IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 1:20-cv-03668-RM-STV

CITIZENS FOR CONSTITUTIONAL INTEGRITY, and
SOUTHWEST ADVOCATES, INC.;
Plaintiffs,

v.

THE UNITED STATES OF AMERICA, *et al.*;
Defendants.

DEFENDANTS' OPPOSITION TO GCC ENERGY, LLC'S MOTION TO INTERVENE

INTRODUCTION

"Each claim in this case concerns the constitutionality of a federal statute alone." Joint Case Management Plan at 5, ECF No. 18 (joint statement of both Parties). Notwithstanding this exceedingly clear framing, endorsed by both Parties and the Court, *see also* ECF No. 19, Proposed Defendant-Intervenor GCC Energy, LLC ("GCC") appears intent on interpreting Plaintiffs' Complaint more broadly to manufacture a basis for intervention. But even if GCC were able to expand this case into something that the parties agree it is not, the undisputed fact would remain that all of Plaintiffs' claims are asserted against the United States based on the same underlying legal theory. *But see* GCC Energy, LLC's Motion to Intervene, ECF No. 28 ("GCC Mot.") (suggesting independent claims against the United States under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and the APA). GCC may disagree with the manner in which the United States has approached the defense of its own actions and statutes, but that view does not demonstrate that the United States' representation of those interests is inadequate. Indeed, the interests of all involved, including GCC, are better served by a clean and simple determination of the question of the CRA's constitutionality on the basis of the dispositive motions already filed. GCC's intervention is neither merited nor necessary, and this Court should deny its motion.

BACKGROUND

On December 15, 2020, Plaintiffs Citizens for Constitutional Integrity (CCI) and Southwest Advocates, Inc. filed this suit, arguing broadly that the Congressional Review Act violates constitutional principles of equal protection, due process, and the separation of powers. *See generally* Compl., ECF No. 1. According to Plaintiffs, the CRA's unconstitutionality renders Congress's disapproval of the Stream Protection Rule invalid, which means that the Stream Protection Rule is still operative; they would therefore require OSMRE to have applied the Stream Protection Rule's requirements to the recent Mining Plan Modification of the King II Mine in Colorado, which Interior approved for the mining of federal coal pursuant to the Mineral Leasing Act of 1920. *See id.* ¶ 4. Plaintiffs ask this Court to declare the CRA unconstitutional and the Stream Protection Rule valid and enforceable; vacate and set aside Interior's approval of the King II Mining Plan Modification; remand that approval to Interior for reconsideration consistent with the Stream Protection Rule; and enjoin all mining activities under it "until the Agencies comply with the Constitution, SMCRA, the Stream Protection Rule, and the APA." *Id.* at 38 (Prayer for Relief).

When this case was filed, it was first assigned to the presiding AP judge, the Honorable Marcia S. Krieger, pursuant to D.C. COLO.LAPR 16.1(a), who directed the parties to confer and prepare a Joint Case Management Plan. Order, ECF No. 7. The parties submitted their proposal on February 18, 2021, which agreed that "[b]ecause each claim in this case concerns the constitutionality of a federal statute alone, an administrative record will not be necessary" and that "[n]o discovery will be warranted." Joint Case Management Plan at 5-6, ECF No. 18. The Court concluded *sua sponte* that Plaintiffs' claims "can be resolved more efficiently if this case is removed from the AP docket," since "[a]lthough there is an underlying administrative decision at issue . . . the alleged failure to apply the SPR was based on the application of an unconstitutional law." Order, ECF No. 19. Judge Krieger issued an order terminating the AP designation of the case and reassigning the case for resolution on the merits. *See id.* Upon reassignment, the parties were ordered to file dispositive motions no later than March 10, 2021. *See* Minute Order, ECF No. 23. Plaintiffs filed a motion for Summary Judgment on March 2, 2021, ECF No. 26, and Defendants moved to dismiss on March 10, 2021 and filed an

opposition to Plaintiffs' motion for summary judgment on March 23, 2021.

Also on March 10, GCC filed the present motion to intervene pursuant to Rule 24(a) and (b). *See* GCC Mot. It also filed a concurrent proposed Motion to Dismiss, and on March 23, 2021 filed a proposed response in opposition to Plaintiffs' motion for summary judgment. *See* GCC LLC's Mot. to Dismiss, ECF No. 29 ("GCC Prop. MTD"); GCC LLC's Resp. in Opp. to Pls.' Mot. for Summ. Judg, ECF No. 36 ("GCC MSJ Resp."). In its intervention motion, GCC argues that it may intervene as of right because it has a protectable interest in its mine operations that it believes may be significantly impacted by this suit, that the Federal Government does not adequately represent its interests, and that its motion is timely. *See generally* GCC Mot.

ARGUMENT

I. GCC May Not Intervene as of Right.

Federal Rule of Civil Procedure 24(a)(2) permits intervention as of right to one 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) (emphasis added). Although courts in this circuit "usually take[] a liberal view" of Rule 24(a), they nonetheless "presume that the party's representation is adequate" where "the applicant and an existing party share an identical legal objective." *Pub. Serv. Co. of New Mexico v. Barboan*, 857 F.3d 1101, 1113–14 (10th Cir. 2017) (rejecting intervention, where proposed intervenor and plaintiff-appellant aimed to advance the same interpretation of a statute); *see also City of Stilwell, Okl. v. Ozarks Rural Elec. Co-op. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996) ("when the objective of the applicant for intervention is identical to that of one of the parties," representation is adequate). Indeed, the Tenth Circuit has cautioned that "[o]ne must be careful not to paint with too broad a brush in construing Rule 24(a)(2)," that is, "practical judgment must be applied in determining whether the strength of the interest and the potential risk of injury to that interest justify intervention." *San Juan Cty. v. United States*, 503 F.3d 1163, 1199 (10th Cir. 2007) (en banc) *abrog'd on other grounds by Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013).

To defeat the presumption of adequate representation, a proposed intervenor must demonstrate "a concrete showing of circumstances . . . that make [the existing parties'] representation inadequate," *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872 (10th Cir. 1986). Where a proposed intervenor "fail[s] to present the district court with specific reasons which would explain why intervenors' representation would be superior to [the existing parties'] representation," *Kiamichi R. Co. v. Nat'l Mediation Bd.*, 986 F.2d 1341, 1345 (10th Cir. 1993), district courts properly deny a motion to intervene as of right. At bottom, "[t]he purpose of intervention is to increase the likelihood of . . . victory" by the intervening party—thus a party must demonstrate that its intervention would further that purpose. *San Juan Cty.*, 503 F.3d at 1200.

GCC misapprehends the governing standard when it argues that, where the Government is a party, "[t]he possibility that the interests of the applicant and the parties diverge 'need not be great.'" *See* GCC Mot. at 8. In fact, demonstrating inadequate representation by the Government does not "always impos[e] only a minimal burden." *San Juan Cty.*, 503 F.3d at 1205 (opinion of Hartz, J.)(citing with approval the Second Circuit's rejection of a "minimal burden" standard where the proposed intervenor had not identified conflicting government interests). Indeed, the low bar GCC wishes to apply only attaches "when [the Government] has multiple interests to pursue," such as where there are "conflicting statutory obligations."[1] *See id.* at 1204-05. GCC has demonstrated no such conflict

[1] The cases upon which GCC primarily relies for its proposed "low bar" standard are inapplicable. For example, *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 997 (10th Cir. 2009) distinguished *San Juan County*, because in the latter case the *en banc* court was "not informed of any potential federal policy that could be advanced by the government's relinquishing its claim of title to the road" at issue there. *WildEarth*, 573 F.3d at 997. In *WildEarth*, "in contrast, the government has multiple objectives and could well decide to embrace some of the environmental goals of [Plaintiffs]." *See id.* A second case upon which GCC relies, *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111 (10th Cir. 2002), is similarly concerned with the potential for a conflict of interest between the Government and the proposed intervenor. *See id.* at 1117. This case presents no such concern, because it presents only claims regarding the constitutionality of a Federal statute. The "Department of Justice has a duty to defend the constitutionality of an Act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General concludes that the argument may ultimately be unsuccessful in the courts." The Att'y General's Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25 (1981). The interests of GCC and the United States are identical; GCC may not manufacture a conflict of interest where none exists in order to intervene as of right.

here—it wishes to defend the lawfulness of OSMRE's actions and the constitutionality of the Congressional Review Act, which is exactly in line with the interests of the United States.

Nothing in GCC's motion demonstrates that its presence in this case would in any way increase the likelihood that these interests prevail. *See San Juan Cty.*, 503 F.3d at 1200. To the contrary, GCC's motion demonstrates that its presence would inject this case—which presents an open-and-shut challenge to the constitutionality of the Congressional Review Act—with needless discussion of mine permitting, mining plan approval, and SMCRA, to little end. GCC's argument that the Government nevertheless inadequately represents its interests is twofold: First, it believes that Defendants' reading of the Complaint is unduly narrow, because it believes that the case includes separate claims under SMCRA and the APA; and second, it wishes to supplement the Government's motion to dismiss with an additional argument that OSMRE's actions were lawful irrespective of whether the Congressional Review Act is constitutional. *See* GCC Mot. at 8-10. Neither assertion suffices to demonstrate inadequate representation by the Government.

As to the first argument, GCC's theory of the case is out of sync with the views of *both* parties, and this Court. Indeed, the Parties both agree that "each claim in this case concerns the constitutionality of a federal statute alone," *see* Joint Case Management Plan at 5, ECF No. 18. The Court, too, has endorsed that understanding:

> The claims asserted in the complaint (#1) challenge the unconstitutionality of the Congressional Review Act and the Cloture Rule. Although there is an underlying administrative decision at issue -- the OSMRE failed to apply the Stream Protection Rule ("SPR") when approving the mine -- the alleged failure to apply the SPR was based on the application of an unconstitutional law.

Order, ECF No. 19. Moreover, GCC itself appears to recognize that only the constitutionality of the CRA is relevant to this case in its recently filed proposed response to Plaintiffs' Summary Judgment Motion. *See* GCC MSJ Resp. at 3 (arguing that Plaintiffs' purported material facts are largely irrelevant, because they "have moved for summary determination on one issue and one issue only – the constitutionality of the Congressional Review Act"). The United States, not GCC, is best suited to address such claims, because Defendants' counsel—the Department of Justice—has been charged by

Congress with the defense of federal laws. *See* 28 U.S.C. § 516.[2]

As to the second argument, GCC argues that the United States' representation of its interests is inadequate because GCC wishes to make a "separate and distinct argument" in its Motion to Dismiss "that the Federal Defendants had no duty to apply the Stream Protection Rule . . . because [that Rule] had been previously withdrawn and invalidated by Congress pursuant to the Congressional Review Act," regardless of whether that Act is constitutional. GCC Mot. at 9. Far from demonstrating any divergent interest, however, this simply illustrates that GCC's legal objective is in fact "identical" to that of the United States. A proposed intervenor's desire to "handle[] the defense of the case differently" does not suffice "to challenge the adequacy of representation." *Bumgarner v. Ute Indian Tribe of Uintah & Ouray Rsrv.*, 417 F.2d 1305, 1308 (10th Cir. 1969). Of course, this supposed difference is, in any event, a semantic one. GCC's argument under the APA asserts that the agency acted rationally in not applying the Stream Protection Rule because the Rule was not in effect at the time of decision. Defendants agree that the agency acted rationally in not applying the Rule, which had been invalidated by a lawful act of Congress. *See* Defs.' MTD at 19 ("Executive Branch has no independent constitutional interest in a regulatory regime, like the Stream Protection Rule, that is no longer authorized by law.")

For these reasons, GCC may not intervene as of right.

II. GCC Should Not Be Permitted To Intervene Under Rule 24(b).

This Court should deny permissive intervention for many of the same reasons. Rule 24(b) provides that, "[o]n timely motion, the 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." Fed. R. Civ. P. 24(b)(1)(B). "In exercising discretion under Rule 24(b), district court may consider 'whether the

[2] But even if GCC were correct—contrary to what everyone involved thinks—that this case requires the determination of some unidentified question(s) under SMCRA, such a claim would still challenge the actions of a federal agency that the United States is best situated to defend. *See* 28 U.S.C. § 516. And Defendants, out of an abundance of caution, do address the possibility of a separate statutory claim under SMCRA their Motion to Dismiss. See Defs.' Mot. to Dismiss, at 7 n.2, ECF No 33 (arguing that to the extent a claim exists under SMCRA, it would be time-barred).

intervenors' interests are adequately represented by other parties." *Tri-State Generation & Transmission Ass'n, Inc. v. New Mexico Pub. Regulation Comm'n*, 787 F.3d 1068, 1075 (10th Cir. 2015) (quoting *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009)). Courts also consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Kane Cty. v. United States*, 597 F.3d 1129, 1135 (10th Cir. 2010) (quoting Fed. R. Civ. P. 24(b)(3)). Permissive intervention is "a matter within the district court's discretion," *Stillwell*, 79 F.3d at 1043, but where a proposed intervention "would only clutter the action unnecessarily" and "would not aid" the legal objective it intends to pursue, *see Arney v. Finney*, 967 F.2d 418, 421-22 (10th Cir. 1992), a district court may properly deny such a request.

Here GCC has no "claim or defense" sharing a "common question of law or fact" with the "main action" because Plaintiffs' claims could not be asserted against GCC in the first place. *See Pub. Utilities Comm'n of D.C. v. Pollak*, 343 U.S. 451, 461 (1952) (The Fifth Amendment "appl[ies] to and restrict[s] only the Federal Government and not private persons"); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) (observing that "most rights secured by the Constitution are protected only against infringement by governments," not private parties) (internal quotation marks and citations omitted). As a practical matter, however, as described above, GCC's presence as a defendant in this case would only serve to unnecessarily complicate the case by introducing ancillary factual and legal matters that all parties recognize are not at issue. It should not be permitted to intervene under Rule 24(b).[3]

CONCLUSION

For the foregoing reasons, GCC's Motion to Intervene should be denied.

[3] To the extent that GCC's motion to intervene asserts that GCC has an interest related to Plaintiffs' threat to file a motion for a temporary restraining order to enjoin the Dunn Ranch Lease mine expansion, *see e.g.*, GCC Mot. at 7, it bears observing that Plaintiffs themselves admit that the basis for such a motion is not present in the Complaint. *See* Joint Case Management Plan at 6, ECF No. 18 ("anticipates filing a second lawsuit [regarding the Dunn Ranch Lease mine expansion] and seeking to consolidate it with this lawsuit."). GCC, too, recognizes, in passing, that this issue is "not directly relevant to Plaintiff's allegations in this action." *See* GCC Mot. at 4 n.2.

Dated: March 25, 2021

Respectfully submitted,

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