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

THE STATE OF NORTH DAKOTA, *et al*.,

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT OF INTERIOR, *et al*.,

Defendants.

BADLANDS CONSERVATION ALLIANCE, CENTER FOR BIOLOGICAL DIVERSITY, CITIZENS FOR A HEALTHY COMMUNITY, DINÉ CITIZENS AGAINST RUINING OUR

No. 1:24-cv-00124-DMT-CRH

ENVIRONMENT, SAN JUAN CITIZENS ALLIANCE, SIERRA CLUB, and WILDEARTH GUARDIANS,

Movant-Intervenor-Defendants.

MEMORANDUM IN SUPPORT OF THE BCA INTERVENORS' MOTION TO INTERVENE

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INTRODUCTION

Badlands Conservation Alliance ("BCA"), Center for Biological Diversity, Citizens for a Healthy Community, Diné Citizens Against Ruining Our Environment, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians (collectively, the "BCA Intervenors") respectfully move under Federal Rule of Civil Procedure 24(a)(2) and (b) to intervene as defendants in this litigation challenging the U.S. Bureau of Land Management's ("BLM") adoption of regulations governing management of BLM-administered public lands, commonly known and hereinafter referred to as the "Public Lands Rule." Conservation and Landscape Health: Final Rule, 89 Fed. Reg. 40,308 (May 9, 2024). The relief sought in this case by the states of North Dakota, Idaho, and Montana (collectively, "Plaintiff States"), if granted, would seriously impair the BCA Intervenors' ability to advance their specific interests in protecting, conserving, and restoring public lands where their members live, work, recreate, and find spiritual value.

The BCA Intervenors are deeply rooted in the western U.S. and value federal public lands as a cornerstone of the region's ecology, economy, and communities. BLM's Public Lands Rule clarifies that conservation is a use on par with other authorized uses of federal public lands and recognizes Federal Defendants have the responsibility under the Federal Land Policy and Management Act of 1976 ("FLPMA") for "prioritizing the health and resilience of ecosystems across public lands." 89 Fed. Reg. at 40,308. In this case, Plaintiff States not only challenge and seek to invalidate the Public Lands Rule; they also challenge Federal Defendants' fundamental authority to consider conservation in managing federal public lands under FLPMA. The relief sought by Plaintiff States would profoundly alter the structure of federal public lands management under FLPMA's multiple use and sustained yield mandates, which have always required Federal Defendants to manage public lands "in a manner that will protect the quality of scientific, scenic,

historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use." 43 U.S.C. § 1701(a)(8). These conservation values are cherished by the BCA Intervenors and their members.

The BCA Intervenors seek to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) and meet all the requirements to intervene as of right. First, this motion is timely, coming at the early stages of litigation and causing no prejudice to any party. Second, the BCA Intervenors have a significant interest in defending the Public Lands Rule and BLM's long-standing FLPMA authority to manage public lands for conservation. They have individually and collectively worked for decades to protect public lands, waters, and vulnerable communities from the negative impacts resulting from Federal Defendants' historic subordination of conservation interests to extractive and consumptive uses. Third, this action may impair the BCA Intervenors' interests as they stand to lose significant ground in advancing their missions to conserve public lands and secure the associated public health, cultural resource, air and water quality, wildlife, recreation, and climate safeguards their members depend on if the Plaintiff States obtains the relief requested. Finally, the BCA Intervenors' interests are not adequately represented by Federal Defendants in this case because Federal Defendants are charged with balancing all authorized uses of federal public lands for the public as a whole. While the Public Lands Rule represents a step in the right direction toward recognizing and providing a means to achieve durable public lands conservation, the BCA Intervenors historically and still presently routinely find themselves in disagreement with Federal Defendants over management decisions affecting federal public lands. Accordingly, this Court should grant their motion for intervention as of right.

In the alternative, the BCA Intervenors satisfy the test for permissive intervention under Federal Rule of Civil Procedure 24(b) because the motion is timely, and they raise common questions of law and fact.

BACKGROUND

BLM manages 245 million acres of public lands, nearly 10 percent of the land in the United States. 89 Fed. Reg. at 40,309. As BLM noted in the preamble to the Public Lands Rule, "[t]hese lands have become increasingly degraded in recent decades through the appearance of invasive species, extreme wildfire events, prolonged drought, and increased habitat fragmentation." *Id*. The vast majority of BLM-managed lands are currently designated as open to extractive development, with more than 26 million acres under oil and gas lease,[1] and a long history of extractive uses has exacerbated these impacts. BLM appropriately acknowledges in the Public Lands Rule that "[e]stablishing and safeguarding resilient ecosystems has become imperative as the public lands experience adverse impacts of climate change and as the BLM works to ensure public lands and ecosystem services benefit human communities." *Id*. at 40,308.

Despite decades of management imbalance, public lands still hold great potential for fulfilling FLPMA's promise of conservation – one of the BLM's core mandates. The BCA Intervenors have advocated for BLM to adopt comprehensive regulations implementing this promise because they know that:

> Connected landscapes contribute to the delivery of ecosystem services, such as water purification, soil fertility, and carbon sequestration. These services benefit both wildlife and human communities, support agricultural productivity, clean water supply, and climate regulation. Healthy, resilient ecosystems are better able to withstand and adapt to environmental changes, such as climate variability, wildfires, and invasive species introductions ….

[1] Report on the Federal Oil and Gas Leasing Program, Prepared in Response to Executive Order 14008, U.S. Dept. of the Interior (Nov. 2021), https://www.doi.gov/sites/doi.gov/files/report-on-the-federal-oil-and-gas-leasing-program-doi-eo-14008.pdf (last visited Sept. 15, 2024).

Rader Decl. ¶ 12.

FLPMA provides BLM with ample authority, and indeed the obligation, to manage public lands for conservation. The U.S. Constitution's Property Clause confers upon Congress the "[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Constitution, Art. IV., Sec. 3, Cl. 2. This power was exercised through passage of key laws governing federal public lands management, including FLPMA. Because it is derived from the U.S. Constitution's property clause, FLPMA exemplifies the federal government's constitutional power at its apex. As the Supreme Court of the United States teaches, "while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'" *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (citation omitted).

In this constitutional context, FLPMA directs Interior to manage federal public lands and resources pursuant to a "multiple use" and "sustained yield" approach, which requires a "delicate balancing" of competing uses. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 710 (10th Cir. 2009). Under the broad rubric of "multiple use," BLM is charged with the responsibility to manage public lands and resources to "meet the present and future needs of the American people" while "conform[ing] to changing needs and conditions . . . tak[ing] into account the long-term needs of future generations . . . ." 43 U.S.C § 1702(c). Ultimately, the multiple use mandate underpins the agency's stewardship responsibility to pursue the "harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment . . . ." *Id*. This long-sighted mandate is

also reflected in a "sustained yield" mandate that obligates BLM to take the long view and satisfy the multiple use mandate "in perpetuity." 43 U.S.C. § 1702(h).

Conservation – now and for future generations – is at the heart of these mandates. In managing public lands for multiple use and sustained yield, FLPMA expressly requires:

> the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

43 U.S.C. § 1701(a)(8). BLM thus holds the responsibility and authority to conserve public lands in the public interest. BLM serves as a trustee of public lands and the rich sweep of ecological, environmental, and other resource values these lands hold.

While BLM has always considered conservation within its purview, until now the agency has not promulgated rules interpreting and administering FLPMA's conservation-focused authorities for the lands it administers as a whole. This has been problematic considering the agency's non-discretionary duties to manage public lands "without permanent impairment" and to "prevent unnecessary or undue degradation." This is also in contrast to BLM's promulgation of extensive rules governing extractive uses. For example, BLM has promulgated rules implementing the Mineral Leasing Act's oil and gas leasing and permitting directives.[2] Those rules, coupled with the absence of broad FLPMA conservation rules, created an asymmetry in BLM's planning and management framework that has favored extractive and consumptive uses at the expense of other public resource values. In other words, while BLM has advanced conservation on public lands, it

[2] *See* 43 C.F.R. Subt. B, Ch. II, Subch. C, Part 3100 (general oil and gas leasing rules), Part 3110 (noncompetitive oil and gas leasing rules), Part 3120 (competitive oil and gas leasing rules), Part 3150 (oil and gas geophysical exploration rules), Part 3160 (oil and gas operations rules), and Part 3170 (oil and gas production measurement and waste rules).

has nevertheless lacked sufficient tools to strike the "delicate balance" required by FLPMA's multiple use-sustained yield mandate, leading to degraded ecosystems on public lands. *Richardson*, 565 F.3d at 710 (FLPMA does not require development or other uses to "be accommodated on every piece of land; rather, delicate balancing is required.").

The Public Lands Rule will facilitate BLM's ability to strike the delicate balance FLPMA requires. It accomplishes this through several regulatory tools to advance ecosystem resilience and carry out BLM's multiple use and sustained yield mandates on public lands. The Rule's core tools include, among others: a restoration and mitigation leasing program that will allow entities to restore public lands or mitigate reasonably foreseeable impacts from authorized activities; a framework for land health and related standards and guidelines for all BLM-managed lands; a focus on protecting and restoring intact landscapes; clarifying the Areas of Critical Environmental Concern ("ACEC") designation and management process; and adopting a mitigation hierarchy for impacts to BLM lands. *See generally,* 89 Fed. Reg. 40,308 *et seq.*

ARGUMENT

I. The BCA Intervenors are entitled to intervene as of right.

Federal Rule of Civil Procedure 24(a)(2) specifies a court must permit a party to intervene who: (1) files a timely motion to intervene; (2) claims an interest relating to the subject of the action; (3) is situated so its interest might be impaired or impeded by disposition of the case; and (4) is not adequately represented by existing parties. Rule 24 is "construed liberally, with all 'doubts resolved in favor of the proposed intervenor.'" *Nat'l Parks Conservation Ass'n v. U.S.*

Env't Protection Agency, 759 F.3d 969, 975 (8th Cir. 2014) (citation omitted). The BCA Intervenors satisfy all four factors to intervene as a matter of right.[3]

A. The BCA Intervenors' motion is timely.

The BCA Intervenors' motion to intervene is timely as it is filed in the earliest stages of these proceedings. A motion's timeliness is "based on all of the circumstances" of the case. *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1094 (8th Cir. 2011). Courts ordinarily consider: (1) the extent the litigation has progressed at the time the motion to intervene is filed; (2) prospective intervenor's knowledge of the litigation; (3) the reason for delay in seeking intervention; and (4) whether the delay may prejudice existing parties. *Id.* (citations omitted). Prejudice is assessed by "whether existing parties may be prejudiced by the delay in moving to intervene, not whether the intervention itself will cause the nature, duration, or disposition of the lawsuit to change." *U.S. v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995) (citing *Mille Lacs Band of Chippewa Indians v. Minn.*, 989 F.2d 994, 998-99 (8th Cir. 1993)).

The BCA Intervenors easily satisfy the timeliness standard as this matter is still in its infancy. Plaintiff States filed this suit on June 21, 2024. ECF No. 1. Federal Defendants filed their Answer on September 6, 2024, ECF No. 11, and a scheduling conference has been set for October

[3] This Court has held that a party seeking intervention pursuant to Rule 24 need not separately establish standing if the relief sought by the intervenor is not broader than the relief sought by an existing party. *West Virginia v. U.S. Env't Prot. Agency*, 2023 WL 3624685, at *2, n.2 (D.N.D. Mar. 31, 2023). This is consistent with the U.S. Supreme Court's statement of the law in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020) ("[T]he Federal Government clearly had standing to invoke the Third Circuit's appellate jurisdiction, and both the Federal Government and the [intervenor] asked the court [for the same relief]. The Third Circuit accordingly erred by inquiring into the [intervenor's] independent Article III standing.") Here, the BCA Intervenors seek the same remedy as Federal Defendants, and therefore do not need to establish standing to intervene as defendants. If this Court determines otherwise, the BCA Intervenors satisfy the requirements for standing as their interests will be harmed by the remedy Plaintiff States seek here. *Nat'l Parks Conservation Ass'n v. U.S. Env't Prot. Agency*, 759 F.3d at 974. *See infra,* Section I.C.

3, 2024. ECF No. 12. Other than briefing on Federal Defendants' venue transfer motion, ECF No. 5, and this Court's Order Denying Motion to Change Venue on September 12, 2024, ECF No. 19, the case has not substantively progressed. There is no briefing schedule currently in place, nor has the administrative record been lodged. The existing parties will not be prejudiced considering this matter is still in its earliest stages. *Mille Lacs Band*, 989 F.2d at 999 (granting motion to intervene filed 18 months after case initiated because case had not "progressed significantly"); *see also State of Iowa v. Council on Env't Quality*, No. 1:24-cv-089, 2024 WL 3595252 at *3 (D.N.D. July 31, 2024).

B. The BCA Intervenors have a significant interest in upholding the Public Lands Rule and the Federal Defendants' authority to promulgate the Rule.

To justify intervention, an interest must be "direct, substantial, and legally protectable." *Union Elec*., 64 F.3d at 1161 (citations omitted). Courts are instructed to use the interest test as "a practical guide to disposing of lawsuits by involving as many apparently concerned parties as is compatible with efficiency and due process." *Id*. at 1162 (citation omitted). The Eighth Circuit has found that an environmental group's interest in ensuring responsible management of natural resources, including public lands, justifies intervention. *Mausolf v. Babbitt*, 85 F.3d 1295, 1302-04 (8th Cir. 1996). Specifically, "aesthetic, scientific and recreational" interests are "adequate, for intervention purposes." *Mausolf v. Babbitt*, 158 F.R.D. 143, 146 (D. Minn. 1994), *aff'd in relevant part*, 85 F.3d at 1302 (8th Cir. 1996). Prior advocacy can establish a protectable interest for purposes of intervention. *Mausolf*, 85 F.3d at 1302. Similarly, a party involved in an agency's administrative process "may properly intervene as of right in a subsequent judicial challenge to the resulting" decision. *Aventure Commc'ns Tech., L.L.C. v. Iowa Utilities Bd*., 734 F.Supp.2d 636, 650 (N.D. Iowa 2010) (citations omitted).

Here, members of the BCA Intervenors have "direct, substantial, and legally protectable" interests in the Public Lands Rule and BLM's long-standing FLPMA authority to consider conservation in its management of public lands. The BCA Intervenors include community, conservation, and Tribal organizations dedicated to protecting public lands. The BCA Intervenors and their members live, work, and recreate on public lands in North Dakota and across the western U.S. DeAngels Decl. ¶¶ 6-10; Joyce Dec. ¶¶ 6, 16-17; Krupp Dec. ¶ 13; Léger Decl. ¶ 3; McKinnon Decl. ¶ 7; Pinto Decl. ¶¶ 3, 6; Rader Decl. ¶¶ 8, 15-21; Straight Decl. ¶¶ 5, 14. They include community-based organizations founded to respond to the disproportionate impacts of public lands resource development on local residents. Léger Decl. ¶¶ 3-5, 10, 13-15; Pinto Decl. ¶¶ 3, 6, 14, 19-22; Rader Decl. ¶¶ 6-10. They work for the protection and restoration of conservation values on public lands not only for the intrinsic environmental value of intact ecosystems, but also for the public health and community benefits resilient ecosystems provide in the forms of clean air, pure water, physical exercise, and cultural resource protection. Joyce Decl. ¶¶ 5-6, 10-12; Krupp ¶¶ 3-5; Léger Decl. ¶¶ 3-5; McKinnon Decl. ¶¶ 3-5; Pinto Decl. ¶¶ 3, 6, 14, 19-22; Rader Decl. ¶¶ 6-10; Straight Decl. ¶ 5. The BCA Intervenors and their members will benefit from the Public Lands Rule's requirement that Indigenous Knowledge be considered in decisions affecting public lands. Pinto Decl. ¶ 16; Rader Decl. ¶¶ 14, 17. They derive inspiration from intact public lands for their livelihoods and economic pursuits and will benefit from BLM's implementation of the Rule's tools to protect and restore intact landscapes. *See, e.g.*, DeAngelis Decl. ¶¶ 2, 5, 14 ("I rely on wild public lands for inspiration and as the subject of my photography and art. The rule will therefore benefit my livelihood in the coming years.")

Conservation is core to the BCA Intervenors' organizational missions, which include: "restoration and preservation" of public lands and "ensur[ing] that the public land management

agencies adhere to the laws that guide them," Straight Decl. ¶ 7; "protecting the lands, waters, and climate that species need to survive," McKinnon Decl. ¶ 4; working to ensure that the "protection of human health and the environment is the foundation of our state and federal laws." Léger Decl. ¶ 4; "advocat[ing] for development that is in harmony with the traditional Navajo philosophy of 'Hozhoji,' path to live in harmony," Pinto Decl. ¶ 6; "protect[ing] and restor[ing] the wildlife, wild places, wild rivers, and health of the American West," Krupp Decl. ¶ 3; "practice[ing] and promot[ing] the responsible use of the earth's ecosystems and resources," Joyce Decl. ¶ 5; and protecting the "water and air, public lands, rural character, and unique quality of life while embracing the diversity of our region's people, economy, and ecology," Rader Decl. ¶ 7.

The BCA Intervenors have advanced these missions through decades of tireless advocacy for public lands conservation and restoration – especially to remedy the historical management imbalance that has resulted in the landscape-scale degradation the Public Lands Rule seeks to address. Joyce Decl. ¶¶ 9, 12, 14; McKinnon Decl. ¶¶ 7-13; Krupp Decl. ¶¶ 7-11; Rader Decl. ¶¶ 8, 13; Pinto Decl. ¶¶ 13-15; Straight Decl. ¶¶ 11-13, 15; Léger Decl. ¶ 5. These groups formed to protect their community's food, air, watershed, cultural resources, and members' health from the downstream impacts of development on neighboring BLM-managed public lands, and continue to organize against these direct threats as well as their legacy of degraded lands that continues to impact their communities. Léger Decl. ¶ 5; Pinto Decl. ¶ 6; Rader Decl. ¶ 7, 9-10. Many of the BCA Intervenors and their members, especially those living adjacent to public lands used for extractive and consumptive purposes, have been impacted by the imbalance in public lands management and will benefit from BLM's implementation of the Public Lands Rule's tools, including the restoration and mitigation leasing program. Léger Decl. ¶ 14; Joyce Decl. ¶ 9; Rader ¶¶ 12, 19; Pinto Decl. ¶¶ 3, 6, 11, 14, 19, 21 ("The Public Lands Rule is also necessary to address

the impacts of oil and gas development on local ecosystems. Implementation of the Rule will benefit local natives, including myself, who forage for wild plants and garden, as well as local ecosystems that I and others in my community enjoy for hiking, camping, cultural use, and recreation.")

The BCA Intervenors and their members routinely advocate for BLM to consider their interests in specific policy, planning, and project decisions, and many have engaged in litigation against the agency to defend those interests. Joyce Decl. ¶¶ 9, 12, 14; McKinnon Decl. ¶¶ 7-12; Krupp Decl. ¶¶ 7-11; Rader Decl. ¶¶ 13-14; Pinto Decl. ¶¶ 8-9; Straight Decl. ¶¶ 12, 13, 15; Léger Decl. ¶¶ 5 ("Citizens for a Healthy Community has actively engaged with the BLM over the course of a decade to encourage it to comply with environmental laws, including the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), and Mineral Leasing Act."), 6-8. In 2022, several of the BCA Intervenors petitioned Interior and BLM to initiate rulemaking to infuse FLMPA's protective mandates into landscape scale planning and explicitly require conservation be considered in the oil and gas leasing program. Joyce Decl. ¶ 8; McKinnon Decl. ¶ 9; Krupp Decl. ¶ 8; Rader Decl. ¶ 11; Léger Decl. ¶ 9. While BLM did not act on the petition, many of its core concepts – such as use of the mitigation hierarchy to avoid, minimize, and compensate for damage to public lands; defining "unnecessary degradation" and "undue degradation"; and viewing public land management through a landscape-scale approach – appear in some form in the Public Lands Rule. Joyce Decl. ¶ 8; McKinnon Decl. ¶ 9; Krupp Decl. ¶ 8; Rader Decl. ¶ 11; Léger Decl. ¶ 9.

The Public Lands Rule's recognition of BLM's authority and responsibility to manage public lands for conservation holds great promise for the BCA Intervenors to advance their respective missions. Pinto Decl. ¶¶ 12, 14; Straight Decl. ¶¶ 10-11; Rader Decl. ¶¶ 13-14, 22; Joyce

Decl. ¶¶ 15, 18. For example, several of the BCA Intervenors advocate for increased protection of conservation values through the designation of ACECs and will benefit from the Public Lands Rule's guidelines for the consideration, designation, and management of ACECs. Rader Decl. ¶ 26; Joyce Decl. ¶¶ 12-13; McKinnon Decl. ¶ 19; Krupp Decl. ¶ 16. Through its engagement with BLM's Tres Rios Field Office's 2020 Resource Management Plan Amendment process, San Juan Citizens Alliance advocated for the designation of nineteen ACECs to protect critical wildlife habitat and cultural resources. Rader Decl. ¶ 13. BLM designated just three ACECs in that process, dismissing San Juan Citizens Alliance's concerns about prioritizing mineral development over ecosystem health. *Id*. The Public Lands Rule's clarification of the ACEC designation process to protect environmental and cultural resources is consistent with the BCA Intervenors' interests and long-term advocacy. *Id*. ("The Public Lands Rule emphasizes the values of ecosystem health and resilience, and considers intact landscapes and habitat connectivity in determining the 'importance' criterion for ACECs. Many of the potential ACECs considered in the Tres Rios Field Office's review may have benefited from the enhanced importance characteristics when analyzed under the new Public Lands Rule.")

For all of these reasons, many of the BCA Intervenors and their members submitted extensive comments on the proposed Public Lands Rule. These comments urged BLM to strengthen the Rule to better implement the Rule's focus on ecosystem resilience and conservation of intact landscapes, and stressing BLM's duty to prevent permanent impairment and unnecessary or undue degradation. Joyce Decl. ¶ 15; Krupp Decl. ¶ 12; Léger Decl. ¶ 12; McKinnon Decl. ¶ 14; Rader Decl. ¶ 25. In fact, the Sierra Club was deeply engaged in educating the public about the Public Lands Rule, and nearly ten percent of the more than 215,000 comments BLM received during the rulemaking process were from Sierra Club members and supporters. Joyce Decl. ¶ 15.

While BLM did not adopt all the BCA Intervenors' suggestions, the final Public Lands Rule – and especially BLM emphasizing its responsibility under FLPMA to treat conservation as a use within the multiple use framework – is a significant step toward BLM advancing the BCA's interests in public lands conservation.

The BCA Intervenors' specific interests and uses of public lands illustrate the diversity of uses that FLPMA requires BLM-managed public lands to support. Public lands are valued for far more than extractive development. If the Plaintiff States' litigation challenging the Public Lands Rule and BLM's long-standing authority to manage public lands for conservation is successful, the interests of the BCA Intervenors and their members in public lands management will be harmed. As in *Mausolf*, these interests support intervention. 85 F.3d at 1302-03.

C. An adverse ruling will impair the BCA Intervenors' ability to protect their interests.

Rule 24(a)(2) only requires an adverse ruling "may as a practical matter impair or impede the applicant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2); *see Kan. Pub. Emps. Ret. Sys. v. Reimer & Kroger Assocs., Inc.* 60 F.3d 1304, 1307 (8th Cir. 1995). Certainty is not required, nor is the standard that an adverse ruling "would" or "will" impair movant's ability to protect its interests. *Kan. Pub. Emps. Ret. Sys.*, 60 F.3d. at 1308; *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 738 F.2d 82, 84 (8th Cir. 1984); *S. Dakota v. Ubbelohde*, 330 F.3d 1014, 1024 (8th Cir. 2003) (finding the potential reduction to downstream river flows if plaintiff prevailed sufficient for intervention by entities concerned with river operation). All that is required is the intervenor's interest "'may be' so impaired." *Kan. Pub. Emps. Ret. Sys.*, 60 F.3d. at 1308; *see also Union Elec.*, 64 F.3d at 1167.

This factor is easily satisfied here. The BCA Intervenors' and their members' interests are so intertwined with conserving public lands that an adverse ruling in this case may compromise

their very ability to advance their respective missions with respect to BLM-administered public lands. The relief sought by the Plaintiff States in this case could nullify, or at the very least significantly hinder, Federal Defendants' ability to conserve public lands for present and future generations. This result would strike at the BCA Intervenors' core values and cause significant harm to the organizations and their members. Krupp Decl. ¶ 17; Léger Decl. ¶ 17; McKinnon Decl. ¶¶ 20-21; Pinto Decl. ¶ 24.

Vacating the Public Lands Rule would eliminate a suite of conservation tools the BCA Intervenors intend to use to push for overdue public lands protections. Krupp Decl. ¶ 16; McKinnon Decl. ¶ 19; Rader Decl. ¶ 13. The Public Lands Rule, for example, requires BLM to develop national land health standards towards achieving functioning watersheds, ecological processes, and improved water quality and habitat conditions. 43 C.F.R. § 6103.1. The BCA Intervenors have a long history of advocating for the very improved conditions these land health standards are designed to achieve, and absent the Public Lands Rule, they would not be able to use these benchmarks to press BLM to restore and manage public lands to meet these standards. 43 C.F.R. § 6103.1.1 (requiring BLM to manage public lands toward achieving land health standards); Joyce Decl. ¶ 7; Kruupp Decl. ¶ 5; Léger Decl. ¶ 5; McKinnon Decl. ¶ 5; Pinto Decl. ¶ 6; Rader Decl. ¶ 8; Straight Decl. ¶ 5. The BCA Intervenors would also not be able to use to Public Lands Rule to push for BLM to protect intact landscapes, 43 C.F.R. § 6102.1, incorporate indigenous knowledge in management decisions, 43 C.F.R. §§ 6101.2(i), 6102.5(b)(6), and prioritize designation of ACECs, 43 C.F.R. § 1610.7-2, aims the BCA Intervenors have long tried to advance. Joyce Decl. ¶ 10; Pinto Decl. ¶¶ 6, 16; Rader Decl. ¶ 13.

The BCA Intervenors have spent decades advocating for BLM to manage public lands in ways that promote their interests in safeguarding communities, fish and wildlife, and healthy

ecosystems, values core to the BCA Intervenors' missions and their members' interests. Joyce Decl. ¶¶ 9, 12, 14; McKinnon Decl. ¶¶ 7-13; Krupp Decl. ¶¶ 7-11; Rader Decl. ¶¶ 8, 13; Pinto Decl. ¶¶ 13-15; Straight Decl. ¶¶ 11-13, 15; Léger Decl. ¶ 5. The Public Lands Rule, once implemented, provides important tools to advance these goals. A decision by this Court to vacate, enjoin, set aside, or modify the Public Lands rule would remove or modify these tools and impair the BCA Intervenors' ability to press for conservation and restoration and public lands. Krupp Decl. ¶ 17; Léger Decl. ¶ 17; McKinnon Decl. ¶¶ 20-21; Pinto Decl. ¶ 24. In *Ubbelohde,* proposed intervenors sufficiently demonstrated that, if the court's ruling resulted in a reduction of Missouri River flow, their interests in navigation, agriculture, water treatment, water quality, and wildlife protection might be impaired. 330 F.3d at 1024. So too here. The BCA Intervenors have sufficiently demonstrated that their interests may be impaired because an invalidation of the Public Lands Rule may lead to a reduction in conservation and the protection of conservation values on public lands. The third intervention factor is satisfied here.

D. The BCA Intervenors' interests are not adequately represented by the existing parties.

Finally, no other party adequately represents the BCA Intervenors' interests in this litigation. *See* Fed. R. Civ. P. 24(a)(2). The burden of demonstrating inadequate representation is typically "minimal." *Mille Lacs Band*, 989 F.2d at 999. Whether representation is adequate is determined by "comparing the interests of the proposed intervenor with the interests of the current parties," and a simple similarity or overlap of "legal contentions" or "legal goal[s]" does not indicate adequate representation. *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992).

Indeed, this Circuit has regularly found governmental entities do not adequately represent the interests of aspiring intervenors because "the government must represent the interest of all of its citizens, which often requires the government to weigh competing interests and favor one

interest over another." *Ubbelohde*, 330 F.3d at 1025. This extends to environmental and public health groups intervening to defend their organizational and members' interests. *Mausolf*, 85 F.3d at 1303-04; *see also State of Iowa v. Council on Env't Quality*, No. 1:24-cv-089, 2024 WL 3595252 at *4 (D.N.D. July 31, 2024).

The BCA Intervenors here readily satisfy this standard. First, their interests are distinct from the Federal Defendants' in this litigation. The BCA Intervenors are a coalition of community, environmental, and public health organizations dedicated to conserving public lands for their irreplaceable cultural resources, wildlife habitat, recreational opportunities, clean air and water, and role in combating climate change. Conserving public lands is the BCA Intervenors' sole interest here, and they have a long history of advocating to advance this goal. Straight Decl. ¶¶ 5, 12-13, 15; McKinnon Decl. ¶¶ 7-12; Leger Decl. ¶¶ 7-11; Pinto Decl. ¶¶ 6, 9-10; Krupp Decl. ¶¶ 7-11; Joyce Decl. ¶¶ 7-9; Rader Decl. ¶¶ 7-10. This particularized mission is distinct from, and often in tension with, BLM's broad mandate to represent and balance the competing interests of the public at large. Krupp Decl. ¶ 19; Pinto Decl. ¶ 25; Rader Decl. ¶ 27. Federal Defendants cannot adequately represent the BCA Intervenors' interests, as advancing their unique interests would "shirk [the government's] duty" to represent the public broadly. *Nat'l Parks Conservation Ass'n*, 759 F.3d at 977 (citation omitted); *see also Mausolf*, 85 F.3d at 1303 ("When managing and regulating public lands . . . the Government must inevitably favor certain uses over others" and "cannot always adequately represent conflicting interests at the same time.").

This distinction is highlighted here. This litigation centers, in large part, on BLM's multiple use mandate under FLPMA. FLPMA requires BLM to consider and balance competing uses of public lands, including inconsistent uses such as conservation, grazing, and energy development. *See* 43 U.S.C. § 1702(c).

The BCA Intervenors often disagree with BLM over its interpretation and implementation of FLPMA's multiple-use mandate, particularly the appropriate balance among competing uses of public lands. They have a history of contesting BLM management decisions authorizing resource extraction and other activities that degrade public lands, and advocating for a comprehensive framework for integrating conservation and climate considerations in BLM's land use planning process. Joyce Decl. ¶¶ 9, 12, 14; McKinnon Decl. ¶¶ 7-12; Krupp Decl. ¶¶ 7-11; Rader Decl. ¶ 13; Straight Decl. ¶¶ 12-13, 15; Léger Decl. ¶ 5. This decades-long history is punctuated by litigation challenging BLM land use planning and permitting decisions. *See, e.g., Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988) (road improvements); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F.Supp.2d 1115, 1167-68 (N.D. Cal. 2006) (off-highway vehicle use); *Ctr. for Biological Diversity v. U.S. Dept. of Interior*, 623 F.3d 633 (9th Cir. 2010) (land exchange with mining company); *WildEarth Guardians v. Bernhardt*, 501 F.Supp.3d 1192 (D.N.M. 2020) (oil and gas leasing instruction memorandum). In comments on the Public Lands Rule, the BCA Intervenors pressed BLM to go further than it ultimately did to advance ecosystem resilience and conserve intact landscapes. Joyce Decl. ¶ 15; Krupp Decl. ¶ 12; Léger Decl. ¶ 12; McKinnon Decl. ¶ 14; Rader Decl. ¶ 25.

This past and present adversarial relationship highlights Federal Defendants' and the BCA Intervenors' divergent interests in the Public Lands Rule at issue here. While Federal Defendants and the BCA Intervenors may presently have a shared goal of upholding the Rule, they come at this goal from unique standpoints. Federal Defendants' is fulfilling its multiple-use mandate, creating a suite of tools to manage public lands for conservation as one use among many. The BCA Intervenors' sole interest is conserving these lands. Based on the BCA Intervenors' past and present differences with BLM over its public lands management, and distinct interests in upholding

the Public Lands Rule, the BCA Intervenors have sufficiently distinct interests to support intervention. *Mausolf*, 85 F.3d at 1303; *see also Ubbelohde*, 330 F.3d at 1025 (finding agency's obligation to balance multiple interests prevents it from adequately representing a subset of those interests).

Finally, Federal Defendants' broad mandate may cause them to change their position or make concessions in this litigation with which the BCA Intervenors disagree. The risk of the government changing position is acute during an election year. *See, e.g., Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1107 (9th Cir. 2002) (noting new administration stopped defending challenges to Forest Service rule). The BCA Intervenors "cannot be assured that the [agency's] current position 'will remain static or unaffected by unanticipated policy shifts.'" *Nat'l Parks Conservation Ass'n*, 759 F.3d at 977 (quoting *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998)); *see also Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001) (granting intervention and noting "'it is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts'" (quoting *Kleissler*, 157 F.3d at 974)).

While, in this Circuit, "the burden is greater if the named party is a government entity that represents interests common to the public," the presumption does not apply if intervenors seek to protect narrower interest "not shared by the general citizenry." *Aventure Commc'ns Tech.*, 734 F.Supp.2d at 651 (citations omitted); *Mille Lacs*, 989 F.2d at 1001; *see also Nat'l Parks Conservation Ass'n*, 759 F.3d at 977 (presumption applies "only to the extent the proposed intervenor's interests coincide with the public interest") (internal quotation marks and alteration omitted). That is the case here, as BCA Intervenors' interests include advancing the organizations and their members' unique health, cultural, economic, and ecological interests, including remedying the disproportionate impacts extractive development has had on the

communities BCA Intervenors represent. DeAngelis Decl. ¶ 6, 15 (noting reliance on BLM lands for economic opportunity); Joyce Decl. ¶¶ 5-6, 10-12; Krupp ¶¶ 3-5; Léger Decl. ¶¶ 3-5 14-15 (describing heightened impacts on community); McKinnon Decl. ¶¶ 3-5; Pinto Decl. ¶¶ 3, 6, 14, 19-22 (describing disproportionate impact of extractive development on Navajos); Rader Decl. ¶¶ 6-10; Straight Decl. ¶ 5. Even if the presumption does apply, the BCA Intervenors have made the required "strong showing of inadequate representation" by showing that their "interests are distinct and cannot be subsumed within the public interest represented by the government entity." *Aventure Commc'ns Tech.*, 734 F.Supp.2d at 651 (citations omitted).

II. This Court should alternatively grant the BCA Intervenors permissive intervention.

If this Court determines the BCA Intervenors do not satisfy the test for intervention as of right, this Court should grant them permissive intervention. Federal Rule of Civil Procedure 24(b) permits intervention where a motion is timely, the applicant has a claim or defense that shares a common question of law or fact with the underlying litigation, and intervention would not unduly delay or prejudice adjudication of the original parties' rights. The "principal consideration" is undue delay or prejudice. *S. Dakota ex rel Barnett v. U.S. Dept. of Interior*, 317 F.3d 783, 787 (8th Cir. 2003).

The BCA Intervenors readily meet this standard. Granting them intervention would neither unduly delay nor prejudice Plaintiff States' or Federal Defendants' rights here. As discussed in Section I.A. above, this case is in its infancy. It has not entered substantive proceedings. *See Kinetic Leasing, Inc. v. Nelson*, No. 3:16-3cv-99, 2016 WL 8737876, at *4 (D.N.D. Sept. 22, 2016) (finding intervention would not unduly delay or prejudice "[g]iven the early stage of this litigation"). Furthermore, the BCA Intervenors raise a common issue as they seek to uphold the very rule Plaintiff States are trying to vacate. *See Franconia Minerals (US)*

LLC v. United States, 319 F.R.D. 261, 268 (D. Minn. 2017). Indeed, they intend to respond directly to the Plaintiff States' challenges to the lawfulness of Federal Defendants' actions, and thus, they intend to assert common defenses of law and fact with the main action. Accordingly, if the Court finds that the BCA Intervenors do not satisfy the test for intervention as of right, permissive intervention is warranted.

CONCLUSION

For the reasons set forth above, this Court should grant the BCA Intervenors' motion to intervene as defendants in this litigation as a matter of right or, in the alternative, to intervene permissively.

Respectfully submitted this 19th day of September, 2024.

/s/ Barbara Chillcott
Barbara Chillcott (*pro hac vice* pending)
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WESTERN ENVIRONMENTAL LAW CENTER

Attorneys for Badlands Conservation Alliance, Center for Biological Diversity, Citizens for a Healthy Community, Diné Citizens Against Ruining Our Environment, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians

CERTIFICATE OF SERVICE

I certify that on this 19th day of September, 2024, I electronically filed the foregoing MEMORANDUM IN SUPPORT OF THE BCA INTERVENORS' MOTION TO INTERVENE with the Clerk of the U.S. District Court for the District of North Dakota and served all parties using the CM/ECF system.

/s/ Barbara Chillcott