

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILDEARTH GUARDIANS,
Plaintiff,

v.

LISA JACKSON, in her official
capacity as Administrator of the
Environmental Protection Agency,
Defendant.

No. C 09-2453 CW

ORDER DENYING
MOTION TO
INTERVENE AND
MOTION FOR AN
ORDER TO SHOW
CAUSE
(Docket Nos. 43
and 46)

United States District Court
For the Northern District of California

Proposed Intervenors State of North Dakota and North Dakota
Department of Health (North Dakota) seek intervention in this
action for the limited purpose of requesting that this Court issue
an order to show cause why Defendant United States Environmental
Protection Agency (EPA) Administrator¹ should not be held in
contempt for exceeding its authority under the consent decree
previously entered in this action. The EPA opposes both motions.
Having considered the papers submitted by the parties and their
oral arguments, the Court DENIES North Dakota's motions.

BACKGROUND

This action was originally initiated by Plaintiff WildEarth
Guardians on June 3, 2009, pursuant to the Clean Air Act's citizen

¹ The Court adopts the terminology used by Defendant and
Proposed Intervenors in their papers and will refer to Defendant
as the EPA throughout this Order.

1 suit provision, 42 U.S.C. § 7604(a)(2), which allows any person to
2 bring an action against the EPA "where there is alleged a failure
3 of the Administrator to perform any act or duty under this chapter
4 which is not discretionary with the Administrator." WildEarth
5 alleged that the EPA had failed to perform a non-discretionary
6 duty either to approve a State Implementation Plan (SIP) or
7 promulgate a Federal Implementation Plain (FIP) for California,
8 Colorado, Idaho, New Mexico, North Dakota, Oklahoma, and Oregon to
9 satisfy the requirements of Clean Air Act section 110(a)(2)(D)(i),
10 42 U.S.C. § 7410(a)(2)(D)(i), regarding interstate transport of
11 pollution and the 1997 National Ambient Air Quality Standards for
12 eight-hour ozone and fine particulate matter. The EPA has
13 separate authority and obligations regarding regional haze
14 requirements, pursuant to Clean Air Act section 169A, 42 U.S.C.
15 §§ 7491, 7492, which were not at issue in this case.

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18 On February 23, 2010, the Court approved the parties' consent
19 decree. Docket No. 26. The consent decree has since been
20 modified on several occasions by stipulation or order of the
21 Court. The consent decree requires the EPA to approve a SIP,
22 promulgate a FIP, or approve a SIP in part and promulgate a
23 partial FIP by specified dates for each of the seven States for
24 each of the four elements of 42 U.S.C. § 7410(a)(2)(D)(i). As a
25 result of several amendments and extensions of deadlines, the
26 consent decree currently requires that the EPA must propose action
27 to address the visibility requirement related to interstate
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1 transport for North Dakota by September 1, 2011, Docket No. 38,
2 and take final action by March 2, 2012, Docket No. 68.

3 On September 1, 2011, the EPA notified North Dakota that the
4 agency proposed the partial approval of North Dakota's regional
5 haze SIP and interstate transport SIP, combined with a partial
6 regional haze FIP and interstate transport FIP. Westfall Decl.,
7 Ex. A. The EPA subsequently published its proposed actions in the
8 Federal Register on September 21, 2011. 76 F.R. 58570. In the
9 notice, the EPA states that the "proposed [interstate transport]
10 FIP consists of a finding that the combination of our proposed
11 partial approval of North Dakota's Regional Haze SIP and our
12 proposed partial FIP for regional haze for North Dakota will
13 satisfy the interstate transport requirements of section
14 110(a)(2)(D)(i)(II) with respect to visibility." 76 F.R. 58574.
15 Because of the overlap between the visibility and regional haze
16 requirements, the EPA determined that simultaneous action would be
17 "the most efficient approach" to address both, without creating
18 two separate sets of requirements for compliance. Id.

21 In the notice in the Federal Register, the EPA referred to
22 the consent decree entered into by this Court several times.
23 Specifically, the EPA referred to the deadlines contained in the
24 consent decree, and stated that, in regards to an interstate
25 transport SIP or FIP, it was required to sign a notice of proposed
26 rulemaking by September 1, 2011. 76 F.R. 58576. The EPA also
27 stated, "Given our September 1, 2011 deadline to sign this notice
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1 of proposed rulemaking under the consent decree," it lacked
2 sufficient time to act on or consider fully voluminous exhibits
3 that North Dakota had submitted on July 28, 2011 with a proposed
4 amendment to its regional haze SIP. 76 F.R. 58579. The EPA
5 nevertheless proposed certain actions on the aspects of this
6 submission that the agency was able to evaluate in the available
7 time, even though under 42 U.S.C. § 7410(k)(2), the EPA was "not
8 required to act on a SIP submittal until 12 months after it is
9 determined to be or deemed complete." Id.

11 DISCUSSION

12 North Dakota seeks to intervene as a matter of right, or in
13 the alternative, through permissive intervention, for the limited
14 purpose of seeking an order directing the EPA to show cause why it
15 should not be held in contempt for violating the terms of the
16 consent decree.

17 I. Intervention as a Matter of Right

18 To intervene as a matter of right under Rule 24(a)(2) of the
19 Federal Rules of Civil Procedure, an applicant must claim an
20 interest the protection of which may, as a practical matter, be
21 impaired or impeded if the lawsuit proceeds without the applicant.
22 Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489,
23 1493 (9th Cir. 1995). The Ninth Circuit applies a four-part test
24 to motions under Rule 24(a)(2):
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26 (1) the motion must be timely; (2) the applicant must
27 claim a "significantly protectable" interest relating to
28 the property or transaction which is the subject of the

1 action; (3) the applicant must be so situated that the
2 disposition of the action may as a practical matter
3 impair or impede its ability to protect that interest;
4 and (4) the applicant's interest must be inadequately
5 protected by the parties to the action.

6 Id. (quoting Sierra Club v. EPA, 995 F.2d 1478, 1481 (9th Cir.
7 1993)).

8 North Dakota alleges that the EPA relied on the consent
9 decree to give it the authority to address regional haze
10 requirements, based on the language described above in the notice
11 of the proposed action in the Federal Register. However, North
12 Dakota misinterprets this language. The notice in the Federal
13 Register does not say that the EPA relied on the consent decree
14 for authority to take action on a regional haze SIP or FIP. It
15 says that the EPA was simultaneously exercising its separate
16 authority on both regional haze and interstate transport
17 requirements, for efficiency. Although this Court is required to
18 "take all well-pleaded, nonconclusory allegations in the motion to
19 intervene, the proposed complaint or answer in intervention, and
20 declarations supporting the motion as true," it is not required to
21 do so when there is "sham, frivolity or other objections." Sw.
22 Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 820 (9th Cir.
23 2001). Because it is contradicted by the text of the notice
24 published in the Federal Register, North Dakota's allegation--that
25 the EPA relied on the consent decree in the notice to assume the
26 legal authority to promulgate a regional haze FIP--will not be
27 regarded as true.
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1 The EPA challenges North Dakota's motion for intervention as
2 a matter of right on two grounds: (1) that the motion is untimely;
3 and (2) that North Dakota does not have a legally protectable
4 interest.

5 The Ninth Circuit test for the timeliness of a motion to
6 intervene considers "1) the stage of the proceedings at which an
7 applicant seeks to intervene; 2) the prejudice to other parties;
8 and 3) the reason for and length of any delay." Empire Blue Cross
9 and Blue Shield v. Janet Greeson's A Place for Us, Inc., 62 F.3d
10 1217, 1219 (9th Cir. 1995).

11 North Dakota argues that its request is timely, even though
12 the case was resolved and closed more than a year and a half ago,
13 because it could not have known that its rights were not
14 adequately protected earlier, in that "this is the first instance
15 in this proceeding at which [the] EPA has interpreted its duties
16 under the [consent decree] to include implementation of the
17 Regional Haze provisions of the [Clean Air Act]." Reply, at 6.
18 However, North Dakota has not made any credible allegations that
19 the EPA interpreted its duties under the consent decree as
20 anything other than a requirement to take action on the interstate
21 transport plans by a certain date.
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23 "An applicant has a 'significant protectable interest' in an
24 action if (1) it asserts an interest that is protected under some
25 law, and (2) there is a 'relationship' between its legally
26 protected interest and the plaintiff's claims." Donnelly v.
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1 Glickman, 159 F.3d 405, 409 (9th Cir. 1998).

2 In its motion, North Dakota protests the content of the EPA's
3 proposed actions regarding the regional haze FIP and the
4 interstate transport FIP and that the EPA issued both proposals
5 together. However, the EPA's authority to enter into any kind of
6 FIP and the content thereof were never at issue in this case. The
7 consent decree in this case did not create any duty or authority
8 on the part of the EPA, other than to enforce the duty to comply
9 with a particular timetable regarding interstate transport plans,
10 and North Dakota is not protesting this schedule. Therefore,
11 North Dakota has not asserted any protectable interest in this
12 case. See, e.g., Our Children's Earth Foundation v. EPA, 2006
13 U.S. Dist. LEXIS 30581, at *7-8 (N.D. Cal.) (denying a motion to
14 intervene to protest the substance of the ultimate EPA action
15 where "[t]he substantive content of any new regulations, was not,
16 however, a subject of this lawsuit, [and t]he only issue [was]
17 whether the Administrator will review the rules and by when he
18 will act on the findings of his review.") (emphasis in original).

19 Accordingly, North Dakota's motion for intervention as a
20 matter of right is DENIED.

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23 II. Permissive Intervention

24 A court may, in its discretion, permit intervention under
25 Rule 24(b)(1)(B) by anyone who "has a claim or defense that shares
26 with the main action a common question of law or fact." In
27 exercising its discretion, a court should "consider whether the
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1 intervention will unduly delay or prejudice the adjudication of
2 the original parties' rights." Fed. R. Civ. P. 24(b)(3). The
3 requirements for permissive intervention are (1) the applicant
4 must show independent grounds of subject matter jurisdiction;
5 (2) the motion must be timely; and (3) the applicant's claim or
6 defense, and the main action, must have a question of law or a
7 question of fact in common. San Jose Mercury News, Inc. v. United
8 States Dist. Court-Northern Dist. of Cal., 187 F.3d 1096, 1100
9 (9th Cir. 1999) (citing predecessor provision, Federal Rule of
10 Civil Procedure 24(b)(2)).

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12 North Dakota reiterates the same reasons for permissive
13 intervention as it asserted for mandatory intervention, which this
14 Court has found wanting. In its reply papers, North Dakota also
15 raises a new argument: that it has "an independent claim regarding
16 the enforcement of the terms" of the consent decree, which is
17 proper to bring under this Court's retained jurisdiction over that
18 decree. However, North Dakota is not actually seeking to enforce
19 the terms of the consent decree. North Dakota is not arguing that
20 the EPA did not take action on the interstate transport SIP within
21 the time periods mandated in the consent decree.

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23 Accordingly, North Dakota's motion for permissive
24 intervention is DENIED.

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26 III. Motion for an Order to Show Cause

27 "The standard for finding a party in civil contempt is well
28 settled: The moving party has the burden of showing by clear and

1 convincing evidence that the [non-moving party] violated a
2 specific and definite order of the court." FTC v. Affordable
3 Media, LLC, 179 F.3d 1228, 1239 (9th Cir. 1999) (quoting Stone v.
4 City & County of San Francisco, 968 F.2d 850, 856 n.9 (9th Cir.
5 1992)). However, substantial compliance and acting on a good
6 faith and reasonable interpretation of the court order can
7 preclude sanctions. In re Dual-Deck Video Cassette Recorder
8 Antitrust Litig., 10 F.3d 693, 695 (9th Cir. 1993). The decision
9 to find a party in contempt is within the discretion of the
10 district court. Jerry's Famous Deli, Inc. v. Papanicolaou, 383
11 F.3d 998, 1004 (9th Cir. 2004).

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13 North Dakota has not demonstrated, and certainly not by clear
14 and convincing evidence, that the EPA has violated this Court's
15 consent decree. North Dakota does not allege that the EPA failed
16 to take action by the required date; North Dakota instead alleges
17 that the EPA took other actions in addition to the single action
18 required in the consent decree. Further, North Dakota presents no
19 evidence that the EPA claimed that the consent decree authorized
20 it to promulgate a regional haze FIP for North Dakota, other than
21 North Dakota's own allegations, which are undermined by the actual
22 contents of the notice in the Federal Register as described above.
23 Instead, the evidence presented shows that the EPA consistently
24 cites to the Clean Air Act as providing authority for it to
25 promulgate both the regional haze FIP and the interstate transport
26 FIP. The EPA cites the consent decree only as providing a
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1 deadline for action on the interstate transport FIP. The EPA made
2 an administrative decision to address both together, and thus
3 chose to address the regional haze FIP by the same date, as is
4 within its right. Nothing in the consent decree prohibited the
5 EPA from taking that action, or required it to do so.

6 Accordingly, even if this Court had granted North Dakota
7 leave to intervene, this Court would have denied North Dakota's
8 motion for an order to show cause.
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10 CONCLUSION

11 For the foregoing reasons, North Dakota's motions to
12 intervene and for an order to show cause are DENIED. (Docket Nos.
13 43 and 46)

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15 IT IS SO ORDERED.

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17 Dated: 12/27/2011

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CLAUDIA WILKEN
United States District Judge