

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION**

VIRGINIA URANIUM, INC., <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:15-cv-00031-JLK
)	
MCAULIFFE, <i>et al.</i> ,)	
)	
Defendants.)	

**MOTION FOR LEAVE TO INTERVENE
PURSUANT TO FED. R. CIV. P. 24
ON BEHALF OF THE ROANOKE RIVER BASIN ASSOCIATION
AND THE DAN RIVER BASIN ASSOCIATION**

Pursuant to Rule 24(a) and (b) of the Federal Rules of Civil Procedure, the Roanoke River Basin Association and the Dan River Basin Association (collectively “Local Intervenors”), hereby move for leave to intervene in the above-captioned matter. Water from the Coles Hill site referenced in the Complaint (Compl., Dkt. No. 1, ¶ 25) drains into the Banister River, which flows into the Dan River, which is part of the larger Roanoke River watershed. Proposed Local Intervenors, on behalf of their members, have a clearly defined interest in the preservation and promotion of these natural and aquatic resources. What is more, Local Intervenors assert unique and acute interests in the subject matter of this litigation, distinct from the interests represented by the Commonwealth Defendants. Plaintiffs’ requested injunctive relief seeks to commandeer state agencies to engage in a permitting process, at which point the interests of the Commonwealth Defendants and Local Intervenors may diverge.

Local Intervenors tender herewith a memorandum in support of their motion setting forth in detail the grounds for why intervention in this instance should be granted.

September 4, 2015

Respectfully submitted,

/s Caleb A. Jaffe

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following:

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**MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO INTERVENE
ON BEHALF OF THE ROANOKE RIVER BASIN ASSOCIATION
AND THE DAN RIVER BASIN ASSOCIATION**

Pursuant to Rule 24(a) and (b) of the Federal Rules of Civil Procedure, the Roanoke River Basin Association and the Dan River Basin Association (collectively “Local Intervenors”), hereby move for leave to intervene in the above-captioned matter. Water from the Coles Hill site referenced in the Complaint (Compl., Dkt. No. 1, ¶ 25) drains into the Banister River, which flows into the Dan River, which is part of the larger Roanoke River watershed. Proposed Local Intervenors, on behalf of their members, have a clearly defined interest in the preservation and promotion of these natural and aquatic resources. What is more, Local Intervenors assert unique and acute interests in the subject matter of this litigation, distinct from the interests represented by the Commonwealth Defendants.

I. BACKGROUND

On August 5, 2015, Plaintiffs filed a Complaint in this Court seeking a declaratory judgment that a Virginia mining statute, enacted in 1982, is pre-empted by non-mining

regulation in the federal Atomic Energy Act. In addition, because there are no federal laws or regulations covering conventional uranium mining on private lands, Plaintiffs also seek a highly-unusual injunction from a federal court ordering Virginia's Department of Mines, Minerals and Energy to process Plaintiffs' state permit applications for mining and mine safety. The Office of the Attorney General of Virginia, on behalf of state officials named in the Complaint (collectively "Commonwealth Defendants") filed a Motion to Dismiss on August 25, 2015 (Dkt. No. 32). The Commonwealth Defendants premise their motion, in part, on the fact that the Atomic Energy Act does not regulate or even reference conventional uranium mining on private lands.

Local Intervenors affirm that that they have conferred with counsel for all parties and that the Commonwealth Defendants have stated that they do not object to this Motion to Intervene. Plaintiffs have informed Local Intervenors that they do intend to object.

II. THE LOCAL INTERVENORS

A. Roanoke River Basin Association

The Roanoke River Basin Association ("RRBA") is a § 501(c)3 nonprofit organization that was formed in 1945. Its mission is to establish and carry out a strategy for the development, use, preservation, and enhancement of resources of the Roanoke River basin. RRBA's territory extends over the 410 miles of the Roanoke River basin, encompassing the Banister River near the Coles Hill site, the Dan River into which it flows, and the larger Roanoke River watershed. Water from the Roanoke River is strategic to the United States military, and military families based in Virginia Beach draw their water from the Roanoke River. RRBA is a member of the steering committee of the Keep The Ban Coalition.

RRBA operates an office in Danville, Virginia and represents members in both Virginia and North Carolina. RRBA's membership includes almost 50 local governments, non-profit, civic and community organizations, and regional governmental entities. RRBA's membership also includes individual citizens who live and recreate on the Dan River downstream from the Coles Hill site. RRBA helped establish, and now supports, the Roanoke River Basin Bi-State Commission legislated by the Commonwealth of Virginia and the State of North Carolina, for the purpose of providing guidance and recommendations to local, state, and federal legislative and administrative bodies for the use, stewardship, and enhancement of the water and other natural resources for all the citizens with the river basin.

RRBA is dedicated to protecting the Roanoke River basin's water quality. Recreation and tourism, hydropower generation, commercial fishing, manufacturing, and agricultural production constitute the backbone of the Roanoke River basin economy. Each is dependent on an ample supply of clean water. RRBA also operates an Upper Reach program that promotes access to the Roanoke River, which in turn supports tourism and recreation throughout the region. For example, the Upper Reach program of RRBA has coordinated with Vets-On-A-Roll, Wounded Warriors, and others to improve access to the waterway for handicap paddlers.

RRBA is also the fiscal agent for The Virginia Coalition, which is a diverse group of Southside Virginia CEO's, business owners, entrepreneurs, and economic developers concerned about the health of their employees and workforce, as well as their future ability to recruit new employees into the region.

B. Dan River Basin Association

The Dan River Basin Association ("DRBA") is a § 501(c)3 nonprofit organization, formed in 2002, and is headquartered in Eden, North Carolina with field offices in Collinsville,

Virginia and Danville, Virginia. Its mission is to preserve and promote the natural and cultural resources of the Dan River basin through stewardship, recreation, and education. DRBA's service area covers the Dan River from its headwaters at Meadows of Dan, Virginia to its drainage at the Kerr Reservoir in Halifax County, North Carolina. DRBA also protects and promotes the Dan River's major tributaries, which include the Banister River near the Coles Hill site. DRBA is a member of the steering committee of the Keep The Ban Coalition.

DRBA has members in all 16 counties within the Dan River watershed. In Virginia, DRBA members reside in Henry County, Patrick County, Pittsylvania County, Franklin County, Halifax County, Mecklenberg County, and the cities of Danville and Martinsville. In North Carolina, DRBA members reside in Rockingham County, Caswell County, Pearson County, Guilford County, Forsyth County, Stokes County, Surry County, and Orange County. Municipal members of DRBA include the City of Eden, North Carolina, City of Reidsville, North Carolina, Town of Stoneville, North Carolina, Town of Mayodan, North Carolina, Town of Madison, North Carolina, Town of Wentworth, North Carolina, Rockingham County, North Carolina, Henry County, Virginia, and Halifax County, Virginia.

By protecting the region's natural assets such as the Dan River and its tributaries, DRBA is working to promote tourism as well as healthy lifestyles. DRBA assists localities in creating community parks, trails, and access to local rivers and streams. A recent example of a DRBA bi-state initiative is the approval of a feasibility study by the Virginia General Assembly for the creation of a state park along the North and South Mayo Rivers in Virginia that would connect to the Mayo River State Park in North Carolina. DRBA also conducts water quality monitoring and holds monthly recreational outings. DRBA leads over 150 miles of cleanups on the Dan River and on trails throughout the region.

DRBA maintains youth and educational programs, providing environmental education in over 50 schools reaching almost 10,000 youth and conducting summer camps and special events to teach youth about conservation. DRBA's educational initiatives include its "Trout in the Classroom" program and its coordination with the Town of Mayodan, North Carolina to support the McMichael High School Mountain Bike Club.

By promoting a bi-state network of rivers, greenways, and trails, DRBA hopes to improve the region's quality of life, making the area a better place in which to live, visit, and do business.

III. STANDARD OF REVIEW

Local Intervenors respectfully seek intervention as a matter of right (pursuant to Rule 24(a)) or, in the alternative, permissive intervention (pursuant to Rule 24(b)).

Rule 24(a)(2) provides that the Court must, in response to a timely-filed motion, allow intervention for any party 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).

Rule 24(b) provides that the Court may, in response to a timely-filed motion, allow intervention for a party 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). Permissive intervention under Rule 24(b) applies a lower threshold inquiry than intervention as a matter of right under Rule 24(a). *Media Gen. Cable of Fairfax, Inc. v. Sequoyah Condo. Council of Co-Owners*, 721 F. Supp. 775, 779-80 (E.D. Va. 1989) ("Although mandatory intervention is inapposite, permissive intervention stands on a different footing. It requires less.").

Permissive intervention is also a discretionary matter, *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003); *Hill v. Western Elec. Co., Inc.*, 672 F.2d 381, 386 (4th Cir.1982)), with the timeliness of the motion being the threshold question. *Alt v. E.P.A.*, 758 F.3d 588, 591 (4th Cir. 2014) (citing *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir.1989)). In evaluating a request for permissive intervention, “the court must consider ‘whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013); *Holsey v. Armour & Co.*, 743 F.2d 199, 205 (4th Cir. 1984) (citing *Hill.*, 672 F.2d at 385–87).

IV. BASIS FOR THE MOTION

Local Intervenors respectfully request intervention, noting that: (1) they raise a unique defense that shares with the main action a common question of law and fact, but that may not be “adequately represented” by the Commonwealth Defendants; (2) the Motion to Intervene is timely, coming just one month after the Complaint was filed; and (3) the Motion to Intervene comes early in the proceedings such that no party will be prejudiced.

A. Local Intervenors Have a Unique Interest in the Main Litigation.

Local Intervenors represent members who reside in Pittsylvania County, site of the Coles Hill Uranium Deposit identified by Plaintiffs in their Complaint. *See* Compl. at ¶ 24. On behalf of these members, Local Intervenors have a unique interest in the subject litigation. As discussed above, the mission statements for each of the Local Intervenors includes a mandate to protect, preserve, and enhance the resources of the Dan River, the Roanoke River, and related tributaries. These watersheds provide meaningful recreational value to the communities and act as significant drivers of the local economy. Plaintiffs’ lawsuit threatens to adversely impact the special resources that Local Intervenors have committed to protect on behalf of their members.

Local Intervenors have an acute interest in this litigation that the Virginia population at large does not share because any potential mining activity undertaken would cause a disproportionate impact on Local Intervenors, their organized activities, and their members. Local Intervenors are actively engaged in their communities through programs such as RRBA's Upper Reach program, which has improved access to the Roanoke River for handicapped paddlers and others. Similarly, DRBA organizes river cleanups on the Dan River and maintains educational programs, such as the "Trout in the Classroom" program. Allowing uranium mining in the relevant watersheds would adversely impact these programs. Plaintiffs acknowledge the close involvement of the Keep The Ban Coalition in the subject matter of this litigation. Compl. at ¶ 83. Local Intervenors are steering committee members of that coalition.

Furthermore, Plaintiffs seek an injunction from this Court ordering various state agencies to "accept and process Plaintiffs' applications" for mining permits. Compl. at ¶ 111. Even accepting Plaintiffs' tortured reading of the Atomic Energy Act, Local Intervenors maintain that the requested relief would be unconstitutional as a "type of federal action [that] would 'commandeer' state governments into the service of federal regulatory purposes" *New York v. United States*, 505 U.S.144, 175 (1992). On this point, the Supreme Court has been abundantly clear: "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." 505 U.S. at 178. Thus, Local Intervenors maintain that Plaintiffs' Complaint wholly fails as a matter of law.

Nevertheless, should Plaintiffs prevail in their quest for injunctive relief, all parties, including Local Intervenors, would find themselves in unchartered administrative territory, with a federal court directing state actors to initiate a state regulatory process. Plaintiffs' requested injunctive relief would force state agencies to engage in a federally-mandated permitting process,

at which point the interests of the Commonwealth Defendants and Local Intervenors may diverge.

This is precisely the kind of situation where intervention is especially appropriate. *See In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991). In *Sierra Club*, the state of South Carolina had denied a hazardous waste permit to an applicant, applying an existing state regulation. The permit applicant then initiated in federal district court a constitutional challenge to the underlying state regulation, seeking both declaratory and injunctive relief. 945 F.2d at 778. The Fourth Circuit found that the Sierra Club must be permitted to intervene in that challenge. The court acknowledged that “the interests of Sierra Club and South Carolina . . . may converge at the point of arguing that [state] Regulation 61-99 does not violate the Commerce Clause.” 945 F.2d at 780. However, intervention must be allowed because “the interests may diverge” when evaluating “the balance of hardships accruing to the parties if part of [state] Regulation 61-99 is enjoined by preliminary injunction, and the public interest factor to be weighed in a preliminary injunction analysis.” *Id.*

Local Intervenors recognize that their interests, with respect to the claim for declaratory relief, are likely to converge with the Commonwealth Defendants’ vigorous defense of the challenged statute. *See Stuart v. Huff*, 706 F.3d 345, 350 (4th Cir. 2013). However, Virginia Uranium, Inc., like the applicant in *Sierra Club*, has sought both declaratory and injunctive relief. The potential *ad hoc*, federal/state permitting process that Plaintiffs seek to impose via injunctive relief could very well commandeer the Commonwealth Defendants into issuing a state mining permit that Local Intervenors would oppose.

Alternatively, Local Intervenors also seek intervention under Rule 24(b), which imposes a more relaxed standard for permissive intervention. *Media Gen. Cable of Fairfax, Inc. v.*

Sequoyah Condo. Council of Co-Owners, 721 F. Supp. 775, 779-80 (E.D. Va. 1989). For example, permissive intervenors need not show standing in order to participate in the proceedings. *Shaw v. Hunt*, 154 F.3d 161, 165 (4th Cir. 1998) (“[A] party who lacks standing can nonetheless take part in a case as a permissive intervenor.” (citing *S.E.C. v. United States Realty & Improvement Co.*, 310 U.S. 434, 459, 60 S.Ct. 1044, 84 L.Ed. 1293 (1940))).

B. Local Intervenors’ Motion to Intervene Is Timely.

Local Intervenors’ Motion to intervene is timely. In assessing timeliness, the Fourth Circuit has considered whether “the proceedings . . . had already reached a relatively advanced stage.” *Alt*, 758 F.3d at 591. For example, the *Alt* court denied intervention to one party where “[s]even other parties had long since requested and received permission from the district court to intervene.” *Id.* Here, Local Intervenors are seeking to join the proceedings less than one month after Plaintiffs filed their Complaint and just ten days after the Commonwealth Defendants filed a Motion to Dismiss. (Dkt. No. 32). Courts in the Western District of Virginia have granted motions to intervene that were filed far later into the litigation. *Nautilus Ins. Co. v. Strongwell Corp.*, No. 1:12CV00038, 2014 WL 2645503, at *3 (W.D. Va. June 13, 2014) (granting motion to intervene even though “motion was not made until over a year after Nautilus filed its original complaint”). Accordingly, Local Intervenors’ Motion to Intervene is timely.

C. Permitting Local Intervenors to Intervene Will Not Prejudice Any Party.

Local Intervenors’ participation in this action will not prejudice any party. This Court has not yet ruled on Commonwealth Defendants’ Motion to Dismiss, Plaintiffs have not yet replied to the Commonwealth Defendants’ motion, and oral argument on the motion is still two months away. (Notice of Hearing, Dkt. No. 37, setting hearing on Commonwealth Defendants’ Motion to Dismiss for November 6, 2015). Courts in similar situations have granted motions to intervene. *See, e.g., U.S. v. Henry*, 519 F. Supp. 2d 618, 621 (E.D. Va. 2007) (finding the

“motion to intervene is timely. It was filed prior to defendants’ filing their answer to the United States’ complaint, prior to the holding of the Rule 16(b) scheduling conference, and prior to the commencement of discovery. . . . Intervention . . . will not prejudice the parties.”); *see also, Alt. v. EPA*, 758 F. 3d at 591 (upholding the denial of a motion to intervene after “[s]even other parties had long sincerely requested and received permission from the district court to intervene. Several months of settlement negotiations had transpired. The EPA’s motion to dismiss Alt’s case had been fully briefed, argued, and denied. The case had been stayed once, and the court’s scheduling order had been extended twice . . . [and the] lawsuit [was] so near to its final resolution.”).

In contrast to the situation in *Alt*, inclusion of Local Intervenors here will not require any delay or change to the Court’s previously scheduled hearings and scheduling decisions, notably the hearing on Commonwealth Defendants’ Motion to Dismiss in November and the bench trial set to commence on December 14, 2015. Intervention will not delay adjudication of the merits in any way.

CONCLUSION

For the foregoing reasons, Local Intervenors respectfully request that this Court grant this Motion to Intervene.

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September 4, 2015

Respectfully submitted,

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