DISTRICT COURT, COUNTY OF LARIMER **STATE OF COLORADO** **201 LA PORTE AVE., SUITE 100** **FORT COLLINS, CO 80521**	DATE FILED: July 14, 2019 11:33 AM CASE NUMBER: 2019CV30339
CITY OF THORNTON, a home rule municipality of the State of Colorado, Plaintiff, **v.** BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LARIMER, State of Colorado; John Kefalas, in his official capacity; Steve Johnson, in his official capacity; Tom Donnelly, in his official capacity, Defendants.	**▲COURT USE ONLY▲** **Case No.: 2019 CV 30339** **Division: 3B**

ORDER GRANTING MOTIONS TO INTERVENE

No Pipe Dream Corporation ("No Pipe") and Save the Poudre ("Save the Poudre") respectively filed motions to intervene pursuant to Colo. R. Civ. P. 106(b) and Colo. R. Civ. P. 24 (together "Motions"). The City of Thornton ("Thornton") opposes each motion. The Court has reviewed the motions, the consolidated response, and the replies. For the reasons set forth in this order, No Pipe and Save The Poudre's motions to intervene are granted.[1]

I. FACTUAL BACKGROUND.

This action arises from an appeal of a decision by the Larimer County Board of County Commissioner's (the "Board") denying Thornton's application for a 1041 permit to construct an

[1] The Court makes one observation. While parties may be entitled to intervene as a matter of right, they could've saved much expense by seeking leave to file an amicus curiae (friend of the court) brief. When a third-party "presents no new questions, [it] can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention." *South Carolina v. North Carolina*, 558 U.S. 256, 288 (2010).

underground domestic water transmission line in unincorporated Larimer County (the "pipeline"). Thornton's 1041 application ultimately advocated for two alternative water pipeline routes: the Douglas Road Alternative, and the County Road 56 Alternative. Thornton seeks judicial review under Colo. R. Civ. P. 106 and declaratory relief under Colo. R. Civ. P. 57 asking the Court to overturn the Board's decision and either approve or require that the Board approve the proposed pipeline. The Board, defending its position, asks the Court to enter judgment affirming the Board's earlier decision.

No Pipe is a Colorado non-profit organization composed of Larimer County residents, property owners, and taxpayers that allege they would be adversely impacted by the construction and operation of the pipeline. *See*, No Pipe Mtn. Ex. A–F. Its members include residents of the various Larimer County neighborhoods that would be adversely affected by the pipeline. *Id.* Those members own property and have residences along both the Douglas Road pipeline route and the County Road 56 pipeline route. Ex. A–F. No Pipe requests that the Court affirm the Board's decision in denying Thornton's 1041 application.

Save the Poudre is a Colorado non-profit membership organization composed primarily of Larimer County residents, including outdoor recreationists, scientists, property owners, and taxpayers that allege they would be adversely impacted by the construction and operation, of the pipeline. *See*, Save the Poudre Mtn. Ex. A–C. The members of Save the Poudre include residents of the various Larimer County communities that allege they would be adversely affected by the Project, including but not limited to residents of the City of Fort Collins. Save the Poudre Mtn., Ex. A at 1.

Save the Poudre's members allege that they would be uniquely and adversely impacted by construction and operation of either pipeline alternative. Most of Save the Poudre's approximately 600 dues-paying members and approximately 5,000 followers and supporters are residents of Larimer County. *Id.* Save the Poudre's members "live, work, and recreate on and around the Cache

la Poudre River ("Poudre River" or "River") in Larimer County." *Id.* Some members own property or have residences near the Poudre River in the City of Fort Collins. *Id.* at 2. Specifically, Save the Poudre alleges its "members interests in clean water and maintaining flows for swimming, fishing, kayaking, and aesthetic enjoyment would be detrimentally impacted by the Thornton Pipeline[.]" Save the Poudre Mtn. Ex. A at 1; Ex. C at 2. Members would benefit if the approximately 13,000 acre-feet of Poudre River water to be conveyed to Thornton was run down the Poudre River to increase flows and enhance recreational opportunities and aesthetic enjoyment of nature related to activities in the Poudre River, including usage of the new Poudre River Whitewater Park in downtown Fort Collins. *Id.* Save the Poudre requests that the Court affirm the Board's decision in denying Thornton's 1041 application.

II. STANDING.

Initially, Thornton launches into the standing waters head first, contending that No Pipe and Save the Poudre lack associational standing to participate in the litigation. Thornton, however, simply assumes that intervenors must have standing when the existing parties remain in the case. But that proposition, especially when the intervenor doesn't seek relief that's different than a party in the action, remains an open question for the U.S. Supreme Court[2] and for the Colorado Supreme Court. As such, the Court must, before diving in with Thornton, dip its toes in the standing inquiry to determine whether such waters are swimmable and determine whether an intervenor must have standing on its own right.

It's well-established that a party must have standing to sue, which is a threshold question of

[2] *Diamond v. Charles*, 476 U.S. 54, 68–69 (1986) ("the precise relationship between the interest required to satisfy the Rule and the interest required to confer standing, has led to anomalous decisions in the Courts of Appeals. We need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III.").

law. *Colo. Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506, 510 (Colo. App. 2018). Standing "involves a consideration of whether a plaintiff has asserted a legal basis on which a claim for relief can be predicated." *Bd. of Cnty. Comm'rs v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1052 (Colo. 1992).

Standing finds its roots in Articles III and IV of the Colorado Constitution, which operate to prevent "courts from invading legislative and executive spheres." *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1006 (Colo. 2014). The Supreme Court has held that "[b]ecause judicial determination of an issue may result in disapproval of legislative or executive acts, this constitutional basis for standing ensures that judicial determination may not be had at the suit of any and all members of the public." *Id.* (internal quotations omitted) (citing *Wimberly v. Ettenberg,* 570 P.2d 535, 538 (Colo. 1977); *Conrad v. City & Cnty. of Denver,* 656 P.2d 662, 668 (Colo. 1982)). Courts are thus required to "limit their inquiries to resolution of actual controversies." *Id.* (citing *Bd. of Dirs., Metro Wastewater Reclamation Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 105 P.3d 653, 655–56 (Colo. 2005)). Such requirements ensure "concrete adverseness that sharpens the presentation of issues to the court." *Id.* (internal quotations omitted).

Although Colorado courts are not subject to the cases-or-controversies requirement of Article III of the United States Constitution, they have similar considerations in applying the standing doctrine. *Wimberly*, 570 P.2d at 538. Moreover, when Colorado law is unclear on an issue, Colorado courts will frequently consult federal cases. *See Maurer v. Young Life,* 779 P.2d 1317, 1324 n.10 (Colo. 1989); *Friends of the Black Forest Reg'l Park, Inc.,* 80 P.3d at 877. The Court, therefore, looks to federal case law on standing.

Federal courts recognize the concept of "piggyback standing" in the intervention context. As the Tenth Circuit has explained, "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.'" *San Juan Cty., Utah v. United States*, 503 F.3d 1163, 1172 (10th

Cir. 2007) (en banc) (citing panel opinion). Several additional circuits recognize the principle, too. *See, e.g.*, *Dillard v. Chilton Cty. Comm'n*, 495 F.3d 1324, 1330 (11th Cir. 2007) ("Because of lessened justiciability concerns in the context of an ongoing Article III case or controversy, intervenors in this circuit may in some cases be permitted to 'piggyback' upon the standing of original parties to satisfy the standing requirement."); *Ruiz v. Estelle*, 161 F.3d 814, 829–30 (5th Cir. 1998) (same); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994) ("An intervenor need not have the same standing necessary to initiate a lawsuit in order to intervene in an existing district court suit where the plaintiff has standing"); *United States Postal Service v. Brennan,* 579 F.2d 188, 190 (2d Cir. 1978) ("The existence of a case or controversy having been established as between the Postal Service and the Brennans, there was no need to impose the standing requirement upon the proposed intervenor."). Other circuits, however, don't. *City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 985 (7th Cir. 2011); *South Dakota v. Ubbelohde,* 330 F.3d 1014, 1023 (8th Cir. 2003); *Fund for Animals, Inc. v. Norton,* 322 F.3d 728, 731–32 (D.C. Cir. 2003).

But an intervenor can't piggyback and, in doing so, break the back of the party on whose standing it rides. That is to say, the piggyback rule isn't without exceptions. For one, the United States Supreme Court recently ruled that "at the least, an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017).[3] And, "intervenors must show

[3] To quench the reader's curiosity, this is what happened next in *Laroe*. The Supreme Court remanded the case to the Second Circuit to determine whether the intervenor sought the same relief as the party. *Laroe Estates, Inc.*, 137 S. Ct. at 1652. In turn, the Second Circuit remanded the case "to the United States District Court for the Southern District of New York to consider 'whether Laroe seeks the same relief as Sherman or instead seeks different relief, such as a money judgment against the Town in Laroe's own name,' *id.* at 1651, and, if the latter, whether it can 'establish its own Article III standing' in order to be able to seek that relief, *id.* at 1652." *Laroe Estates, Inc. v. Town of Chester*, 693 F. App'x 69, 70 (2d Cir. 2017). The district court held that Laroe had Article III standing and could intervene as of right. *See generally Sherman v. Town of Chester*, 339 F. Supp. 3d 346, 355 (S.D.N.Y. 2018).

independent standing to continue a suit if the original parties on whose behalf intervention was sought settle or otherwise do not remain adverse parties in the litigation." *Dillard*, 495 F.3d at 1330. Those principles apply whether there are multiple plaintiffs, multiple defendants, or intervenors of right on either side. *Kane Cty. Utah v. United States*, No. 18-4122, 2019 WL 2588524, at *5, n.12 (10th Cir. 2019) (citing *Town of Chester, N.Y.*, 137 S. Ct. at 1650; *Pennsylvania v. President United States of Am.*, 888 F.3d 52, 57 n.2 (3rd Cir. 2018)).

The Court finds that as in *San Juan Cty., Utah*, 503 F.3d at 1172, because there are "lessened justiciability concerns" under Articles III and IV of the Colorado Constitution, an intervenor may piggyback on the standing of the original parties, especially a party aligned on the same side as the intervenor. As the Fifth Circuit noted, "[o]nce a valid Article III case-or-controversy is present, the court's jurisdiction vests. The presence of additional parties, although they alone could independently not satisfy Article III's requirements, does not of itself destroy jurisdiction already established." *Ruiz*, 161 F.3d at 832. That logic applies here with equal force.

Therefore, the Court concludes that because the intervenors request the same relief as the Board—that the Court affirm its decision, Board Ans. at 19; No Pipe Ans. at 21; Save the Poudre Ans. at 21—they need not show standing on their own right. Indeed, Thornton admits that the relief the intervenors request "is identical to that of the [Board]'s." Thornton Resp. at 4. Given that fact is undisputed, and plainly viewing the relief requested by each party, the Court concludes that both No Pipe and Save the Poudre may "piggyback" on the Board's standing. It also goes without saying that a live controversy exists between Thornton, which has been aggrieved by the Board's decision to deny its application. Still, the Court will closely scrutinize the intervenors' filings to ensure that they stay within their swimming lane and that the relief they seek remains the same as the Board's.

In any event, in the interests of judicial economy, the Court will address the parties' standing.

As to No Pipe, the Court concludes that it possesses standing to intervene.[4] An association may assert claims on behalf of its members where the association alleges injuries to its individual members sufficient to confer standing. *See Colo. Union of Taxpayers Foundation*, 418 P.3d at 510–11. Specifically, an association has standing to assert claims on behalf of its members when it demonstrates: (1) its members could otherwise sue in their own right; (2) the interests the association seeks to protect are germane to its purpose; and (3) neither the claims asserted, nor the relief requested would require the individual members to participate in the lawsuit. *Id.* (citing *Buffalo Park Dev. Co. v. Mountain Mut. Reservoir Co.*, 195 P.3d 674, 687–88 (Colo. 2008).

Addressing the first element, No Pipe's members may sue in their own right. *See id.* In Colorado, a party may prove their standing by showing: (1) an injury in-fact, and (2) that the injury was to a legally protected interest. *City of Arvada ex rel. Arvada Police Department v. Denver Health and Hospital Authority*, 403 P.3d 609, 613–14 (Colo. 2017) (citing *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (1977)).

For challenges to administrative actions, the "injury in fact" element does not require that a party suffer actual injury, so as long as the party can demonstrate that the administrative action *threatens* to cause an injury. *Board of County Com'rs, LaPlata County v. Colorado Oil and Gas Conservation Com'n*, 81 P.3d 1119, 1122 (Colo. App. 2003) (emphasis added). The "injury must be sufficiently direct and palpable to allow a court to say with fair assurance that there is an actual controversy proper for judicial resolution." *Id.*; *see also Bd. of County Comm'rs v. Bowen/Edwards Assocs., Inc.,* 830 P.2d 1045, 1053 (Colo. 1992 (the plaintiff must demonstrate an "existing legal controversy that can be effectively resolved ... and not a mere possibility of a future legal dispute over some issue").

[4] The Court is unconvinced that Save the Poudre has standing to intervene. Based on its submissions, the Court concludes that it has failed to establish an injury-in-fact. Because this Order is interlocutory, Colo. R. Civ. P. 54(b), Save the Poudre may try again when it files a brief on the merits.

A party may satisfy the injury-in-fact test by showing that the action they complained of threatens to cause injury. *Colorado Manufactured Hous. Ass'n v. Pueblo Cty.*, 857 P.2d 507, 510 (Colo. App. 1993). No Pipe has shown that it and its members have an injury-in-fact. No Pipe participated the 1041 application process, contesting Thornton's proposal. No Pipe submitted six declarations of its members in conjunction with its motion to intervene. *See generally* Ex. A–F. The declarants, who are home owners whose property interest would be directly and adversely impacted if the Board's decision were to be overturned, complain of property values decreasing and of health concerns stemming from the construction. Moreover, the homeowners complain of property access problems and increased traffic congestion. The Court credits those assertions solely for the purposes of the standing inquiry and finds that they're sufficient to establish an injury in-fact. *See 1405 Hotel, LLC v. Colorado Economic Development Commission*, 370 P.3d 309, 316 (Colo. App. 2015). Moreover, this is not some theoretical legal dispute, but an existing controversy that'll be resolved by this Court and, presumably, by appellate courts. *See Bowen/Edwards Assocs., Inc.,* 830 P.2d at 1053.

Thornton contends, albeit in the context of arguing against the second element of the associational standing test, that No Pipe didn't participate in the original application process and thus lacks a right to intervene. No Pipe disagrees, asserting that it and its members participated in all aspects of the underlying 1041 permit proceedings, and that No Pipe's conversion from an association to a corporation was of no import to its standing or interest.[5] The Court agrees with No Pipe.

While an organization's status and participation before an agency may be relevant to standing, it's not a dispositive issue. In *Brown v. Bd. of Cty. Comm'rs of Arapahoe Cty.*, the Court of

[5] *See, e.g.*, No Pipe Reply. Ex. M Comment Letter. The Court may consider points raised for the first time in a reply brief when those points are made in response to arguments raised by a response brief. *See Sch. Dist. No. 1, City & Cty. of Denver v. Cornish*, 58 P.3d 1091, 1095 (Colo. App. 2002) (citing *Snider v. Town of Platteville*, 75 Colo. 589, 227 P. 548 (Colo. 1924).

Appeals held, without much explanation, that a company could not be a proper party in a Colo. R. Civ. P. 106(a)(4) proceeding because it wasn't a party before a prior tribunal. 720 P.2d 579, 583 (Colo. App. 1985). Critically, the court also noted that a company's "status as a party before the board of county commissioners may be relevant to the issue of standing, but it is not controlling." *Id.* at 582. Indeed, "When standing is in issue, the broad question is whether, as a matter of law, the plaintiff has stated a claim for relief which should be entertained in the context of a trial on the merits." *Id.* (citing *Wimberly v. Ettenberg,* 194 Colo. 163, 570 P.2d 535 (1977)). Thus, regardless of whether No Pipe as an association, corporation, or merely its members engaged in the application process, the critical question is whether any of No Pipe's members meet the test under *Wimberly*.[6] The Court, as discussed above, concludes that they do.

The second element asks whether the injury suffered by the party in question is to a legally protected interest. A legally protected interest can be tangible or economic, including an interest in property, arising out of contract, founded on a statute which confers a privilege, or even intangible interest such as an interest in having a government act within the bounds of the state constitution. *Ainscough*, 90 P.3d at 856. In making that determination, the Court looks to the right that is alleged to be injured. *Id.* Claims for relief under the constitution, the common law, a statute, or a rule or regulation satisfy the legally-protected-interest requirement. *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1007 (Colo. 2014) (citing *Ainscough*, 90 P.3d at 856).

Here, No Pipe claims that its individual members, who are homeowners who live near or adjacent to the proposed pipeline route will result in economic, environmental, and aesthetic harm

[6] The Court also agrees with No Pipe that for the purposes of this action, there was no fundamental difference between No Pipe as an association versus No Pipe as a corporation. The mission, membership, leadership, and activities of No Pipe are effectively identical, and the law treats non-profit associations and corporations the same for the purpose of standing. *See* Colo. Rev. Stat. § 7-30-107(2).

to their homes. *See Ainscough*, 90 P, 3d at 856. Specifically, No Pipe alleges that its home-owner members would suffer decreasing property values property values as well as health concerns stemming from the construction of the pipeline. Moreover, the outcome of the litigation could result in a loss of such property. The homeowners could lose the property itself, use of it, access to it, and their quiet enjoyment. No Pipe Mtn. at 4. Thus, No Pipe meets the second prong of the test as the harm is directly affecting the legally protected interests of its members. Accordingly, the Court concludes that the first prong of the associational standing test is met for No Pipe.

Next, Thornton contends—facetiously in the Court's view—that the interests that the No Pipe seeks to protect aren't germane to its purpose. Thornton argues that No Pipe's "main organizational interest … relates to an issue not pending before this Court" and its other interest of defending its member's individualized interests do not match No Pipe's interests. Thornton's Resp. at 4. Again, the Court disagrees.

Here, the declarations attached to No Pipe's motion provide sufficient indicia of No Pipe's purpose—to prevent the construction of the pipeline on the proposed routes. (That should've been obvious from the organization's pull-no-punches, ironic name: No Pipe Dream.) No Pipe's motion provides that No Pipe and its members "participated in all aspects of the 1041 permit process … opposing the Thornton Northern Project" and that it "presented additional legal and technical reasons for denial of Thornton's 1041 Application." No Pipe Mtn. at 4. The declarations also specify that No Pipe "made arguments opposing both pipeline alternatives." Ex. D. ¶ 6. Indeed, No Pipe's advocacy for the down-the-river option is consistent with its interest to not have the pipeline built by near its members' homes, and is apparently an alternative route presumably referenced in the administrative record. *See No Pipe* Reply at 7, Ex. O. Moreover, Thornton's own response points to No Pipe's website, which has a pull-no-punches banner: "Stop Thornton's Pipe Dream." Thornton's Resp., Ex. A. Given the foregoing, the Court is convinced that No Pipe's interest is

germane to its members' interests and the litigation.

Thornton points to *Colo. Manufactured Hous. Ass'n v. Pueblo Cty.*, contending that there are no facts to allow a finding that the interests of No Pipe are germane to the organization's purpose, and thus there can be no associational standing. *See* 857 P.2d 507, 514 (Colo. App. 1993). The Court rejects Thornton's artificially narrow and self-serving construction of No Pipe's interests. The facts there are materially different and, as the Court discussed above, No Pipe provided sufficient factual support to determine No Pipe's purpose.[7] Indeed, Thornton acknowledges that the "down-the-river idea" is only the "main" organizational interest, which suggests that No Pipe's advances other interests. *See* Thornton Resp., at 4.

In *Colorado Union of Taxpayers Foundation*, the Supreme Court found that a taxpayers' foundation had associational standing where its organization purpose "to educate the public as to the dangers of excessive taxation, regulation, and government spending" was germane to protecting its members' interests in challenging Aspen's bag-fee ordinance. Analogously, the issue here is whether the organizational purpose of halting the construction of the Thornton pipeline in favor of a different route is germane in protecting its members' interest in challenging the proposed pipeline routes. Because the interests in picking a different, non-pipeline alternative is evidently germane to the purpose of stopping the pipeline, the Court concludes that the second element is met for No Pipe. Finally, the relief that No Pipe seeks here—to uphold the Board's decision—does not require the participation of its individual members. *See Colorado Union of Taxpayers Found*, 418 P.3d at 511

[7] It is not necessary for No Pipe to provide its bylaws for the Court to determine the organization's purpose. *See Conestoga Pines Homeowners' Ass'n, Inc. v. Black*, 689 P.2d 1176, 1177 (Colo. App. 1984). Nevertheless, in its reply No Pipe filed its bylaws, which provide that its organizational purpose is "any lawful purpose. Specifically, the Corporation's primary purpose is to oppose the construction of a pipeline or pipelines… by the City of Thornton or any other entity in Larimer County, Colorado." No Pipe Reply, Ex. N. Thus, the interests No Pipe is protecting are germane to its broad organizational purpose.

(citing *Warth v. Seldin*, 422 U.S. 490, 515 (1975)). Indeed, No Pipe filed an answer concurrently with its motion, which includes multiple affirmative defenses, none of which require the specific participation of its members. Accordingly, the Court concludes that No Pipe has associational standing.

II. INTERVENTION.

The Court now addresses the parties' intervention arguments. Under Colo. R. Civ. P. 24, a non-party may intervene in a civil action as a matter of right, or by way of a permissive intervention. "One who timely files an application may intervene as a matter of right if a statute confers an unconditional right to intervene or (1) the applicant claims an interest in the subject matter of the litigation; (2) the disposition of the case may impede or impair the applicant's ability to protect that interest; and (3) the interest is not adequately represented by existing parties." *Feigin v. Alexa Group, Ltd.,* 19 P.3d 23, 26 (Colo. 2001) (citing Rule 24(a); *People* v. *Ham,* 734 P.2d 623, 625 (Colo. 1987).

Alternately, the Court may allow a party to intervene under Colo. R. Civ. P. 24(b) "when an applicant's claim and the original cause of action present common questions of law or fact, so long as the intervention will not unduly delay or prejudice the rights of the original parties." *In re Marriage of Paul*, 978 P.2d 136, 139 (Colo. App. 1998). A trial court has considerable discretion in granting or denying the motion. *Id.*

Regardless of the method of intervention, "Rule 24 should be liberally interpreted to allow, whenever possible and compatible with efficiency and due process, issues related to the same transaction to be resolved in the same lawsuit and at the trial court level." *Id.* (citing *O'Hara Group Denver, Ltd.* v. *Marcor Housing Sys., Inc.,* 595 P.2d 679, 688 (Colo. 1979)).

The Court concludes that No Pipe and Save the Poudre may intervene as a matter of right under Colo. R. Civ. P. 24(a)(2). Following a timely application for a motion to intervene, a party "may intervene as a matter of right if a statute confers an unconditional right to intervene or (1) the

applicant claims an interest in the subject matter of the litigation; (2) the disposition of the case may impede or impair the applicant's ability to protect that interest; and (3) the interest is not adequately represented by existing parties." *Feigin,* 19 P.3d at 26. The Court Addresses each issue in turn, and concludes that both No Pipe and Save the Poudre meet the requirements.

Whether a motion to intervene is timely presents "a threshold question that must initially be determined." *Diamond Lumber, Inc. v. H.C.M.C., Ltd.*, 746 P.2d 76, 78 (Colo. App. 1987) (citing *NAACP v. New York*, 413 U.S. 345 (1973)). To answer that question, the Court "must weigh the lapse of time in light of all the circumstances of the case, including whether the applicant was in a position to seek intervention at an earlier stage in the case." *L. Offices of Andrew L. Quiat, P.C. v. Ellithorpe*, 917 P.2d 300, 303 (Colo. App. 1995).

As an initial matter, the Court finds both No Pipe and Save the Poudre's motions to intervene are timely. The complaint was filed on April 16, 2019, and the Board filed its answer on June 3, 2019. There are no pending motions before the court, excepting the motions to intervene, and neither Thornton nor the Board have filed substantive briefs. Indeed, the certified record also is not yet filed with the Court. Notably, Thornton hasn't objected to the timeliness of the motions. The Court, therefore, concludes that the motions to intervene are timely under the circumstances. *See id.*

The Court also concludes that No Pipe and Save the Poudre each made the required showing to intervene as of right under the first element of the test. Under Rule 24(a)(2), "the party seeking intervention must claim an interest relating to the property or transaction which is the subject of the action." *Cherokee Metro. Dist. v. Meridian Serv. Metro. Dist.,* 266 P.3d 401, 404 (Colo. 2011). Colorado courts take a flexible approach, rejecting formalistic constraints, in determining whether a party can claim an interest relating to the property or transaction which is the subject of the action. *See id.* at 404, 406 (citing *Feigin*, 19 P.3d at 29). "The interest prong is primarily a practical

guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Id.* at 404.

No Pipe has an interest related to the claims asserted by Thornton in this action. Liberally interpreting No Pipe's interest, *Feigin*, 19 P.3d at 26, No Pipe's members have individual and particularized injuries as landowners. The outcome of the litigation could result in a loss of property through loss of the property itself, use, access, or quiet enjoyment. No Pipe Mtn. at 4. No Pipe's goal of stopping the pipeline would ultimately be harmed if Thornton's request that the Board or this Court choose either proposed route. Thus, No Pipe has an interest in the outcome of the litigation.

Save the Poudre, by comparison, has an interest in the outcome of the litigation through its members' interests in clean water and maintaining the flow of the River for swimming, fishing, kayaking, and aesthetic enjoyment which would be impacted through the outcome of the litigation. Save the Poudre Mtn. at 3. Should the pipeline be built, their argument goes, the water diversion would perpetuate negative impacts, diminishing water quantity and quality in the Cache la Poudre River and negatively impact both the downstream riparian environment and the ability to recreate on the River. In support of this argument, Save the Poudre provides several affidavits of its members who all attest that they are all homeowners who live in the vicinity of the River and each of them recreates on the section of the River that would allegedly be impacted were Thornton's requested relief granted. *See, e.g.*, *Save the Poudre* Mtn. Ex. C at 1–2. Thus, Save the Poudre also has an interest regarding the litigation.

The Court rejects Thornton's argument——that neither No Pipe nor Save the Poudre have any interest relating to the pipeline or denial of the 1041 application—as overly narrow, and too formalistic. *See Cherokee Metro Dist.*, 266 P.3d at 404, 406. The Court must construe the existence of an interest in a liberal manner. *Feigin*, 19 P.3d at 29. Merely because No Pipe and Save the Poudre

also want to send the water down the Poudre instead of building the pipeline doesn't change the fact that *both* organizations and their respective members have interests in stopping the pipeline. Because the interests here *are* related to the pipeline, and the ultimate outcome of this litigation impacts such interests, the Court concludes that both No Pipe and Save the Poudre have interests in the subject matter of this action.

As to the second element, the intervenor "must show that it is so situated that the disposition of the underlying action may as a practical matter impair its ability to protect its interest." *Cherokee*, 266 P.3d at 406 (citing Colo. R. Civ. P. 24(a)(2)). The intervenor's interest is impaired if "the disposition of the action in which intervention is sought will prevent any future attempts by the applicant to pursue his interest. *Feigin*, 19 P.3d at 30. This element is generally satisfied where isn't "a clear alternative venue in which the proposed intervenor may pursue relief" or defend its interests. *Mauro v. State Farm Mut. Auto. Ins. Co.*, 410 P.3d 495, 499 (Colo. Ct. App. 2013); *see also San Juan Cty., Utah*, 503 F.3d at 1199 (explaining that the Court applies practical judgment to determine the strength of, and risk of injury to, the movant's interests).

The Court finds that proceeding without both No Pipe and Save the Poudre will, as a *practical matter*, impair and impede each organization's ability to protect their particularized interests. *Cherokee*, 266 P.3d at 406. As noted above, No Pipe's members own properties that fall along the proposed pipeline routes. These property interests are evidently affected by the outcome of the litigation, as such interests may be impacted if the pipeline is constructed on, under, or adjacent to, their property. Moreover, no alternative forum is sufficient to adequately protect No Pipe or its members' rights because whether the pipeline is built or not will be determined by this litigation. *See Feigin*, 19 P.3d at 30. Thus, the ability of No Pipe to protect its interests would likely be impaired and impeded if they could not intervene in this action.

Analogously, Save the Poudre would experience an impediment to its interests if it were not

allowed to intervene. Save the Poudre's interest in environmental protection could not be served through another forum, because the outcome of the pipeline, as discussed above, will be decided in this case. *See id.* Moreover, Save the Poudre alleges that the pipeline will affect its and its member's interests in several way, including through decreased recreational and aesthetic enjoyment. *See Dillon Companies, Inc. v. City of Boulder*, 515 P.2d 627, 629 (1973) (finding increased traffic and drainage issues to be sufficient to affect the intervenor's interest).

As to the third element—whether a would-be intervenor's interest is adequately represented—the Supreme Court requires application of factors set forth in 7C Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, *Federal Practice and Procedure* § 1909 (3d ed. 1997) for determining the adequacy of representation. Under that test, the Court looks to the following:

> [1] If the interest of the absentee is not represented at all, or if all existing parties are adverse to the absentee, then there is no adequate representation. [2] On the other hand, if the absentee's interest is identical to that of one of the present parties, or if there is a party charged by law with representing the absentee's interest, then a compelling showing should be required to demonstrate why this representation is not adequate. [3] But if the absentee's interest is similar to, but not identical with, that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, although intervention ordinarily should be allowed unless it is clear that the party will provide adequate representation for the absentee.

Cherokee, 266 P.3d at 407. This analysis is necessarily a fact-specific inquiry, balancing the goal of consolidating related issues against cluttering lawsuits with useless intervenors. *Concerning Application for Underground Water Rights*, 304 P.3d 1167, 1170 (Colo. 2013). In some instances, "even though two parties may have different motivations for an interest, the interest may nevertheless be identical." *Id.* at 1171. Conversely, merely requesting the same relief doesn't mean that the interests of the intervenor and the existing party are identical under Rule 24. *Kane Cty. Utah*, 2019 WL 2588524, at *5, n.13 (citing the substantially similar Fed. R. Civ. P. 24(a)). To hold otherwise, as Thornton urges, would mean that intervenors who pursue the same relief as a party are *per se* adequately represented

by the party to the action. *Id.* The Court need not belabor the illogic of that argument anymore.

The Supreme Court has held that property owners are entitled to intervention and representation by counsel of their choosing when they own property adjacent to and abutting rezoned property and couldn't be represented by an attorney appearing on behalf of the government entity. *See Roosevelt v. Beau Monde Co.*, 384 P.2d 96, 100 (Colo. 1963). In *Roosevelt v. Beau Monde Co.*, neighboring property owners who would be bound by a judgment in a suit attacking the validity of a zoning ordinance were entitled to intervene notwithstanding the fact the city attorney of the enacting municipality was defending the attack against the ordinance, where their interests in preventing the erection of a shopping center might not be identical with the municipality's interest in upholding the zoning ordinance. *See id.*[8]

Here, the Court finds that No Pipe and Save the Poudre's interests fall in the third category—neither organization nor their members' interests are entirely or adequately represented by the existing parties. As in *Roosevelt*, No Pipe has similar, but not necessarily identical interests to the Board. *Id.* Both are interested in seeing the Board's determination affirmed. But that fact that they seek the same relief isn't dispositive. *See Kane Cty. Utah*, 2019 WL 2588524, at *5, n.13. If No Pipe and Save the Poudre aren't allowed to intervene, it's unclear that the Board would raise the same arguments given their differing interests and the Board's curt and dismissive statement that it'll "run its own case."

Indeed, No Pipe presented legal and technical reasons for denying Thornton's application, which the Board did not specifically document in the its Findings and Resolution denying the project. Moreover, as just noted, the Board stated that it would "run its own case," which

[8] The Court is unpersuaded by Thornton's argument that *Roosevelt* is distinguishable merely because the adjacent property owners themselves sought to intervene as of right. As the Court concluded above, both No Pipe and Save the Poudre both have standing and thus the only requirement is that they meet the test under *Feigin*. 19 P.3d at 26.

presumably (and naturally) will consist in defending the reasons the Board proffered in its decision. Because these arguments are unlikely to overlap with the record-based arguments that No Pipe intends to make on behalf of its members, the Board cannot be said to act as adequate representation for No Pipe.

The reasoning of the Board's decision has even less overlap with the environmental interests of Save the Poudre. Save the Poudre's interests focus on its member's proximity to the River and the potential harm to their recreation abilities caused by environmental damage. The Board makes no specific mention of those interests in its decision, but instead talks about the need for the water to be held for irrigation purposes for nearby farmland. While Save the Poudre seems to love the River, it hasn't expressed as much interest for the adjoining farmland. Thus, the Court concludes that the interests of both No Pipe and Save the Poudre will not be adequately represented by the Board in the current matter.

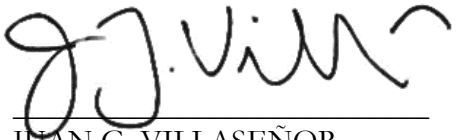
Because No Pipe and Save the Poudre meet all three parts of Rule 24(a)(2), they have the right to intervene. Based on the foregoing, the Court need not consider whether permissive intervention is allowable under Colo. R. Civ. P. 24.

III. CONCLUSION.

Accordingly, for the reasons set forth above, No Pipe's motion to intervene and Save the Poudre's motion to intervene are granted. The Clerk shall accept for filing the intervenors' proposed answers.

SO ORDERED this 14th day of July, 2019.

BY THE COURT:



JUAN G. VILLASEÑOR
District Court Judge