IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE **1130 17th Street, NW** **Washington, DC 20036** **CENTER FOR BIOLOGICAL DIVERSITY** **P.O. Box 710** **Tucson, AZ 85702-0710** ***Plaintiffs*,** **v.** **SALLY JEWELL,** **Secretary, U.S. Department of the Interior** **1849 C Street NW** **Washington, DC 20240** **DANIEL M. ASHE,** **Director, U.S. Fish and Wildlife Service** **1849 C Street NW** **Washington, DC 20240** ***Defendants.***	**Case No. 1:13-cv-00919-RC**

MOTION TO INTERVENE ON BEHALF OF DEFENDANTS

For the reasons set forth in its accompanying Memorandum of Points and Authorities, Intervenor-Applicants American Petroleum Institute, Independent Petroleum Association of America, New Mexico Oil and Gas Association, Permian Basin Petroleum Association, and Texas Oil & Gas Association (collectively, “Intervenor-Applicants”) respectfully submit this Motion to Intervene as of Right, in or, in the alternative, for Permissive Intervention in support

of Defendants Sally Jewell and Daniel M. Ashe ("Federal Defendants") in the above-captioned action pursuant to Fed. R. Civ. P. 24(a)(2) & (b)(1)(B). This motion is supported by the accompanying Memorandum of Points and Authorities and Declarations.

Pursuant to Local Rule 7(m), counsel for Intervenor-Applicants have conferred with counsel for Plaintiffs and Federal Defendants in this action. Federal Defendants' counsel takes no position on this Motion. Counsel for Plaintiffs indicated that Plaintiffs take no position on the Motion, but reserve the right to file a response at the appropriate time.

With the Motion to Intervene, Intervenor-Applicants are submitting a Proposed Answer.

For the foregoing reasons, Intervenor-Applicants respectfully request that the Court grant their Motion to Intervene and permit the Answer to be filed.

Dated: 9/20/2013

Respectfully submitted,

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DEFENDERS OF WILDLIFE **1130 17th Street, NW** **Washington, DC 20036** **CENTER FOR BIOLOGICAL DIVERSITY** **P.O. Box 710** **Tucson, AZ 85702-0710** ***Plaintiffs*,** **v.** **SALLY JEWELL,** **Secretary, U.S. Department of the Interior** **1849 C Street NW** **Washington, DC 20240** **DANIEL M. ASHE,** **Director, U.S. Fish and Wildlife Service** **1849 C Street NW** **Washington, DC 20240** ***Defendants*.**	))	**Case No. 1:13-cv-00919-RC**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE FILED BY AMERICAN PETROLEUM INSTITUTE, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, NEW MEXICO OIL AND GAS ASSOCIATION, PERMIAN BASIN PETROLEUM ASSOCIATION, AND TEXAS OIL & GAS ASSOCIATION

INTRODUCTION

The American Petroleum Institute ("API"), the Independent Petroleum Association of America ("IPAA"), the New Mexico Oil and Gas Association ("NMOGA"), the Permian Basin Petroleum Association ("PBPA"), and the Texas Oil & Gas Association ("TXOGA") (collectively, the "Intervenor-Applicants") have here moved to intervene on behalf of Defendants

Sally Jewell and Daniel M. Ashe (collectively, "Federal Defendants") in this action filed by Defenders of Wildlife and the Center for Biological Diversity (collectively, "Plaintiffs"). Through this suit, Plaintiffs seek to overturn the determination by the Federal Defendants to withdraw the Proposed Rule to list the dunes sagebrush lizard ("DSL") as endangered under the Endangered Species Act, 16 U.S.C. § 1531, *et seq* ("ESA").

Intervenor-Applicants are trade associations that collectively represent all aspects of the oil and gas industry. *See* September 13, 2013 Declaration of Erik G. Milito, American Petroleum Institute ("Milito Decl.") ¶6; September 13, 2013 Declaration of Daniel T. Naatz, Independent Petroleum Association of America ("Naatz Decl.") ¶6; September 13, 2013 Declaration of Steve Henke, New Mexico Oil and Gas Association ("Henke Decl.") ¶6; September 19, 2013 Declaration of Ben Shepperd, Permian Basin Petroleum Association ("Shepperd Decl.") ¶6; September 16, 2013 Declaration of Debbra Mamula Hastings, Texas Oil & Gas Association ("Hastings Decl.") ¶¶2-3. Members of Intervenor-Applicants own, lease, or otherwise operate on, or adjacent to, land that the United States Fish and Wildlife Service ("FWS") identifies as DSL habitat. *See* Milito Decl. ¶7; Naatz Decl. ¶7; Henke Decl. ¶7; Shepperd Decl. ¶7; Hastings Decl. ¶5. Intervenor-Applicants and their members are committed to the conservation of the DSL and its habitat, and helped develop conservation programs in which many of Intervenor-Applicants' members participate. *See* Milito Decl. ¶¶12, 19; Naatz Decl. ¶¶12, 19; Henke Decl. ¶¶11-19; Shepperd Decl. ¶¶13-15; Hastings Decl. ¶¶8, 10, 12. Intervenor-Applicants collectively participated from the beginning in the rulemaking proposing to list the DSL under the ESA (75 Fed. Reg. 77,801 (Dec. 4, 2010)), as did many of Intervenor-Applicants' members individually. *See* Milito Decl. ¶17, 18; Naatz Decl. ¶16-18; Henke Decl. ¶21; Shepperd Decl. ¶24; Hastings Decl. ¶6. This longstanding and sustained participation in the

administrative process was premised on an interest in avoiding the costs and constraints that the DSL's unwarranted listing could have on industry operations through development of, and participation in, voluntary conservation efforts. *See* Milito Decl. ¶¶12, 16; Naatz Decl. ¶¶12, 16; Henke Decl. ¶¶11, 21; Shepperd Decl. ¶¶13, 24; Hastings Decl. ¶¶7, 8, 13.

As discussed further below, for these reasons and others, Intervenor-Applicants have a direct, meaningful, and longstanding interest in the listing status of the DSL and, therefore, in the outcome of Plaintiffs' action seeking to overturn the Federal Defendants' decision to not list the DSL under the ESA.

Background and Summary of the Case

On December 14, 2010, FWS published a Proposed Rule to list the DSL as endangered under the ESA. 75 Fed. Reg. 77,801 ("Proposed Rule"). Importantly, FWS did not base its Proposed Rule on evidence of declining DSL populations because no such evidence exists. *See id.*; s*ee also* 77 Fed. Reg. 36,872, 36,882 (June 19, 2012). Instead, the proposed listing was based on prior levels of DSL habitat modification and concern that, if that level of modification continued, DSL populations would decline. 77 Fed. Reg. at 36,882.

FWS reopened the comment period twice over the course of a year and a half and received and responded to over 800 written comments. 77 Fed. Reg. at 36,875. FWS also held two public hearings and received testimony from 147 individuals and organizations. *Id.* Intervenor-Applicants submitted comments on the Proposed Rule and participated in public meetings. *See* Milito Decl. ¶¶17, 18; Naatz Decl. ¶¶16-18; Henke Decl. ¶21; Shepperd Decl. ¶24; Hastings Decl. ¶6. Many of Intervenor-Applicants' members also submitted comments on the Proposed Rule and participated in public meetings. *See* Milito Decl. ¶18; Naatz Decl. ¶18; Henke Decl. ¶21; Shepperd Decl. ¶24.

On June 19, 2012, FWS issued a notice withdrawing its Proposed Rule. Withdrawal of Proposed Rule to List Dunes Sagebrush Lizard, 77 Fed. Reg. 36,872 (June 19, 2012) ("Withdrawal Determination"). The Withdrawal Determination responded to the substantive issues raised during the rulemaking, explained the changes from the proposal and the rationale for those changes, and addressed at length each of the listing factors required to be considered under the ESA. *See* 77 Fed. Reg. 36,872. More specifically, FWS based its Withdrawal Determination, in part, on its conclusion that cooperative conservation efforts undertaken by the states of Texas and New Mexico, the United States Bureau of Land Management ("BLM"), and the private sector – memorialized in New Mexico by a candidate conservation agreement ("CCA") and a candidate conservation agreement with assurances ("CCAA"), and in Texas by a CCAA and a habitat conservation plan ("HCP") – "have reduced or eliminated current and future threats to the [DSL] to the point that the species no longer is in danger of extinction now or in the foreseeable future." *Id*. at 36,899. These conservation agreements, and the significant landowner participation thereunder, provide for surface protections in DSL habitat, as well as funds for DSL conservation. *Id* at 36,898-39,899.

FWS also premised its Withdrawal Determination on clarifications provided by BLM regarding the implementation of the Special Status Species Resource Management Plan Amendment ("RMPA"). *Id.* at 36,876. These clarifications corrected FWS' previous misapprehension that the RMPA was simply guidance, and did not contain meaningful mitigation measures and protections. *Id.* at 36,879. Finally, the Withdrawal Determination was also based on new survey data demonstrating that the DSL occupied a broader range than previously understood, *id.* at 36,876, and that caliche roads, which can fragment DSL habitat, were reclaimed at rates greater than previously understood. *Id.* at 36,881.

On June 19, 2013 – one year after FWS issued its Withdrawal Determination – Plaintiffs filed a complaint alleging that the Withdrawal Determination was arbitrary and capricious. Complaint for Declaratory and Injunctive Relief (Dkt. 1) ¶ 75. Specifically, Plaintiffs challenge, in part, Defendants' reliance on the New Mexico CCA/CCAA and Texas CCAA/HCP as a basis for its withdrawal determination. *Id.* ¶ 70. Plaintiffs claim these conservation plans are mere "voluntary agreements" that "may not be considered as existing regulatory mechanisms" in FWS' listing determination for the DSL. *Id.* ¶ 64. Plaintiffs thus ask this Court to hold that the Withdrawal Determination violates the Administrative Procedure Act, 5 U.S.C. §§ 551, 701 *et seq* ("APA"); set aside the Withdrawal Determination; and order Defendants to reinstate and reconsider the Proposed Rule to list the DSL as endangered and to issue a new Final Rule. Compl. at 17 ("Prayer for Relief").

Interests of Proposed Intervenor-Applicants

DSL habitat overlies the Permian Basin, which is one of the most productive oil and gas producing areas in the western United States. 77 Fed. Reg. at 36,887. As explained above, Intervenor-Applicants' members lease, own and operate on lands within the range of the DSL. *See* Milito Decl. ¶7; Naatz Decl. ¶7; Henke Decl. ¶7; Shepperd Decl. ¶7; Hastings Decl. ¶5. According to FWS, over 50 percent of oil produced in Texas occurs in Districts 8 and 8a, which are largely within the known geographic range of the DSL. 77 Fed. Reg. at 36,887. Many of Intervenor-Applicants' members are among the companies that produce oil in these Districts. *See* Milito Decl. ¶10; Naatz Decl. ¶10; Shepperd Decl. ¶8. Moreover, over 70 percent of land within the range of the DSL in New Mexico has been leased for oil and gas development. 77 Fed. Reg. at 36,887. Intervenor-Applicants' members constitute a large percentage of the

leaseholders in this region. *See* Milito Decl. ¶11; Naatz Decl. ¶11; Henke Decl. ¶8; Shepperd Decl. ¶8; *see also* Hastings Decl. ¶¶2, 3, 5.

Because of the proximity of the DSL to Intervenor-Applicants' members' operations in and around the Permian Basin, Intervenor-Applicants' members have made great efforts to protect the DSL and preserve its habitat, and have conducted research with the aim of protecting the species and preserving industry's ability to safely and responsibly develop oil and gas resources in the region. *See* Milito Decl. ¶¶12, 16; Naatz Decl. ¶¶12, 16; Henke Decl. ¶¶11, 21; Shepperd Decl. ¶¶13, 24; Hastings Decl. ¶¶8, 12. Listing the DSL as endangered under the ESA would adversely impact Intervenor-Applicants' members operating in and around the Permian Basin because such a listing 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. *See* Milito Decl. ¶¶13-15; Naatz Decl. ¶¶13-15; Henke Decl. ¶¶18-20; Shepperd Decl. ¶¶21-23; Hastings Decl. ¶¶7, 13.

Intervenor-Applicants and their members collaborated with the States of New Mexico and Texas in the development of those states' CCA/CCAA and CCAA/HCP, respectively. *See* Milito Decl. ¶19; Naatz Decl. ¶19; Henke Decl. ¶¶12-13; Shepperd Decl. ¶¶14-15; Hastings Decl. ¶¶8, 10. Intervenor-Applicants and their members worked closely with state and federal regulators to strike a careful balance between realistic, effective conservation measures in concert with the oil and natural gas industry in New Mexico and Texas. *See* Milito Decl. ¶¶12, 19; Naatz Decl. ¶¶16, 19; Henke Decl. ¶¶11, 21; Shepperd Decl. ¶¶13, 16, 24; *see also* Hastings Decl. ¶¶8, 10-12. In becoming signatories to the conservation agreements, Intervenor-Applicants' members and others in the range of the DSL voluntarily accepted meaningful restrictions and agreed to undertake various mitigations to protect and preserve DSL habitat. *See*

Milito Decl. ¶19; Naatz Decl. ¶19; Henke Decl. ¶15; Shepperd Decl. ¶17; *see also* Hastings Decl. ¶12. Intervenor-Applicants' members and others continue to participate in the New Mexico and Texas CCA/CCAA and CCAA/HCP, respectively, and carry on, to this day, their important efforts to protect DSL habitat. *See* Milito Decl. ¶19; Naatz Decl. ¶19; Henke Decl. ¶16; Shepperd Decl. ¶19; Hastings Decl. ¶12.

Intervenor-Applicants' members have a strong interest in preserving the ability to consider the New Mexico CCA/CCAA and Texas CCAA/HCP as part of the listing determination for the DSL. Not only have Intervenor-Applicants' members invested a significant amount of time and resources in developing these conservation agreements with state and federal regulators, but they also believe that collaborative conservation agreements are a crucial part of successful species protection. *See* Henke Decl. ¶17; Shepperd Decl. ¶20. A ruling by this Court precluding Federal Defendants from taking the New Mexico CCA/CCAA and Texas CCAA/HCP into consideration as part of the listing determination would undermine Intervenor-Applicants members' efforts and the importance of these conservation agreements in protecting the DSL and its habitat, as well as other species. *See* Henke Decl. ¶17; Shepperd Decl. ¶20.

Intervenor-Applicants and their members advocated these interests from the earliest stages of the listing process. *See* Milito Decl. ¶17; Naatz Decl. ¶17; Henke Decl. ¶21; Shepperd Decl. ¶24; Hastings Decl. ¶6. Intervenor-Applicants collectively submitted 50 pages of comments on the proposed listing. FWS-R2-ES-2010-0041-0324. Additionally, NMOGA and PBPA each submitted substantial individual comments from their organizations and participated in several public hearings. *See* Henke Decl. ¶21; Shepperd Decl. ¶24. TXOGA also submitted individual comments and participated throughout the administrative process. *See* Hastings Decl.

¶6. All told, Intervenor-Applicants' members and other energy companies and their employees submitted dozens of comments to the DSL listing record.

ARGUMENT

I. INTERVENOR-APPLICANTS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 24(a)

Intervenor-Applicants are entitled to intervene as of right in this action pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure, which provides, in relevant part:

> On 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.

Id. (*citing* Fed. R. Civ. P. 24(a)(2)). Tracking this language, the U.S. Court of Appeals for the District of Columbia Circuit has "identified four prerequisites to intervene as of right: '(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) (quoting *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998)); *see also Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998) (same, quoting Fed. R. Civ. P. 24(a)). "The D.C. Circuit has taken a liberal approach to intervention," *The Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000) (citing *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 910-911 (D.C. Cir. 1977) ("*NRDC*")), and has emphasized that the standards for intervention must be interpreted flexibly. *Nuesse v. Camp,* 385 F.2d 694, 700-701 (D.C. Cir. 1967).

For all the reasons set forth below, Intervenor-Applicants entitled to intervene as a matter of right in this litigation.

A. Intervenor-Applicants' Motion To Intervene Is Timely

This Court has held that an application's timeliness "is a context-specific inquiry," which takes into consideration the following factors: "(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 Guardians*, 272 F.R.D. at 12 (citing *Karsner v. Lothian,* 532 F.3d 876, 885 (D.C. Cir. 2008)). The "critical factor" in the timeliness analysis "is whether any 'delay in moving for intervention will prejudice the existing parties to the case.'" *Akiachak Native Cmty. v. U.S. Dep't of Interior*, 584 F. Supp. 2d 1, 5 (D.D.C. 2008) (*citing* 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1916 (3d ed. 2007)).

Where, as here, the administrative record has not yet been filed, and no briefing schedule for dispositive motions had been set, the existing parties cannot "credibly claim . . . that they would be prejudiced by [Intervenor-Applicants'] intervention." *WildEarth Guardians*, 272 F.R.D. at 15; *see also Safari Club Int'l v. Salazar*, 281 F.R.D. 32, 42 (D.D.C. 2012) (finding proposed intervenors' motion to intervene timely where motion was filed "one month after the FWS filed its answer, and before any dispositive motions were filed"). Furthermore, Intervenor-Applicants are filing this Motion and Answer within a week of Federal Defendants' Answer, and will comply with all forthcoming scheduling orders. As such, there can be no prejudice to Plaintiffs or to the Federal Defendants, and Intervenor-Applicants' motion is therefore timely.

As discussed in more detail below, Intervenor-Applicants' purpose in intervening, and their interest in preserving their rights through this intervention, also weigh heavily in favor of timeliness.

B. Intervenor-Applicants Have Legally Protected Interests That Would Be Affected by Plaintiffs' Suit

The "interest" 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 Guardians*, 272 F.R.D. at 12-13 (citing *United States v. Morten,* 730 F. Supp. 2d 11, 15–16, (D.D.C. 2010)). To satisfy this requirement, the applicant must show that it has a "legally protectable" interest in the litigation. *See Mova Pharm.*, 140 F.3d at 1074 (citing *S. Christian Leadership Conf. v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984)). This test is not stringent: "In a motion to intervene under Rule 24(a)(2), the question is not whether the applicable law assigns the prospective intervenor a cause of action. . . . As the Rule's plain text indicates, intervenors of right need only an 'interest' in the litigation—not a 'cause of action' or 'permission to sue.'" *Jones v. Prince George's County*, 348 F.3d 1014, 1017-18 (D.C. Cir. 2003). This requirement is readily satisfied here.

"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). Moreover, courts in this Circuit regularly grant intervention to industry groups representing their members in litigation brought against government agencies challenging regulatory decisions made by those agencies. *See, e.g.*, *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30 (D.D.C. 2003); *NRDC*, 561 F.2d at 913; *The Wilderness Soc'y*, 104 F. Supp. at 18. In addition, the United States Supreme Court has found economic interests were protectable under the ESA where "economic consequences are an explicit concern of the ESA." *Bennett v. Spear,* 520 U.S. 154, 176-77

(1997). Recently, the U.S. District Court for the District of Idaho held that ranchers had a legally protected interest in FWS' listing determination for a particular plant species, where the ranchers were signatories to a CCA aimed at protecting that species. *Otter v. Salazar*, No. 1:11–cv–00358–CWD, 2012 WL 3257843, *13 (D. Idaho Aug. 8, 2012) (citing *Alabama–Tombigbee Rivers Coal. v. Norton*, 338 F.3d 1244, 1254 (11th Cir.2003) (holding that a coalition of businesses had standing to challenge a listing under the ESA based upon the finding that "[t]he listing adds another layer of concrete economic considerations that may be in tension with the members' pre-listing assumptions")).

Intervenor-Applicants' members' interest in the litigation here is "obvious," *Foster*, 655 F.2d at 1324, because they have ownership, lease rights and operational interests in the property at issue – *i.e.*, lands within the range of the DSL. *See* Milito Decl. ¶7; Naatz Decl. ¶7; Henke Decl. ¶7; Shepperd Decl. ¶7; Hastings Decl. ¶5. Intervenor-Applicants' members' interests would be negatively impacted by costs, operational constraints, and delays caused by listing the DSL under the ESA. *See* Milito Decl. ¶¶13-15; Naatz Decl. ¶¶13-15; Henke Decl. ¶¶18-20; Shepperd Decl. ¶¶21-23; Hastings Decl. ¶¶7, 13. Intervenor-Applicants' members, therefore, benefitted by Defendants' withdrawal of the proposed listing. "[T]he participation of the persons most directly affected by the [challenged agency action] is utterly consistent with the notice and opportunity to be heard concerns that lie at the heart of the due process clause." *Am. Horse Prot. Ass'n, Inc. v. Veneman,* 200 F.R.D. 153, 158 (D.D.C. 2001); *see also County of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 49 (D.D.C. 2007) (granting intervention of trade association in support of Service's decision not to list Gunnison sage-grouse as endangered or threatened under ESA).

Intervenor-Applicants monitor and participate in regulatory actions that affect their members, and, here, actively participated in creating and implementing the conservation agreements that are at the heart of the Plaintiffs' claims. The New Mexico CCA/CCAA and Texas CCAA/HCP that Plaintiffs seek to make at issue in this action were developed in conjunction with Intervenor-Applicants and their members, and the members of Intervenor-Applicants are the primary participants in these programs. *See* Milito Decl. ¶19; Naatz Decl. ¶19; Henke Decl. ¶¶12-13; Shepperd Decl. ¶¶14-15; Hastings Decl. ¶¶8, 10-12. Accordingly, Intervenor-Applicants' members have a legally protected interest in the listing determination. *Otter*, 2012 WL 3257843 at *13.

Furthermore, Intervenor-Applicants' members have an interest in preserving the Federal Defendants' ability to take the conservation agreements into consideration as part of its listing determination specifically for the DSL, but also for other species as well. As noted above, Intervenor-Applicants and their members invested a substantial amount of time and resources into collaborating with federal and state regulators in an attempt to conserve the DSL and ultimately obviate the need to list it under the ESA. *See* p. 7, *supra*. A determination by this Court that Defendants are precluded from relying on the conservation agreements would undermine Intervenor-Applicants' and their members' efforts, as well as public policy favoring collaborations between the public and private sectors aimed at species conservation. *See, e.g.*, 64 Fed. Reg. 32,726, 32,727 (June 17, 1999) ("A collaborative approach fosters cooperation and facilitates that exchange of ideas among private citizens, Federal agencies, States, local governments, Tribes, business, and organizations by involving all stakeholders in the conservation planning process.").

Accordingly, Intervenor-Applicants and their members have a strong, protected interest in the outcome of this litigation. As further described below, this interest is also sufficient to confer standing on the Intervenor-Applicants.

C. Disposition of This Action Would Impede Intervenor-Applicants' Ability to Protect Their Interests

To show impairment of interests for the purposes of Rule 24(a)(2), a proposed intervenor need show only that the disposition of an action "*may* as a practical matter" impede the intervenor's ability to protect its interests in the subject of the action. Fed. R. Civ. P. 24(a)(2) (emphasis added). "The inquiry is not a rigid one: consistent with the Rule's reference to dispositions that may 'as a practical matter' impair the putative intervenor's interest, Fed. R. Civ. P. 24(a)(2), courts look to the 'practical consequences' of denying intervention." *WildEarth Guardians*, 272 F.R.D. at 13 (citations omitted).

Where the relief sought would have a direct, immediate, and harmful impact on a third party's interests, that adverse impact is sufficient to satisfy Rule 24(a)(2). *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003). Further, an entity has sufficient interests to intervene where the proceeding has the potential to subject the movant to governmental regulation or significantly change how the movant does business. *See, e.g.*, *Lujan*, 504 U.S. at 561-62; *Fund for Animals*, 322 F.3d at 735.

If the DSL were listed as endangered under the ESA, members of Intervenor-Applicants could be prohibited from operating in the Permian Basin because normal industry operations could cause incidental takes of DSL. *See* Milito Decl. ¶14; Naatz Decl. ¶14; Henke Decl. ¶19; Shepperd Decl. ¶22; Hastings Decl. ¶7. To avoid violating the ESA, the members of Intervener-Applicants would need to apply for, and obtain, incidental take permits in order to conduct even routine operations. *See* Milito Decl. ¶14; Naatz Decl. ¶14; Henke Decl. ¶19; Shepperd Decl.

¶22; Hastings Decl. ¶7. Even when such permits are granted, they often lead to delay, generate administrative expenses relative to requesting the permits, and contain operational restrictions or costly mitigation measures. *See* Milito Decl. ¶14; Naatz Decl. ¶14; Henke Decl. ¶19; Shepperd Decl. ¶22; Hastings Decl. ¶7. When such incidental take permits are not granted, the members may be effectively shut out from leased or owned parcels entirely. *See* Milito Decl. ¶14; Naatz Decl. ¶14; Henke Decl. ¶19; Shepperd Decl. ¶22; Hastings Decl. ¶7. Further, if the DSL were listed as endangered, as Plaintiffs have repeatedly demanded, federal actions that could impact the DSL, such as leasing actions on federal land, would require time-consuming consultation under Section 7 of the ESA and could cut off access entirely to parcels of federal lands in DSL habitat. *See* Milito Decl. ¶15; Naatz Decl. ¶15; Henke Decl. ¶20; Shepperd Decl. ¶23; Hastings Decl. ¶7.

Listing the DSL as endangered could also alter Intervenor-Applicants' members' business expectations related to the viability of their oil and natural gas operations under the New Mexico CCA/CCAA and Texas CCAA/HCP. In *Otter*, for example, ranchers who were subject to a CCA alleged that they would suffer injury if FWS listed an endangered plant species because their "voluntary efforts under the CCA [would] be rendered null and void," and "subsequent land use restrictions [would] impact both [their] private property values and [their] ability to use that property whether it be for ranching, farming, development, subdivision, or otherwise." *Otter*, 2012 WL 3257843 at *13. The court agreed, finding that that "the Ranchers [had] certain business expectations related to the viability of their operations under the strictures of the CCA and that these expectations [had] been altered due to the listing." *Id.* So too here: If the Federal Defendants list the DSL, Intervenor-Applicants' members could be subject to a wide

array of land use restrictions beyond those outlined in the agreements, impairing the prospects and even the viability of their business operations in the Permian Basin.

Moreover, a ruling by this Court precluding Federal Defendants from taking the New Mexico CCA/CCAA and Texas CCAA/HCP into consideration as part of its listing determination would injure Intervenor-Applicants' interest in preserving the benefit of their proactive efforts and those of their members to protect the DSL. The New Mexico and Texas conservation agreements include a vast array of protections for the DSL and its habitat, and Intervenor-Applicants and their members were instrumental in designing these protections. Any ruling preventing Federal Defendants from considering these agreements as part of its analysis would render these efforts meaningless.

In short, it is sufficient to establish that the movant's interests will be impaired for purposes of intervention where "the [government]'s decision below was favorable to [the proposed intervenor], and the present action is a direct attack on that decision." *WildEarth Guardians*, 272 F.R.D. at 14. Here, the Federal Defendants' reasoned and supported decision below to take the New Mexico CCA/CCAA and Texas CCAA/HCP into consideration as part of their listing determination, and their ultimate decision that the DSL does not warrant listing, were favorable to Intervenor-Applicants and their members. Plaintiffs' present action is a direct attack on both of those decisions, and the outcome requested "may have a 'practical consequence'" of threatening the ability of Intervenor-Applicants' members to operate. *Id.* The precedential effect of an adverse decision here will also "as a practical matter" threaten the interests of the Intervenor-Applicants and their members. Fed. R. Civ. P. 24(a)(2).

D. <u>Intervenor-Applicants' Interest Is Not Adequately Represented By Existing Parties</u>

"[T]he burden on a party seeking intervention to demonstrate inadequate representation 'is not onerous' and requires only a showing 'that representation of [the party's] interest 'may be' inadequate, not that representation will in fact be inadequate.'" *Earthworks v. U.S. Dep't of Interior*, No. 09-01972, 2010 WL 3063143, *2 (D.D.C. Aug. 3, 2010) (quoting *Dimond v. Dist. of Columbia,* 792 F.2d 179, 192 (D.C. Cir. 1986)). *See also WildEarth Guardians*, 272 F.R.D. at 13 ("the putative intervenor's burden here is *de minimis*"). The interests of the Plaintiffs are clearly adverse to those of Intervenor-Applicants.

The Federal Defendants, who initially proposed to list the DSL as endangered, cannot adequately represent the specific interests of the regulated industry. When assessing the adequacy of an applicant's representation by a governmental agency, "it is well-established that governmental entities generally cannot represent the 'more narrow and parochial financial interest' of a private party." *WildEarth Guardians*, 272 F.R.D. at 15 (*quoting Fund for Animals,* 322 F.3d at 737). In fact, this private interest / public interest distinction has justified intervention in many cases. *See, e.g.*, *NRDC*, 561 F.2d at 912; *Fund for Animals*, 322 F.3d at 736; *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994); *County of Fresno*, 622 F.2d at 438-39; *Natural Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345-46 (10th Cir. 1978).

Intervenor-Applicants' interests here include protecting the legal rights and economic interests of their members by opposing Plaintiffs' attempt to have this Court reverse the decision to withdraw the Proposed Rule and not to list the DSL in light of numerous important factors, including the establishment of, and significant enrollment in, the New Mexico and Texas conservation agreements. As representatives of government agencies, the Federal Defendants

cannot be expected to adequately represent Intervenor-Applicants' members' "parochial financial interests," *WildEarth Guardians*, 272 F.R.D. at 15, or their interest in securing the implementation of a practical and administratively feasible regulatory regime that provides for both DSL protection and the sustainability of oil and natural gas industry in the Permian Basin. *See NRDC*, 561 F.2d at 912 (fact that "particular interests" of rubber and chemical companies "may not coincide" with interests of the Environmental Protection Agency "justif[ied] separate representation"); *Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009) ("The D.C. Circuit has frequently found 'inadequacy of governmental representation' when the government has no financial stake in the outcome of the suit") (citing cases). Although the State of Texas has also moved to intervene as a defendant, the interests of the State also do not adequately represent the narrower interests of industry, including the interests of private landowners. Accordingly, Intervenor-Applicants merit separate representation in this case.

E. Intervenor-Applicants Have Standing

Intervenor-Applicants easily meet the test for associational standing; to wit, "that '(a) [their] members would otherwise have standing to sue in their own right; (b) the interests [they] seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Ass'n of Flight Attendants-CWA, AFL-CIO, v. U.S. Dep't of Transp.*, 564 F.3d 462, 464 (D.C. Cir. 2009) (quoting *Int'l Bhd. of Teamsters v. Transp. Sec. Admin.*, 429 F.3d 1130, 1135 (D.C. Cir. 2005)).

First, Intervenor-Applicants have shown that their members would have standing to sue in their own right because, in an intervention analysis, standing is typically satisfied when the second factor of the four-part intervention test is met. "[G]enerally speaking, when a putative intervenor has a 'legally protected' interest under Rule 24(a), it will also meet constitutional

standing requirements, and *vice versa*." *WildEarth Guardians*, 272 F.R.D. at 13, n.5 (citing *Roeder v. Islamic Republic of Iran,* 333 F.3d 228, 233 (D.C. Cir. 2003) and *Fund for Animals*, 322 F.3d at 735). Intervenor-Applicants have already demonstrated that their members' interests meet the second prong of the intervention as of right test, *see* pp. 10-12, *supra*; thus, the first prong of the associational standing test is satisfied.

Second, the interests sought to be protected here – namely, the ability of the oil and natural gas industry to cost-effectively operate in the Permian Basin, and the protection of Intervenor-Applicants' members' rights and obligations under the CCAs/CCAAs/HCP applicable to that region – are central to Intervenor-Applicants' organizational purposes. *See* Milito Decl. ¶8; Naatz Decl. ¶8; Henke Decl. ¶6; Shepperd Decl. ¶6; Hastings Decl. ¶4.

Third, resolution of the issues at stake in this litigation do not require the participation of Intervenor-Applicants' individual members because Plaintiffs have requested declaratory and injunctive relief. *See Nat'l Treasury Emps. Union v. Whipple*, 636 F. Supp. 2d 63, 75 (D.D.C. 2009) ("NTEU seeks declaratory and injunctive relief, which does not require individual participation") (citing cases).

Thus, Intervenor-Applicants meet the requirements for associational standing.

II. IN THE ALTERNATIVE, INTERVENOR-APPLICANTS ARE ALSO ENTITLED TO PERMISSIVE INTERVENTION

Federal Rule of Civil Procedure 24 contemplates two forms of intervention—intervention of right and permissive intervention—and a court may grant an intervenor's motion on either basis. *UAW, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965). Permissive intervention should be granted under Rule 24(b) of the Federal Rules of Civil Procedure, which, in pertinent part, states:

> On timely motion, the court may permit anyone to intervene who:. . . (B) has a claim or defense that shares with the main action a common question of law or fact.

Fed. R. Civ. P. 24(b)(1). Thus, "[a] court, in its discretion, also may permit intervention where the applicant (1) makes a timely motion; (2) has a claim or defense; and (3) that claim or defense shares with the main action a common question of law or fact." *Van Valin v. Locke*, 628 F. Supp. 2d 67, 77-78 (D.D.C. 2009) (citations omitted). Intervenor-Applicants have established all three criteria.

First, as previously demonstrated, Intervenor-Applicants' Motion to Intervene is timely, will not cause undue delay, and will not prejudice Plaintiffs or the Federal Defendants. *See* p. 9, *supra*.

Second, Intervenor-Applicants have defenses that have a question of law or fact in common with the main action. In *Sierra Club v. Van Antwerp*, for instance, this Court found that proposed intervenors had satisfied this prong of the permissive intervention analysis where their development of a particular tract of land would allegedly have an impact on four endangered species: "Intervenors are jointly developing [the tract of land at issue] and intervenor Sierra Properties holds the section 404 permit that plaintiffs challenge. Intervenors have an interest in retaining the permit and in continuing to develop CCTC . . . This showing is sufficient for the purposes of permissive intervention." 523 F. Supp. 2d 5, 10 (D.D.C. 2007). As discussed above, Intervenor-Applicants' members have an interest in continuing their activities in DSL habitat as permitted under the New Mexico CCA/CCAA and the Texas CCAA/HCP, including exploration, development, and production of oil and gas resources – the precise activities challenged by Plaintiffs in this litigation. *See, e.g.*, Compl. ¶ 2 (alleging that "ongoing oil and gas drilling and herbicide spraying for livestock" threatens the DSL). Intervenor-Applicants

seek to defend these interests. There can be no doubt that their defenses share the same questions of law and fact alleged in the Complaint.

Absent intervention, Intervenor-Applicants will lack the opportunity to adequately defend their substantial interests and those of their members. Moreover, as described above, the existing parties will not be prejudiced by intervention, because the case is still early in the proceedings and Intervenor-Applicants agree to abide by any procedural and briefing schedules entered by this Court. Intervenor-Applicants have therefore satisfied the requirements for permissive intervention, and this Court should accordingly grant Intervenor-Applicants' Motion to Intervene in this action.

CONCLUSION

For all the reasons set forth above, Intervenor-Applicants respectfully request that this Court grant Intervenor-Applicants' Motion to Intervene.

Date: 9/20/2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of September, 2013, I caused the foregoing Motion to Intervene on Behalf of Defendants, and accompanying Memorandum of Points and Authorities in Support thereof, as well as the following attachments thereto, to be electronically filed using the Court's CM/ECF system:

- [Proposed] Order Granting Motion to Intervene
- Proposed Answer of American Petroleum Institute, Independent Petroleum Association of America, New Mexico Oil and Gas Association, Permian Basin Petroleum Association, and Texas Oil and Gas Association
- Declaration of Erik G. Milito, American Petroleum Institute
- Declaration of Daniel T. Naatz, Independent Petroleum Association of America
- Declaration of Steve Henke, New Mexico Oil and Gas Association
- Declaration of Benjamin Sheppard, Permian Basin Petroleum Association
- Declaration of Debbra Mamula Hastings, Texas Oil and Gas Association
- LCvR 7.1 Corporate Disclosure Statement for the American Petroleum Institute, the Independent Petroleum Producers of America, the New Mexico Oil and Gas Association, and the Permian Basin Petroleum Association
- LCvR 7.1 Corporate Disclosure Statement for the Texas Oil and Gas Association

Such filing shall cause a notification of electronic filing to be sent to the following counsel for Plaintiffs and Defendants:

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