

(“CISF”) in Lea County in southeastern New Mexico and another CISF in Andrews County, Texas, are *ultra vires* and outside of the NRC’s authority granted under the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101 *et seq.* (“NWPA”). Additionally, the State challenges the NRC’s decision to place the substantial burdens and costs of emergency preparation and response on New Mexico’s infrastructure, which will place significant strain on its resources and pose unacceptable economic risks to regional industries and may result in a reduction of property values and investments within the Permian Basin.

On April 29, 2021, Holtec filed its Motion to Intervene in this case. Holtec contends that it has a right to intervene pursuant to Fed. R. Civ. P. 24(a)(2) because it has an interest in the subject matter of this litigation based on its status as an investor in the subject CISF project and as the applicant for the subject CISF license. Holtec further contends that the disposition of the State’s litigation will impair its ability to protect those interests, and the NRC does not adequately represent its interests.³ In the alternative, Holtec asserts that they should be allowed to permissively intervene because there is a common question of law or fact with the main action based on their status as an applicant for an NRC license to store spent nuclear fuel at the proposed CISF.⁴

II. HOLTEC’S MOTION TO INTERVENE AS A MATTER OF RIGHT SHOULD BE DENIED

Holtec has failed to meet its burden of proof under Rule 24(a)(2) and is not entitled to intervention as of right. Rule 24(a)(2) places the burden of proving the proposed intervenor is entitled to intervention as of right is on the movant. *Kane Cty. v. United States*, 928 F.3d 877, 889

³ *Id.* at p.6 (“The relief requested by New Mexico will, if granted, have an immediate and adverse effect on the economic interest of Holtec.”); *Id.* at p.8 (without further explanation stating: “[w]hile Holtec and the NRC may share the same posture in this litigation, the NRC cannot adequately represent Holtec’s interest.”).

⁴ *Id.* at p.9 (“[T]he defenses of Holtec and the NRC raise common questions of law and fact (as to the legality of licensing the HI-STORE facility.”)

(10th Cir. 2019). The Tenth Circuit has held that a proposed intervenor is entitled to intervene as of right if the proposed intervenor has filed a timely motion showing an interest sufficient to merit intervention, has shown that without intervention the proposed intervenor's interest may be impaired, and that the present litigants do not adequately represent the proposed intervenor's interests. Fed. R. Civ. P. 24(a)(2); *Kane Cty.* 928 F.3d at 889; *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001). The movant has the burden of proving each element and failure to prove any one of the criteria is sufficient grounds to deny the motion. *Kane*, 928 F. 3d at 889. See also *In re Kaiser Steel Corp.*, 998 F.2d 783, 791 (10th Cir. 1993); and 6 James W. Moore et al., *Moore's Federal Practice-Civil* § 24.03 (3d ed. 2008). Thus, "[e]ven if an applicant satisfies the other requirements of Rule 24(a)(2), it is not entitled to intervene if its 'interest is adequately represented by existing parties.'" *San Juan Cnty., Utah v. United States*, 503 F.3d 1163, 1203 (10th Cir.2007) (en banc) (quoting Fed.R.Civ.P. 24(a)(2)).

Holtec's Motion to Intervene falls short of meeting its burden to show that the NRC's representation is inadequate. To meet its burden, Holtec must provide some factual basis to support its argument. The Tenth Circuit has granted intervention where the intervenor has proven that existing parties have taken or could take an interest adverse to its interests in this case, that the existing parties could take a position that compromises the interest the intervenor seeks to defend, or that the existing parties will not defend their own authority to the extent the intervenor's interest is faced with potential risk.⁵ Holtec has absolutely failed to provide any facts proving that existing parties will not provide adequate representation of its interests. Thus, Holtec's Motion to Intervene as a matter of right under Rule 24(a)(2) should be denied.

⁵ *Sanguine, Ltd. v. United States Department of Interior*, 736 F.2d 1416, 1419 (10th Cir.1984) (an applicant may meet burden of showing inadequate representation by showing that the representative has an interest adverse to the applicant); see also *Tri-State*, 787 F.3d at 1073 (internal citations omitted).

Instead of supporting its Motion to Intervene with the facts necessary to meet its burden, Holtec merely asserts the “NRC is a federal agency tasked with regulating the HI-STORE project, and Holtec’s and the NRC’s particular interests in the ultimate outcome of this proceeding are not necessarily coextensive”.⁶ As for factual allegations from Holtec, that’s it. Holtec relies heavily on caselaw stating, generally, where a governmental agency must represent the interests of the general public and the interests of a private party seeking intervention, the burden of proving the government’s representation is inadequate is minimal.⁷ See, e.g., *Utah Ass’n of Counties v. Clinton*, 255 F. 3d 1246, 1256 (10th Cir. 2001) (inadequate representation prong satisfied where government was “obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor”); *Coalition of Arizona/New Mexico Counties for Stable Econ. Growth v. Dept. of Interior*, 100 F. 3d 837, 844 (10th Cir. 1996) (intervenor’s particular interest diverged from DOI’s protection of the public interest); *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009) (intervention appropriate where the public interest generally is not coextensive with the intervenor's particular interest).

But, each of these cases cited by Holtec hinged on the governmental agency having numerous obligations and burdens, and one or several of those obligations were in conflict with the proposed intervenor’s interests. Where the government is pursuing multiple objectives, and one of those objectives is not coextensive with its own, an intervenor’s burden is minimal; however when the government is pursuing a single objective, the intervenor must show how the

⁶ Motion to Intervene at p.8.

⁷ Motion to Intervene at p.7.

government's objective is unlike its own.⁸ Here, Holtec is seeking to intervene to defend the NRC's authority, and Holtec has given no indication that the NRC does not intend to do the same.

The Tenth Circuit has held that the inadequate representation prong is not satisfied if “the objective of the applicant for intervention is identical to that of one of the parties.” *City of Stilwell, Okla. v. Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1042 (10th Cir.1996) (quoting *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872 (10th Cir.1986)); see also *Coal. of Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 845 (10th Cir.1996). The Tenth Circuit has provided that under such circumstances where the government has the same ultimate objective, a rebuttable presumption arises that representation is adequate. *San Juan Cnty.*, 503 F.3d at 1204 (opinion of Hartz, J.) (a presumption of adequate representation should apply “when the government is a party pursuing a single objective.”). See *Bottoms*, 797 F.2d at 872–73; *id.* at 1227 & n. 1 (Ebel, J., dissenting); *Tri-State Generation & Transmission Ass'n, Inc. v. New Mexico Pub. Regul. Comm'n*, 787 F.3d 1068, 1073 (10th Cir. 2015). As in the case here, a party seeking intervention may have different motivations from the governmental agency, but if its ultimate objectives are the same as the governments, there is a presumption that representation is adequate. *Ozarks*, 79 F.3d at 1042.

Holtec does not argue the NRC has a broad spectrum of views it must consider that are somehow inconsistent with Holtec's objectives in this case. Nor does Holtec try to explain how any of NRC's other statutory or regulatory obligations conflict with Holtec's objectives. Holtec's Motion to Intervene is also silent regarding the inconsistencies between the NRC's public

⁸ See *San Juan Cnty., Utah v. United States*, 503 F.3d at 1203-1204 (“much precedent states that a prospective intervenor need make only a minimal showing to establish that its interests are not adequately represented by existing parties. But those decisions involve contentions that the government, when it has multiple interests to pursue, will not adequately pursue the particular interest of the applicant for intervention.”)

interest and its own objectives. The only interest Holtec claims to have is the protection of the \$5 million investment that Holtec has made in the pursuit of the proposed CISF license. But, in Holtec's own words, "Holtec expects that the relief that NRC will seek be the same as that sought by Holtec, i.e., the denial of the relief sought by the State."⁹ So even Holtec anticipates its own objectives and the NRC's will be identical in this case, thus Holtec is not entitled to intervene under Rule 24.¹⁰

Further, at issue in this case is the single and narrow issue of whether the NRC is acting within its statutory authority in conducting the licensing proceedings for the proposed CISF, and Holtec's sole objective is to defend the NRC's authority. Holtec has not alleged the NRC has any objectives that diverge from its own or alleged any facts showing the NRC has taken any actions adverse to Holtec's interests. Because Holtec has not shown the NRC has more than one objective in this case other than to defend its own authority to authorize Holtec's CISF, a presumption should apply that NRC's representation is adequate to defend Holtec's interest. *See Barnes v. Sec. Life of Denver Ins. Co.*, 945 F.3d 1112, 1124 (10th Cir. 2019).

The presumption that representation is adequate can be rebutted with a concrete showing of circumstances that representation is in fact inadequate. *Bottoms*, 797 F.2d at 872. The Tenth Circuit has found this presumption to be rebutted in circumstances where there is a "showing that there is collusion between the representative and an opposing party, that the representative has an interest adverse to the applicant, or that the representative failed to represent the applicant's interest." *Id. See also Tri-State*, 787 F.3d at 1073. Again, Holtec has only provided a generalized assertion that as a neutral regulatory body the NRC cannot represent the public at large and the

⁹ Motion to Intervene p.8.

¹⁰ If, in the alternative, the Court grants Holtec's Motion to Intervene, Holtec and the NRC should be required to coordinate on briefings to avoid duplicative briefing.

private interest of Holtec with the same perspective and vigor.¹¹ Such conclusory statements do not overcome a presumption of adequate representation and does not satisfy Holtec's burden of demonstrating intervention is warranted. Holtec must present some kind of facts showing the NRC will take a position that compromises Holtec's objectives in this case.

Contrary to Holtec's contentions, NRC is fully capable of defending of its authority and pursuing this single objective and is equipped to represent itself.¹² Holtec is in no better position than Defendants to present the argument that NRC is in compliance with the law. *See Forest Guardians, et al. v. Bureau of Land Management, et al.*, 188 F.R.D. 389 (D.N.M. 1999) (finding economic interests insufficient to warrant as-of-right intervention and denying permissive intervention because agency was in best position to present compliance argument with environmental permit). Lastly, Holtec has not argued how its intervention will provide any elements to this case that NRC cannot or will not provide. *Tri-State* 787 F.3d at 1075

Failing to articulate why NRC would be incapable of representing its interest and failing to articulate any interest specific to Holtec within the context of State's case, intervention as a matter of right must be denied.

III. HOLTEC'S MOTION FOR PERMISSIVE INTERVENTION SHOULD BE DENIED

Fed. R. Civ. P. 24(b)(1)(B) states that a court may permit anyone to intervene who has a claim or defense that shares with the main action a common question of law or fact. Granting of permissive intervention lies within the sound discretion of the Court and in making a determination

¹¹ Motion to Intervene at p.9.

¹² *See* NRC website, "The General Counsel is the chief legal advisor to the NRC and directs all matters of law and legal policy for the agency" consisting of seven divisions that provide advice and assistance to General Counsel and NRC Staff and a Solicitor, who in conjunction with legal counsel, has the primary responsibility for supervising litigation in courts of law.

regarding intervention, the Court must consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Fed. R. Civ. P. 24(b)(3); *San Juan Cty., Utah v. United States*, 503 F.3d 1163, 1203–04 (10th Cir. 2007)

When deciding whether permissive intervention was properly granted within the trial court's discretion, the Tenth Circuit has considered several factors, including: whether the intervenors' interests are adequately represented by other parties, the legal position they seek to advance and its relation to the merits of the case, whether intervention will prolong or delay the litigation or otherwise prejudice the original parties, and whether the proposed intervenor will significantly contribute to full development of the underlying factual issues in the suit. *City of Stilwell, Okl. v. Ozarks Rural Elec. Co-op. Corp.*, 79 F.3d 1038, 1043 (10th Cir. 1996).

Holtec's motion for permissive intervention falls short under the Tenth Circuit's analysis. Holtec has failed to show how it plans to pursue any claim or defense that NRC will not and Holtec again fails to explain why NRC's representation will be inadequate to defend these common issues of law and fact. Holtec does not propose an expanded or different interpretation or argument from the NRC in this. Holtec has not shown what, if any, elements or substance its intervention brings to this case that the NRC does not. Thus, the NRC's representation is adequate and permissive intervention should be denied on this basis. See *Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 249 (D.N.M. 2008); (“While not a required part of the test for permissive intervention, a court's finding that existing parties adequately protect prospective intervenors' interests will support a denial of permissive intervention.”)

Further, allowing Holtec to intervene would result in needless duplication – requiring this Court to review duplicative briefing without meaningful distinctions as to the issues at hand and prejudice the State in having to needlessly respond to multiple briefs on identical issues. Holtec's

Motion to Intervene is noticeably lacking any claims or facts showing its intervention brings something to the table in terms of developing the factual or legal issues relevant to State's claims and the underlying NRC proceedings. Thus, Holtec's intervention is unnecessary and unhelpful to the development and resolution of the case before the court, and the unnecessary duplication will only serve to burden the adjudication of the issues and prejudice New Mexico. See *Tri-State* 787 F.3d at 1075 (district court is mandated by language of Rule 24(b) to consider whether permissive intervention might unduly delay or prejudice adjudication of the original parties' rights). See also, *Animal Legal Defense Fund v. Otter*, 300 F.R.D. 461 (D. Idaho 2014), *reconsideration denied* 2014 WL 5223068 (finding identical goals of state and agricultural trade association did not warrant permissive intervention in an action challenging constitutionality of state statute criminalizing interference with agricultural production); and *Habitat Educ. Center, Inc. v. Bosworth*, 221 F.R.D. 488 (E.D. Wis. 2004) (denying permissive intervention where sole claim in suit was allegation that Forest Service failed to comply with statutory obligations and proposed intervenors made no similar claim and there was no indication that proposed intervenors could make a significant contribution to development of underlying factual and legal issues).

Permissive intervention is not warranted because Holtec does not have an independent claim or defense distinguishable from the NRC, and Holtec's intervention would create unnecessary duplication and hinder the resolution of the State's litigation. In addition, denial of intervention would in no way prejudice the interests asserted by Holtec, but would prejudice New Mexico. Accordingly, Holtec's Motion to Intervene should be denied.

IV. CONCLUSION

Holtec has not provided any facts supporting its argument that the NRC's representation in this case is inadequate and therefore has failed to meet its burden under Rule 24 (a). Similarly,

permissive intervention must also be denied under Rule 24(b), as Holtec has not explained how it would be prejudiced if the court determines NRC's representation is adequate or how Holtec's intervention would not unduly delay and prejudice the adjudication of this case with unnecessary duplication of briefings. Intervention should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiff's Response in Opposition to Holtec International's Motion to Intervene was filed with the Court's CM/ECF system, providing service to all parties and counsel of record by electronic means.

/s/ P. Cholla Khoury _____
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