

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

FOREST SERVICE EMPLOYEES FOR)
ENVIRONMENTAL ETHICS; ALLEGHENY)
DEFENSE PROJECT; SIERRA CLUB,)

CIVIL ACTION NO. 08-CV-323

Plaintiffs,)

v.)

Electronically filed

UNITED STATES FOREST SERVICE,)

Defendant,)

and)

PENNSYLVANIA OIL AND GAS)
ASSOCIATION and ALLEGHENY)
FOREST ALLIANCE,)

Intervenor-Defendants.)
_____)

PLAINTIFFS' RESPONSE TO INTERVENORS' EMERGENCY MOTION FOR STAY

Plaintiffs submit this objection to intervenors' emergency motion for stay.

I. THERE IS NO EMERGENCY

Intervenors title their document an "emergency" motion for stay, and have required the court and the parties to set aside their other work and immediately turn to this motion. But nowhere in their motion do intervenors explain why this is an emergency. The meetings

occurring this week are not harming intervenor in any way. To the contrary, the sooner the oil and gas Notices to Proceed (NTPs) can move forward -- legally, through the required government processes -- the better for intervenors. Any further delay (such as postponing the meetings) would do nothing to move the NTPs forward.

II. INTERVENORS HAVE DEMONSTRATED NO HARM OR PREJUDICE FROM THE SETTLEMENT

Intervenors insist that they will be harmed by the settlement. But they have presented no cogent explanation of why they will be harmed by involvement of the public in the analysis of what environmental impacts oil and gas exploration and drilling will have on our public lands. Some environmental analysis already is conducted by the government, through the NTP process. And intervenors are already well-represented in the courts in four lawsuits challenging that process itself:

1) Pennsylvania Oil & Gas Association et Al V. United States Forest Service et al, W.D. Penn. 08-00162-SJM, filed May 2008;

2) Duhring Resource Co. v. Forest Service (W.D. Pa. No. 07-cv-00314-SJM, filed in May 2008;

3) PAPCO v. Forest Service (W.D. Pa. No. 08-cv-00253-MBC), filed Sept 2008;

4) Catalyst Energy v. U.S. Forest Service. W.D. Penn., 1:09-cv-00070-SJM, filed March 27, 2009.

If intervenors wish to challenge the NEPA process as well as the NTPs themselves, they can file a fifth lawsuit and seek a preliminary injunction -- as plaintiffs would have done had they not been successful in settling the case.

III. NEPA ANALYSIS SERVES IMPORTANT PUBLIC PURPOSES

Contrary to the intervenors' histrionic assertions, plaintiffs have not sought a remedy of halting all oil and gas exploration on the public lands. Due to the split estates, it is simply implausible for intervenors to posit such an outcome. Plaintiffs have simply acted as private attorneys-general in enforcing the National Environmental Policy Act (NEPA).

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. 1500.1(a). In NEPA, Congress declared as a national policy "creat[ing] and maintain[ing] conditions under which man and nature can exist in productive harmony." 40 U.S.C. 4331(a). NEPA "simply guarantees a particular procedure," rather than a substantive result. Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 737, 118 S. Ct. 1665, 140 L.Ed.2d 921 (1998)); see also Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51, 109 S. Ct. 1835 (1989) (discussing NEPA's procedural focus). Nonetheless, the statute remains "the broadest and perhaps most important" of the environmental statutes. Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

NEPA's purpose is realized not through substantive mandates but through the creation of a democratic decisionmaking structure that. Robertson v. Methow Valley, 490 U.S. at 350. See also Churchill County v. Norton, 276 F.3d 1060, 1072-73 (9th Cir.2001) (describing NEPA's theory of democratic decisionmaking). By requiring the consideration of environmental factors in the course of agency decisionmaking on major federal actions, NEPA serves two purposes: First, "it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." Second, it "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."

Dep't of Transp. v. Public Citizen, 541 U.S. 752, 768, 124 S. Ct. 2204, 159 L.Ed.2d 60 (2004) (internal citations and alteration omitted). "Public scrutiny [is] essential to implementing NEPA." 40 C.F.R. 1500.1(b). By requiring agencies to take a "hard look" at how the choices before them affect the environment, and then to place their data and conclusions before the public, NEPA relies upon democratic processes to ensure -- as the first appellate court to construe the statute in detail put it -- that "the most intelligent, optimally beneficial decision will ultimately be made." Calvert Cliffs', 449 F.2d at 1114.

Intervenors argued orally that the settlement goes beyond what is required by law. First, that is not true -- as clearly explained in plaintiffs' complaint, the Notices to Proceed constitute "major federal actions" affecting the public's lands, and therefore are required to undergo NEPA analysis prior to being issued. See 40 C.F.R. 1508.18 (defining major federal actions for NEPA purposes as "actions . . . potentially subject to Federal control and responsibility"). The fact that the Allegheny chose not to comply with NEPA until it was sued proves nothing.

But, even if this were not true, federal courts clearly have the authority to approve and enforce consent decrees in which the parties undertake obligations that the court could not impose. Local No. 93 v. City of Cleveland, 478 U.S. 501, 522-23, 106 S. Ct. 3063, 3075 (1986). By settling this matter (and by settling plaintiffs' attorney fees and costs, as would be available to plaintiffs under 28 U.S.C. 2412 had the government chosen to litigate the case), the government has violated no laws and has not abused its discretion in any way.

IV. DISMISSAL OF THE CASE IS PROPER UNDER FRCP 41(A)(1)

FRCP 41 allows plaintiff to voluntarily dismiss their claims without a court order before the opposing parties serve an answer. Unlike class actions, derivative actions, and claims

between nonprofits and their members (FRCP 23(e), 23.1(c), and 23.2), pre-answer voluntary dismissal does not require court approval. No answer was filed prior to the dismissal being filed; thus, there are no grounds for halting the dismissal. See RFR Industries, Inc. v. Century Steps, Inc., 477 F.3d 1348, 1351-52 (Fed. Cir. 2007) (answer that was filed and faxed but not properly served did not preclude voluntary dismissal).

V. THERE IS NO LIVE CASE OR CONTROVERSY, AND INTERVENORS CANNOT BLOCK SETTLEMENT

There is no longer any live case or controversy. Plaintiffs have dismissed their claims. In their answer filed after the dismissal was filed, intervenors' only requested relief was dismissal with prejudice; they raised no counterclaims. NEPA does not bind the intervenors to any action, as it applies only to the federal government and federally-funded projects.

Furthermore, "while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent." Local No. 93 v. City of Cleveland, 478 U.S. 501, 528-29, 106 S. Ct. 3063, 3079 (1986). A third party cannot prevent the plaintiffs and defendants from "settling their own disputes." Id. See also United States v. Comunidades Unidas Contra La Contaminacion, 204 F.3d 275 (1st Cir. 2000) (intervenors' concerns were adequately considered; no right to an evidentiary hearing).

The Third Circuit has explicitly held that an intervenor's power to oppose a settlement, even when its interests are affected, is limited to the right to air its objections to the reasonableness of the settlement and to introduce evidence. Equal Employment Opportunity Commission v. American Telephone & Telegraph Co., 556 F.2d 167, 173-74 (3rd Cir. 1977), cert. denied, 438 U.S. 915 (1978). In that case, three intervening unions objected to a consent

decree that contained affirmative action employment provisions which abrogated various rights claimed by the unions under collective bargaining agreements. The unions argued that the consent decree was invalid because it affected their rights under the collective bargaining agreements. The court rejected this argument, stating that "to the extent that third party rights in which the unions are interested have been affected, they were allowed to intervene and be heard in this case." Id. The court concluded that the collective bargaining agreements conferred on the unions the right to be heard and to object to the consent decree, but it did not confer the power to block the decree.

In this case, intervenors do not have any independent claims, and cannot prevent the plaintiffs and defendants from reaching a settlement agreement. Intervenors can object to the settlement if it causes them "plain legal prejudice," or strips them of a "legal claim or cause of action." See Waller v. Financial Corporation of America, 828 F.2d 579, 583 (9th Cir. 1987). The stipulation submitted by plaintiffs and the government in this case, however, does not affect any legal claim intervenors might have. Intervenors do not have a contractual right to use the surface lands owned by the public, in violation of the applicable laws. As fully briefed by the government and intervenors in the Duhring case brought by industry, they do not have an absolute right to use their subsurface rights without regard to the surface owner's rights (in this case, the public). See, e.g., 30 U.S.C. 226(o) (specifically directing Secretary of Agriculture to promulgate regulations to "impose terms and conditions" on outstanding oil and gas developments "prior to the commencement of surface-disturbing activities" on the Allegheny National Forest).

The Supreme Court's decision in Local No. 93 v. Cleveland case provides helpful

analysis. In that case, an organization of black and Hispanic firefighters employed by the City of Cleveland filed a complaint charging the City with discrimination on the basis of race and national origin. The union was granted intervention as of right. As in the instant case, the intervenor did not allege any causes of action or assert any claims against either the plaintiffs or the defendant. It expressed the view that "[promotions] based upon any criterion other than competence, such as a racial quota system, would deny those most capable from their promotions and would deny the residents of the City of Cleveland from maintaining the best possible fire fighting force," and asserted that "Local #93's interest is to maintain a well trained and properly staffed fire fighting force and [Local 93] contends that promotions should be made on the basis of demonstrated competency, properly measured by competitive examinations administered in accordance with the applicable provisions of Federal, State, and Local laws." Unlike the intervenors' answer in the instant case, the intervenors in that case even filed a "complaint" which concluded with a prayer for relief in the form of an injunction requiring the City to award promotions on the basis of such examinations. The Supreme Court rejected the intervenors' challenge to the settlement, providing the following analysis:

Local 93 and the United States also challenge the validity of the consent decree on the ground that it was entered without the consent of the Union. They take the position that because the Union was permitted to intervene as of right, its consent was required before the court could approve a consent decree. This argument misconceives the Union's rights in the litigation.

A consent decree is primarily a means by which parties settle their disputes without having to bear the financial and other costs of litigating. It has never been supposed that one party -- whether an original party, a party that was joined later, or an intervenor -- could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 392, 400 (1982); Kirkland v. New York State

Dept. of Correctional Services, 711 F.2d 1117, 1126 (CA2 1983), cert. denied, 465 U.S. 1005 (1984). Here, Local 93 took full advantage of its opportunity to participate in the District Court's hearings on the consent decree. It was permitted to air its objections to the reasonableness of the decree and to introduce relevant evidence; the District Court carefully considered these objections and explained why it was rejecting them. Accordingly, "the District Court gave the union all the process that [it] was due" Zipes, supra, at 400.

Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of non-consenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor. 3B Moore para. 24.16[6], p. 181; see also, United States Steel Corp. v. EPA, 614 F.2d 843, 845-846 (CA3 1979); Wheeler v. American Home Products Corp., 563 F.2d 1233, 1237-1238 (CA5 1977). And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree. See, e. g., United States v. Ward Baking Co., 376 U.S. 327 (1964); Hughes v. United States, 342 U.S. 353 (1952); Ashley v. City of Jackson, 464 U.S., at 902 (REHNQUIST, J., dissenting from denial of certiorari); 1B Moore para. 0.409[5], p. 326, n. 2. However, the consent decree entered here does not bind Local 93 to do or not to do anything. It imposes no legal duties or obligations on the Union at all; only the parties to the decree can be held in contempt of court for failure to comply with its terms. See United States v. Armour & Co., 402 U.S., at 676-677. Moreover, the consent decree does not purport to resolve any claims the Union might have under the Fourteenth Amendment, see Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), under § 703 of Title VII, see McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); Steelworkers v. Weber, 443 U.S. 193 (1979), or as a matter of contract, see W. R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983). Indeed, despite the efforts of the District Judge to persuade it to do so, the Union failed to raise any substantive claims. Whether it is now too late to raise such claims, or -- if not -- whether the Union's claims have merit are questions that must be presented in the first instance to the District Court, which has retained jurisdiction to hear such challenges. The only issue before us is whether § 706(g) barred the District Court from approving this consent decree. We hold that it did not. Therefore, the judgment of the Court of Appeals is affirmed.

478 U.S. at 528-30.

Intervenors in the instant case raise no claims, and cannot demonstrate that the settlement imposes any duties or obligations upon them. Nor does it destroy any legal rights they have, as they are free to file their own separate lawsuit raising claims (which they did not do in this case).

They cannot veto the settlement.

CONCLUSION

Intervenors' interests have been adequately considered by the Court. The settlement agreement violates no laws; imposes no duties or obligations upon the intervenors; and does not dispose of any valid asserted claims of the intervenors. Based upon this brief and the record before the court, plaintiffs respectfully request that the Court deny the intervenors' motion, and enter the stipulated judgment forthwith.

Respectfully submitted April 15, 2009.

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