

United States District Court, S.D. West Virginia.

OHIO RIVER VALLEY ENVIRONMENTAL
COALITION, INC., and West Virginia Highlands
Conservancy, Inc., Plaintiffs,

v.

Kenneth SALAZAR, Secretary of the Interior,
Defendant.

Civil Action No. 3:09-0149.

June 18, 2009.

Derek O. Teaney, Joseph Mark Lovett, Lewisburg,
WV, Walton D. Morris, Jr., Charlottesville, VA, for
Plaintiffs.

Ruth Ann Storey, U.S. Department of Justice, Wash-
ington, DC, for Defendant.

ORDER

ROBERT C. CHAMBERS, District Judge.

Pending before the Court is the West Virginia De-
partment of Environmental Protection's Motion to
Intervene (Doc. 12). For the reasons explained below,
the Court GRANTS the motion.

Background

This case involves a challenge to the December 24,
2008 decision of former Secretary of the Interior
Dick Kempthorne ("the Secretary) to approve pro-
gram amendments to West Virginia's regulatory pro-
gram of surface mining. The changes modified two
definitions within Title 38, Series 2 of West Vir-
ginia's Code of State Rules: (1) the definition of "cu-
mulative impact;" and, (2) the definition of "material
damage." Plaintiffs argue that the approval of these
changes was contrary to the federal Surface Mining
Control and Reclamation Act and the Administrative
Procedures Act.

While Plaintiff's challenge is to the Secretary's de-
cision, it has obvious implications upon the underlying
West Virginia law. If Plaintiffs' challenge is success-
ful, then the changes to West Virginia law may not
stand. For this reason the WVDEP has a strong inter-
est in the matter. It is for this reason it seeks interven-

tion Plaintiffs oppose such intervention arguing it is
unnecessary and inappropriate under the circum-
stances.

Analysis

Under Federal Rule of Civil Procedure 24, there are
two ways to gain intervenor status. Pursuant to Rule
24(a), a court must permit intervention to one who
"claims an interest relating to the property or transac-
tion 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
this interest." Here, the WVDEP and Plaintiffs vigor-
ously contest whether or not this standard is met.
They agree that the issue turns on the question of
whether the Secretary will "adequately represent" the
WVDEP's interest in the litigation. The WVDEP ar-
gues that although they seek the same outcome as
Defendant, their interest is of a higher intensity.
Plaintiffs argue that there is a presumption an exist-
ing party will "adequately represent" the interests of
a one who shares its objectives in litigation and that
the WVDEP's arguments do not serve to rebut this
presumption. Plaintiffs further point out that this is a
matter which must be decided on the administrative
record, and, as such, they argue that extraneous ar-
guments offered by the WVDEP will not be relevant.

A putative intervenor may also be allowed to partici-
pate in litigation through the grant of permissive in-
tervention. Under Rule 24(a)(2) a court may permit
anyone to intervene who "has a claim or defense that
shares with the main action a common question of
law or fact." All parties concede that it the Court
would be within its discretion to allow WVDEP to
intervene under this provision. Plaintiffs, however,
contend that such intervention would place an unnec-
essary burden upon them and the Court.

Rather than constructing an interpretation of what it
means to "adequately represent" an interest, the
Court exercises its discretion and permits WVDEP to
intervene pursuant to Rule 24(a)(2). Although the
goal of the WVDEP appears to be identical to that of
the Secretary-defense of his decision-it is not clear
that the interests are of identical magnitude. The cur-
rent Defendant's interest is in defending an agency
decision handed down by an unelected appointee of
the prior administration. The WVDEP arguably has a

higher interest in defending the product of the full legislative process of the State of West Virginia. It is at least conceivable that this difference in degree of interest could motivate the WVDEP to mount a more vigorous defense than the current Defendant. The possibility that this difference in vigor could unearth a meritorious argument overlooked by the current Defendant justifies the potential burden on having an additional party in litigation. The Court exercises its discretion and welcomes the WVDEP to take part in this case.

Conclusion

For the reasons explained above, the Court GRANTS the West Virginia Department of Environmental Protection's Motion to Intervene (Doc. 12). The Court DIRECTS the Clerk to send a copy of this Order to counsel of record and any unrepresented parties.