IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

DAKOTA RESOURCE COUNCIL, Plaintiff, v. NORTH DAKOTA PUBLIC SERVICE COMMISSION, Defendant.	)	Case No. 1:12-cv-64 SECRETARY OF THE INTERIOR KEN SALAZAR'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

INTRODUCTION

Pursuant to 28 U.S.C. § 517 and Fed. R. Civ. P. 24(a), the Secretary of the United States Department of the Interior Ken Salazar ("Secretary"), in his official capacity, moves to intervene as a matter of right as a defendant in this case. In the alternative, the Secretary moves to intervene permissively pursuant to Fed. R. Civ. P. 24(b)(2).

The Secretary has an unconditional right to intervene and a significant interest in this case. This case concerns the United States Department of Interior, Office of Surface Mining Reclamation and Enforcement's ("OSM") alleged duty to review policy guidance and memoranda issued by state programs that have attained primacy under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"). Plaintiff alleges that the Defendant, North Dakota Public Service Commission ("NDPSC"), has violated SMCRA by failing to submit certain policy memoranda and guidelines to OSM for formal approval or denial as state program amendments prior to implementation. Dkt. No. 1 ¶

17. OSM administers SMCRA in conjunction with the individual States (including, as relevant to this case, North Dakota) that have assumed primary jurisdiction for the surface mining programs within their borders. In addition, the same Plaintiff has filed a separate lawsuit against the Secretary alleging SMCRA violations, which involves similar questions of fact and law. *See Dacotah Chapter of Sierra Club v. Salazar*, No. 1:12-CV-00065-CSM (D.N.D.) (filed May 30, 2012) ("*Dacotah Chapter*"). Indeed, the plaintiffs used the same Notice of Intent to Sue for both issues. *Compare id.*, Complaint ¶ 6; *with* Dkt. No. 1 ¶ 6. The Court recently granted NDPSC leave to intervene as of right in *Dacotah Chapter*.

Due to the plain language of SMCRA, and the effect Plaintiff's claim could have on OSM's oversight role under SMCRA and on OSM's relationship with States that have achieved primary jurisdiction across the country, the Secretary must be granted intervention in this case.

RELEVANT BACKGROUND

SMCRA permits a state to assume primacy for the regulation of surface coal mining and reclamation operations on non-federal and non-Indian lands within its borders after it demonstrates, among other things, that it has the necessary legal, regulatory, and administrative mechanisms in place to adequately enforce the Act. *See, e.g.,* 30 U.S.C. § 1253(a)(1) and (7). North Dakota attained primacy in 1980, and NDPSC is designated as the state regulatory authority for the North Dakota state program.

Once a state attains primacy, it is required to notify OSM of "any significant events or proposed changes which affect the implementation, administration or

enforcement of the approved State program." 30 C.F.R. § 732.17(b). After such notification, OSM is required to determine whether an amendment to the state program is required. *Id.* § 732.17(c). Similarly, even if it has not received notification from the state, OSM must determine whether a program amendment is required "whenever [OSM] becomes aware" of changes to the state program that indicate that the state program no longer conforms to SMCRA. *Id.* §§ 732.17(c), (e). If submission of a program amendment is necessary, federal regulations set forth procedures for OSM's review and decision. *Id.* §§ 732.17(f)-(h). Ultimately, OSM will approve a state program amendment if it is no less stringent than SMCRA and no less effective than the federal regulations. *Id.* §§ 730.5, 732.15(a). Neither SMCRA nor the corresponding federal regulations require formal review and approval of state policy memoranda and guidelines that clarify program requirements so long as they are not contrary to the approved program.

This lawsuit is part of a general grievance stated by plaintiffs against NDPSC and OSM. Here, Plaintiff alleges that Defendant NDPSC violated SMCRA by failing to submit certain policy memoranda and guidelines to OSM for formal approval or denial as state program amendments prior to implementation. Dkt. No. 1 ¶ 17. The same Plaintiff has filed a related lawsuit against the Secretary—*Dacotah Chapter*,Cas e No. 1:12-cv-065—which alleges that OSM has violated a mandatory, nondiscretionary duty under SMCRA to substitute a federal program in North Dakota due to NDPSC's alleged failure to implement its state program in a manner consistent with SMCRA and its regulations

concerning prohibited financial interests under SMCRA. The court granted NDPSC's motion to intervene as of right in this second lawsuit on August 27, 2012.

ARGUMENT

I. The Secretary May Intervene as of Right in this Case

Federal Rule of Civil Procedure 24(a) requires a court to grant intervention to a party which has filed a timely motion to intervene in either of two circumstances. First, intervention must be permitted where a party "is given an unconditional right to intervene by a federal statute." Fed. R. Civ. P. 24(a)(1). Second, intervention must be permitted where a party "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." Fed. R. Civ. P. 24(a)(2). "Doubts regarding the propriety of permitting intervention should be resolved in favor of allowing it, because this serves the judicial system's interest in resolving all controversies in a single action." *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992).

A. The Secretary has an Unconditional Right to Intervene by Virtue of the Surface Mining Control and Reclamation Act and 28 U.S.C. § 517

For any action brought pursuant to the citizen suit provision of SMCRA, the Secretary of the Interior has an unconditional right to intervene. SMCRA's citizen suit provision states that "[i]n such action under this section, the Secretary, or the State regulatory authority, if not a party, may intervene as a matter of right." 30 U.S.C. § 1270(c)(2). This language is unambiguous. *See Dacotah Chapter*, Case No. 1:12-cv-

065, 2012 WL 3686742 *2 (finding that SMCRA bestowed an "unconditional right to intervene" on the NDPSC in a related case filed against the Secretary by the same plaintiff as the present case); *Cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 188 n.4 (2000) (interpreting similar statutory language in the Clean Water Act and stating that "if the Executive Branch opposes a particular citizen suit, the statute allows the Administrator of the EPA to 'intervene as a matter of right'") (quoting 33 U.S.C. § 1365(c)(2)).

As the United States Supreme Court has held, a statute containing the phrase "may intervene" grants an "absolute and unconditional" right to intervene within the meaning of Fed. R. Civ. P. 24(a)(1). *Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 531, 526 (1947) (interpreting provision which stated, in pertinent part, "[r]epresentatives of employees of a carrier . . . may intervene and be heard in any proceeding arising under this Act affecting such employees") (quoting 54 Stat. 916). The Eighth Circuit Court of Appeals has also construed similar language in the Clean Water Act's citizen's suit provision, found at 33 U.S.C. § 1365(b)(2), and held that it granted an unconditional right of intervention. *United States v. Metropolitan St. Louis Sewer District*, 883 F.2d 54, 55-56 (8th Cir. 1989) (interpreting provision which stated that "in any such action in a court of the United States any citizen may intervene as a matter of right").

Under the plain terms of SMCRA, Congress has afforded the Secretary an unconditional right to intervene in any citizen suit brought pursuant to 30 U.S.C. § 1270.[1] Accordingly, the Secretary's timely motion to intervene must be granted.

B. The Secretary Also Satisfies the Requirements of Fed. R. Civ. P. 24(a)(2)

In addition to having an unconditional right to intervene pursuant to SMCRA, the Secretary also satisfies the requirements for mandatory intervention under Fed. R. Civ. P. 24(a)(2). Under that Rule, a 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." Fed. R. Civ. P. 24(a)(2). This Rule is to be "liberally construed with all doubts resolved in favor of the proposed intervenor." *Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664, 671 (8th Cir. 2008).

i. The Secretary has a Significant Protectable Interest in this Action Which May Be Impaired Without Intervention

For the purposes of Rule 24(a)(2), an asserted interest must be significantly protectable. *United States v. Metropolitan St. Louis Sewer Dist.*, 569 F.3d 829, 839 (8th Cir. 2009). In addition to demonstrating this interest, a movant for intervention must

[1]Congress has additionally provided the Department of Justice with the authority to intervene in any case, such as this, where the interests of the United States are implicated. 28 U.S.C. § 517 ("The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.").

demonstrate "that the subject matter of the action affects its interests in a direct rather than tangential way." *Id.*

The Secretary has a significant protectable interest in the outcome of this litigation. First, this case cannot be decided without an examination of the federal regulations implementing SMCRA, including the scope of actions requiring approval as state program amendments. As the ultimate authority charged with implementation of SMCRA, the United States Department of the Interior has a significant interest in assuring that its interpretation of SMCRA and associated federal regulations are presented to the Court. Second, this Court's ruling on the merits may have a significant precedential effect. There is presently little case law interpreting the relevant SMCRA provisions, and the Court's decision on the merits may be accorded persuasive authority in federal courts across the country. Accordingly, it is imperative that the Secretary's views on this novel question of federal law be heard. Without intervention, the Secretary would not be able to defend the federal position on the proper interpretation of federal law and regulations, and the Court would be deprived of hearing all positions on this matter of first impression—including hearing the OSM's position on interpreting its own regulations. Third, in the event the Court were to find that OSM must review every primacy state's internal policy documents, memoranda, handbooks, and guidelines as part of the state program amendment process, OSM would be directly impacted though a substantially increased workload nationwide. In light of the significant and novel question of federal law presented in this case, the Secretary has a significant protectable interest in the outcome of the litigation.

ii. Existing Parties Do Not Adequately Represent the Secretary's Interests

The existing parties cannot adequately represent the interests of the Secretary. While the Secretary and NDPSC may ultimately present similar arguments, each party represents unique sovereign interests and may have differing views on the proper role of either the state or federal government under SMCRA. Without hearing the Secretary's position, the Court could set precedent impacting OSM's oversight role in North Dakota and elsewhere. In addition, because the interpretation of the federal regulations may be a key component of this case, OSM's interpretation of its own regulations should be a point of particular interest to the Court, and the NDPSC is not the proper party to speak on behalf of OSM's own interpretations.

C. The Secretary's Motion to Intervene is Timely

"Whether a motion to intervene is timely is determined by considering all of the circumstances of the case." *United States v. Union Elec.*, 64 F.3d 1152, 1158-59 (8th Cir. 1995). Courts consider four factors in assessing whether a motion to intervene is timely: "(1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties." *Planned Parenthood of the Heartland v. Heineman*, 664 F.3d 716, 718 (8th Cir. 2011).

This case is substantively in its early stages. The only substantive filings yet on the docket are the Plaintiff's complaint, Defendant's answer and Plaintiff's recently-filed

motion for summary judgment. The Court has entered a scheduling order for further proceedings, and the Secretary will work diligently to comply with the briefing deadlines contained in that order. The Secretary also stands ready to file an answer to Plaintiff's complaint, as evidenced by the proposed answer attached to this motion. *See* Exhibit 1. Further, while the Secretary became aware of this litigation shortly after the complaint was filed on May 30, 2012, the relevant federal agencies required sufficient time to coordinate—specifically, among the bureaus and offices within the Department of the Interior, primarily the Office of Surface Mining Reclamation and Enforcement and the Office of the Solicitor, as well as with the Department of Justice—in order to brief the relevant decisionmakers and secure formal authorization to file a motion to intervene on behalf of the Secretary. Moreover, no parties will suffer undue prejudice as a result of the Secretary's intervention. No discovery is expected, and counsel for the Secretary will work diligently to conform to the briefing schedule already in place and to coordinate to the extent possible with Defendant NDPSC so as to avoid unnecessarily duplicative arguments. This case presents a straightforward question of law, which can be quickly and efficiently resolved through cross-motions for summary judgment. The Secretary's participation in this case will aid in the Court's full consideration of the legal issue presented. For all these reasons, the Court should grant the Secretary's timely motion to intervene.

II. In the Alternative, The Secretary Satisfies the Requirements for Permissive Intervention

In addition to granting intervention as a matter of right, a court may also grant permissive intervention to a federal officer where a party's claim or defense is based on "a statute or executive order administered by the officer or agency" or is based on "any regulation, order, requirement or agreement issued or made under the statute or executive order." Fed. R. Civ. P. 24(b)(2).

The rule for permissive intervention by a government officer requires a proposed intervenor to comply with four conditions: 1) to file a timely 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 intervene. *Coffey v. C.I.R.*, 663 F.3d 947, 951 (8th Cir. 2011). "The whole thrust of the 1948 Amendment to Civil Rule 24(b)(2), permitting government intervention where a statute is involved, 'is in the direction of allowing intervention liberally to governmental agencies and officers to speak for the public interest.'" *Boehnen v. Walston & Co., Inc.*, 358 F. Supp. 537, 542 (D.S.D. 1973) (quoting 7A C. Wright and A. Miller, Federal Practice and Procedure § 1912 (1972)).

The Secretary also satisfies the rule for permissive intervention. As discussed above, this motion to intervene is timely. Moreover, there is no question that the Secretary of the Department of the Interior and the Office of Surface Mining Reclamation and Enforcement are a federal officer and agency, respectively, and that they are charged by Congress to administer SMCRA on behalf of the federal government and to protect

the federal government's interest therein. Finally, permission to intervene will not cause undue delay or prejudice to the existing parties since this case remains in its opening stage and counsel for the Secretary will work diligently to abide by the briefing schedule. Accordingly, for this alternative reason, the Secretary's motion to intervene should be granted.

CONCLUSION

THEREFORE, the Secretary respectfully requests this Court to grant leave to intervene in this matter as of right pursuant to Fed. R. Civ. P. 24(a)(1). In the alternative, the Secretary requests the Court to grant permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2).

Dated this 16th day of November, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2012, the above-captioned document was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

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IN THE UNITED STATES DISTRICT COURT
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DAKOTA RESOURCE COUNCIL, Plaintiff, v. NORTH DAKOTA PUBLIC SERVICE COMMISSION Defendant, v. SECRETARY OF THE INTERIOR KEN SALAZAR, in his official capacity, [Proposed] Intervenor- Defendant.	)	Case No. 1:12-cv-64 **INTERVENOR-DEFENDANT'S ANSWER TO PLAINTIFF'S COMPLAINT**

Intervenor-Defendant the Secretary of the United States Department of the Interior Ken Salazar ("Secretary"),in his official capacity, states the following in response to Plaintiff's Complaint filed on May 30, 2012. Each response corresponds to the same numbered paragraph of Plaintiff's Complaint.

1. The allegations contained in the first sentence of Paragraph 1 consist of Plaintiff's characterization of the case, to which no response is required. The allegations contained in the second sentence of Paragraph 1 consist of Plaintiff's characterization of its requested relief, to which no response is required. To the extent a response may be required, Intervenor-Defendant denies that Plaintiff is entitled to any relief in this case.

2. Intervenor-Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in the first through seventh and tenth sentences of Paragraph 2, and on that basis denies the allegations. To the extent the allegations contained in the sixth and seventh sentences constitute legal conclusions, no response is required. The allegations contained in the eighth and ninth sentences of Paragraph 2 consist of legal conclusions, to which no response is required.

3. Intervenor-Defendant admits the allegation contained in the first sentence of Paragraph 3 that the North Dakota Public Service Commission is the state regulatory authority with duties under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"). The remaining allegations contained in the first sentence of Paragraph 3 consist of legal conclusions, to which no response is required. In addition, the allegations contained in the first sentence also purport to characterize a statute, which speaks for itself and is the best evidence of its contents. Any allegation contrary to its plain language and meaning is denied. Intervenor-Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in the second and third sentences of Paragraph 3, and on that basis denies the allegations.

4. The allegations contained in Paragraph 4 consist of legal conclusions, to which no response is required. To the extent the allegations contained in Paragraph 4 purport to characterize statutes, those statutes speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language and meaning are denied. To the extent any further response is required, Intervenor-Defendant denies that 28 U.S.C. §§ 1331,220 1, or 2202 confer jurisdiction or authorize any relief for this case.

5. The allegations contained in the first and fourth sentences of Paragraph 5 consist of legal conclusions, to which no response is required. To the extent a further response may be required, Intervenor-Defendant avers that 30 U.S.C. § 1270(c) provides venue in this Court only for certain actions alleging a violation of SMCRA and its implementing regulations related to surface coal mining operations located in North Dakota. Intervenor-Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in the second and third sentences of Paragraph 5, and on that basis denies the allegations.

6. The allegations contained in the first sentence of Paragraph 6 consist of legal conclusions, to which no response is required. The allegations contained in the first sentence also characterize a letter or similar document, which speaks for itself and is the best evidence of its contents. Any allegation contrary to the document's plain language and meaning is denied. Intervenor-Defendant avers that it received a letter from Plaintiff's counsel dated March 26, 2012, regarding a Notice of Intent "to file a federal civil lawsuit to compel compliance with [SMCRA] against the Director" of OSM, the State of North Dakota, and the North Dakota Public Service Commission. Intervenor-Defendant lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 6, and on that basis denies the allegations.

7. The allegations contained in Paragraph 7 characterize statutes, which speak for themselves and are the best evidence of their contents. Any allegation contrary to their plain language and meaning is denied.

8. The allegations contained in Paragraph 8 characterize statutes, which speak for themselves and are the best evidence of their contents. Any allegation contrary to their plain language and meaning is denied.

9. The allegations contained in Paragraph 9 characterize regulations, which speak for themselves and are the best evidence of their contents. Any allegation contrary to their plain language and meaning is denied.

10. The allegations contained in Paragraph 10 characterize regulations, which speak for themselves and are the best evidence of their contents. Any allegation contrary to their plain language and meaning is denied.

11. Intervenor-Defendant admits the allegation contained in Paragraph 11 that it approved the state of North Dakota's regulatory program under SMCRA effective December 15, 1980. Intervenor-Defendant also avers that NDPSC has issued numerous policy memoranda since December 15, 1980. To the extent the allegations contained in Paragraph 11 characterize various policy memoranda, those documents speak for themselves and are the best evidence of their contents. Any allegation contrary to their plain language and meaning is denied.

12. The allegations contained in Paragraph 12 consist of legal conclusions, to which no response is required. To the extent a response may be required, Intervenor-Defendant denies the allegations.

13. The allegations contained in Paragraph 13 consist of legal conclusions, to which no response is required. To the extent the allegations contained in Paragraph 13 characterize the referenced policy memoranda or regulations, those documents speak for

themselves and are the best evidence of their contents. Any allegation contrary to their plain language and meaning is denied. To the extent a further response may be required, Intervenor-Defendant denies the allegations.

14. The allegations contained in Paragraph 14 consist of legal conclusions, to which no response is required. To the extent a further response may be required, Intervenor-Defendant denies the allegations.

15. Intervenor-Defendant incorporates by reference each prior response to the allegations contained in Paragraphs 1-14.

16. The allegations contained in Paragraph 16 consist of legal conclusions, to which no response is required. To the extent the allegations contained in Paragraph 16 characterize statutes and regulations, those documents speak for themselves and are the best evidence of their contents. Any allegation contrary to their plain language and meaning is denied. To the extent a further response may be required, Intervenor-Defendant denies the allegations.

17. The allegations contained in Paragraph 17 consist of legal conclusions, to which no response is required. To the extent the allegations contained in Paragraph 17 characterize statutes and regulations, those documents speak for themselves and are the best evidence of their contents. Any allegation contrary to their plain language and meaning is denied. To the extent a further response may be required, Intervenor-Defendant denies the allegations.

18. Intervenor-Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 18, and on that basis denies the

allegations. The allegations contained in Paragraph 18 also consist of legal conclusions, to which no response is required. To the extent a further response may be required, Intervenor-Defendant denies the allegations.

Plaintiff's Prayer For Relief:

The allegations contained in the remaining, unnumbered paragraphs of Plaintiff's Complaint constitute a prayer for relief, to which no response is required. To the extent a further response may be required, Intervenor-Defendant denies that Plaintiff is entitled to any relief whatsoever.

GENERAL DENIAL

To the extent any allegations have not been specifically addressed in the preceding paragraphs, Intervenor-Defendant hereby denies such allegations.

AFFIRMATIVE DEFENSES

Without limiting or waiving any available defenses, Intervenor-Defendant hereby asserts the following affirmative defenses:

First Affirmative Defense

Plaintiff has failed to state a claim upon which relief can be granted.

Second Affirmative Defense

Plaintiff lacks standing to bring the claim asserted in the Complaint.

Third Affirmative Defense

The Court lacks subject matter jurisdiction over Plaintiff's claim.

Fourth Affirmative Defense

Plaintiff's claim is not ripe for adjudication.

Fifth Affirmative Defense

To the extent that Plaintiff may be challenging regulations implementing 30 U.S.C. § 1267(g), any such challenge is barred by the statute of limitation provision at 30 U.S.C. § 1276 (a)(1).

REQUEST FOR RELIEF

Intervenor-Defendant respectfully requests the Court to dismiss this action with prejudice, enter judgment in favor of Defendant, and grant any other relief the Court deems just and proper.

Respectfully submitted this 16th day of November, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2012, the above-captioned document was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to all counsel of record.

/s/ Joanna K. Brinkman
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