

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWEST DIVISION

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

NORTH DAKOTA PUBLIC SERVICE COMMISSION’S REPLY
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, files its Reply in Support of its Motion to Intervene as a defendant in this proceeding. NDPSC respectfully requests the Court grant NDPSC’s Motion to Intervene without the conditions requested by Plaintiffs Dacotah Chapter of Sierra Club and Dakota Resource Council (collectively “**Plaintiffs**”) in their Response to Motion to Intervene. Plaintiffs have made no showing as to why NDPSC’s participation in this matter should be conditioned or otherwise restricted, and no basis exists for doing so. The Court should further reject Plaintiffs’ purported reservation of “right to contest any and all such [intervention] arguments or statements at any subsequent point during this action.” Response at 1.

In further support of NDPSC's Motion to Intervene, NDPSC states as follows:

I. NDPSC's INTERVENTION IS PROPER AND SHOULD NOT BE LIMITED

Neither North Dakota nor the NDPSC is currently a party to this litigation even though Plaintiffs' Complaint seeks the wholesale invalidation of North Dakota's implementation of the federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201, *et seq.* ("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. However, Congress recognized in the SMCRA regulatory regime that primary governmental responsibility for coal mining "**should rest with the States.**" (emphasis added). 30 USC § 1201(f). North Dakota has continuously maintained the exclusive authority over coal mining and reclamation on its non-federal and non-tribal lands pursuant to SMCRA since 1980. *See* N.D. Cent. Code § 38-14.1-02(4); 30 C.F.R. § 934.10. Plaintiffs' lawsuit seeks to strip away the NDPSC's authority under SMCRA. Accordingly, NDPSC properly seeks to intervene as a party in this case to speak for and defend North Dakota's sovereign and indispensable interests under SMCRA against the erroneous allegations set forth in Plaintiffs' Complaint.

A. NDPSC's Unrestricted Intervention As A Matter Of Right And Permissively Is Proper.

As fully explained in NDPSC's Memorandum of Law, NDPSC is entitled to intervene either by right or permissively. *See* Memorandum at pp. 5-10. NDPSC is entitled to intervene in this proceeding as a matter of right under either prong of Fed. R. Civ. P. 24(a). First, NDPSC's intervention is timely as briefing in this matter has not yet begun and NDPSC's intervention will not cause undue delay or prejudice to the parties. *See Coffey v. Comm'r*, 663 F.3d 947, 951 (8th Cir. 2011). Second, pursuant to Fed. R. Civ. P. 24(a)(1) and 30 U.S.C. § 1270(c), NDPSC is entitled to intervene because NDPSC is the exclusive state agency responsible for implementing

SMCRA on North Dakota's non-federal and non-tribal lands. 30 U.S.C. Section 1270(c) expressly authorizes the "State regulatory authority, if not a party, may intervene as a matter of right" in a citizen suit under 30 U.S.C. § 1270, which is the statutory basis for Plaintiffs' Complaint. *See* Complaint at 4. Third, NDPSC's intervention is necessary because NDPSC's interests in this proceeding are not adequately protected by the parties. *See Mille Lacs Band of Indians v. Minnesota*, 989 F.2d 994, 997 (8th Cir. 1993).

B. Plaintiffs' Improperly Seek To Limit NDPSC's Participation In This Case.

The limitations Plaintiffs seek to impose on NDPSC's participation in this case would make NDPSC subservient to the Defendant Secretary of the Department of the Interior ("Secretary"), as though NDPSC has no independent and legally cognizable interest in assuring it continues to implement SMCRA in North Dakota or in demonstrating it has properly exercised its authority under SMCRA. If the Plaintiffs requested limitations are imposed, NDPSC would: be limited to the issues raised by the parties – neither of whom represent NDPSC's unique legal and equitable interests; have stricter page limitations imposed for "memoranda of points and authorities" than the Plaintiffs and the Secretary; be required to confer with the Secretary prior to filing any motion or brief so as to determine whether positions advanced by the two may be consolidated; and be required to file a joint statement of facts with the Secretary for purposes of summary judgment with the limited option of including additional facts in NDPSC's memorandum. Response at 2. Any need for the imposition of such extreme conditions is not articulated by Plaintiffs (nor does it exist) and doing so would greatly prejudice NDPSC's participation in this matter in addition to not being consistent with the Office of the North Dakota Attorney General's practice to not release work product to outside parties.

Nothing in Fed. R. Civ. P. 24 requires the imposition of Plaintiffs' limitations on NDPSC's participation in this matter. Further, Plaintiffs' Response entirely fails to provide any

factual or legal justification for the imposition of these limitations. NDPSC is entitled to intervention as a matter of right. *See* Memorandum of Law at 5. To condition the scope of participation of a party entitled to intervene as a matter of right is strongly disfavored, as recognized by Plaintiffs own purported authority, because it limits the intervenor's ability to fully protect its rights.

Federal Rule of Civil Procedure 24 distinguishes a permissive intervenor from an intervenor of right by the stake each has in the litigation. **The intervenor of right has an interest in the litigation that it cannot fully protect without joining the litigation**, while the permissive intervenor does not. Accordingly, a district court has less discretion to limit the participation of an intervenor of right than that of a permissive intervenor. (emphasis added).

Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 381-382 (U.S. 1987) (Brennan, J., concurring).

Further, as a sovereign State, North Dakota is not presumed to be adequately represented by the Secretary since NDPSC seeks to protect state and local interests that are not necessarily shared or represented by the Secretary. *See Mille Lacs Band of Indians v. Minnesota*, 989 F.2d 994, 1001 (8th Cir. 1993). NDPSC's interest in protecting its authority to implement its SMCRA plan is unique. Because the Secretary's role under SMCRA is different than NDPSC's, conditioning NDPSC's participation in this proceeding so that it must confer with and coordinate with the Secretary impermissibly constrains NDPSC's implementation of SMCRA in North Dakota. While NDPSC does not object to conferring with the Secretary in an effort to avoid duplicative argument, NDPSC's intervention should not be conditioned or otherwise restricted because NDPSC is the only party to the proceeding that can and will represent the interests of the State.

C. Plaintiffs Provide No Valid Justification For Limiting NDPSC's Participation In This Matter.

The authorities Plaintiffs cite in their Response are inapplicable and factually distinguishable since none involve a court imposing conditions upon a government agency's intervention in a lawsuit seeking to strip that agency of the regulatory authority it holds pursuant to a federal statute. *See generally Stringfellow*, 480 U.S. 370, 380 (U.S. 1987) (holding district court's order granting non-profit organization's permissive intervention with conditions, but denying intervention of right, in enforcement action is an not immediately appealable order); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 737-38 (D.C. Cir. 2003) (ordering intervention—without conditions—of foreign government in citizen suit against federal government that would be injured by relief sought by plaintiffs); *Beauregard, Inc. v. Sword Svcs., LLC*, 107 F.3d 351, 352 (5th Cir. 1997) (affirming dismissal of intervenor's complaint for intervention where intervenor failed to comply with order granting intervention and imposing conditions relating to *in rem* admiralty case).

Moreover, the cases Plaintiffs cite relate to parties seeking intervention pursuant to Fed. R. Civ. P. 24(a)(2). *See* Response, pp. 1-2. These cases are therefore not applicable to NDPSC's intervention as a matter of right under Fed. R. Civ. P. 24(a)(1), because SMCRA itself grants NDPSC the unconditional right to intervene in this proceeding. *See* 30 U.S.C. §1270 (c). Plaintiffs have made no showing how NDPSC's intervention as a full party would unduly burden or delay the underlying proceeding—because it will not as NDPSC has timely sought intervention at the outset of the case. Further, Plaintiffs do not allege any prejudice that would result from NDPSC's unrestricted intervention in this matter. In fact, there would be none. NDPSC's intervention will instead benefit this Court's consideration of the issues. It is NDPSC's implementation of SMCRA that the Plaintiffs ultimately allege was improper. It is NDPSC—not

the Defendant Secretary—that is in the best position to defend itself against the allegations in Plaintiffs' Complaint.

II. CONCLUSION

For the reasons stated herein and previously in its Memorandum of Law in Support of Its Motion to Intervene, Applicant in Intervention North Dakota Public Service Commission respectfully requests that this Court grant its Motion for Leave to Intervene and permit it to fully participate as a party-defendant.

DATED: August 7, 2012.

Respectfully submitted,

**STATE OF NORTH DAKOTA
WAYNE STENEHJEM
ATTORNEY GENERAL**

/s/Paul M. Seby

Paul M. Seby
Special Assistant Attorney General
Marian C. Larsen
Special Assistant Attorney General
Moye White LLP
1400 16th Street, Sixth Floor
Denver, CO 80202
Telephone: (303) 292-2900
Facsimile: (303) 292-4510
Email: paul.seby@moyewhite.com
Email: mimi.larsen@moyewhite.com

Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone: (701) 328-3640
Facsimile: (701) 328-4300

*Attorneys for the North Dakota Public Service
Commission*

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2012, the foregoing North Dakota Public Service Commission's Reply 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

Michelle D. Hitchcock

Brandner, Tara B.

From: Paul Seby <Paul.Seby@moyewhite.com>
Sent: Tuesday, August 07, 2012 6:11 PM
To: Brandner, Tara B.; Deutsch, James R.
Cc: Mimi Larsen
Subject: Fw: Activity in Case 1:12-cv-00065-CSM Dacotah Chapter of Sierra Club et al v. Salazar
Reply to Response to Motion

From: ndd_nef@ndd.uscourts.gov <ndd_nef@ndd.uscourts.gov>
To: CourtMail@ndd.uscourts.gov <CourtMail@ndd.uscourts.gov>
Sent: Tue Aug 07 16:34:43 2012
Subject: Activity in Case 1:12-cv-00065-CSM Dacotah Chapter of Sierra Club et al v. Salazar Reply to Response to Motion

This is an automatic e-mail message generated by the CM/ECF system. Please **DO NOT RESPOND** to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

District of North Dakota

Notice of Electronic Filing

The following transaction was entered by Seby, Paul on 8/7/2012 at 5:34 PM CDT and filed on 8/7/2012

Case Name: Dacotah Chapter of Sierra Club et al v. Salazar

Case Number: [1:12-cv-00065-CSM](#)

Filer: North Dakota Public Service Commission

Document Number: [13](#)

Docket Text:

REPLY to Response to Motion re [7] MOTION to Intervene filed by North Dakota Public Service Commission. (Seby, Paul)

1:12-cv-00065-CSM Notice has been electronically mailed to:

Carrie LaSeur claseur@plainsjustice.org

Joanna K. Brinkman joanna.brinkman@usdoj.gov

Marian Camille Larsen mimi.larsen@moyewhite.com

Paul M. Seby paul.seby@moyewhite.com, brooke.somerville@moyewhite.com,
michelle.hitchcock@moyewhite.com, mimi.larsen@moyewhite.com

1:12-cv-00065-CSM Notice will not be electronically mailed to:

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

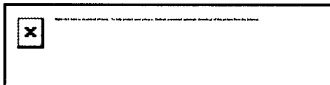
Electronic document Stamp:

[STAMP dcecfStamp_ID=1102363164 [Date=8/7/2012] [FileNumber=517014-0]
[51e05121e201575a687e3920b365bb2baac7c67a472c66b747f24850490cb8984b907
7cad1f3037c792f90b1b15afc636a49856617646dfceab63310ac407c82]]

Paul M. Seby

Partner

303 292 7934



Moye White LLP Attorneys at Law
16 Market Square 6th Floor 1400 16th Street Denver CO 80202-1486
tel 303 292 2900 fax 303 292 4510 www.moyewhite.com



[Profile](#)

[Download vCard](#)