

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DUHRING RESOURCE COMPANY, : CIVIL ACTION NO. 07-314
Plaintiff :
 : Judge McLaughlin
v. :
 :
THE FOREST SERVICE, RANDY :
MOORE, KATHLEEN M. MORSE, :
ROBERT T. FALLON, ANTHONY V. :
SCARDINA, ROBERT A. STOVALL, :
KENT P. CONNAUGHTON, :
LEANNE M. MARTEN, ROBERT :
GYDUS, JASON J. HABERBERGER :
and PHILIP MICKLE, :
Defendants :

ALLEGHENY DEFENSE PROJECT'S
BRIEF IN SUPPORT OF MOTION TO INTERVENE
UNDER RULE 24

AND NOW, comes the Movant, the Allegheny Defense Project, Inc., (hereinafter "ADP"), by and through its attorneys, Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., and files the following Brief in Support of Motion to Intervene Under Rule 24:

I. STATEMENT OF FACTS

Plaintiff has filed suit seeking multiple forms of relief against the United States Forest Service and Forest Service employees claiming that certain of its rights have been violated. The Defendants have responded with a Motion to Dismiss Plaintiff's First

Amended Complaint and a brief in support of the motion and the Plaintiff has responded with a motion to again amend its complaint and a brief in opposition to the motion to dismiss. Plaintiff opposes the Forest Service's and its employees' efforts to review and regulate its oil and gas operations in the Allegheny National Forest. The current amended complaint alleges Defendants' violations of due process under the Fifth Amendment, the National Forest Management Act, the regulations of the Secretary of Agriculture, the directives in the Forest Service Manual and Handbook for Oil and Gas Administration, as well as Pennsylvania Common Law. The Plaintiff seeks monetary, injunctive and declaratory relief as well as mandamus to compel that the Forest Service takes certain actions favorable to the Plaintiff.

II. ARGUMENT

A. ADP is entitled to intervene as of right.

The Third Circuit applies a four-part test under Rule 24(a) providing for intervention as of right when an applicant (1) files a timely application; (2) has an interest in the subject of the action; (3) is so situated that its interest may be impaired or impeded as a result of the litigation; and (4) has an interest not adequately protected by the existing parties. Fed.R.Civ.P. 24(a); Kleissler, et al. v. United States Forest Service, et al. v. Ridgeway Area School District, et al., 157 F.3d 964 (1998); [other citations].

1. The motion is timely.

In determining whether a motion is timely, the Court should consider the stage of the proceeding, prejudice to the other parties and the reason for the length of any delay. Here, the matter is just in its infancy and timeliness cannot be an issue. According to the docket, the Plaintiff's original Complaint was filed on November 8, 2007, with service being completed in late December, 2007. The Defendants were granted until March 3, 2008, to file a response to Plaintiff's Complaint. However, on March 1, 2008, the Plaintiff filed its First Amended Complaint, following which the Court issued an order directing the Defendants to respond by April 28, 2008, to the First Amended Complaint. Subsequent docket entries indicate an extension to file a response until late May, 2008. As noted, the Defendants filed a motion to dismiss on April 10, 2008, along with a brief and the Court issued an order directing the Plaintiffs to respond by May 15. This brief in response to the motion was filed, but also on May 16, 2008, a motion to amend the complaint was filed and the Court directed the Defendants to file a brief in opposition by June 4, 2008. As can be seen, given the early stage of the litigation, this motion is timely filed.

2. Movant has a sufficient, protectable interest in the litigation.

ADP has been an active, valuable and committed entity seeking to minimize the adverse impact of activities within the Allegheny National Forest, most notably timbering and oil and gas operations. Its members [[[????]]] enjoy the many

recreational opportunities that the Forest provides. ADP frequently comments on Forest Service projects, for the Forest Service Management Plans for the Allegheny National Forest (“ANF”), and, indeed, on many occasions is at odds with the Forest Service. ADP has advocated the appropriate regulation of the mineral extractive processes and related activities. The Plaintiff seeks to extract oil and gas from the ANF, but ADP questions its intent to do so appropriately. Not being a participant in this litigation compromises the mission of ADP if the result of the litigation permits the Plaintiff to achieve a result contrary to the requirements of the Forest Service as set forth in its Manual and Handbook and all applicable state and federal laws. This is not unlike the intervention sought by a conservation group that, although it did not have an ownership interest in the property, since it had a purpose of protecting the public lands and preventing the destructive effect of motorized vehicles being used on fragile resources, that the group’s members used the park for “health, recreational, scientific, spiritual, educational and other activities, it would be adversely affected by a decision in a county’s favor “and that the group had participated in the National Park Services’ land use planning for that park, intervention as of right was permitted.” San Juan County, Utah v. US, C.A. 10th, 2005, 420 F.3d 1197.

3. ADP’s interest would be impaired or affected as a practical matter by the disposition of this dispute.

Should the Plaintiff be successful, based upon the perceived interest of the Defendants to protect the surface of the properties upon which the Plaintiff allegedly has an interest in the mineral resources (oil and gas), then the property would be subject to the harms that ADP seeks to protect, including harm caused by fragmentation, erosion, stream pollution, extension of roads, timbering, non-coal surface mining, and noise, all of which compromise the interest of ADP and its members in their use of the ANF.

4. The interests of ADP are not adequately represented by the existing parties.

Clearly, the interests of the Plaintiff are contrary to the interests of ADP. The interests of the Forest Service and ADP, while on the surface appear to be similar, when examined more closely, they are not. While it is true that the Forest Service Manual and Handbook provides for certain protections, the ADP has in the past had conflicts with the Forest Service with regard to the interpretation and application of the Handbook and Manual. In addition, ADP has been at odds with the Forest Service with regard to the management plan for ANF. Additionally, and at least equally as significant, ADP contends that the National Environmental Policy Act (“NEPA”), _____ U.S.C. _____, applies to the Forest Service and taking actions to grant authorizations to parties like the Plaintiff to extract minerals from the sub-surface must be preceded by an environmental assessment. While this is a matter of much contention between parties

like ADP and the Forest Service and other governmental agencies, inroads in the roadblock to accept that NEPA applies have been occurring. By way of example, the Ottawa National Forest Ranger District announced in July 2007 in a draft environmental assessment that “federal actions such as permitting access and surface occupancy for the exercise of private mineral rights must be analyzed to determine potential environmental consequences pursuant to the National Environmental Policy Act of 1969 (NEPA).”

In addition, ADP is concerned that the Forest Service may ultimately reach a settlement with the Plaintiff that is inconsistent with the requirements of law and most notably the Manual and Handbook. Given the past history of actions of the Forest Service with regard to the ANF, and the mineral rights of others, ADP remains concerned that in the absence of intervention its rights may be significantly impaired and it cannot rely upon the Forest Service to protect those rights.

It would be expected that ADP would offer important elements to the proceeding that the existing parties may minimize or neglect, because ADP’s interests diverge from those of the Forest Service.

B. Alternatively, ADP is entitled to permissive intervention.

Should the Court make a determination that intervention as of right is not available to ADP, then ADP should be allowed to intervene permissively. Rule 24(b) of the Federal Rules of Civil Procedure provides for permissive intervention within the

Court's discretion where an applicant's claim or defense possess questions of law or fact in common with the existing action. As noted, ADP has been actively involved in the activities of the entities that exploit the minerals within the ANF and has been intimately involved in the actions of the Forest Service providing valuable and consistent input with regard to the Forest Service's plans of action and can likely provide valuable information if permitted to participate in this litigation.

III. CONCLUSION

WHEREFORE, for the reasons stated above, the Allegheny Defense Project respectfully requests that the Court enter an order allowing it to intervene as a right pursuant to Rule 24(a), or failing same, in the alternative, allowing it permissive intervention pursuant to Rule 24(b).

Respectfully submitted,

QUINN, BUSECK, LEEMHUIS, TOOHEY &
KROTO, INC.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served upon the following by hand delivery or United States first class mail on the ____ day of _____, 2008:

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