensure continued supply of necessary energy resources to the public in New Mexico and nationally. *Id.*

The Final Rule changes the ability of NMOGA members to assign and mortgage their existing ROWs on tribal and allotted lands. This change is material to NMOGA's members because the historical ability to assign or encumber an ROW enables businesses to execute transactions necessary for the effective development, financing, and management of their businesses. *Id.* ¶ 16. Flexibility regarding assignment and financing is an integral part of NMOGA's members' ability to compete in energy markets. *Id.* The Final Rule also negatively affects the ability of NMOGA's members to freely assign and mortgage their ROWs by requiring landowner consent and BIA approval unless the agreement expressly so authorizes, further

impairing the ability to execute needed transactions and decreasing the value of the ROW to NMOGA's members. *Id.* ¶ 17. Although NMOGA's members regularly negotiate with Tribes over such matters, and do not challenge Tribes' ability to negotiate for such terms in future ROW grants, NMOGA's members are adversely affected by the retroactive impact of the Final Rule on existing ROWs.

The additional consent requirements contained in the Final Rule may prevent business transactions from culminating. The time and expense to identify all landowners of individual allotments, including remainder interest holders, securing their consent or the consent of Tribes, potentially paying additional compensation, and then obtaining BIA approval for each ROW assignment or encumbrance may make some deals simply unworkable. *Id.* ¶ 19. The fact that the Final Rule seeks to make tribal taxation and jurisdiction apply to existing grants, when those grants are currently silent regarding tribal taxation and jurisdiction, will also harm transactions by NMOGA members by significantly increasing costs and making the assignment or mortgage of a ROW less attractive to a contracting party. *Id.* ¶ 20. Furthermore, the retroactive application of certain provision of the Final Rule means the harm to NMOGA's members will not arise only when they enter into a transaction regarding an existing or new ROW; they will be immediately harmed upon enactment of the Final Rule. *Id.* ¶ 21.

IV. LEGAL STANDARD.

NMOGA is entitled to intervene as of right under Fed. R. Civ. P. 24(a) or, in the alternative, permissively under 24(b). "A court ruling on a motion to intervene must accept as true all material allegations in the motion to intervene and must construe the motion in favor of the prospective intervenor." *Nat'l Parks Conservation Ass'n v. U.S. E.P.A.*, 759 F.3d 969, 973 (8th Cir. 2014). "Viewing the complaint holistically, the court should assume the plaintiff will

receive the relief it seeks and, from that assumption, assess the sufficiency of the prospective intervenor's motion." *Id.*

V. NMOGA HAS STANDING TO INTERVENE AND REPRESENT THE INTERESTS OF ITS MEMBERS.

NMOGA's members are entitled to judicial review of the Final Rule, *see* 5 U.S.C. § 702, and NMOGA has standing to represent its members' interests herein. An organization has standing to assert the interests of its members "so long as (1) the individual members would have standing to sue in their own right; (2) the organization's purpose relates to the interests being vindicated; and (3) the claims asserted do not require the participation of individual members." *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 985-86 (8th Cir. 2011) ("*Army Corps*"). An organization "need not establish that all of its members would have standing to sue individually so long as it can show that any one of them would have standing." *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 869 (8th Cir. 2013) (internal quotation marks and citations omitted); *id.* at 870 ("At least some members are currently operating under permits that allow them to utilize blending and bacteria mixing zones in circumstances inconsistent with the EPA letters, which they must imminently rectify. Moving into compliance will be costly. The League has therefore articulated an injury in fact.") (internal quotation marks and citations omitted).

A. NMOGA's members have standing to sue in their own right.

NMOGA has members with the Article III standing required to intervene. *Mausolf v. Babbitt*, 85 F.3d 1295, 1300-01 (8th Cir. 1996). The Henke Declaration establishes that NMOGA, and its members, have shown (1) an injury in fact, (2) causation, and (3) a likelihood that the injury will be redressed by a favorable decision. *See Nat'l Parks*, 759 F.3d at 974-75 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). When an association seeks to assert its members' standing, it must prove that at least one of its members satisfies each of

these components. *Iowa League*, 711 F.3d at 869 (internal quotation marks and citations omitted). As discussed herein, NMOGA's members meet each of these requirements.

1. NMOGA's members will be injured if the Final Rule is not vacated.

The Final Rule, if not vacated, will inflict economic harm by limiting NMOGA members' ability to obtain, assign, mortgage, and renew ROW grants. By mandating landowner consent and BIA approval before assignments or mortgages of ROWs can be effectuated, the Final Rule impairs the ability of NMOGA's members to execute needed transactions, and decreases the value of their ROWs. Of course, a Tribe and a ROW applicant/grantee may include, and even have included, tribal consent requirements for assignments or mortgages in specific ROW documents. NMOGA challenges the Final Rule's mandate that landowner consent and BIA approval apply retroactively to existing grants that are silent with respect to assignment and mortgaging because, under prior practice and law, ROW grants are freely alienable. *See* The Law of Easements & Licenses in Land § 9:5 (2016) ("[T]he modern American view is that commercial easements in gross are freely alienable as a matter of law, unless the instrument of creation provides to the contrary."). Under the Final Rule, if a NMOGA member seeks to assign a ROW, but a landowner or the many separate owners of several allotments over which a single ROW may cross refuse consent, the ability of a company, such as a natural gas or petroleum products pipeline, to deliver vital energy resources to end users may be destroyed. *See* Henke Declaration ¶¶ 16-17. Additionally, the consent requirements will make each transaction regarding a ROW more costly for ROW holders. *See id.* ¶¶ 17-18. Uncertainty regarding taxes, duties, and other regulatory burdens imposes an economic cost on transactions by ROW holders. *Id.* This is sufficient to satisfy the "injury in fact" requirement for purposes of standing.

An injury in fact "need not be large"; rather, "an identifiable trifle will suffice." *Army Corps*, 645 F.3d at 988. The "[r]isk of direct financial harm establishes injury in fact." *Nat'l Parks*, 759 F.3d at 975. Courts have found an injury in fact when litigation could result in the imposition of a regulation that creates a threat of financial harm, or otherwise harms an intervenor's ability to conduct business. In *Iowa League of Cities*, for example, the Eighth Circuit held that organization members established injury because they operated under permits that were inconsistent with the EPA letters at issue in the litigation, and "moving into compliance [with the letters would] be costly." 711 F.3d at 870. Similarly, in *National Parks Conservation Association*, the Eighth Circuit held that a power plant satisfied the injury in fact requirement because it might be compelled to install emission-control technologies. 759 F.3d at 975; *see also City of Waukesha v. E.P.A.*, 320 F.3d 228, 237 (D.C. Cir. 2003) (finding that member of mining association established injury because it alleged "a substantial probability" that its water system would "have uranium levels above the M.C.L. provided for by EPA's new regulations, resulting in significant monitoring, compliance, and disposal costs").

Notably, an alleged injury may be imminent and concrete for purposes of standing even if "the timing and extent of . . . financial injury . . . remains to be determined" at the time of the court's decision. *Nat'l Parks*, 759 F.3d at 975 (explaining that power plant might be subject to "costly pollution controls," but the amount and timing of its injury remained to be determined). In *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003), the plaintiff sought to enjoin the Corps of Engineers from releasing water from one of six reservoirs on the Missouri River during a drought. The court held that downstream water users "presented sufficient evidence of a threatened injury" to their interests in navigation, transportation of goods, agriculture, and water

treatment, because of the *potential* that the court's ruling would lead to reduced downstream water flow. *Id.* at 1024.

Here, members of NMOGA will suffer a concrete, imminent injury to their legally protected interests if the Final Rule goes into effect. The Final Rule will cause NMOGA members' injuries.

2. NMOGA's members will be injured if the Final Rule is not invalidated by the Court.

To establish the causation prong of standing, a prospective intervenor must establish "a causal connection between the injury and the conduct complained of." *Nat'l Parks*, 759 F.3d at 975. This requires a showing that the intervenor's "alleged injury must be fairly traceable to the defendant's conduct." *Id.* (internal citations and quotation marks omitted). When a prospective intervenor is the subject of agency action, "there is ordinarily little question that the action . . . has caused him injury." *Iowa League*, 711 F.3d at 871 (quoting *Lujan*, 504 U.S. at 561-62); *see also CropLife Am. v. E.P.A.*, 329 F.3d 879, 884 (D.C. Cir. 2003) ("There is no doubt that the injury [being precluded from using studies previously submitted to verify the safety of their products] is caused by the new rule.").

Here, the Final Rule directly regulates ROWs held by, applied for, or to be applied for by NMOGA members. There is no question that the injuries described above would be fairly traceable to the imposition of the Final Rule.

3. NMOGA members' injuries will be redressed by a favorable decision.

The last component of standing is a showing that "a favorable decision will likely redress the injury." *Nat'l Parks*, 759 F.3d at 975 (internal citations and quotation marks omitted). Where a challenged rule is "vacated as substantively unlawful, it is indeed likely that the members' injuries would be redressed." *Iowa League*, 711 F.3d at 870; *see also CropLife America*, 329

F.3d at 884 ("There is no doubt . . . that this injury can be redressed if the court vacates the new rule and reinstates the agency's previous practice . . . ."). The Final Rule directly regulates NMOGA members' rights in property, specifically ROWs currently held under existing regulations or to be acquired after the effective date of the Final Rule. A decision vacating the Final Rule will redress members' injuries.

B. NMOGA's purpose relates to the interests vindicated in this lawsuit.

NMOGA seeks to protect interests that are "germane" to its purpose. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). NMOGA's stated purpose is to promote the safe and responsible development of oil and gas resources in New Mexico through advocacy, collaboration, and education. *See* Henke Declaration ¶ 4. That purpose is directly related the claims NMOGA will advance in this lawsuit, seeking invalidation and vacation of the Final Rule, because imposition of the Final Rule will impede members' ability to cost-effectively produce and transport oil, gas, and electricity in New Mexico, and elsewhere.

NMOGA's challenge to the Final Rule is far from merely "incidental" to its purpose as an organization. Even if such relief were not central, but only pertinent, to NMOGA's purpose, however, the germaneness analysis would be satisfied here. *See Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1022 (8th Cir. 2012) (finding organization's stated purpose of "promoting atheistic and agnostic views [wa]s plainly germane to its members' interest in being free of Establishment Clause violations"); *Sierra Club v. U.S. Forest Serv.*, 878 F. Supp. 1295, 1303 (D.S.D. 1993), *aff'd*, 46 F.3d 835 (8th Cir. 1995) (finding germaneness requirement satisfied in lawsuit seeking review of Forest Service's decision to allow timber sales in national forest because the organization's purpose was "to preserve the environment").

C. The claims asserted do not require participation of NMOGA members.

Finally, associational standing is proper because the claims asserted in this lawsuit do not require the participation of individual NMOGA members. Claims for injunctions, declaratory judgments, or other prospective relief "have been recognized as legitimate goals for litigation brought by representative organizations . . . and do not require the participation of individual members." *Ark. Med. Soc., Inc. v. Reynolds*, 6 F.3d 519, 528 (8th Cir. 1993); *see also Warth v. Seldin*, 422 U.S. 490, 515 (1975) ("If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured."). NMOGA's proposed claims seek a declaration and injunctive relief against implementation of the Final Rule. This is precisely the type of claim that does not require participation of NMOGA members.

D. NMOGA also has standing to sue in its own right.

NMOGA also has standing to challenge the Final Rule on its own behalf because the Final Rule diverts NMOGA's resources away from its goal of promoting the development of oil and gas resources in New Mexico through advocacy, collaboration, and education. "There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth*, 422 U.S. at 511. "'Standing may be found when there is a concrete and demonstrable injury to an organization's activities which drains its resources and is more than simply a setback to its abstract social interests.'" *Nat'l Fed. of Blind of Mo. v. Cross*, 184 F.3d 973, 1979 (8th Cir. 1999) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).

Here, NMOGA has suffered a concrete and demonstrable injury to its activities. NMOGA actively engages in legislative activities, education, and community outreach in order to promote the oil and gas industry in New Mexico, and resources for these activities are limited by this effort to address member concerns regarding the Final Rule and the negative effects thereof. *See Ark. ACORN Fair Housing, Inc. v. Greystone Dev., Ltd. Co.*, 160 F.3d 433, 434 (8th Cir. 1998) ("[T]he deflection of an organization's monetary and human resources from counseling or educational programs to legal efforts aimed at combating discrimination . . . is itself sufficient to constitute an actual injury."); *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 132-33 (D.C. Cir. 2006) (holding that organization established standing to challenge FDA policy impeding access to drugs with a record of success in clinical testing where it had diverted significant time and resources from counseling, referral, advocacy, and educational services to combat FDA policy). These injuries are directly attributable to the Final Rule's deficiencies requiring litigation, and would be redressed by a favorable ruling of the Court. *See Nat'l Parks*, 759 F.3d at 974-75.

E. NMOGA and its members are within the zone of interests of the Final Rule.

The Final Rule undisputedly affects the owners of ROWs, and thus NMOGA's members are within the zone of interests of the Final Rule and have a right to challenge the Final Rule and its promulgation under the 1948 Act. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, __ U.S. __, __, 134 S. Ct. 1377, 1387 (2014). The zone of interests test is not "especially demanding," and agency action is "presumptively reviewable" under the APA. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, __ U.S. __, __ 132 S. Ct. 2199, 2210 (2012). Key is whether the issues raised are within the zone of interests of the statute or regulation being challenged. *See id.* at 2211-12 (holding a non-Indian plaintiff raises *issues*

within the "zone of interests" of the statute, and thus satisfies what was then termed the prudential standing analysis). The issues NMOGA seeks to raise are within the zone of interests of the 1948 Act and the Final Rule promulgated thereunder, interests which would be regulated by the Final Rule, if allowed to go into effect. Specifically, NMOGA's proposed Complaint-in-Intervention challenges whether the Final Rule is within the authority granted by the 1948 Act, and thus raises issues within the zone of interests of that Act. *See Tuttle v. Jewell*, No. 13-365 (RMC), 2016 WL 1048775, at *8 (D.D.C. Mar. 11, 2016) ("The zone of interests governed by the statute and its accompanying regulations concern the leasing of Indian-owned land, without regard to the identity of the lessee.").

VI. NMOGA'S INTERVENTION IS PROPER UNDER EITHER FED. R. CIV. P. 24(A) OR 24(B).

NMOGA seeks to intervene to protect the rights of its members, rights that will be adversely affected if the Final Rule is not invalidated or vacated. The Federal Rules of Civil Procedure allow intervention of right or permissively to timely applicants. It cannot be disputed that the Motion is timely, being filed just after the initial hearing on preliminary injunction. NMOGA satisfies the requirements to intervene under either standard.

A. NMOGA satisfies the requirements to intervene of right.

Intervention of right must be granted to an intervenor 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 should be construed liberally, with all doubts resolved in favor of the proposed intervenor." *Nat'l Parks*, 759 F.3d at 975 (internal quotation marks and citations omitted).

1. NMOGA and its members claim an interest relating to the Final Rule that is the subject of this action.

A prospective intervenor "must have a recognized interest in the subject matter of the litigation" that is direct, substantial, and legally protectable. *United States v. Union Elec. Co.*, 64 F.3d 1152, 1161 (8th Cir. 1995). The recognized interest requirement is satisfied when an intervenor's property and/or financial interests are at stake in the litigation. *See Nat'l Parks*, 759 F.3d at 976; *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002) ("The threat of economic injury from the outcome of litigation undoubtedly gives a petitioner the requisite interest."); *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 989 F.2d 994, 997-98 (8th Cir. 1993) (private landowners had a recognized interest in land-dispute litigation between Mille Lacs Band and Minnesota because the litigation would determine the Band members' rights to hunt, fish, and gather on the private landowners' property). The impact of the proposed regulations on existing and future ROWs of NMOGA members establishes a recognized interest. *See Utahns for Better Transp.*, 295 F.3d at 1116 (members of transportation trade association had economic interest supporting its intervention in Clean Air Act lawsuit in which plaintiffs sought to impede certain regional transportation plans, and trade association members had current and future contracts that would be affected).

Here, as in *Mille Lacs*, *National Parks Conservation Association*, and *Utahns for Better Transportation*, NMOGA members have property and economic interests at stake. The Final Rule at issue in this lawsuit targets ROWs that are essential to NMOGA members' production and transportation of oil and gas. NMOGA itself is injured by the diversion of resources to challenge the Final Rule. This is sufficient to establish a recognized interest in the dispute under Rule 24(a). *See Nat'l Parks*, 759 F.3d at 976.

2. Resolution of this lawsuit may, as a practical matter, impair NMOGA's and its members' ability to protect their interests.

The second prong of Rule 24(a)(2) requires a showing that disposition of the lawsuit at issue "may as a practical matter impair or impede the applicant's ability to protect its interests." *Union Elec.*, 64 F.3d at 1161 (internal brackets, quotation marks, and citations omitted). The Eighth Circuit has described the necessary showing as "a sufficient stake in the litigation." *Id.* This is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *See id.* at 1162.

If the Final Rule is imposed, NMOGA members' interests in utilizing their existing ROWs and acquiring ROWs needed in future to conduct their businesses would be directly affected. This establishes a "sufficient stake in the litigation" for purposes of intervention as of right. *See Nat'l Parks*, 759 F.3d at 976 (holding that power plant's interests would be "directly impacted" if plaintiff environmental groups succeeded in their suit to compel the EPA to require the plant to install best available retrofit technology); *Mille Lacs*, 989 F.2d at 998 (holding that prospective intervenors' property rights might be impacted because a settlement favorable to the Indian Band might have permitted Band members to hunt, fish, and gather upon intervenors' land and thereby reduce property values).

3. No existing party adequately represents the interests of NMOGA or its members.

The third factor requiring consideration under Rule 24(a) is whether existing parties "adequately represent" NMOGA's interests in this suit. They do not. "Doubts regarding the propriety of permitting intervention should be resolved in favor of allowing it, because this serves the judicial system's interest in resolving all related controversies in a single action." *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992). NMOGA is required to show only "that representation of [its] interest 'may be' inadequate . . . ." *Trbovich v. United Mine Workers*

of Am., 404 U.S. 528, 538 n.10 (1972). This factor is generally "easy to satisfy," and the burden on NMOGA is "minimal." *Mausolf*, 85 F.3d at 1303.

WEA does not represent NMOGA's interests in this lawsuit, because WEA "represent[s] the interests of [its] members and answer[s] only to [its] members." *Sierra Club v. Robertson*, 960 F.2d at 86 (allowing intervention by a state asserting a property interest affected by planned agency action). It has no "obligation to represent the interests of the party seeking to intervene," and thus the burden on NMOGA to establish this factor of the intervention analysis is minimal. *Union Elec.*, 64 F.3d at 1168. While NMOGA and WEA might share an "overall point of view," WEA simply does not represent NMOGA's members' interest in challenging the Final Rule. *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 913 (D.C. Cir. 1977) (concluding that, under the "minimal burden" standard applicable to the adequate representation question, the intervention of additional industry parties complied with Rule 24(a)(2)). Intervention is proper when "the interests which [the intervenors] have at stake in this litigation are not identical to those which the [parties] seeks to protect." *Planned Parenthood Minn., N.D., S.D. v. Alpha Ctr.*, 213 F. App'x 508, 510 (8th Cir. 2007) (unpublished).

NMOGA seeks to intervene to represent the unique interests of its members. While acknowledging that there is some overlap in the type of members of WEA and NMOGA, *i.e.*, oil exploration, production, and transportation companies, NMOGA's membership includes entities representing broader interests in the oil, gas, and energy industries, including pipelines, midstream companies, an electric public utility, and convenience store operators. NMOGA focuses on issues pertaining to tribal and allotted land and taxation issues, consent to assignment and mortgage, allotment consent of pressing concern to its members, and its member entities

share the common interest of operating or being based in New Mexico—although its members have interests in states around the country, including North Dakota.

NMOGA's unique position as a representative of oil and gas interests in New Mexico supports its intervention in this case. A significant portion of New Mexico land is owned or held by Native American Tribes and Pueblos, and NMOGA's members' abilities to effectively produce and transport energy within and across New Mexico will be substantially affected by the Final Rule. NMOGA represents its members in addressing regulatory challenges in New Mexico and nationally and will add a regional perspective grounded in Southwestern energy development that will inform presentation of the merits. Courts have found that a "localized perspective" in a challenge to the constitutionality of a statute supports intervention of an industry group. *NYNEX Corp. v. F.C.C.*, 153 F.R.D. 1, 3 (D. Me. 1994). No existing party represents NMOGA's interests in this lawsuit, and, as NMOGA satisfies Rule 24(a)(2), it should be allowed to intervene of right.

B. Alternatively, the Court should exercise its discretion to allow NMOGA to intervene by permission.

NMOGA also satisfies the requirements of Rule 24(b), and the Court should exercise its discretion and allow NMOGA to intervene because it "has a claim or defense that shares with the main action a common question of law or fact" and its intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(1)(B), (b)(3).[2] "In deciding whether to grant a motion to intervene, the timeliness requirement is of first importance." *W. Agric. Ins. Co. v. Wilson Excavating, Inc.*, No. 4:10CV3151, 2011 WL 666246,

[2] It is an open question whether the Eighth Circuit requires standing be established for a party intervening permissively. *See Solliday v. Dir. of Bureau of Prisons*, No. 11-CV-2350 MJD/JJG, 2014 WL 6388568, at *3 (D. Minn. Nov. 14, 2014). As discussed in Section IV, *infra*, however, NMOGA possesses Article III standing to participate in this action as a plaintiff.

at *2 (D. Neb. Feb. 12, 2011) (internal quotation marks and citations omitted). As discussed above, NMOGA's Motion, filed at this early stage in the litigation, is timely.

"The principal consideration in ruling on a Rule 24(b) motion is whether the proposed intervention would unduly delay or prejudice the adjudication of the parties' rights." *South Dakota ex rel. Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 787 (8th Cir. 2003). This case is in its infancy, with only WEA's motion for preliminary injunction and the motion to intervene of the Three Affiliated Tribes pending before the Court. *See Vander Wal v. Sykes Enter., Inc.*, No. A1-04-49, 2004 WL 2075474, at *2 (D.N.D. Sept. 10, 2004) ("[I]ntervention will not prejudice the Defendants as this case is still in its infancy."). No undue delay or prejudice to the parties will result from NMOGA's intervention at this pre-answer stage. *See W. Agric. Ins. Co.* 2011 WL 666246, at *2 ("[T]he parties in this case have not been subjected to any unreasonable delays, in fact the complaint was filed only six months ago."); *Alleghany Corp. v. Pomeroy*, 698 F. Supp. 809, 815 (D.N.D. 1988), *rev'd on other grounds,* 898 F.2d 1314 (8th Cir. 1990) ("It appears that the issues raised in the case are ideally suited for resolution by summary judgment. Thus the court fails to see how allowing the [company] to intervene will unduly delay the ultimate resolution on the merits of [plaintiff's] claim."). Neither WEA nor the United States will be prejudiced by NMOGA's intervention.

Analysis of whether NMOGA's challenges to the Final Rule share common questions of law with WEA's complaint is simple: both the WEA and NMOGA challenge the Final Rule under the APA, on overlapping yet distinct grounds. *See Alleghany Corp.* 698 F. Supp. at 815 (granting permissive intervention as a defendant because the "claim and defense of the statute" by the intervenor and the original parties shared questions of law); *see also New York v. Abraham*, 204 F.R.D. 62, 66 (S.D.N.Y. 2001) (allowing permissive intervention to defend an

agency's "authority to delay or cancel implementation" of a final rule). NMOGA satisfies the requirements to intervene under Rule 24(b).

VII. THE EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE DOES NOT BAR NMOGA'S INTERVENTION.

NMOGA's specific challenges to the Final Rule were brought to the attention of the BIA by NMOGA's members, or by other members of the public. Several NMOGA members filed comments on the Proposed Rule, *see* Henke Declaration ¶ 12, along with more than 200 other commentators. *See Ark Initiative v. Tidwell*, 64 F. Supp. 3d 81, 94 (D.D.C. 2014), *aff'd,* No. 14-5259, 2016 WL 874773 (D.C. Cir. Mar. 8, 2016) ("[I]f the agency knew or should have known about the specific concerns, then the plaintiff need not have personally raised them during the comment period."); *Pac. Coast Fed'n of Fishermen's Assocs. v. U.S. Dep't of Interior*, 996 F. Supp. 2d 887, 901 (E.D. Cal. 2014) (the comment letters sufficiently alerted the agency to the issue, so a party that did not file a comment could challenge the issue in court); 32 Fed. Prac. & Proc. Judicial Review § 8174 (1st ed.) ("[I]t suffices that another person has raised the issue in a timely way, allowing the agency to consider it."). Each of the issues NMOGA will raise if granted leave to intervene was considered by the BIA and will be properly before the Court.

VIII. CONCLUSION.

For the reasons set forth in NMOGA's Motion to Intervene and herein, the Court should grant NMOGA leave to intervene as of right or, in the alternative, permissively, as a plaintiff in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2016, I filed the foregoing MEMORANDUM IN SUPPORT OF MOTION OF NEW MEXICO OIL & GAS ASSOCIATION TO INTERVENE electronically with the Clerk of the Court using the CM/ECF System, which caused EFC Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

MODRALL SPERLING ROEHL HARRIS & SISK, P.A.

/s /Lynn H. Slade
Lynn H. Slade

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