TODD KIM
Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
MICHAEL S. SAWYER
Senior Attorney, Natural Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 514-5273
Email: michael.sawyer@usdoj.gov

Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

GARFIELD COUNTY, UTAH, a Utah political subdivision; KANE COUNTY, UTAH, a Utah political subdivision; and THE STATE OF UTAH, by and through its Governor, SPENCER J. COX, and its Attorney General, SEAN D. REYES;

Plaintiffs,

ZEBEDIAH GEORGE DALTON; BLUERIBBON COALITION; KYLE KIMMERLE; and SUZETTE RANEA MORRIS;

Consolidated Plas,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, et al.,

Defendants,

HOPI TRIBE, NAVAJO NATION, PUEBLO OF ZUNI, and UTE MOUNTAIN UTE TRIBE;

Intervenor-Dfts.

CONSOLIDATED RESPONSE IN PARTIAL OPPOSITION TO INTERVENTION MOTIONS

Case No. 4:22-cv-00059-DN-PK (lead case)
Case No. 4:22-cv-00060-DN-PK

District Judge David Nuffer
Magistrate Judge Paul Kohler

Defendants respectfully submit this consolidated response in partial opposition to eight intervention motions[1] filed by twenty-four putative intervenors[2] represented by twenty-six counsel. Defendants do not oppose those motions insofar as the movants seek permissive intervention under Federal Rule of Civil Procedure 24(b), provided the Court imposes appropriate limitations.[3] But Defendants oppose intervention as of right under Rule 24(a) because the twenty-four movants have failed to carry their burden to establish inadequate representation.

The adequate representation requirement of Rule 24(a) "serves to prevent 'a cluttering of lawsuits with multitudinous useless intervenors.'"[4] For that requirement to fulfill its purpose, latter movants for intervention must establish that earlier intervenors do not adequately represent the latter movants' interest.[5] And movants for intervention should not be allowed to circumvent

---

[1] Docket no. 27, filed November 22, 2022; docket no. 31, filed November 23, 2022; docket no. 33, filed November 23, 2022; docket no. 34, filed November 23, 2022; docket no. 40, filed November 30, 2022; docket no. 42, filed November 30, 2022; docket no. 43, filed November 30, 2022; docket no. 44, filed November 30, 2022.

[2] The twenty-two distinct groups seeking leave to intervene are Center for Biological Diversity, Grand Canyon Trust, Great Old Broads for Wilderness, National Parks Conservation Association, National Resources Defense Council, Sierra Club, Southern Utah Wilderness Alliance, Western Watersheds Project, WildEarth Guardians, Wilderness Society, Grand Staircase Escalante Partners, Society of Vertebrate Paleontology, Conservation Lands Foundation, Access Fund, Archaeology Southwest, Friends of Cedar Mesa, National Trust for Historic Preservation in the United States, Patagonia Works, Utah Diné Bikéyah, American Anthropological Association, Archaeological Institute of America, and Society for American Archaeology. Two of these groups—Society of Vertebrate Paleontology and Conservation Lands Foundation—have moved to intervene twice to represent distinct interests, without providing any precedent that allows parties to intervene twice in the same litigation.

[3] For example, permissive intervenors should file coordinated, non-duplicative briefs.

[4] *Morgan v. McDonough*, 726 F.2d 11, 13–14 (1st Cir. 1984) (quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure,* 81 Harv. L. Rev. 356, 403 (1967)).

[5] *Coal. to Defend Affirmative Action, Integration & Immigr. Rts. & Fight for Equal. by any Means Necessary v. Granholm*, 240 F.R.D. 368, 376 (E.D. Mich. 2006) (judging adequacy of representation against not only the original parties to a lawsuit but also against earlier

this requirement through coordinating timing so that numerous intervention motions are evaluated simultaneously.

Before the twenty-four movants sought leave to intervene, four Tribes—the Navajo Nation, Hopi Tribe, Ute Mountain Ute Tribe, and the Pueblo of Zuni (collectively, "Tribes")—moved to intervene without opposition.[6] The Court granted the Tribes' motion.[7] The day the Tribes moved to intervene, twenty-four additional groups announced their intention to intervene in coordinated correspondence.[8] Over the ensuing week, these twenty-four groups moved to intervene as defendants, claiming that the federal government failed to adequately represent their interests.[9] Yet none of these twenty-four groups have offered any argument why the Tribes would not adequately represent their interests in the litigation. Nor have any of these groups offered any argument why any of the other groups who previously moved to intervene would not adequately represent their interests in the litigation.

For example, Utah Diné Bikéyah (UDB) moved to intervene to protect its alleged interests as "a nonprofit organization headquartered in Utah," that "preserves Native American traditions, with a focus on preserving the Bears Ears region for its cultural, ancestral, and paleontological resources" and "focuses on preventing mining in the region."[10] But UDB offers no argument why

---

intervenors), *aff'd sub nom. Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775 (6th Cir. 2007); *see also Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 913 (D.C. Cir. 1977) (judging adequacy of representation against other intervenors).

[6] Docket no. 26, filed November 18, 2022; docket no. 47, Case No. 4:22-cv-00060, filed November 18, 2022.

[7] Docket no. 52, filed December 8, 2022.

[8] Exhibit A, Email from Steve Bloch to M. Sawyer et al.

[9] Docket no. 27, at 9–10, filed November 22, 2022; docket no. 31, at 9–10, filed November 23, 2022; docket no. 33, at 10–11, filed November 23, 2022; docket no. 34, at 9–11, filed November 23, 2022.

[10] Docket no. 33, at 4, filed November 23, 2022.

the first-moving Tribes would fail to adequately represent those interests. Nor has UDB offered any argument why the second-moving conservation groups, such as the Southern Utah Wilderness Alliance (SUWA), would fail to adequately represent its interests. That omission is particularly telling as SUWA seeks intervention to represent largely identical interests, *viz.* "the preservation and protection of cultural, archaeological and paleontological resources" and preventing "development activity such as hard rock mining and oil, gas, and coal leasing."[11] Given such overlapping interests, allowing all twenty-four groups to intervene risks cluttering this litigation "with multitudinous useless intervenors."[12]

In such circumstances, latter movants for intervention must show that their interests in the litigation are not adequately represented by both the original parties to the litigation and any earlier movants for intervention. Eschewing this course—and evaluating adequacy of representation solely against the original parties to the litigation—would allow coordinated movants to vitiate the purpose of Rule 24(a)'s adequate representation requirement. Because none of the twenty-four later movants have met their burden of establishing inadequate representation by the Tribes or other earlier movants, their motions to intervene as of right should be denied.[13]

[11] Docket no. 27-2 ¶¶ 6, 21, filed November 22, 2022.

[12] Kaplan, *Continuing Work of the Civil Committee*, *supra* n.4, at 403.

[13] *Sierra Club v. Froehlke*, 359 F. Supp. 1289, 1337 (S.D. Tex. 1973) (denying intervention to later-moving groups because it "appears that their interests are adequately represented by one or more of the existing parties, cumulatively considered"), *rev'd on other grounds Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974).

Dated: December 27, 2022

Respectfully submitted,

TODD KIM
Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

/s/ Michael S. Sawyer
MICHAEL S. SAWYER
Senior Attorney, Natural Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 514-5273
Fax: (202) 305-0506
Email: michael.sawyer@usdoj.gov

Counsel for Defendants