

I. INTRODUCTION

On April 25, 2006, Pennaco Energy, Inc., Marathon Oil Company, and Devon Energy Corporation (hereafter Petitioners) filed a Petition pursuant to United States District Court Local Rule 83.7.2 seeking judicial review of the U.S. Environmental Protection Agency's (EPA) decision to approve Montana's water quality standards for Sodium Adsorption Ratio (SAR) and Electrical Conductivity (EC). Petitioners seek herein to overturn the water quality standards adopted by the Montana Board of Environmental Review (BER) in April 2003. The BER adopted standards for EC and SAR pursuant to its authority to establish standards for the protection of Montana's waters under the Montana Water Quality Act, Title 75, Chapter 5, Montana Code Annotated (MCA), and the Federal Clean Water Act (CWA). (See, *Notice of Adoption of Amendment* in the Montana Administrative Record, 8 MAR 779, Petition, *Attachment A*). EPA approved Montana's standards on August 28, 2003, determining that those standards were in conformance with the requirements of the CWA. See 33 U.S.C. § 1313(3)(c.)

On or about May 24, 2006, the State of Wyoming moved to intervene as a Petitioner. This Court granted Wyoming's motion on May 25, 2006. No other action has occurred. Therefore, no parties will be prejudiced by granting Montana's motion to intervene and its motion is clearly timely as required by Rule 24(a)(2).

Montana seeks to intervene as a party respondent as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2), to protect its sovereign interest in the control of pollution to Montana's streams and rivers and to maintain its right to establish water quality standards for all waters within its borders pursuant to 33 U.S.C. § 1313(c). No other existing party can adequately

represent the interests of the state *qua* state. In the alternative, Montana seeks permissive intervention under Fed. R. Civ. P. 24(b).

As required by to U.S.D.C.L.R. Rule 7.1(b)(1) A), counsel for the State of Montana have conferred with counsel for each of the parties herein. Counsel for the State have been informed that neither Petitioners nor Respondent take a position with respect to Montana's intervention. Intervenor-Petitioner Wyoming has no objection to Montana's intervention.

II. DISCUSSION AND ARGUMENT

Fed. R. Civ. P. 24(a)(2) provides in relevant part:

Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

An applicant may intervene as of right if: 1) the application is timely; 2) the applicant claims an interest relating to the property or transaction which is the subject of the action; 3) the applicant's interest may as a practical matter be impaired or impeded; and 4) the applicant's interest is not adequately represented by existing parties. *Coalition of Arizona/New Mexico Counties v. Department of Interior*, 100 F. 3d. 837, 840 (10th Cir. 1996); *Utahns for Better Transp. v. United States DOT et*, 295 F.3d 1111, 1115-117 (10th Cir. 2002). Nothing has yet occurred in this case. No party opposes Montana's intervention. Montana's water quality standards are directly in issue. An adverse determination would, at least temporarily, prevent Montana's own regulations from being considered the applicable standards under the Clean Water Act. See, 65 FR 24644-45. Clearly, Montana has satisfied the requirements for intervention as a matter of right.

A. Montana's Motion to Intervene Is Timely.

A motion to intervene must be timely so as to avoid prejudice to other parties and interference with advanced judicial process. Fed. R. Civ. P. 24(a), *Sanguine, LTD v. United States Dep't of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984). This petition was filed on April 25, 2006. Wyoming has filed a motion to intervene as a Petitioner and the Court granted that motion on May 25, 2006. No other action has yet taken place. The administrative record has not yet been compiled and presented to the Court; no scheduling order has been entered to mandate the course of the proceedings. There is no prejudice to any party resulting from the timing of Montana's motion at this state of the proceedings.

B. Montana's Interest In These Proceedings.

Whether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact specific determination, but intervention should be allowed liberally when such an interest is present. *Coalition of Arizona/New Mexico Counties v. DOI*, 100 F. 3d. 837 at 841. Unquestionably, Montana has a strong interest in defending its regulatory program from attack, even when that attack takes the form of a petition for judicial review of the federal approval of its standards. See, e.g., *Utahns for Better Transportation v. United States DOT et al.*, 295 F.3d 1111, 1117 (10th Cir. 2002) (district court erred in denying environmental group associational standing to assert its members' rights; government could not adequately represent private rights); *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 981, 986, 987 (D.Wyo. 1998) (state regulatory agency has a right to intervene in civil action alleging violation of environmental laws).

Here, Petitioners allege the EPA erroneously approved Montana's revised water quality standards. Montana's right to establish and enforce its standards is directly in issue,

and as such its interests as a sovereign with jurisdiction over its waters is at stake. See, 65 FR 24644-45. (State standards are not applicable water quality standards under the CWA unless approved by EPA.) Montana has a strong public policy interest in protecting its waters from pollution. “It is the public policy of this state to: (1) conserve water by protecting, maintaining, and improving the quality and potability of water for public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation and other beneficial uses:” Mont. Code Ann. § 75-5-101 (2005).

C. Montana’s Interest May Be Impaired Absent Intervention.

Montana will be significantly harmed if it is not allowed to intervene. The test is a practical one.

“It should be pointed out that the Rule refers to impairment “as a practical matter.” Thus, the court is not limited to consequences of a strictly legal nature. The court may consider any significant legal effect in the applicant’s interest and it is not restricted to a rigid res judicata test. Hence, the stare decisis effect might be sufficient to satisfy the requirement. See *New York Public Interest Research Group, Inc. v. Regents of the University of New York*, 516 F.2d 350, 352 (2d Cir. 1975). It is said that where, as here, the case is of first impression, the stare decisis effect would be important. See *Nuesse v. Camp*, 128 U.S. App. D.C. 172, 385 F.2d 694, 702 (1967).

Natural Resources Defense Council v. United States Nuclear Regulatory Commn., 578 F.2d 1341, 1345 (10th CA 1978).

Any judicial determination other than to defer to the federal agency responsible for administering the CWA and affirm its decision would likely impair Montana’s ability to enforce its own standards entirely within the State of Montana.

The Tenth Circuit interprets the interest impairment test of Rule 24(a) broadly, *Natural Resources Defense Council v. United States Nuclear Regulatory Commn.*, 578 F.2d 1341, 1344 (American Mining Congress’s and Kerr-McGee Nuclear Corporation’s interests in

federal approval would be impaired by adverse ruling requiring EIS causing delays or injunction from obtaining licenses.) The CWA clearly requires all state standards to be submitted to and approved by EPA to be the “applicable” standards under the Clean Water Act. 33 U.S.C. § 303(c). Any reversal and remand of EPA’s decision to approve Montana’s water quality standards will therefore cause legal uncertainty regarding the ability of Montana to enforce its standards within the state. This adverse effect on Montana’s ability to establish and enforce its water quality standards is sufficient to establish impairment for intervention as of right under Fed. R. Civ. P. 24(a). *Utahns for Better Transp. v. United States DOT*, 295 F.3d 1111, 1116 (10th Cir. 2002).

D. Existing Parties Do Not Adequately Represent Montana’s Interests.

The burden to show an applicant for intervention’s rights are not being adequately represented by existing parties is minimal.

As we observed in *Utah Association*, “that burden is the ‘minimal’ one of showing that representation ‘may’ be inadequate.” 255 F.3d at 1254 (quoting *Sanguine, Ltd. v. United States Dep’t of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984)). “The possibility that the interests of the applicant and the parties may diverge ‘need not be great’ in order to satisfy this minimal burden.” *Id.* (quoting *Natural Res. Def. Council*, 578 F.2d at 1346).

Utahns for Better Transp. v. United States DOT, 295 F.3d 1111, 1116 (10th Cir. 2002).

The interest of the federal Respondent EPA is not the same as the State. Only Montana can represent its sovereign interest. Although EPA approved Montana’s water quality standards for EC and SAR, the EPA’s role in approving a state’s water quality standards is a limited one. EPA need only determine whether the standard is consistent with the CWA. 40 CFR §§ 131.11 and 131.12. In distinction, the Montana BER proposed the adoption of water quality standards for EC and SAR to ensure that the designated beneficial uses of Montana’s waters would be protected. As part of the standard-setting process, the

Montana BER accepted, reviewed, and responded to volumes of public comment and scientific evidence regarding the proposed adoption of these standards. Ultimately, the Montana BER determined that the numeric water quality standards for EC and SAR were necessary to protect Montana's waters and adopted the rules being challenged by the Petitioners. Clearly, only Montana can adequately represent its interest in this matter. See, *Utahns for Better Transp. v. United States DOT*, Id. at 1117 (regarding the limited interests the United States may represent); *Coalition of Arizona/New Mexico Counties*, 100 F. 3d. at 844. (Naturalist with expertise and interest in owl protection who had petitioned for protection had sufficient interest to intervene as a matter of right; governmental and other associational parties did not adequately protect his interests; interests need not be economic to support right to intervene.)

The possibility of divergence of interest need not be great in order to satisfy the applicant's burden. *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984) (Native Americans met minimal burden to show federal defendants did not adequately represent their interests in entering into consent decree regarding challenged communitization agreement.

In order that the Court may be fully informed regarding this petition for judicial review, and that Montana's broad public policy interests may be protected, Montana must be a party to this action.

III. INTERVENTION UNDER RULE 24(b)

Rule 24(b) encourages courts to permit state governmental officers and agencies to intervene in actions where statutes they administer are at issue. Permissive intervention is available when sought because an aspect of public interest with which a state office is

officially concerned is involved in the litigation. *Nuesse v. Camp*, 385 F.2d 694, 706 (D.C. Cir. 1967) (Wisconsin state Commissioner of Banks entitled to intervene in dispute involving comptroller of currency and others regarding establishment of branch bank, as state commissioner advanced state public interests.) For the reasons set forth in this memorandum, the State of Montana should be permitted to intervene pursuant to Rule 24(b) in the unlikely event that Court determines intervention as of right is not applicable.

IV. CONCLUSION

For the forgoing reasons, the State of Montana should be permitted to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a) or in the alternative permitted to intervene pursuant to Fed. R. Civ. P. Rule 24(b).

Respectfully submitted this _____ day of June, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on _____, 2006, an accurate copy of the foregoing State of Montana Memorandum in Support of its Motion to Intervene as Respondent was served on the following persons by the following means:

- _____ CM/ECF
- _____ Hand Delivery
- _____ Mail
- _____ Overnight Delivery Service
- _____ Fax
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