

SUMMARY OPINION AND ORDER; NOT INTENDED FOR PUBLICATION IN THE OFFICIAL REPORTERS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE, and THE CENTER FOR BIOLOGICAL DIVERSITY Plaintiffs, v. SALLY JEWELL, Secretary, U.S. Department of the Interior, and DANIEL ASHE Director, U.S. Fish and Wildlife Service Defendants. Civil Action No.: 13-0919 (RC) Re Document Nos.: 7, 9

MEMORANDUM OPINION AND ORDER

GRANTING COMPTROLLER COMBS’S AND AMERICAN PETROLEUM INSTITUTE, ET AL.’S MOTIONS TO INTERVENE

I. INTRODUCTION

The dunes sagebrush lizard is a small brown lizard that is found in southeastern New Mexico and west Texas. Compl. ¶ 2, ECF No. 1. On June 19, 2012, pursuant to Section 4 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533, the United States Fish and Wildlife Service (“FWS”), decided to withdraw a proposed rule to list the lizard as an endangered species. See Withdrawal of the Proposed Rule to List Dunes Sagebrush Lizard, 77 Fed. Reg. 36,872 (June 19, 2012). The plaintiffs in this action challenge that decision as contrary to the ESA, as well as not reflective of the best available science as mandated by the ESA. Compl. ¶ 70. The plaintiffs also challenge the agency action as arbitrary and capricious in violation of the Administrative Procedure Act (“APA”). Compl. ¶¶ 70, 75.

There are two pending motions to intervene in this case. The first was brought by the Comptroller of Public Accounts of the State of Texas, Susan Combs. The second motion was brought collectively by the American Petroleum Institute, the Independent Petroleum Association of America, the New Mexico Oil and Gas Association, the Permian Basin Petroleum Association, and the Texas Oil & Gas Association (“Petroleum-Intervenors”). The applicants have moved to intervene in this matter as of right, or alternatively, for permissive intervention. Their motions have not been opposed. For the reasons that follow, the Court will grant both applicants’ motions to intervene.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 24(a),

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

FED. R. CIV. P. 24(a)(2).

The D.C. Circuit has read this language to establish four distinct factors: “(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant’s interests.” *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008). In addition, the D.C. Circuit has held that “a party seeking to intervene must demonstrate that it has standing under Article III of the Constitution.” *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003).¹

¹ This court has repeatedly found that “the standing inquiry is repetitive in the case of intervention as of right because an intervenor who satisfies Rule 24(a) will also have Article III standing.” *Akiachak Native Comm. v. U.S. Dep’t of Interior*, 584 F. Supp. 2d 1, 7 (D.D.C.

III. ANALYSIS

With respect to the timeliness inquiry, “courts should take into account (a) the time elapsed since the inception of the action, (b) the probability of prejudice to those already party to the proceedings, (c) the purpose for which intervention is sought, and (d) the need for intervention as a means for preserving the putative intervenor’s rights.” *WildEarth Guardian v. Salazar*, 272 F.R.D. 4, 12 (D.D.C. 2010). In this case, both the intervenors’ motions were timely because they were filed within a few months of the Complaint being filed. In addition, because dispositive motions have not yet been filed by the parties in this case, the applicants’ intervention will not prejudice any of the parties involved. *See id.* at 14. *See also Karsner*, 532 F.3d at 886. Additionally, as explained below, the applicants have demonstrated their need for intervention as a means of preserving their rights. Thus, the applicants satisfy the first factor.

With respect to the second factor, this Circuit has explained that the “putative intervenor must have a ‘legally protected’ interest in the action... .” *Karsner*, 532 F.3d at 885. “The test operates in large part as a practical guide, with the aim of disposing of disputes with as many concerned parties as may be compatible with efficiency and due process.” *WildEarth*, 272 F.R.D. at 12-13. Here, Comptroller Combs has an interest as the chief financial officer of the state of Texas in “regulating environmental quality and also protecting its financial and socioeconomic stake in oil, gas, and agricultural production in the Permian Basin,” home of the dunes sagebrush lizard in Texas. *See Combs’s Mem. of Law in Supp. Mot. to Intervene* 10, 24, ECF No. 7-1 (“Combs’s Mot.”). *See also WildEarth*, 272 F.R.D. at 18 (finding that the state of Wyoming had a legally protected interest in “preserving its role in regulating environmental

2008); *see also WildEarth Guardian v. Salazar*, 272 F.R.D. 4, 13 n.5 (D.D.C. 2010) (“In most instances, the standing inquiry will fold into the underlying inquiry under Rule 24(a): generally speaking, when a putative intervenor has a ‘legally protected’ interest under Rule 24(a), it will also meet constitutional standing requirements, and vice versa.”).

quality within its borders, and ensuring that the development of coal mining operations within its territory continues in a safe and environmentally responsible manner,” and “in protecting its financial and socioeconomic stake in the development of coal mining operations in Wyoming.”).

In addition, the FWS approved the Texas Conservation Plan (“TCP”), a plan negotiated and overseen by Comptroller Combs in consultation with various local, state, and federal stakeholders. *See* Combs’s Mot. at 4-7. The parties in this case dispute whether the TCP adequately protects the lizard, as well as the propriety of the FWS’s reliance on the TCP in reaching its determination. *See* Compl. ¶¶ 5-11. As a signatory to the TCP, Comptroller Combs thus has a legally protected interest in seeking to ensure the continued success and viability of the TCP in Texas. *See WildEarth*, 272 F.R.D. at 18 (explaining that a state government has a legally protected interest where it seeks to defend an Environmental Impact Statement it helped a federal agency prepare with respect to the use of its lands).

The Petroleum-Intervenors also have a legally protected interest in this action. “An intervenor’s interest is obvious when he asserts a claim to property that is the subject matter of the suit.” *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981). The Petroleum-Intervenors “own, lease, or otherwise operate land” in and around the Permian Basin. *See* Petroleum-Intervenors’ Mem. of Law in Supp. Mot. Intervene 2 (“Petroleum-Intervenors’ Mot.”), ECF No. 9. The Petroleum-Intervenors thus have a property interest in the regulation of the lizard on their land.²

As to the third factor, the action must threaten to impair the putative intervenor’s proffered interest in the action. *Karsner*, 532 F.3d at 885. Here, Comptroller Combs has met that

² As explained above, because the Court finds that both applicants have a legally protected interest in the action, the Court need not undertake a separate, redundant, standing analysis. The Court therefore concludes that because the parties have legally protected interests in the action under Fed. R. Civ. P. 24(a), they also have standing for purposes of Article III.

standard. The plaintiffs seek to have the FWS's determination set aside, and to have the FWS ordered to reconsider the listing of the lizard and issue a new Final Rule within six months. *See* Compl. at 17. A reversal of the FWS's decision could impact the viability of the TCP in Texas and could also lead to increased federal regulation of the State-owned and privately-owned land in the Permian Basin.

The Petroleum-Intervenors have also demonstrated that this action would impair their interests because the FWS changing its course could "constrain access to important lease sites, lead to increased permitting requirements and delays, and significantly increase the cost of operating in the Permian Basin." Petroleum-Intervenors' Mot., Milito Decl. ¶13, ECF No. 9-3. As this court has stated, the movant can show that its interest will be impaired where the government's "decision below was favorable to [the proposed intervenor], and the present action is a direct attack on that action." *WildEarth*, 272 F.R.D. at 14. *See also* *Cnty. of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 44 (D.D.C. 2007) (explaining that because "the intervenor-applicants benefit from the FWS's current 'not warranted' determination because their land use is unfettered by regulations designed to protect the habitat of the Gunnison sage-grouse," any reversal of that determination would impair their interest in the action).

Finally, as to the last factor, the applicants have shown that the existing parties do not adequately represent their interests. The applicant's burden here is *de minimis*, and extends only to showing that there is a possibility that its interests may not be adequately represented absent intervention. *See Fund for Animals*, 322 F.3d at 735. This Circuit has found that "[federal] governmental entities do not adequately represent the interests of aspiring intervenors" because the government's obligation "is to represent the interests of the American people," whereas private parties generally are concerned with their own organization's interests. *Id.* at 735-36.

Moreover, this Circuit has frequently found the “inadequacy of governmental representation when the government has no financial stake in the outcome of the suit.” *Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009). Because the federal government represents the American public and has no financial interest at stake, its interests are inadequate to represent the interests of the Petroleum-Intervenors and the Texas Comptroller. As such, the applicants satisfy the fourth factor.

Because the applicants satisfy the requirements of Federal Rule of Civil Procedure 24(a), the Court must permit them to intervene. Their motions are therefore granted.

IV. CONCLUSION

For the foregoing reasons, the applicants’ motions to intervene are hereby GRANTED.

SO ORDERED.

Dated: October 24, 2013

RUDOLPH CONTRERAS
United States District Judge