

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
EASTERN DIVISION**

STATE OF WEST VIRGINIA, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
CASS COUNTY FARM BUREAU, <i>et al.</i> ,)	
)	
Intervenor-Plaintiffs,)	
)	Civil No. 3:23-cv-0032
v.)	
)	
U.S. ENVIRONMENTAL PROTECTION)	
AGENCY, <i>et al.</i> ,)	
)	
Defendants,)	
)	
and)	
)	
CHICKALOON VILLAGE TRADITIONAL)	
COUNCIL, <i>et al.</i> ,)	
)	
Intervenor-Defendants.)	

**MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE
OF PROPOSED BUSINESS INTERVENORS**

Proposed Business Intervenors Associated General Contractors of North Dakota, Florida Transportation Builders Association, Home Builders Association of Central Arizona, Kansas Livestock Association, North Dakota Association of Builders, North Dakota Petroleum Council, REALTORS® Land Institute, South Carolina REALTORS®, Southern Arizona Home Builders Association, Tennessee Road Builders Association, and Utah Mining Association respectfully request leave to intervene as plaintiffs as a matter of right pursuant to Federal Rule of Civil

Procedure 24(a) or, in the alternative, request leave for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b).

The State plaintiffs consent to the proposed intervention. The Federal Defendants and Intervenor-Defendants reserve judgment on their positions until they review the motion to intervene and proposed Complaint.

INTRODUCTION

This action was originally brought by a coalition of 24 States to challenge a final agency action by the Environmental Protection Agency and the U.S. Army Corps of Engineers (the “Agencies”) promulgating a definition of Waters of the United States (“WOTUS”) under the Clean Water Act (“CWA”). *See Revised Definition of “Waters of the United States,”* 88 Fed. Reg. 3004 (Jan. 18, 2023) (the “2023 Rule”). This Court granted leave to Cass County Farm Bureau and North Dakota Farm Bureau to permissively intervene to challenge the 2023 Rule. Dkt. 171. As this Court explained, Cass County Farm Bureau and North Dakota Farm Bureau had standing and were permitted to intervene because they and their members “are the direct object of the challenged regulation” and they are injured by the regulation. *Id.* at 5-6.

On September 8, 2023, the Agencies amended the Code of Federal Regulations purportedly to conform the definition of “waters of the United States” to the United States Supreme Court decision in *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023) (the “Amended Rule”). The Amended Rule was published in the Federal Register at 88 Fed. Reg. 61964. On November 13, 2023, Intervenor-Plaintiffs Cass County Farm Bureau and North Dakota Farm Bureau filed an Amended Complaint challenging the 2023 Rule as amended by the Amended Rule. Dkt. 175.

Proposed Business Intervenor trade groups represent parties directly regulated by this definition: the intervenors’ members and their members’ clients consist of countless businesses and individuals that own or use land for a broad variety of purposes including mining, energy

production, construction, road building, and home and commercial building in States from North Dakota to Florida to Kansas to Tennessee to Utah to Arizona. Proposed Business Intervenors assert that the 2023 Rule as amended by the Amended Rule (together, the “Rule”) violates the CWA, the Administrative Procedure Act (“APA”) and the Constitution, for multiple reasons. Attached to this motion, Proposed Business Intervenors submit their proposed Complaint, which is substantially identical to the Amended Complaint filed by Plaintiff-Intervenors Cass County Farm Bureau and North Dakota Farm Bureau.

Conducting activities on land often requires determining whether property includes a dry or wet feature that falls within the definition of WOTUS and is therefore subject to the Agencies’ jurisdiction. If a feature is a WOTUS, it is subject to the CWA’s permitting requirements and exposes the landowner or user to the threat of criminal and civil liability if activity occurs without a permit. The Rule creates enormous uncertainty for the regulated community, using categorical standards that exceed the scope of the CWA as well as impermissibly vague standards that will require costly case-by-case determinations or else will require property owners and users to scale-back or forgo important projects altogether or risk criminal penalties and significant fines. *See* Hanson Decl. ¶¶ 8, 10-12; Prasad Decl. ¶¶ 8-9; Kobernus Decl. ¶¶ 7-8; Starwalt Decl. ¶¶ 15-17; Roehrich Decl. ¶¶ 12-13; Teagarden Decl. ¶ 6; Adams Decl. ¶¶ 7, 9; Moll Decl. ¶¶ 13-14; Godlewski Decl. ¶¶ 16-17; Ness Decl. ¶¶ 14-15; Somers Decl. ¶¶ 7-9; King Decl. ¶ 7.

For example, the Rule was promulgated in violation of the APA and violates the CWA because it reads the word “navigable” out of the statute and therefore is disconnected from Congress’s clear intent that WOTUS be navigable or actually adjacent to navigable waters. And the Rule is unconstitutional because it (1) does not give the regulated community adequate notice as to what may be considered a WOTUS; (2) is an impermissible executive action that purports to

answer a major policy question that must be resolved by Congress; and (3) is an impermissible exercise of legislative powers.

Because their members and their members' clients stand to be significantly harmed if the Rule stands, proposed Business Intervenors seek to join Cass County Farm Bureau and North Dakota Farm Bureau and intervene as plaintiffs. As representatives of a large part of the regulated community, proposed Business Intervenors are well-situated to explain the harms that implementation of the Rule would cause to American industry across many different types of business and as applied to different geographic features. And by virtue of their experience, proposed Business Intervenors are well-positioned to explain the legal flaws in the Rule as it applies to their members. *See* Kobernus Decl. ¶ 6; Hanson Decl. ¶ 4; Prasad Decl. ¶ 6; Starwalt Decl. ¶ 11; Roehrich Decl. ¶ 4; Teagarden Decl. ¶¶ 4-5; Moll Decl. ¶ 7; Godlewski Decl. ¶ 8; Ness Decl. ¶¶ 4-5; Somers Decl. ¶¶ 3-4; King Decl. ¶¶ 4, 6-7. In that way, proposed Business Intervenors can bring additional and diverse experience to the issues raised by Plaintiff-Intervenors Cass County Farm Bureau and North Dakota Farm Bureau on behalf of the regulated community.

This motion is timely; proposed Business Intervenors, whose members and members' clients are owners or users of land for a large variety of business and commercial purposes, have regulatory and economic interests that will be impaired by the Rule; and the States, as government entities, cannot represent the interests of a portion of their constituents—the regulated business community—with the same perspective and vigor. Proposed Business Intervenors believe that their experience operating under the CWA and the various regulatory regimes implementing it will be helpful to the Court in resolving this case. Additionally, proposed Business Intervenors can provide expertise and analysis regarding the impact of the Rule on diverse industries and geographic features, beyond those that are within the experience and expertise of the existing

Plaintiff-Intervenors. Permitting the proposed Business Intervenors to join Cass County Farm Bureau and North Dakota Farm Bureau will allow the broader regulated community to bring its expertise to the Court to assist in the resolution of the claims.

As several courts, including this Court, have recognized in granting industry members' motions to intervene in earlier rounds of litigation challenging previous iterations of a WOTUS rule, proposed Business Intervenors, their members, and their members' clients "have a substantial stake in the outcome" of litigation determining the regulatory definition of WOTUS, in part because "the industries that these business groups represent operate in a regulatory sphere that include regulations governing water usage in the United States." *S.C. Coastal Cons. League ("SCCCL") v. Pruitt*, 2018 WL 2184395, at *8-9 (D.S.C. May 11, 2018); *see also Env't'l Integrity Project v. Wheeler*, No. 1:20-cv-1734, Dkt. 26, Order at 5 (D.D.C. Jan. 27, 2021) ("As regulated parties, the Business Entities' members have an obvious stake in the outcome of litigation that challenges the requirements and regulations governing the use of their property"); *New York v. Pruitt*, No. 1:18-cv-1030-JPO, Dkt. 57, Order at 2 (S.D.N.Y. Apr. 5, 2018) ("the industry groups have demonstrated a serious economic interest in the [WOTUS] rule, as it regulates discharge into waterways"). As this Court stated in granting permissive intervention to Cass County Farm Bureau and North Dakota Farm Bureau, intervention is proper because the business groups and their members "are the direct object of the challenged regulation" and they are injured by the WOTUS rule. Dkt. 171 at 5-6.

The same is true here. The lawsuit before this Court will determine the permissible parameters of the regulatory regime under which proposed Business Intervenors' members must

operate. The Court should therefore grant proposed Business Intervenors leave to intervene to protect their interests in this litigation.¹

ARGUMENT

A. Proposed Business Intervenors Are Entitled to Intervene as of Right.

Pursuant to Rule 24(a)(2), “a court must permit anyone to intervene who: (1) files a timely motion to intervene; (2) ‘claims an interest relating to the property or transaction that is the subject of the action’; (3) is so situated so that disposing of the action may, as a practical matter, impair or impede the movant’s ability to protect that interest; and (4) is not adequately represented by the existing parties.” *Nat’l Parks Conservation Ass’n v. U.S. EPA*, 759 F.3d 969, 975 (8th Cir. 2014). The Eighth Circuit has “paraphrased [the standard] to say that a putative intervenor must establish that it: ‘(1) ha[s] a recognized interest in the subject matter of the litigation that (2) might be impaired by the disposition of the case and that (3) will not be adequately protected by the existing parties.’” *N. Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918, 921 (8th Cir. 2015). “Doubts regarding the propriety of permitting intervention should be resolved in favor of allowing it, because this serves the judicial system’s interest in resolving all related controversies in a single action.” *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992). Proposed Business Intervenors meet each requirement for intervention as of right.

¹ Because proposed Business Intervenors do not wish “to pursue relief not requested by [the plaintiff States],” they do not need to show independent Article III standing in this case. *See Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 435, 439-40 (2017). This Court reached this same conclusion with regard to the Cass County Farm Bureau and North Dakota Farm Bureau. Dkt. 171 at 5-6. In any event, the proposed Business Intervenors have filed declarations, accompanying their Complaint as **Exhibit A**, that amply establish their standing.

1. Proposed Business Intervenors' motion to intervene is timely.

“Whether a motion to intervene is timely is determined by considering all the circumstances of the case.” *United States v. Union Elec. Co.*, 64 F.3d 1152, 1158–59 (8th Cir. 1995). In particular, a court considers three factors: “the reason for any delay by the proposed intervenor in seeking intervention, how far the litigation has progressed before the motion to intervene is filed, and how much prejudice the delay in seeking intervention may cause to other parties if intervention is allowed.” *Id.* at 1159. Under this standard, proposed Business Intervenors’ motion is timely.

First, the proposed Business Intervenors have not delayed in filing this motion, and the litigation has not progressed past its very earliest stages. The motion comes just seven days after the States and the Intervenors filed their Amended Complaints for the first time challenging the Rule as amended. Second, intervention at this point causes no prejudice to other parties. The proposed Business Intervenors submit with this motion their proposed Complaint, which adopts without substantive alteration the Amended Complaint filed by Plaintiff-Intervenors Cass County Farm Bureau and North Dakota Farm Bureau, therefore obviating any need for any delay in these proceedings. By contrast, denial of the motion to intervene would cause proposed Business Intervenors considerable prejudice by preventing them from participating to protect their significant interests in the scope of the Agencies’ regulatory authority. Under all three criteria, proposed Business Intervenors’ motion is timely. *Union Elec. Co.*, 64 F.3d at 1159 (motion to intervene timely when filed four months after the suit itself was filed); *H.J. Martin & Son, Inc. v. Ferrellgas, Inc.*, 2020 WL 6122525, at *2 (D.N.D. Oct. 16, 2020) (motion to intervene filed five months after suit timely because intervenor was not dilatory in filing and litigation had not progressed so far as to make intervention impracticable).

2. Proposed Business Intervenors have a legally protectable interest that may be impaired or impeded by this litigation.

Proposed Business Intervenors satisfy the second requirement for intervention because they have “a recognized interest in the subject matter of the litigation.” *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996). The burden set by this requirement is not a heavy one. A party need show “only that its interest ‘may be’ . . . impaired” by the resolution of the litigation. *Kansas Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 60 F.3d 1304, 1308 (8th Cir. 1995) (emphasis added); *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081-82 (8th Cir. 1999) (“It is enough under Rule 24(a) that [a party] *could* be prejudiced by an unfavorable resolution in later litigation.”) (emphasis added). The Eighth Circuit has repeatedly recognized intervening parties’ economic interests as sufficient to allow intervention as of right. *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861 (8th Cir. 1997) (homeowners had “significantly protectable interest” in defending an ordinance when its validity would impact their property values); *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 989 F.2d 994, 997-98 (8th Cir. 1993) (recognizing interest when “[t]he result of the litigation . . . may affect the proposed intervenors’ property values”); *S.E.C. v. Flight Transp. Corp.*, 699 F.2d 943, 948 (8th Cir. 1983) (holding that a “potential loss in the market value of the intervenors’ [property] constituted a sufficient ‘interest’ under Rule 24(a)(2)”).

Proposed Business Intervenors possess a practical interest that stands to be impacted by this litigation for at least two reasons. First, the definition of WOTUS determines the regulatory framework under which proposed Business Intervenors’ members and their members’ clients must operate. *See* Kobernus Decl. ¶¶ 7, 11; Prasad Decl. ¶¶ 7-10; Hanson Decl. ¶¶ 6-7; Starwalt Decl. ¶¶ 12-13; Roehrich Decl. ¶¶ 7-10; Teagarden Decl. ¶¶ 6-7; Adams Decl. ¶¶ 3-6; Moll Decl. ¶¶ 8-10; Godlewski Decl. ¶¶ 9-11; Ness Decl. ¶¶ 10-11; Somers Decl. ¶ 5; King Decl. ¶¶ 5-7. As a

result, proposed Business Intervenors possess a significant, legally protected interest that they seek to safeguard by intervening to challenge the Rule. *See Nat’l Parks Conservation Ass’n*, 759 F.3d at 976 (an intervenor whose property would be regulated depending on the outcome of the suit met the recognized interest requirement). An unfavorable ruling would subject proposed Business Intervenors to a broad but vague regulatory scheme, heightening the burden of compliance by subjecting them to extremely expensive and lengthy jurisdictional investigations or else forcing them to forgo or scale back activities or projects to avoid risking criminal penalties. *See* Kobernus Decl. ¶ 8; Prasad Decl. ¶¶ 9; Hanson Decl. ¶ 12; Starwalt Decl. ¶¶ 15-17; Roehrich Decl. ¶ 13; Teagarden Decl. ¶ 6; Adams Decl. ¶¶ 7, 9; Moll Decl. ¶¶ 13-14; Godlewski Decl. ¶¶ 16-17; Ness Decl. ¶¶ 14-15; Somers Decl. ¶¶ 7-9; King Decl. ¶ 7.

Second, proposed Business Intervenors’ members have an interest in pursuing their organizational purposes, including supporting and working to achieve public policies favorable to each organization’s members. *Mausolf*, 85 F.3d at 1302-03 (conservation association’s interest in “vindicating a conservationist vision for the Park” satisfied the recognized interest requirement). Kobernus Decl. ¶ 6; Prasad Decl. ¶¶ 5-6; Hanson Decl. ¶ 6; Starwalt Decl. ¶¶ 8-11; Roehrich Decl. ¶¶ 6, 8; Teagarden Decl. ¶¶ 3-4; Moll Decl. ¶ 7; Godlewski Decl. ¶¶ 3-5; Ness Decl. ¶¶ 4-5; Somers Decl. ¶¶ 3-4; King Decl. ¶¶ 3-6.

Given the significant costs their members stand to incur if the broad and vague Rule is implemented, proposed Business Intervenors have demonstrated a sufficient interest that may be impaired by the litigation. *See* Dkt. 171 at 5-6.

3. The existing parties do not adequately represent proposed Business Intervenors’ interests.

Proposed Business Intervenors “face[] a ‘minimal burden’ of showing that its interests are not adequately represented by the parties,” a burden clearly met here. *Mausolf*, 85 F.3d at 1303;

see also Kansas Pub. Emps. Ret. Sys., 60 F.3d at 1308 (“This requirement is met by a minimal showing that representation ‘may be’ inadequate.”). Proposed Business Intervenors, which represent private entities, cannot rely on the States to represent their interests. The Eighth Circuit has distinguished between the interests of Government and private citizens, even when directed at a common cause. *Sierra Club v. Robertson*, 960 F.2d 83 (8th Cir. 1992). A State’s interests differ from those of private citizens and associations: “the State is a government entity, obliged to represent the interests of all its citizens” and “has an interest in protecting and promoting the state economy on behalf of all its citizens.” *Id.* at 86. Proposed Business Intervenors, on the other hand, “represent the interests of their members and answer only to their members.” *Id.* And as the States’ Complaint makes clear, their focus is on their sovereign authority to manage the water and land within their boundaries and their role as state regulators—interests markedly different from those possessed by the proposed Business Intervenors. *See, e.g.*, Dkt. 176, ¶¶ 1, 7-8.

Neither a common legal goal nor “tactical similarity” between parties will “assure adequate representation.” *See Robertson*, 960 F.2d at 86. Intervention is appropriate, where, as here, the interests of the intervenors are “not shared by the general citizenry of” a government entity party. *Mille Lacs*, 989 F.2d at 1001; *Nat’l Parks Conservation Ass’n*, 759 F.3d at 977 (contrasting government agency’s “general interests” with regulated entity’s narrower self-interest). Even if a State shares a common goal with a private party, those interests may diverge later in litigation. *Mille Lacs*, 989 F.2d at 1001 (explaining that “there is no assurance that the state will continue to support all the positions taken in its initial pleading” and that “what the state perceives as being in its interest may diverge substantially from the [would-be intervenors’] interests”); *Nat’l Parks Conservation Ass’n*, 759 F.3d at 977 (private entity “cannot be assured that the [government agency’s] position will remain static or unaffected by unanticipated policy shifts”). “A potential

conflict of this sort is sufficient to satisfy the proposed intervenors' minimal burden of showing that representation of their interests by the existing parties may be inadequate." *Mille Lacs*, 989 F.2d at 1001.

Further, as discussed, proposed Business Intervenors can complement the existing Plaintiff-Intervenors and present a more complete picture of the effect of the regulations on the regulated community by bringing to the case their expertise regarding application and effect of the regulations on additional industries, in different States, and affecting additional geographic features than may be within the expertise of Cass County Farm Bureau and North Dakota Farm Bureau. The agriculture interests of the North Dakota-based Farm Bureau intervenors are different from those of the proposed intervenors engaged in mining, petroleum, building, real estate, and other non-farm businesses, for which the Rule presents different problems. And the narrow geographical area represented by the Plaintiff-Intervenors is different from the varied geographical areas in which the proposed Business Intervenors operate, which involve features such as desert washes that are important to the analysis of the Rule's defects but that are not encountered in North Dakota.

For these reasons, proposed Business Intervenors have met each of the requirements to intervene as of right, and this Court should therefore grant them leave to do so.

B. Alternatively, Proposed Business Intervenors Should Be Allowed to Intervene Permissively.

In the alternative, Rule 24(b) provides that a court may allow a party to intervene if (1) its motion is timely; (2) the party "has a claim or defense that shares with the main action a common question of law or fact"; and (3) intervention will not cause undue delay or prejudice. Fed. R. Civ. P. 24(b); *see also Ferrellgas, Inc.*, 2020 WL 6122525 at *1-2. This Court found that these factors

were satisfied by Cass County Farm Bureau and North Dakota Farm Bureau, and those factors are similarly satisfied by proposed Business Intervenors here.

First, proposed Business Intervenors were not dilatory in seeking intervention, as this motion is filed seven days after the Amended Complaints were filed in this action. Second, the claims that proposed Business Intervenors seek to bring involve common questions of law and fact regarding the validity of the Rule. Indeed, proposed Business Intervenors' proposed Complaint is substantively identical to that filed by Intervenors Cass County Farm Bureau and North Dakota Farm Bureau. Third, permitting proposed Business Intervenors to intervene to challenge the 2023 Rule as amended by the Amended Rule would allow them to vindicate their substantial interests and, given their prompt action, would neither delay this case nor prejudice any of the parties. Additionally, because proposed Business Intervenors represent a broad array of industries with a wide geographical scope, they are well positioned to shed light on the impacts of the Rule on a diverse range of land and water features.

Therefore, intervention in this case will aid the Court's resolution of the important challenges to this nationwide rule that affects a significant portion of the American economy. *See* Dkt. 171 at 5-6 (granting permissive intervention to Cass County Farm Bureau and North Dakota Farm Bureau).

CONCLUSION

For the foregoing reasons, proposed Business Intervenors respectfully request that the Court grant the motion to intervene.

Dated this 20th day of November, 2023.

Respectfully submitted,

/s/ Katie J. Schmidt

Katie J. Schmidt, ND ID #06949
Andrew D. Cook ND ID #06278
OHNSTAD TWICHELL, P.C.
444 Sheyenne Street, Suite 102
P.O. Box 458
West Fargo, ND 58078-0458
Tel: (701) 282-3249
Fax: (701) 282-0825
Email: kschmidt@ohnstadlaw.com
Email: acook@ohnstadlaw.com

Timothy S. Bishop (*pro hac vice*)
Brett E. Legner (*pro hac vice*)
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
Telephone: (312) 701 7829
Facsimile: (312) 706 8607
Email: tbishop@mayerbrown.com
Email: blegner@mayerbrown.com

James B. Danford, Jr. (*pro hac vice*)
MAYER BROWN LLP
700 Louisiana Street, Suite 3400
Houston, TX 77004
Tel: 713-238-2700
Email: jdanford@mayerbrown.com

Attorneys for the Proposed Business-Intervenors