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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

GARY R. HERBERT, in his official capacity as Governor of the State of Utah, *et al.*,

Plaintiffs,

and

UTAH FARM BUREAU FEDERATION; and AMERICAN FARM BUREAU FEDERATION,

Proposed Intervenor-Plaintiffs,

v.

S.M.R. JEWELL, in her official capacity as Secretary of the United States Department of the Interior, *et al.*,

Defendants, and

THE WILDERNESS SOCIETY, *et al.*,

Intervenor-Defendants.

No. 2:16-cv-00101-DAK

MOTION TO INTERVENE AS PLAINTIFFS BY UTAH FARM BUREAU FEDERATION AND AMERICAN FARM BUREAU FEDERATION and MEMORANDUM IN SUPPORT

Utah Farm Bureau Federation and American Farm Bureau Federation ("Farm Bureaus" or "Proposed Intervenors") hereby move to intervene as plaintiffs pursuant to Fed. R. Civ. P. 24 and DUCivR 7-1. In this lawsuit, Governor Gary Herbert, the State of Utah, and State of Utah School and Institutional Trust Lands Administration (together, "State Plaintiffs") seek declaratory and injunctive relief against the U.S. Bureau of Land Management ("BLM"), the U.S. Forest Service ("Forest Service"), and their representatives (together, "Federal Defendants") for alleged violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*, the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701, *et seq.*, the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600 *et seq.*, and other statutes. According to the Complaint, the Federal Defendants violated those statutes in adopting an "unprecedented management plan for millions of acres of Federal lands in Utah for the ostensible purpose of conserving Sage-grouse habitat." Compl. ¶¶ 3-4.

The challenged land management plan amendments and related environmental analyses at issue in this case significantly impair the ability of ranchers to conduct their operations on public lands. As explained in more detail below, the challenged actions impose restrictive standards and guidelines that govern ranching activities on substantial portions of the Federal lands in Utah, such as minimum height requirements for vegetation; limits on the placement of range management structures (*e.g.*, fences, windmills, water tanks, etc.); and prohibitions on water developments (*e.g.*, wells) and livestock ponds. In so doing, the Federal Defendants sidestepped public participation and notice requirements (*e.g.*, under FLPMA and NFMA) and also violated substantive standards in those statutes. Accordingly, the Farm Bureaus seek to intervene as plaintiffs in this case to ensure that the federal government does not continue to

subject their member ranch families to requirements that are arbitrary and capricious, not in accordance with law, and in excess of their statutory jurisdiction and authority.

Counsel for the Farm Bureaus has conferred with counsel for State Plaintiffs, Federal Respondents, and Intervenor-Defendants. [State Plaintiffs do not oppose this Motion, Federal Defendants take no position on this Motion, and Intervenor-Defendants oppose this Motion/reserve their position on this Motion].

BACKGROUND

State Plaintiffs seek to invalidate unprecedented resource and land management plan amendments for millions of acres of Federal lands in Utah issued by BLM and the Forest Service. In the Federal Defendants' view, those actions are necessary to conserve Greater Sage-Grouse habitat. To provide additional context for the Farm Bureaus' motion to intervene, we summarize the key issues and developments below.

I. Legal Framework

Under FLPMA, BLM manages public lands and resource values according to multiple use and sustained yield principles, which means that lands are to be "utilized in the combination that will best meet the present and future needs of the American people." 43 U.S.C. § 1702(c). The Act requires BLM to develop and periodically revise land use plans, such as the challenged resource management plan amendments in this case, in coordination with state and local governments' land use planning and management initiatives. *See generally id.* § 1712. While FLPMA Section 302(b) authorizes BLM to "take any action necessary to prevent unnecessary or undue degradation of the lands," that authorization plainly contemplates some degree of impacts to land and resources will result from longstanding multiple uses on federal lands, such as ranching. *Id.* § 1732(b). Of particular relevance here, when BLM amends resource management plans, it must prioritize the designation and protection of areas of critical environmental concern

("ACECs"), which are areas where special attention is needed to protect important wildlife resources, among others. *See id.* § 1712(c)(3). BLM regulations implementing FLPMA contain mandatory procedures for establishing ACECs. *See* 43 C.F.R. § 1610.7-2.

The Forest Service develops and maintains land management plans for National Forest System lands under NFMA. *See* 16 U.S.C. §§ 1600 *et seq.* Just as BLM must do under FLPMA, NFMA requires the Forest Service to consider state and local land management plans and try to reduce or eliminate inconsistencies between federal plans and state and local plans. And like FLPMA, a guiding principle of the National Forest System is one of multiple use and sustained yield, *see* 16 U.S.C. §§ 1601(d), 1602, meaning that Forest Service lands, like BLM lands, are by design not intended to be preserved in a pristine state. To the contrary, they exist with the expectation that their resources will be utilized and harvested, albeit in sustainable fashion—hence their management by the Forest Service, an agency within the U.S. Department of Agriculture.

II. Sage-Grouse Conservation Efforts

Utah has long devoted resources to conserving Sage-grouse population and habitat. As detailed in State Plaintiffs' Complaint, Utah issued a comprehensive Sage-grouse management plan in 2002, and it revised that plan in 2009. *See* Compl. ¶¶ 22. Then in 2013, the State adopted a Sage-grouse Conservation Plan in good faith reliance on the the U.S. Department of Interior's invitation to western states to develop State-based conservation plans and regulatory mechanisms to help ensure that the federal governent would not have to list the Sage-grouse as a threatened or endangerd species under the Endangered Species Act. *See id.* ¶¶ 91-99. As a result of Utah's considerable efforts, the Sage-grouse population has increased since 1965. *See id.* ¶¶ 1 & 90. Moreover, a recent report by the Western Association of Fish and Wildlife Agencies, estimated a minimum breading Sage-grouse population of over 424,645 birds, with

positive trends identified in Utah, Wyoming and Idaho since 1965. *See* Greater Sage Grouse Population Trends: An Analysis of Lek Court Databases 1965-2015 (August 2015), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjl5KbNvLfNAhXNPB4KHSg9ASkQFggcMAA&url=http%3A%2F%2Fwww.wafwa.org%2FDocuments%2520and%2520Settings%2F37%2FSite%2520Documents%2FNews%2FLek%2520Trend%2520Analysis%2520final%25208-14-15.pdf&usg=AFQjCNHx_oYwZbGIH_NC4crhtPGaEZ7rGw.

Despite the extensive efforts by Utah and other western states to implement conservation plans and collaborate with the Federal Government with respect to Sage-grouse conservation, BLM and the Forest Service ultimately abandoned that state-specific approach in favor of adopting more restrictive prescriptions through amending resource management plans and land management plans for BLM and National Forest System lands, respectively. *See* Compl. ¶¶ 105-111. Those plan amendments, and the related environmental impact analysis under NEPA, are the subject of this lawsuit: State Plaintiffs are challenging BLM's Record of Decision for the Great Basin Region ("BLM ROD") and Approved Resource Management Plan Amendment for Utah ("Utah ARMPA"), as well as the Forest Service's Record of Decision for Idaho and Southwest Montana, Nevada and Utah ("Forest Service ROD"), which includes a Utah Plan Amendment. *See id.* ¶ 85. The challenged RODs and plan amendments were issued after preparation of an Environmental Impact Statement ("EIS") that purports to evaluate the potential impacts of the Utah plan amendments. *See id.* ¶ 86. The Federal Defendants' RODs, management plan amendments, and Final EIS suffer from a slew of procedural and substantive defects and thus, violate numerous federal statutes. *See id.* ¶¶ 112-212; *see also* Compl. in Intervention ¶¶ **-**.

III. Proposed Intervenor-Plaintiffs

American Farm Bureau Federation ("AFBF"), which was formed in 1919, is the largest non-profit general farm organization in the United States, representing farming and ranching families and other supporters of American agriculture through member organizations in all fifty states and Puerto Rico, including Utah. Its member organizations include the Utah Farm Bureau Federation ("UFBF"). AFBF's primary function is to advance and promote the interests and betterment of farming and ranching, the farming and ranching communities, and families engaged in those activities. This effort involves advancing, promoting, and protecting the economic, business, social, and educational interests of farmers and ranchers across the United States. AFBF advocates the development of reasonable and lawful environmental and land use regulations and regulatory policy. AFBF also participates in litigation when necessary to defend its members' interests. Many of AFBF's member families conduct ranching operations on private, state, and federal lands in Utah that are subject to the challenged land management plan amendments, which require adherence to stringent standards and guidelines that will make ranching operations more difficult, more costly, and economically infeasible in the affected areas.

UFBF is a general farm and ranch organization that provides leadership, education, information, training, and economic services to Utah's farmers and ranchers. UFBF is the largest general farm and ranch organization in the state of Utah, representing more than 29,000 member families. Many of UFBF's members own and operate ranches on private, state, and federal lands that will be affected by the challenged land use plan amendments. During the agency proceedings below, UFBF participated throughout the NEPA process, culminating in the submission of comments on the Utah Greater Sage-Grouse Draft Land Use Plan Amendments and Environmental Impact Statement ("EIS"). Following issuance of the final land management

plan amendments and final EIS, UFBF filed a formal protest with BLM in accordance with 43 C.F.R. § 1610.5-2.[1]

ARGUMENT

Federal Rule of Civil Procedure 24 recognizes two paths to intervention. Under Rule 24(a), a party is entitled to intervene as of right if the party "claims an interest relating" to the action and "is so situated that disposing of the action may as a practical matter impair or impede" the party's "ability to protect its interest." Fed. R. Civ. P. 24(a). Alternatively, a party may seek "permissive" intervention under Rule 24(b)(1) so long as the party 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). For reasons explained below, the Farm Bureaus are entitled to intervene under Rule 24(a) and, alternatively, should be permitted to intervene under Rule 24(b).

I. The Farm Bureaus Are Entitled to Intervene as of Right.

Fed. R. Civ. P. 24(a)(2), which provides for intervention as of right, states, as follows:

> 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.

In other words, intervention as of right requires (1) timeliness; (2) a cognizable interest; (3) impairment of interest; and (4) inadequate representation. *See, e.g.*, *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002); *Utah Ass'n of Counties v. Clinton*, 255

[1] The Forest Service has its own administrative protest procedures, but it waived those procedures here in accordance with 36 C.F.R. § 219.59 and instead adopted the BLM protest procedures in 43 C.F.R. § 1610.5-2. *See* FS ROD at 61.

F.3d 1246, 1249 (10th Cir. 2001). The Tenth Circuit has liberally interpreted that test in favor of intervention. *Utahns for Better Transp.*, 295 F.3d at 1115. In analyzing those factors, the Circuit has instructed courts to focus on the practical effect of the litigation on the movant and its interests. *San Juan Cnty., Utah v. United States*, 503 F.3d 1163, 1193 (10th Cir. 2007). For reasons that follow, the Farm Bureaus satisfy all of the requirements for intervention as of right.

A. The Farm Bureaus' Motion is Timely.

Because Rule 24 is silent as to what constitutes timely application for intervention, timeliness is to be judged in consideration of all of the particular circumstances of a case. *Oklahoma v. Tysons Foods, Inc.*, 619 F.3d 1223, 1231 (10th Cir. 2010); *Utah Ass'n of Counties*, 255 F.3d at 1250. Intervention must be timely to ensure that the existing parties do not suffer prejudice caused by a latecomer seeking to intervene. *Utah Ass'n of Counties*, 255 F.3d at 1250-51. However, "[t]he requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner." *Utah Ass'n of Counties*, 255 F.3d at 1250. The Tenth Circuit has stated that "[f]ederal courts should allow intervention where no one would be hurt and greater justice could be attained." *Id.*

Plaintiffs filed their complaint on February 4, 2016, and the Federal Defendants responded on April 5. The Court entered a briefing schedule for this case on May 2, but recently modified that schedule on June 8 to accommodate Intervenor-Defendants. *See* Amended Scheduling Order, ECF No. 49 (June 8, 2016). Under the amended schedule, State Plaintiffs' objections or motion to supplement the administrative record are due on July 8, and State Plaintiffs' opening brief would be due on August 22 at the earliest. The Farm Bureaus will comply with all deadlines set forth in the Court's amended schedule. Moreover, the Farm Bureaus do not seek to reopen any settled issues in the case (*e.g.*, preliminary motions) or

independently dispute the contents of the administrative record. The Farm Bureaus seek only to participate in the upcoming merits briefing. The Farm Bureaus' participation therefore will not prejudice any of the existing parties.

Given the relatively short amount of time since the Court's entry and modification of a briefing schedule and the absence of prejudice to any party, this motion is timely.

B. The Farm Bureaus Have Cognizable Interests Related to the Subject of this Litigation.

The test for an applicant for intervention's interest "is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Utah Ass'n of Counties*, 255 F.3d at 1251-52. "The movant's claimed interest is measured in terms of its relationship to the property or transaction that is the subject of the action, not in terms of the particular issue before the district court." *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010). The interest must be direct, substantial, and legally protectable, a standard that is satisfied by the *threat* of economic injury. *Utahns for Better Transp.*, 295 F.3d at 1115; *Utah Ass'n of Counties*, 255 F.3d at 1251. In this Circuit, "[t]he threat of economic injury from the outcome of litigation undoubtedly gives a petitioner the requisite interest." *Utahns for Better Transp.*, 295 F.3d at 1115.

The Farm Bureaus have a significantly protectable interest in the outcome of this litigation. Many of their member families own and operate ranches that are subject to new federal land use designations and restrictions as a result of the Federal Defendants' actions. BLM's ROD and Approved Resource Management Plan Amendment prescribes a suite of management decisions and actions, which are measures that "*will be applied* to guide day-to-day activities on public lands, including but not limited to, stipulations, guidelines, [best management practices], and [required design features]." BLM ROD at 2-2 (emphasis added). Indeed, BLM

states unequivocally that it "will apply these actions where the BLM has discretion to implement them[,]" *i.e.*, in areas where BLM administers the surface estate. BLM Utah Approved RMP Amendment at 2-2.

The Forest Service ROD and Land Management Plan Amendment likewise prescribes final and immediately effective standards (defined as "[*m]andatory constraints* on project and activity decision making, established to help achieve or maintain the desired condition or conditions, to avoid or mitigate undesirable effects, or to meet applicable legal requirements") and guidelines (defined as "constraints on project and activity decision making that allows for departure from its terms, so long as the purpose of the guideline is met") that will govern ranching activities. Forest Service ROD at 25 (emphasis added). Neither the standards nor the guidelines can be modified or removed without a Land Management Plan amendment. *See id.* at 26. Equally important, the Forest Service ROD clarifies that, in most cases, "no additional site-specific NEPA analysis or decision is anticipated" prior to implementation of the new grazing prescriptions. *Id.* at 72. Instead, implementation will occur "as soon as practicable" after issuance of the ROD, and "term grazing permits of affected allotments *will be modified* with new grazing guidance by the 2017 grazing season for most units and no later than 2018 grazing season for all units." *Id.* at 71-72 (emphasis added).

The management actions, standards, and guidelines that apply to ranching activities on nearly three million acres of Federal public lands in Utah place substantial constraints on the Farm Bureaus' members. *See* Utah ARMPA at 1-5; Forest Service ROD at 19. For instance, the challenged actions impose minimum height requirements (seven inches) for perennial grasses within specified distances of leks during certain times of year to provide concealment of breeding and nesting Sage-grouse from predators. *See* Utah ARMPA at 2-4; Forest Service

ROD at 31 & 147. The Forest Service's ROD also establishes additional height requirements (four inches) during other times of year for both perennial grasses and herbaceous vegetation. *See* Forest Service ROD at 31 & 147. Simply measuring and monitoring the vegetation heights on grazing lands will be very burdensome, and ensuring compliance with those height requirements will be difficult, costly and likely economically infeasible.

Elsewhere, the challenged BLM and Forest Service RODs and plan amendments impose strict new constraints on range management structures such as fencing, windmills, water tanks, and corrals. Under the Forest Service ROD and Land Management Plan Amendment, fences should not be constructed or reconstructed within 1.2 miles from the perimeter of occupied Sage-grouse leks unless collision risk can be mitigated. *See* Forest Service ROD at 147. New permanent facilities should not be constructed within those areas at all. *Id.* Similarly, BLM's ROD and Approved Resource Management Plan Amendment impose a wide variety of new structural range improvements which must be designed such that they "have a neutral effect or conserve, enhance, or restore [Sage-grouse] habitat[.]" Utah ARMPA at 2-24. Existing structural range improvements are to be evaluated to ensure they have a neutral effect or conserve, enhance, or restore Sage-grouse habitat, *and* fences in high risk areas (e.g., within 1.2 miles of a lek) must be removed, modified, or marked to reduce Sage-grouse strikes and mortality. *Id.*

Beyond the aforementioned restrictions on range management structures, BLM and the Forest Service included specific requirements for water developments which are vital to ranching activities such as wells, pumps, and livestock watering ponds. BLM's ROD requires ranchers to remove any livestock ponds that were built in perennial stream channels that are negatively impacting riparian habitats, and it also prohibits the construction of any new livestock ponds in

those areas. *See* BLM ROD at 1-19. Within the now designated Sage-grouse "priority habitat management" areas on BLM lands, new water developments cannot be authorized unless they "have a neutral effect or are beneficial to [Sage-grouse] habitat," and existing water developments must be reevaluated to determine whether they must be modified to maintain or improve riparian areas and habitat. Utah ARMPA at 2-23. By comparison, within "priority habitat management areas" on Forest Service lands, new water developments are prohibited unless they are beneficial to Sage-grouse habitat. Forest Service ROD at 146.

Together, these management actions, standards, and guidelines impose new requirements on the Farm Bureaus' members that threaten severe economic and social injury and thus, the Farm Bureaus satisfy the interest test for intervention as of right. *See Utahns for Better Transp.*, 295 F.3d at 1115. As explained in the Farm Bureaus' Proposed Complaint in Intervention, the Federal Defendants violated several environmental and land use statutes in establishing those requirements, and the Farm Bureaus seek to protect their members against the Federal Defendants' unlawful actions. Under the BLM ROD, even private and State lands will be harmed by the new management actions that apply on Federal lands. MA-LG-3 applicable to livestock grazing and ranch management states "[m]anage unfenced private lands and SITLA lands within a grazing allotment that are under exchange of use agreements or percent public land use as a single unit that will have the same management as the public lands." BLM Utah ARMPA at 2-22.

AFBF has on many occasions challenged governmental overreach in rulemaking proceedings and litigation in the environmental context, both as a plaintiff/petitioner and intervenor-plaintiff. *See, e.g.*, *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281 (3d Cir. 2015);

Nat'l Pork Producers Council v. EPA, 635 F.3d 738 (5th Cir. 2011); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005); *Alt v. EPA*, 979 F. Supp. 2d 701 (N.D. W.V. 2013). In those prior cases, AFBF sought to invalidate actions that improperly expanded the federal government's authority under the Clean Water Act. Here, similarly, the Farm Bureaus have a significant interest in ensuring that BLM and the Forest Service do not continue to exceed their authority under FLPMA, NFMA, and NEPA by imposing these new requirements and restricting ranching operations without adhering to public participation and other procedural requirements or statutory multiple use directives and protection standards.

C. The Farm Bureaus' Interests May Be Impaired.

Applicants for intervention need only meet a minimal burden by showing that impairment of their interests is possible if intervention is denied. *Utah Ass'n of Counties*, 255 F.3d at 1253; *WildEarth Guardians*, 573 F.3d at 995. The question of impairment is inseparable from the question of the existence of a protectable interest. *See Natural Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978).

The Farm Bureaus' intervention is warranted in this case because the disposition of State Plaintiffs' claims in the absence of their participation will practically impair and impeded the Farm Bureaus' ability to protect their interests and those of their members. An unfavorable outcome in this case could have significant legal and practical consequences on ranchers in Utah as well as in the many other western states subject to the federal government's unprecedented efforts related to Sage-grouse habitat. The Farm Bureaus' members' interests in ranching will be impaired if the challenged management plans are upheld because those plans impose immediate restrictions on ranchers. *See supra* at **-** (discussing, *e.g.*, vegetation height requirements and restrictions on range management structures and water developments).

Additionally, in states other than Utah, an unfavorable judgment could be viewed as persuasive precedent in support of the Federal Defendants' authority to establish special management areas—what amounts to *de facto* ACECs—without having followed the established statutory and regulatory procedures and to impose special environmental protection. Thus, AFBF's ability to protect its members' interests in other parts of the country subject to the Federal Defendants' Sage-grouse-related actions could be practically impaired or impeded if they are not permitted to participate in this Court's decision on the core legal issues presented by State Plaintiffs' Complaint.

For these reasons, the Farm Bureaus satisfy the impairment requirement.

C. The Existing Parties Do Not Adequately Represent the Farm Bureaus' Interests.

None of the existing parties in this case can adequately represent the Farm Bureaus' interests. The Tenth Circuit has held that the "inadequate representation element of Rule 24(a)(2) also presents a minimal burden." *WildEarth Guardians*, 604 F.3d at 1200; *accord Utah Ass'n of Counties*, 255 F.3d at 1254. The Farm Bureaus must show simply that there is a possibility that representation "may be" inadequate. *Utahns for Better Transp.*, 295 F.3d at 1117. In cases involving governmental parties, the Tenth Circuit has emphasized that, "[i]n litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which conflict with the particular interest of the would-be intervenor." *Utah Ass'n of Counties*, 255 F.3d at 1256. Simultaneous representation of both public and private interests is "'on its face impossible' and creates the kind of conflict that 'satisfies the minimal burden of showing inadequacy of representation.'" *Utahns for Better Transp.*, 295 F.3d at 1117; *see also Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538-39 (1972) (finding that a prospective intervenor met his "minimal" burden of showing possible

inadequate representation of its interests by the government even though the statute at issue in the case expressly obligated the Secretary of Labor to serve his interests); *Utah Ass'n of Counties*, 255 F.3d at 1256 (recognizing that governmental parties cannot adequately represent private parties' interests because "it is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts").

The Farm Bureaus easily satisfy the "minimal" requirement of showing inadequate representation. No other party in this case shares their precise interests. The State Plaintiffs' Complaint contains little mention of impacts on ranching, while focusing considerable attention on oil and gas and mining. This comes as no surprise as State Plaintiffs—and Federal Defendants for that matter—are governmental entities seeking to balance a wide range of interests including wildlife conservation, mineral resource development, and management of all natural resources. The Farm Bureaus cannot rely on any of those parties to represent their members' farming and ranching interests. Moreover, Intervenor-Defendants are advocacy groups with a singular focus on environmental preservation. Their interests fundamentally differ from the Farm Bureaus' interests in preserving their members' ability to farm and ranch on lands affected by the challenged land use plans.

That the Farm Bureaus and State Plaintiffs may share a common objective, *e.g.*, a finding that Federal Defendants' land use plans violate federal environmental and land use statutes, is both irrelevant and insufficient. Parties must not be assumed to share the same interests "merely because both entities occupy the same posture in the litigation." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001). Ultimately, whatever common threads may be found in State Plaintiffs' and the Farm Bureaus' claims, the existing plaintiffs are inherently

unable to adequately represent the Farm Bureaus' unique interests and those of its members. As such, intervention of right is warranted in this case.

II. The Farm Bureaus Should Be Permitted To Intervene Under Rule 24(b).

In the alternative, the Farm Bureaus seek this Court's permission to intervene in this action. Rule 24(b) permits a party, upon timely motion, to intervene where the movant "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). Rule 24(b) further provides that in weighing a request for permissive intervention, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Under the test for permissive intervention, the Farm Bureaus need not meet the interests or inadequate representation requirements of the Rule 24(a) test for intervention as of right.

Here, the Farm Bureaus' motion is timely, the claims in their proposed Complaint in Intervention share common questions of law and fact with the State Plaintiffs' case, and the Farm Bureaus' intervention will not unduly delay or prejudice these proceedings, especially since the opening merits brief is not due until late August and the Farm Bureaus will not seek any changes to the briefing schedule. For these reasons, permissive intervention is also appropriate.

III. CONCLUSION

The Farm Bureaus respectfully request that this Court grant them leave to intervene as plaintiffs as a matter of right, or alternatively, grant them permissive intervention.

June **, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June **, 2016, I electronically filed the foregoing Motion to Intervene as Plaintiffs and Memorandum in Support with the Clerk's Office using the CM/ECF system, which will send a notice of this filing to all registered CM/ECF users.

/s/ DRAFT
Andrew Deiss