UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWEST DIVISION

DACOTAH CHAPTER OF SIERRA CLUB and DAKOTA RESOURCE COUNCIL, Plaintiffs, v. SECRETARY OF THE INTERIOR KEN SALAZAR, in his official capacity, Defendant.	CASE NO. 1:12-cv-065

NORTH DAKOTA PUBLIC SERVICE COMMISSION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO INTERVENE

Pursuant to Federal Rule of Civil Procedure 24 and D.N.D. Civ. L.R. 7.1(B), Applicant in Intervention North Dakota Public Service Commission ("**NDPSC**"), by and through its undersigned counsel, respectfully files its Memorandum of Law in Support of its Motion to Intervene as a defendant in this proceeding. NDPSC requests that if this Court grants NDPSC's Motion to Intervene, it also order that NDPSC's answer or responsive pleading in response to Plaintiffs' Complaint be due the later of August 21, 2012, the date by which Defendant's answer is currently due, or 21-days from the Court's Order granting NDPSC's Motion to Intervene. In support of the relief requested in its Motion, NDPSC states as follows:

I. BACKGROUND

A. Procedural History

On March 26, 2012, Plaintiffs notified the Secretary of the Department of the Interior ("**Secretary**") and NDPSC, the state agency charged with implementing the federal Surface

Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201, *et seq.* ("**SMCRA**") in North Dakota, of their intent to file a federal civil lawsuit to compel North Dakota's compliance with SMCRA. On May 30, 2012, Plaintiffs filed the present Complaint with the Court. It was not until June 29, 2012 that NDPSC obtained a copy of the Complaint. Plaintiffs served its Complaint in this matter on the Secretary on June 22, 2012. Plaintiffs' Complaint alleges that the NDPSC has improperly implemented the SMCRA conflict of interest provisions as it relates to actions taken by NDPSC Commissioners in their enforcement of SMCRA in North Dakota. Plaintiffs' Complaint asks this Court to enter an order compelling the Secretary to entirely revoke North Dakota's federally approved program for exclusively regulating all surface coal mining activities on all non-federal and non-tribal lands in North Dakota. Complaint, p. 18.

While Plaintiffs seek the invalidation of North Dakota's implementation of SMCRA, neither North Dakota nor the NDPSC is currently a party to this litigation. NDPSC strenuously objects to the Complaint. Accordingly, NDPSC moves to intervene as a party in this case to speak for and defend North Dakota's sovereign and indispensable interests under SMCRA against the Plaintiffs' erroneous allegations and requested relief set forth in their Complaint.

B. SMCRA

Congress enacted SMCRA to provide for comprehensive regulation of surface coal mining and the attendant reclamation of mined lands on all non-federal and non-tribal lands. The SMCRA regulatory regime is one of state primacy, reflecting Congress's recognition that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations...**should rest with the States**." (emphasis added). 30 USC § 1201(f).

A state assumes the exclusive enforcement authority under SMCRA, or "primacy," over the coal mining operations on its non-federal and non-tribal lands by submitting a permanent regulatory program that the Secretary approves. *See generally* 30 U.S.C. § 1253; *see also Hodel v. Va. Surface Mining and Reclamation Ass'n, 452 U.S. 264, 271(1981)*. The program-approval process requires an extensive review by the Department of the Interior's Office of Surface Mining Reclamation and Enforcement ("**OSM**") and the solicitation and consideration of comments on the program from other agencies and the public. *See* 30 U.S.C.§ 1201(a)-(c). The state's program must establish two criteria: (1) the minimum federal standards must be implemented as state law; and (2) the state has the capability to enforce the law. *See* 30 U.S.C. § 1253.

Once a state achieves "primacy" under SMCRA, the state regulatory authority "exercises front-line supervision, and the Secretary [of the Interior] will not intervene unless its discretion is abused." *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 523 (D.C. Cir. 1981) (*en banc*). The state, not OSM, has the primary responsibility for all aspects of the regulatory program. SMCRA "does not provide for concurrent jurisdiction in the states and federal government" once a state's program is approved by the Secretary. *Haydo v. Amerikohl Mining, Inc.*, 830 F.2d 494, (3d Cir. 1987); *see also Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 288-89 (4th Cir. 2000); *Coteau Props. Co. v. Dep't of Interior*, 53 F.3d 1466, 1469 (8th Cir. 1995).

In developing SMCRA,

> Congress did not pursue, although it could have, the **direct** regulation of surface coal mining as its preferred course . . . . Nor did Congress invite the States to enforce **federal** law directly. By giving States exclusive regulatory control through enforcement of **their own** approved laws, Congress intended that federal law establishing minimum national standards would "drop out" as operative law and that the State laws would become the sole operative law.

Bragg, 248 F.3d at 295 (emphasis in original). Accordingly, it is the state, and only the state, that will determine, among other things, under what conditions mining operations will take place, whether a permittee's techniques for avoiding environmental degradation are sufficient, and whether reclamation plans are acceptable. *See In re Permanent* at 519.

When a state has primacy, OSM's role is one of limited oversight, which involves occasional on-site inspections "to evaluate the administration of approved State programs." 30 U.S.C. § 1267(a). Based on those inspections, OSM may alert the state to possible violations of SMCRA, which triggers a regulatory enforcement review process. *See id.* § 1271(a)(1); 30 C.F.R. § 842.11(b)(1). Only in states that do not have an "approved state program" does OSM directly regulate surface coal mining under a "federal program." 30 U.S.C. § 1254(a)(1)-(2).

C. North Dakota's Extensive Regulation of Coal Mining and Reclamation

North Dakota began regulating surface coal mining and reclamation in 1970, well before the enactment of SMCRA in 1977. After the enactment of SMCRA, the North Dakota legislature amended its coal mining and reclamation statutes in 1979 to incorporate SMCRA's minimum federal standards into state law, which is the requisite first step to obtaining exclusive enforcement responsibility under SMCRA. *See generally* N.D. Cent. Code §§ 38-14.1-01, *et seq.* On February 29, 1980, North Dakota submitted its plan implementing SMCRA to the Secretary for approval.

On December 15, 1980, the Secretary approved North Dakota's plan ("**SMCRA Plan**"), granting North Dakota primacy to enforce SMCRA on North Dakota's non-federal and non-tribal lands. 45 Fed. Reg. 82,214 (Dec. 15, 1980); *see also* 30 C.F.R. § 934.10. NDPSC's regulation of surface coal mining activities is a comprehensive program, requiring those engaged

in surface coal mining operations to comply with extensive permitting requirements and environmental protection performance standards. *See* 30 U.S.C. §§ 1256-1266.

Since North Dakota's SMCRA Plan was approved by the Secretary in 1980, North Dakota has continuously maintained the exclusive authority over coal mining and reclamation on its non-federal and non-tribal lands. *See* N.D. Cent. Code § 38-14.1-02(4); 30 C.F.R. § 934.10. Since 1982, the Secretary has reviewed and approved, either wholly or in-part, numerous amendments to North Dakota's SMCRA Plan. These several amendments are detailed in 30 C.F.R. § 934.15. Notably, OSM recently recognized NDPSC's continued successful implementation of its SMCRA Plan in the OSM's 2011 annual report, which stated NDPSC's "excellent coal regulatory program" has "no major issues that need corrective action." Office of Surface Mining Reclamation and Enforcement, Annual Evaluation Report for the Regulatory Program Administered by the Public Service Commission of North Dakota for Evaluation Year 2011, pp. 1, 5 (Sept. 2011). OMS has never threatened to remove the NDPSC's authority to implement the SMCRA Plan.

II. LEGAL ARGUMENT

A. NDPSC Is Entitled To Intervention As A Matter Of Right Under Fed. R. Civ. P. 24(a).

The right of a third party to intervene in an action is governed by Fed. R. Civ. P. 24. Pursuant to Fed. R. Civ. 24(a) upon timely application, anyone shall be permitted to intervene in an action: (1) When a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the position of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by interested parties. The standards for intervention of right

are to be construed liberally and any doubts must be resolved in favor of applicants for intervention. *U.S. v. Ritchie Special Credit Invs., Ltd.*, 620 F.3d 824, 831 (8th Cir. 2010). Further, the "central purpose" of Fed. R. Civ. P. 24 is to allow intervention by those who might be "practically disadvantaged" by a case's disposition. *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 970 (3rd Cir. 1998).

1. NDPSC's Motion is Timely

Whether a motion to intervene has been timely filed is the threshold factor that must be considered before any other factor. *See Ritchie Special Credit Invs., Ltd.*, 620 F.3d at 832. Importantly, how far the suit has progressed is a factor to be considered when looking at the timeliness of a motion to intervene, but "it is not solely dispositive." *Id.* In the Eighth Circuit, several factors are considered to determine whether a motion to intervene is timely filed: "how far the litigation had progressed at the time of the motion for intervention, the prospective intervenor's prior knowledge of the pending action, the reason for the delay in seeking intervention, and the likelihood of prejudice to the parties in the action." *Minnesota Milk Producers Ass'n v. Glickman*, 153 F.3d 632, 646 (8th Cir. 1998).

NDPSC's Motion for Leave to Intervene is timely as it has been filed within two months of the filing of Plaintiffs' Complaint on May 30, 2012, and prior to the Defendant's August 21, 2012 deadline to file an answer or other responsive pleading. Further, while Plaintiffs' Complaint was filed on May 30, 2012, NDPSC did not actually obtain a copy of the Complaint until June 29, 2012. NDPSC moved as expeditiously as possible to intervene in this matter once it became aware that the Complaint had been filed.

Granting NDPSC's intervention will not delay the proceedings. Currently, Defendant's answer or responsive pleading to Plaintiffs' Complaint is due August 21, 2012. If NDPSC's Motion is granted, it respectfully requests that its answer or responsive pleading to Plaintiffs' Complaint be due the later of 21-days from the entry of this Court's order granting intervention or August 21, 2012, the day Defendant's answer is due. Accordingly, NDPSC's intervention will not delay or otherwise prejudice the parties by delaying the advancement of this lawsuit as its answer or responsive pleading would be due concurrent with Defendant's answer or responsive pleading or shortly thereafter.

2. SMCRA Grants NDPSC the Unconditional Right to Intervene

NDPSC is entitled to intervene in this proceeding pursuant to Fed. R. Civ. P. 24(a)(1) because SMCRA provides an explicit and unconditional right for NDPSC to intervene. Specifically, "[i]n any such action under [30 U.S.C. § 1270], the Secretary or the State regulatory authority, if not a party, may intervene as a matter of right." 30 U.S.C. § 1270(c).

Plaintiffs' Complaint seeks review under 30 U.S.C. § 1270(a). *See* Complaint, ¶¶ 4-6. As set forth above, NDPSC exclusively exercises the State of North Dakota's regulatory authority challenged in this proceeding. *See* N.D. Cent. Code § 38-14.1-02(4); 30 C.F.R. § 934.10; *see also Coteau Props. Co.*, 53 F.3d at 1469 ("North Dakota is a primacy state; its state regulatory program is enforced by the [NDPSC] . . . ."). As federal courts recognize, with 30 U.S.C. § 1270(c), "Congress expressly gave regulatory authorities the power to intervene as a matter of right in any SMCRA citizens suit." *McCracken v. Black Diamond Co.*, No. 1:11-cv-00073, W.D. Va, 2012 U.S. Dist. LEXIS 63096, slip op. at * 13 (May 6, 2012); s*ee also Save Our Cumberland Mountains, Inc. v. Lujan*, 963 F.2d 1541, 1548 (D.C. Cir. 1992) (recognizing the state regulatory agency's right to intervene in a citizen suit). Consequently, NDPSC's intervention as a matter of

right pursuant to Fed. R. Civ. 24(a)(1) and 30 U.S.C. § 1270(c) is proper and should be granted by this Court.

3. NDPSC has several legally cognizable interests directly relating to the subject matter of this action.

Under Fed. R. Civ. P. 24(a)(2), a movant may, upon timely application, intervene in an action as a matter of right if the movant establishes that (1) it has a cognizable interest in the subject matter of the litigation; (2) the interest may be impaired as a result of the litigation; and (3) the interest is not adequately protected by the existing parties to the litigation. *Mille Lacs Band of Indians v. Minnesota*, 989 F.2d 994, 997 (8th Cir. 1993). The movant bears the burden of demonstrating its right to intervene. 6 James Wm. Moore, et al., Moore's Federal Practice § 24.03[1][a] (3d ed. 2008). All criteria must be satisfied before a non-party can intervene as a matter of right. *Id.*

As set forth above, NDPSC is the state-government agency that administers SMCRA in North Dakota, and a challenge to strip NDPSC's authority under SMCRA is the express purpose behind Plaintiffs' claims and requested relief. *See* Complaint, p. 18. NDPSC therefore has legally cognizable interests in this litigation.

No other party to this litigation can adequately represent NDPSC's interest in this suit. An applicant's burden to prove inadequate representation by existing parties is minimal. The United States Supreme Court has held this "requirement of the rule is satisfied if the applicants show the representation of its interest 'may be' inadequate." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 (1972). Certainly, Plaintiffs, all non-for-profit environmental organizations are adverse to NDPSC and therefore cannot represent its interests. Nor is the Secretary able to adequately represent the interests of NDPSC. Under SMCRA, it is the Secretary that reviews

and approves a state's SMCRA plan. *See* 30 USC § 1253(b). It is also the Secretary that may withdraw a state's authority to implement its SMCRA plan. *see generally* 30 CFR 733.12.

Further, North Dakota and its citizens are not presumed to be adequately represented by the Secretary since NDPSC seeks to protect state and local interests not necessarily shared or represented by the Secretary. *Mille Lacs*, 989 F.2d 1001. In short, NDPSC's interest in protecting its authority to implement its SMCRA Plan is of highest priority, and because the Secretary's role under SMCRA is different than NDPSC's, it cannot adequately represent NDPSC's interests. Therefore, NDPSC must be allowed to intervene to protect its interests.

B. NDPSC is Entitled to Permissive Intervention Under Fed. R. Civ. P. 24(b).

While NDPSC has an unconditional right to intervene, its permissive intervention under Fed. R. Civ. P. 24(b)(2) is also warranted. To be granted permissive intervention, Fed. R. Civ. P. 24(b)(2) requires an intervenor to "(1) timely file a motion, (2) be a federal or state governmental officer or agency, (3) administer the statute, executive order or regulation at issue and (4) not cause undue delay or prejudice to the original parties' rights, if allowed to (permissively) intervene." *Coffey v. Comm'r*, 663 F.3d 947, 951 (8th Cir. 2011). As set forth below, NDPSC meets the criteria established under Fed. R. Civ. R. 24(b)(2) and therefore its permissive intervention in this case is warranted.

1. NDPSC's Motion to Intervene is timely.

As set forth in Section A(1) *supra*, NDPSC's Motion is timely.

2. NDPSC is the sole and express agency in North Dakota vested with the authority to implement North Dakota's SMCRA Plan.

The Eighth Circuit Court of Appeals recognized permissive intervention by a non-federal agency that has been delegated responsibility for implementing a federal statute is proper. *Coffey*,

663 F.3d 947, 951. Like the intervenor in *Coffey*, NDPSC has the exclusive responsibility and authority for implementing SMCRA on North Dakota's non-federal and non-tribal lands. Further, NDPSC will be practically disadvantaged if Plaintiffs and the Secretary are allowed to singularly evaluate NDPSC's implementation of SMCRA **without** direct input from or participation by NDPSC—the state agency charged with enforcement of SMCRA. North Dakota has spent more than thirty years properly enforcing SMRCA's requirements and to deny NDPSC the right to defend against Plaintiffs' allegations would unduly prejudice North Dakota.

A loss of authority to implement its SMCRA Plan would result in great harm to the NDPSC and the State of North Dakota and its citizens. SMCRA clearly states the Congressional purpose and preference for states to have primacy in regulating surface coal mining on lands within a state. *See* 30 USC § 1201(f). NDPSC is the only entity that can properly and adequately represent the interests of North Dakota and its citizens and the NDPSC's Commissioners, and to defend the actions that NDPSC has taken in implementing SMCRA. As the state entity charged with implementing SMCRA in North Dakota, NDPSC respectfully seeks permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2).

3. NDPSC's intervention will not cause undue delay or prejudice to the parties.

NDPSC's intervention will not prejudice the parties as this case is at an early stage, as demonstrated by the fact that the Defendant has not yet filed an answer or responsive pleading in this case. If NDPSC's requested intervention is granted, its answer or responsive pleading will be due concurrent with Defendant's answer or soon thereafter. No undue prejudice to Plaintiffs will result. Accordingly, NDPSC meets the requirements of Fed. R. Civ. P. 24(b)(2), and therefore, its permissive intervention in this matter should be granted by this Court.

III. CONCLUSION

Applicant Intervenor North Dakota Public Service Commission respectfully requests that this Court grant its Motion for Leave to Intervene and its request that its answer or responsive pleading to Plaintiffs' Complaint be due the later of August 21, 2012 or 21-days from the Court's order granting NDPSC's Motion to Intervene.

DATED: July 30, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2012, the foregoing North Dakota Public Service Commission's Memorandum of Law in Support of Its Motion to Intervene was served electronically to all counsel of record through the Court's ECF System.

s/Michelle D. Hitchcock
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