

FILED



2:12 pm, 9/4/26

Margaret Botkins
Clerk of Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

MICHAEL J. CLEMENT,

Petitioner,

NELSON NEIGHBORHOOD
CONSERVATION COALITION, a
Wyoming nonprofit corporation

Petitioner-Intervenor,

VS.

UNITED STATES DEPARTMENT OF
AGRICULTURE FOREST SERVICE
BRIDGER-TETON NATIONAL
FOREST SUPERVISOR, in his official
capacity also known as Chad Hudson, *et*
al.,

Respondents,

Case No. 2:26-CV-1-ABJ

ORDER GRANTING MOTION TO INTERVENE AS OF RIGHT

This matter is before the Court on Petitioner-Intervenor Nelson Neighborhood Conservation Coalition's (hereinafter "NNCC") Motion to Intervene as of Right under Fed. R. Civ. P. 24(a)(2). (ECF No. 20). The Court has reviewed Petitioner-Intervenor's Motion, Respondents' response, Petitioner-Intervenor's reply, the applicable law, and is fully informed in the matter. The Court finds Petitioner-Intervenor is entitled to intervention as

of right under the requisite standard. Thus, the Court GRANTS Petitioner-Intervenor's motion.

BACKGROUND

The Court refers to and incorporates the facts underlying the dispute found in its previous order denying Petitioner Michael Clement's motion for a preliminary injunction and assumes the parties' familiarity with the facts therein. (ECF No. 25). As concerns this Motion specifically, the Nelson Neighborhood Conservation Coalition is "a Wyoming nonprofit corporation" formed in March 2026, "whose members are residents living immediately adjacent to the proposed 36-unit residential development at the Nelson Drive Trailhead." (ECF Nos. 20 at 1, 20-1 at 3). As NNCC states:

The Coalition was formed for the express purposes of: (a) preserving and protecting the environmental quality, natural resources, and economical integrity of the Nelson Drive area in Teton County, Wyoming, and surrounding National Forest System lands; (b) ensuring compliance with federal, state, and local environmental laws affecting the Nelson Drive area; (c) protecting and preserving public access to and enjoyment of the Nelson Drive Trailhead; (d) advocating for responsible land use planning consistent with the residential character of the Nelson Drive neighborhood; and (e) representing the interests of Nelson Drive area residents in administrative and judicial proceedings affecting environmental quality and land use in the neighborhood.

(ECF No. 20-9 ["Ex. F"] ¶ 10).

NNCC members include Kailey Gieck, Lisa Gillette, and Michael McDonnell, all of whom live on or near Nelson Drive and the proposed development. (ECF No. 20-1 at 3–4). Each provided affidavits detailing their interests, and collectively, the three are

concerned with the building of the development as relates to child safety, traffic impacts, loss of wildlife habitat, and artificial lighting. (*Id.*).

NNCC, in representation of residents like Ms. Gieck, Ms. Gillette, and Mr. McDonnell, was formed in direct response to the challenged Special Use Permit and the filing of this action by Petitioner Clement. (*Id.* at 6). It promptly filed the present Motion to Intervene as of Right. (ECF No. 20). The government filed a response, (ECF No. 21), and NNCC filed a reply, (ECF No. 22).

STANDARD OF REVIEW

Fed. R. Civ. P. 24(a)(2) states that, “[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.” *Id.* 24(a)(2). To succeed on such a motion, the proposed intervenor holds the burden to “establish (1) that the application is timely, (2) that it claims an interest relating to the property or transaction that is the subject of the action, (3) that the interest may as a practical matter be impaired or impeded, and (4) that the interest may not be adequately represented by the [existing parties].” *Kane Cnty, Utah v. United States (III)*, 94 F.4th 1017, 1029–30 (10th Cir. 2024), *reh’g denied en banc*, 113 F.4th 1290 (10th Cir. 2024). The Court “follow[s] a somewhat liberal line in allowing intervention,” with the “central concern” being “the practical effect of the litigation on the applicant for intervention.” *Barnes v. Sec. Life of Denv. Ins. Co.*, 945 F.3d 1112, 1121 (10th Cir. 2019) (citations omitted).

ANALYSIS

NNCC alleges that the nonprofit satisfies the four requirements for intervention as of right under Fed. R. Civ. P. 24(a)(2). It claims (1) that its motion is timely, (2) that NNCC “has legally protectable interests in the subject matter of this action,” (3) that disposing of the Petition “may as a practical matter impair or impede NNCC’s ability to protect those interests,” and (4) that existing parties do not adequately represent those interests. (ECF Nos. 20 at 2; 20-1 at 7–12).

The government concedes the timeliness requirement. (ECF No. 21 at 6). Moreover, the government’s response does not directly contest that the current litigation will impair or impede NNCC’s ability to protect its interests, or that existing parties fail to represent NNCC’s interests. (ECF Nos. 21 at 6 (“[T]he United States contends that Proposed Intervenor does not have a sufficient justiciable interest in the subject of this action because its legal interests have long been extinguished by statute and rule”); 22 at 2 (“[The government] does not address whether disposition of this case will impair [NNCC’s] interests[,] [a]nd it does not address whether Plaintiff Clement, proceeding *pro se* on his own behalf, adequately represents the Coalition’s members.”)).

Instead, the government claims that NNCC “does not have a justiciable interest in this litigation,” and that intervention would be futile for a variety of reasons, including, *inter alia*, failure to sue within the requisite statute of limitations or to exhaust administrative remedies, and an argument that the Special Use Permit does not constitute a final agency action. (*Id.* at 6–7). For the reasons explained below, this argument falls

under step two of the Rule 24(a)(2) analysis, and the Court only considers whether NNCC possesses a legally cognizable interest in the subject of the litigation.

For the second requirement, Petitioner-Intervenor “must have an interest that could be adversely affected by the litigation.” *San Juan Cnty., Utah v. United States*, 503 F.3d 1163, 1199 (10th Cir. 2007) (en banc). This is a “highly fact-specific determination.” *Coal. of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep’t of Int.*, 100 F.3d 837, 840 (10th Cir. 1996). The interest in the proceedings must “be direct, substantial, [] legally protectable,” *id.*, as well as “compatible with efficiency and due process.” *Coal. of Ariz.*, 100 F.3d at 841. “A protectable interest is one that would be impeded by the disposition of the action.” *W. Energy All. v. Zinke*, 877 F.3d 1157, 1165 (10th Cir. 2017) (quotation marks omitted); *see Barnes*, 945 F.3d at 1121–22. And even then, whether an interest is “legally protectable” “must yield to practical concerns.” *San Juan Cnty.*, 503 F.3d at 1196.

It is undisputable that “a prospective intervenor’s environmental concern is a legally protectable interest.” *WildEarth*, 604 F.3d at 1198 (citing *San Juan Cnty.*, 503 F.3d at 1199). The Tenth Circuit has decided “numerous cases in which environmental organizations and other special interest groups have been held to have a sufficient interest for purposes of intervention as of right in cases in which their particular interests were threatened.” *Utah Ass’n of Cntys.*, 255 F.3d at 1252. This extends to interests related to purely “aesthetic and recreational purposes,” *WildEarth*, 604 F.3d at 1199, including “the desire to use or observe an animal species, even for purely [a]esthetic purposes,” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562–63 (1992). On its own, NNCC’s interests in preserving the natural wildlife near Nelson Drive and preventing aesthetic hardships caused by

artificial lighting qualify as “direct, substantial, and legally protectable” interests. *Coal. of Ariz.*, 100 F.3d at 841. And from a practical standpoint, NNCC claims that allowing the building of the proposed development will cause increased car traffic on narrow roads without sidewalks, which “impedes” a further “protectable interest” in maintaining safety for pedestrians, particularly children, in the neighborhood. *Barnes*, 954 F.3d at 1121; (Ex. F ¶¶ 44–49 (describing the effects of the possible increases in traffic)). Taken with the environmental interests, NNCC has sufficiently alleged an interest that “relates to the property or transaction which is the subject of the action” and meets the standard in Rule 24(a)(2). *Coal. of Ariz.*, 100 F.3d at 842.

The government does not contest the above. Instead, the government claims that the “interest” requirement cannot be met because intervention would be futile. In reply, NNCC states that “futility is not the standard for intervention as of right in the Tenth Circuit,” and that in any event, NNCC’s proposed intervention is not futile. (ECF No. 22 at 2).

Whether futility is a reason to deny a Motion to Intervene as of Right is a question of first instance for the Court. To the Court’s knowledge, the Tenth Circuit has never opined as to whether futility is a proper defense in this context, and the merits are not an express part of the test detailed in Rule 24(a)(2). *See Educ. Credit Mgmt. Corp. v. Bradco, Inc.*, Civil Action No. 07-2418-DJW, 2008 WL 2066993, at *4 (D. Kan. May 14, 2008) (“Neither subsection (a) nor (b) of Rule 24 takes into consideration the merits of the proposed claim or defense in intervention, and the Court is unable to find any Tenth Circuit case law addressing the issue.”).

On the other hand, the Court recognizes that other courts in this circuit have utilized legal futility as a basis for denying a motion to intervene. *Id.* at *4 n.28 (listing cases). This is true in other circuits as well. For example, in *Williams & Humbert Ltd. v. W. & H. & Trade Marks (Jersey) Ltd.*, the U.S. Court of Appeals for the D.C. Circuit held that, when considering whether the cognizable interest element is met, “[a]n application to intervene should be viewed on the tendered pleadings—that is, *whether those pleadings allege a legally sufficient claim or defense* and not whether the applicant is likely to prevail on the merits.” 840 F.2d 72, 75 (D.C. Cir. 1988) (emphasis added) (citations omitted). As Wright and Miller put it:

The proposed pleading must state a good claim for relief or a good defense. . . . The general rules on testing a pleading are applicable here. The pleading is construed liberally in favor of the pleader-intervenor and the court will accept as true the well-pleaded allegations in the pleading.

7C Wright & Miller’s Federal Practice and Procedure § 1914 (3d ed. 2026).

Every other circuit to consider this issue has adopted a similar standard. *Sw. Ctr. For Biological Diversity v. Berg*, 268 F.3d 810, 819–20 (9th Cir. 2001) (holding that “[c]ourts are to take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint . . . in intervention, and declarations supporting the motion as true absent sham, frivolity or other objections,” after listing cases¹). As such, the Court opts for

¹ *Accord, e.g., Stadlin v. Union Elec. Co.*, 309 F.2d 912, 917 (8th Cir. 1962); *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995); *Chesapeake Bay Found. v. Am. Recovery Co.*, 769 F.2d 207, 209 (4th Cir. 1985); *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981); *Mendenhall v. M/V Toyota Maru No. 11*, 551 F.2d 55, 56 n.2 (5th Cir. 1977); *see also* (ECF No. 22 at 4 (“[T]he standard would be whether the proposed claims are *clearly* foreclosed.”)).

the approach adopted by these circuits when faced with challenges to the second element of Rule 24(a)(2) based on futility.

In so doing, the Court looks *only* to “the adequacy of the proposed pleadings” when deciding the intervention question. *Williams & Humbert Ltd.*, 840 F.2d at 77. Phrased differently, “a motion to intervene as a matter of right . . . should not be dismissed unless it *appears to a certainty* that the intervenor is not entitled to relief under any set of facts which could be proved under the complaint [in intervention].” *Reich*, 64 F.3d at 321 (emphasis added) (quoting *Shea v. Angulo*, 19 F.3d 343, 344 (7th Cir. 1994)). Questions that are not “presented on the pleadings”—including those that would require an express decision on the merits—are “properly addressed in the first instance” after intervention is allowed, if such a motion is granted. *Id.*

Applying these concepts, the Court looks to NNCC’s proposed “Complaint in Intervention for Declaratory and Injunctive Relief” attached to its Motion, assuming all facts therein as true, but ignoring all conclusory allegations. (ECF No. 20-9). Applying this standard, the government cannot succeed.

The futility dispute between the parties boils down to the question of statutory standing.² As is relevant here, to possess statutory standing under the APA, the party

² The parties do not dispute whether NNCC, as a nonprofit, possesses associational standing to sue on behalf of its members under Article III of the U.S. Constitution. *See Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 342 (1977) (detailing the three-part test for associational standing). In any event, the proposed complaint in intervention and attached affidavits from three of NNCC’s members meet the *Hunt* standard, and the Court finds NNCC possesses associational standing under Article III. (Ex. F ¶¶ 9–13). The “zone-of-interest” requirement for statutory standing is similarly undisputed. *See Lujan*, 497 U.S. at 882.

seeking judicial review (which includes for violations of NEPA, *Lujan*, 497 U.S. at 882) must “identify some ‘final agency action.’” *Catron Cnty. Bd. Of Com’rs, N.M. v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996) (quoting 5 U.S.C. § 551(13)). The government claims that the only “final agency action” in this case was the original 2012 FONSI decision. Every other source of purported futility the government cites, including statute of limitations, waiver of claims, and exhaustion of administrative remedies, depends on a presumption that no final agency action occurred following 2012.

The Court has already addressed this issue. In its order denying Petitioner Clement’s request for a preliminary injunction, the Court held that the 2025 “issuance of a special use permit” in this case “is [a] final agency action that has an actual or immediately threatened effect to trigger [statutory] standing.” (ECF No. 25 at 7 (citing *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 639 (9th Cir. 2004))). Per this order, NNCC’s intervention is not futile, and because the government’s remaining objections as to futility rely upon a presumption that no final agency action occurred in 2025, those objections are not compelling. This is so even if the other decisions NNCC cites, like (1) Hudson’s 2025 review of the 2012 FONSI decision or (2) Hudson’s departure from previous commitments made by prior Supervisor Buchanan, would not qualify as final agency actions. The presence of one final agency action establishes statutory standing and this Court’s jurisdiction, and NNCC’s intervention is not futile.

Thus, because NNCC possesses an interest that could be adversely affected by the litigation and intervention is not futile, NNCC meets the second element of the Rule

24(a)(2) standard. And because the government does not contest the other three elements of Rule 24(a)(2), NNCC has met the standard for intervention as of right.

CONCLUSION

IT IS ORDERED that NNCC's Motion to Intervene as of Right (ECF No. 20) is **GRANTED**, and NNCC is joined to this action as Petitioner-Intervenor.

IT IS FURTHER ORDERED that Petitioner-Intervenor shall file its Complaint in Intervention within fourteen (14) days of the date of this Order, and all future pleadings, motions, and other papers filed in this action shall reflect NNCC's status as Petitioner-Intervenor in the caption.

IT IS FURTHER ORDERED that the Petitioner-Intervenor will join the other parties in providing the Court with information on the status of the case on or before September 28, 2026, pursuant to this Court's previous Order Requesting a Status Update (ECF No. 26).

Dated this 4th day of September, 2026.



Alan B. Johnson
United States District Judge