

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Judge Robert E. Blackburn**

Civil Action No. 19-cv-00208-REB

WILDEARTH GUARDIANS, and  
WESTERN WATERSHEDS PROJECT,

Petitioners,

v.

U.S. FOREST SERVICE, a federal agency of the United States Department of Agriculture,

Respondent,

and

WAYNE BROWN,  
JERRY BROWN,  
THE COLORADO WOOL GROWERS ASSOCIATION,  
J. PAUL BROWN, and  
THE COLORADO FARM BUREAU FEDERATION,

Respondents-Intervenors.

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**ORDER GRANTING MOTIONS TO INTERVENE**

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**Blackburn, J.**

This matter is before me on the following: (1) the **Proposed Respondent - Intervenors' Motion to Intervene** [#12]<sup>1</sup> filed May 31, 2019; (2) the **Motion To Intervene by Colorado Farm Bureau Federation and J. Paul Brown** [#13] filed May 31, 2019; and (3) the **Stipulation on Motion To Intervene** [#16] filed June 21, 2019. The stipulation [#16] largely resolves the first motion [#12]. Responses [#17 & #18] and a reply [#19] concerning the second motion [#13] were filed. I grant each of the motions.

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<sup>1</sup> “[#12]” is an example of the convention I use to identify the docket number assigned to a specific paper by the court’s case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

## I. STANDARD OF REVIEW

Under Fed. R. Civ. P. 24(a)(2), a person may intervene of right if certain requisites are shown. “On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the . . . 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). To intervene of right, a proposed intervenor must show: (1) the application to intervene is timely; (2) the applicant claims an interest relating to the property or transaction that is the subject of the case; (3) the action may, as a practical matter, impair or impede that interest; and (4) no party to the action can be an adequate representative of the interest of the applicant. ***Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of Interior***, 100 F.3d 837, 840 (10<sup>th</sup> Cir. 1996). Failure to satisfy even one of these requirements is sufficient to warrant denial of a motion to intervene as of right. ***Commodity Futures Trading Com’n v. Heritage Capital Advisory Services, Ltd.***, 736 F.2d 384, 386 (7<sup>th</sup> Cir. 1984); ***National Ass’n for Advancement of Colored People v. New York***, 413 U.S. 345, 369 (1973). In the alternative, permissive intervention is permitted when a person “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)(B).

On the second and third factors, the United States Court of Appeals for the Tenth Circuit follows a somewhat liberal line of cases in allowing intervention of right. ***Utah Association of Counties v. Clinton***, 255 F.3d 1246, 1249 (10<sup>th</sup> Cir. 2001). A proposed intervenor “must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal.” ***Id.*** at 1253 (internal citation and quotation

marks omitted). An applicant for intervention must show inadequate representation of its interests by other parties. *Id.* at 1254. That burden also is minimal, requiring a showing that representation may be inadequate. *Id.* “(A) prospective intervenor need make only a minimal showing to establish that its interests are not adequately represented by existing parties.” ***San Juan County, Utah v. United States***, 503 F.3d 1163, 1203 (10<sup>th</sup> Cir. 2007) (en banc), ***abrogated in part on other grounds by Hollingsworth v. Perry***, 570 U.S. 693 (2013).<sup>2</sup>

## II. BACKGROUND

The petitioners challenge the 2018 authorization of the U.S. Forest Service of domestic sheep grazing on the Wishbone allotment (the allotment) within the Rio Grande National Forest. The Wishbone allotment is central to the domestic sheep production operations of proposed intervenors, Wayne and Jerry Brown, who have grazed on allotments of public lands for many years. According to the Browns, there are very limited (or no) summer pastures available to them outside the Wishbone allotment. Without the allotment, the Browns contend they will lose their summer pasture completely, forcing them to purchase replacement feed at elevated costs which threatens the viability of their businesses.

Proposed intervenor, the Colorado Wool Growers Association (CWGA), a membership-based organization comprised of sheep producers and lamb feeders throughout Colorado, represents that it is considered a premier legislative, regulatory and policy management organization for the Colorado sheep industry. Wayne and Jerry Brown

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<sup>2</sup> ***Hollingsworth*** held that a prerequisite to intervention to defend one’s interest is assertion of “an injury in fact of his own.” 570 U.S. at 708. Thus, ***Hollingsworth*** abrogates the principle of ***San Juan County, Utah*** that “parties seeking to intervene under Rule 24(a) or (b) need not establish Article III standing so long as another party with constitutional standing on the same side as the intervenor remains in the case,” 503 F.3d at 1172.

are members of the CWGA. The CWGA avers that it exists to promote a viable and profitable sheep industry, including working on behalf of sheep producers to protect their ability to raise and market their sheep in a complex and increasingly urban environment. CWGA cannot exist as an organization without a viable membership of sheep producers, such as Wayne and Jerry Brown.

In the present case, the petitioner, the respondent, and proposed respondent - intervenors Wayne Brown, Jerry Brown, and the CWGA (collectively, the CWGA Intervenor(s)) reached agreement between and among themselves on the terms under which the CWGA Intervenor(s) should be permitted to intervene. *Stipulation* [#16]. The parties concede that the CWGA Intervenor(s) satisfy the requirements for intervention of right under Fed. R. Civ. P. 24(a)(2). Having reviewed the motion [#12] and the stipulation [#16], I find and conclude that the CWGA Intervenor(s) satisfy the requirements for intervention of right under Fed. R. Civ. P. 24(a)(2). In addition, I approve the stipulated terms under which the CWGA Intervenor(s) will be permitted to intervene. Those terms are included in this order.

Proposed respondent-intervenor(s), Colorado Farm Bureau Federation (CFB) and J. Paul Brown (collectively, the CFB Intervenor(s)), present different circumstances. CFB claims to be the largest agricultural non-profit membership organization in the state of Colorado, representing the interests of nearly 25,000 ranchers, farmers, and other industry professionals in every county in the state. CFB was founded in 1919 and is dedicated to preserving and protecting the future of Colorado agriculture and rural values. The operations of CFB include assisting rural communities (economically and otherwise), sponsoring education and outreach programs, and influencing policy at the state and local level. CFB is devoted to the protection of agriculture and rural communities and focuses on issues that are specific to the small towns and individual farmers and ranchers of Colorado.

CFB members graze their livestock on public lands located within Colorado, including the allotments in the Rio Grande National Forest that are the subject of the 2017 Environmental Assessment and 2018 Final Decision at issue in this case. Preserving the viability of public lands livestock grazing is of paramount importance to the organization, the CFB says.

J. Paul Brown is a member of CFB. J. Paul Brown is a sheep producer who holds a federal grazing permit on the Tank Creek, Virginia Creek, and Enlich Mesa Allotments in the San Juan National Forest. The J. Paul Brown allotments are located near the Wishbone Allotment, the allotment at issue in this case, in the Rio Grande National Forest. Mr. Brown says he is a past president of the CWGA and a member of the board of directors of CFB. J. Paul Brown says he is aware of this suit against the Forest Service and the agency's conclusion that impacts to bighorn sheep which may be caused by domestic sheep ranching were not major.

According to the CFB Intervenor, they seek intervention in this case because the interests of every livestock operator in Colorado, including the livelihood of J. Paul Brown, are threatened directly by the management actions sought by the petitioners in this case. According to the CFB Intervenor, the petitioners seek to set aside a Forest Service decision to authorize sheep grazing on the Wishbone Allotment in the Rio Grande National Forest because that decision contradicts their overarching goal of destroying livestock operations throughout the American west.

### **III. ANALYSIS**

Intervention by the CWGA Intervenor needs no further analysis. The only question is whether the CFB Intervenor has satisfied the requirements for intervention of right or permissive intervention. It is undisputed that the motion of the CFB Intervenor is timely. The parties and the CFB Intervenor dispute (A) whether the CFB Intervenor has an

interest relating to this case; (B) whether this action may impair any such interest; and (C) whether the respondent and/or the CWGA Intervenor adequately represent the interests of the CFB Intervenor.

#### A. Interest Relating To The Property or Transaction At Issue

The contours of the interest requirement have not been clearly defined in the Tenth Circuit. ***Utah Ass'n of Counties v. Clinton***, 255 F.3d 1246, 1251 (10<sup>th</sup> Cir. 2001). Courts in the Tenth Circuit typically have considered whether the interest of the proposed intervenor is “direct, substantial, and legally protectable.” ***Coalition of Ariz./N.M. Counties for Stable Economic Growth v. Dep't of Interior***, 100 F.3d 837, 840, 842 (10th Cir. 1996). “A protectable interest is one that would be impeded by the disposition of the action.” ***Western Energy Alliance***, 877 F.3d at 1165. While “[t]he threshold for finding the requisite legally protected interest is not high,” “an intervenor must specify a particularized interest” in the litigation and may not “raise interests or issues that fall outside of the issues raised” by the parties. ***Am. Ass'n of People with Disabilities***, 257 F.R.D. 236, 246 (D. N.M. 2008). “(A)n undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right.” ***Public Serv. Co. of New Hampshire v. Patch***, 136 F.3d 197, 205 (1st Cir. 1998).

The CFB Intervenor asserts three bases to show their interest related to the property or transaction at issue in this case: (1) a persistent record of advocacy by CFB on related issues; (2) the geographic proximity of the grazing operation of J. Paul Brown; and (3) future impacts of this case on other, similar grazing allotments. Neither the CFB nor J. Paul Brown have grazing operations or contemplated operations on the allotment. However, Mr. Brown holds a federal grazing permit on certain allotments near the allotment at issue in this case. J. Paul Brown says he is concerned that an adverse outcome for the permittee

in the Wishbone Allotment will translate to an adverse outcome for his nearby allotments, given the geographic and biological contiguity of the area. J. Paul Brown and CFB say they also have a broader interest in sheep grazing on national forest lands and the policies applied by the government to sheep grazing on these lands. They cite a variety of roughly similar cases, mostly from Idaho, to show that “Colorado is simply the newest front in an old war waged against sheep grazing.” *Reply* [#19], pp. 4-5.

The petitioners and the respondent both contend the interests asserted by the CFB Intervenor are too indirect to support intervention. The generalized claim of a persistent record of advocacy on related issues is not circumstantiated on the record. The declarations [#13-2 & #13-3] on which the CFB Intervenor rely provide no specifics on this point. As noted by the petitioners, the CFB Intervenor did not participate in the National Environmental Policy Act process for the Wishbone Allotment. *Response* [#17], p. 6. The record of advocacy of the CFB Intervenor does not tend to show that they have a direct, substantial, and legally protectable interest in this case. Relatedly, the more generalized interests in livestock grazing issues asserted by the CFB Intervenor do not support their claim to have a direct, substantial, and legally protectable interest in this case. Rather, those asserted interests are only generalized interests in issues roughly similar to the issues in this action. For example, their contention that Colorado is the newest front in an old war waged against sheep grazing demonstrates only a generalized interest and not a substantial and legally protectable interest in this particular case.

J. Paul Brown holds grazing permits on national forest land near the Wishbone Allotment. Other members of the CFB hold grazing permits on nearby national forest land and elsewhere in Colorado. In addition, CFB says it has members who graze livestock on allotments in the Rio Grande National Forest which “are the subject of the 2017

Environmental Assessment and 2018 Final Decision at issue in this case.” *Memorandum* [#13-1], Exhibit A [#13-2] (Martini Declaration), ¶ 8. According to the CFB, if the petitioners obtain the declaratory and injunctive relief they seek in this case, this case will have a severe impact on the rights of CFB constituents, “including closure of the Wishbone Allotment to sheep grazing and potentially many other sheep allotments due to a professed concern over bighorn sheep populations nearby.” *Id.*, ¶ 9. As noted, J. Paul Brown shares a similar concern.

I find and conclude that the interests of J. Paul Brown and members of the CFB in grazing allotments near the Wishbone Allotment tend to show that they have a direct, substantial, and legally protectable interest in this case. Grazing allotments in the near vicinity of the Wishbone Allotment are geographically and biologically proximate to the Wishbone Allotment, the allotment at issue in this case. There is a reasonable possibility that analysis and decisions applicable to the Wishbone Allotment may be applied to other allotments which are geographically and biologically proximate to the Wishbone Allotment.

#### B. Impairment of Interest

Rule 24(a)(2) also requires proposed intervenors to demonstrate that the disposition of the action may, as a practical matter, impair or impede their ability to protect their interest. “To satisfy [the impairment] element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied.” ***WildEarth Guardians v. U.S. Forest Serv.***, 573 F.3d 992, 995 (10<sup>th</sup> Cir. 2009) (citation and internal quotation omitted). “If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.” *Id.* (citation and internal quotation omitted). The burden to establish this element is minimal and only requires a showing “that

impairment of [a] substantial legal interest is possible if intervention is denied.” *Id.* (citation and internal quotation omitted). An interest of a third party may be impaired when the resolution of the legal questions in the case might effectively foreclose the rights of the intervenor in later proceedings, whether through *res judicata*, collateral estoppel, or *stare decisis*. ***Federal Deposit Ins. Corp. v. Jennings***, 816 F.2d 1488, 1492 (10<sup>th</sup> Cir. 1987).

Addressing the interests of J. Paul Brown and members of the CFB in grazing allotments near the Wishbone Allotment, I find that it is possible – if not probable – those interests will be impaired if intervention is denied. As noted, there is a reasonable possibility that analysis and decisions applicable to the Wishbone Allotment will be applied to other allotments which are geographically and biologically proximate to the Wishbone Allotment. That would tend to impair these interests. Further, decisions, particularly on appeal, in this case could establish precedents which might affect the CFB Intervenors in terms of their allotments which are geographically and biologically proximate to the Wishbone Allotment.

### C. Adequacy of Representation

The remaining requisite for intervention is that the interests of the CFB Intervenors are not adequately represented by the respondent and/or the CWGA Intervenors. The burden to satisfy this condition is “minimal.” ***Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of Interior***, 100 F.3d 837, 844 (10<sup>th</sup> Cir. 1996). The possibility of divergence of interest need not be great in order to satisfy this burden. *Id.* An intervenor need only show the possibility of inadequate representation. ***Utah Ass'n of Counties v. Clinton***, 255 F.3d 1246, 1254 (10<sup>th</sup> Cir. 2001).

On its face, it is impossible for a government agency to carry the task of protecting the private interests of a prospective intervenor. ***WildEarth Guardians v. National Park***

**Service**, 604 F.3d 1192, 1200 (10<sup>th</sup> Cir. 2010). The respondent, the United States Forest Service – try as it may – cannot adequately represent the interests of the CFB Intervenor.

The CFB Intervenor contends their interests diverge also from the interests of the CWGA Intervenor. For example, the CFB Intervenor notes that the CWGA is focused on sheep products while the CFB advocates for a broader range of Colorado agricultural interests. In the context of this case, these differences are narrow. Nevertheless, these differences show the possibility of a divergence of interest between the CFB Intervenor and the CWGA Intervenor.

#### D. Conclusion

The CFB Intervenor has shown all of the requisites for intervention as of right under Fed. R. Civ. P. 24(a)(2). Thus, their motion to intervene is granted. In their reply, the CFB Intervenor agrees to abide by the terms under which the CWGA Intervenor and the parties agreed to intervention by the CWGA Intervenor. Those terms are reasonable and will be applicable to both the CWGA Intervenor and the CFB Intervenor. Below, the court provides a revised briefing schedule to accommodate the intervenors and the opportunity for the petitioners and the respondent to respond to issues raised by the intervenors.

#### **IV. ORDERS**

**THEREFORE, IT IS ORDERED** as follows:

1. That under Fed. R. Civ. P. 24(a)(2), the **Proposed Respondent - Intervenor's Motion to Intervene** [#12] is granted;
2. That under Fed. R. Civ. P. 24(a)(2), Wayne Brown, Jerry Brown, and The Colorado Wool Growers Association (collectively, the CWGA Intervenor) are permitted to intervene as respondents;

3. That under Fed. R. Civ. P. 24(a)(2), the **Motion To Intervene by Colorado Farm Bureau Federation and J. Paul Brown** [#13] is granted;

4. That under Fed. R. Civ. P. 24(a)(2), J. Paul Brown and The Colorado Farm Bureau (collectively, the CFB Intervenors) are permitted to intervene as respondents;

5. That the caption of this case shall be amended to show each of these respondent-intervenors, as shown in the caption of this order;

6. That the **Stipulation on Motion To Intervene** [#16] is approved and the relief sought there is granted, to include:

A. the respondent-intervenors shall not file any independent claims in this action against the parties; and

B. each party shall bear its own costs and fees related to the participation of respondent-intervenors in this matter;

7. That the opening brief of the petitioner shall be limited to 35 pages and shall be filed on or before May 20, 2020;

8. That the response brief of the respondent shall be limited to 50 pages and shall be filed on or before June 22, 2020;


9. That the response briefs of the CWGA Intervenors and of the CFB Intervenors shall be limited to 25 pages and shall be filed on or before June 29, 2020;

10. That the CWGA Intervenors and the CFB Intervenors each may file only one response brief; and

11. That the reply brief, if any, of the petitioners shall be limited to 30 pages and shall be filed on or before July 20, 2020.

Dated March 30, 2020, at Denver, Colorado.

**BY THE COURT:**

A handwritten signature in blue ink that reads "Rob Blackburn". The signature is written in a cursive, slightly stylized font. The first name "Rob" is written with a large, looping 'R'. The last name "Blackburn" is written in a more standard cursive script. The signature is positioned above a horizontal line.

Robert E. Blackburn  
United States District Judge