BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In the Matter of a Permit Issued To Mobil Coal Producing, Inc., For Caballo Rojo Mine by the Air Quality Division of the Department of Environmental Quality	)	Docket No. 1656-85

OPPOSITION OF MOBIL COAL PRODUCING, INC.
TO MOTIONS OF CORDERO MINING CO. AND
THUNDER BASIN COAL COMPANY TO INTERVENE

At the late dates of May 27 and May 28, 1986, respectively, Cordero Mining Co., Inc. ("Cordero") and Thunder Basin Coal Company ("Thunder Basin") filed motions to intervene in this proceeding. Because those motions are virtual duplicates of each other, we respond to them together.

The motions of Cordero and Thunder Basin should be denied for any one of a host of reasons. Filed only a week before the commencement of the hearing, they are clearly untimely and prejudicial. They are, moreover, a blatant attempt to end run the regulatory time limits for filing appeals with the Council. Finally, the interests of Cordero and Thunder Basin are not sufficiently aligned with the issues in this proceeding to warrant their intervention.

I. Background

On June 21, 1985, the Air Quality Division ("Division") completed its analysis of Mobil's permit application and proposed to approve that application. Publication of its proposal to approve was duly made, and AMAX Coal Company ("AMAX") filed an objection to the issuance of the permit within the 30 day public comment period. Pursuant to that objection, a public hearing was held on August 20, 1985. A record was made of the hearing and the public comment period was extended to include all comments received by the Division by the end of business on August 28, 1985. Neither Cordero nor Thunder Basin objected to the issuance of the permit to Mobil, nor did they participate in the public hearing, nor did they submit comments on the matter to the Division.

On August 30, 1985, after the public hearing and on the basis of the record made, the Administrator determined that the permit should be issued to Mobil. On October 29, 1985, AMAX protested that determination by filing a Request for Hearing with the Environmental Quality Council. No protest of any kind was filed by either Cordero or Thunder Basin.

Quite apart from the Mobil proceeding, and under a separate docket, the Division determined, on February 12, 1986, to issue a permit to the Carter Mining Company ("Carter"). That determination was made following a public hearing requested by AMAX. Both Cordero and Thunder Basin participated in that public hearing and expressed their objection to the issuance of a permit

to Carter. In addition, Mr. James Sutherland, Manager of Environmental Affairs for Cordero, sent a letter to the Division on January 24, 1986, expressing Cordero's views on the question of whether a permit should be issued to Carter. The Administrator subsequently determined that the permit should be issued to Carter, and his decision was appealed to the Council by AMAX, Cordero and Thunder Basin.

On April 15 and April 21, 1986, respectively, the Division and Carter moved for consolidation of the Mobil and Carter proceedings before the Council. Mobil filed a paper generally supporting the request for consolidation, but making it clear that its support was conditioned on the proposition that "Cordero and Thunder Basin be denied any right to directly or indirectly challenge the [Mobil] permit issuance" since "neither Cordero nor Thunder Basin participated in [Mobil's] permitting process and the time for appealing the [Mobil] permit has long since passed." Mobil paper of April 21, 1986, p. 2.

The consolidation motions were subsequently argued before Hearing Officer Park on April 28, 1986. The Division, AMAX, Carter, Mobil, Cordero and Thunder Basin were all heard on the issue at that time. Mobil once again expressed its "concerns about the participation of Thunder Basin, Cordero, in an appeal or protest of the [Mobil] permit because they did not file a protest within the statutory time limit of the [Mobil] permit." Transcript of April 28, 1986 argument, p. 31. In the event consolidation were granted, Mobil sought "specific safeguards to assure [Mobil]

that Cordero and Thunder Basin do not have any ability to directly or indirectly attack the issuance of the [Mobil] permit." Transcript, p. 32. In the end, Hearing Officer Park denied the motions for consolidation.

Subsequently, on May 20, 1986, Carter moved to intervene in the Mobil proceeding and Hearing Officer Park granted Carter a limited right of intervention. Seven and eight days later, and only a week before the commencement of the hearing, Cordero and Thunder Basin moved to intervene -- thus expressing, for the very first time, an effort to participate directly in the Mobil proceeding.

II. Argument

A. The Motions For Intervention Are Untimely And Granting Them Would Be Highly Prejudicial To Mobil

It is a bedrock principle of our legal system, of course, that motions to intervene may not be granted unless they are timely. See, e.g., Fed. R. Civ. P. 24(a),(b); 7A Wright & Miller, Federal Practice and Procedure § 1904. The reason for the timeliness requirement is to avoid prejudice to the existing parties to the proceeding.

As our background statement shows, the Cordero and Thunder Basin motions -- filed one week before the hearing -- represent the first indication that those parties might be participants in the Mobil proceeding. Neither Cordero nor Thunder Basin participated in any way in the proceedings before the Division,

nor did either of them protest the Administrator's decision to the Council. Mobil and its counsel are not acquainted with their specific situations, either factually or legally, and clearly have no opportunity to become familiar with their situations before the hearing begins. As a result, a grant of their intervention motions would put them in the position of snipers, free to take pot shots at Mobil without having their own factual identities or whereabouts known.

It is important to remember that Mobil has a permit at stake in this proceeding, whereas neither Cordero nor Thunder Basin have an equal stake. If they did, they were certainly free to make that stake known at an earlier stage and to utilize the procedures established by the regulations for participating in a way that avoided surprise and prejudice to any party.

The untimeliness of the motions is beyond any doubt. Over a month ago, in opposing the motions for consolidation, counsel for Cordero and Thunder Basin argued that "here we are on [April] 28th looking at a June 2nd hearing date. I think frankly it's just premature." Transcript of April 28, 1986 argument, p. 43. It is absurd for those same parties, one month later and less than a week before the hearing date, to contend that their effort to participate in a proceeding in which they have never before sought to participate is timely.

B. Cordero and Thunder Basin Do Not Have An Interest In The Issues In This Proceeding That Is Sufficient To Warrant Their Intervention

In addition to timeliness, a basic requirement for intervention is that the party seeking intervention must have an interest relating to the subject of the action that might be impaired if the action were decided without their participation. See Fed. R. Civ. P. 24(a); 7A Wright & Miller, Federal Practice and Procedure § 1904. If either Cordero or Thunder Basin did have such an interest in the Mobil proceeding, it could have participated in the public hearing before the Division on the Mobil permit and furthermore, it could have appealed the Administrator's decision to the Council, as provided for by the Rules and Regulations of the Department of Environmental Quality. They chose not to do so.

The simple fact is that whatever interest Cordero and Thunder Basin might have in the Carter proceeding, they have none in the Mobil proceeding. As counsel for Cordero and Thunder Basin pointed out during the April 28 oral argument on the motions to consolidate, "The positions of Cordero and Thunder Basin are different as to both the Mobil and the Carter matter." Transcript of April 28, 1986 argument, p. 44. Any interest that Cordero and Thunder Basin have in the Carter proceeding can be fully protected by them in the litigation of that proceeding before the Council, which will be held subsequently as a separate matter from the

Mobil proceeding. There is no justification for their intervention in this proceeding; on the other side, however, their late effort to intervene could substantially prejudice Mobil.

Cordero and Thunder Basin will doubtless argue justification by reason of the fact that Carter has been given a limited right of intervention in the Mobil proceeding. It is important to understand, however, that the position of Carter is fundamentally different from that of Cordero and Thunder Basin. In their separate proceedings, Mobil and Carter are both in the position of having a permit right taken away from them. That is not the case with Cordero or Thunder Basin who, like AMAX, do not have permits that are the subject of this proceeding. Whatever permit rights they have will continue, regardless of the outcome of this proceeding. The rights of those parties whose permits are the specific subject of these proceedings are entitled, in weighing the balance, to greater protection against prejudice than those parties or potential parties whose rights are not.

C. Intervention By Cordero and Thunder Basin Is Barred By Their Failure To Timely Appeal The Administrator's Decision To The Council

Apart from the untimeliness of the Cordero and Thunder Basin petitions, and apart from the lack of threatened interests that those parties have in this proceeding, intervention by Cordero and Thunder Basin is unallowable as a matter of law. Section 16 of Chapter I of the Rules and Regulations of the Department of Environmental Quality requires that "all appeals to Council from final actions of the Administrators or Director shall be made within sixty (60) days of such action." It is undisputed that

neither Cordero nor Thunder Basin appealed the Administrator's decision to issue the Mobil permit within the required 60 day period. The statutory time limitation is jurisdictional, and Cordero and Thunder Basin may not now circumvent that limitation under the guise of intervention.

Section 16 illustrates, in still another way, the fundamentally different positions of Carter, on the one hand, and Cordero and Thunder Basin on the other. If Cordero and Thunder Basin were adversely affected by the Mobil decision, they had a specific remedy under the regulations for seeking redress. Carter, on the other hand, was differently situated. It was not adversely affected by the Mobil decision, so it had no basis for appealing to the Council. Once an appeal was brought by others, however, and its interest was thereby threatened, its only vehicle for obtaining redress was to seek intervention in the appeal proceeding. Cordero and Thunder Basin, on the other hand, had a clearly prescribed avenue for protecting their interests without intervention, and indeed that avenue was exclusive.

A virtually identical situation occurred in the United States District Court for the District of Columbia in the national regulatory litigation under the Surface Mining Control and Reclamation Act of 1977. Section 526(a)(1) of the Surface Mining Act, 30 U.S.C. § 1276(a)(1), provides that petitions for review of national rules or regulations shall be filed "within 60 days from the date of such action." Compare id. with DEQ Rules and

Regulations, Ch. 1, §16a. Systems Fuels, Inc. did not petition for review within the 60 day time period, but subsequently sought to intervene on the side of those who had petitioned for review of the regulations. Although motions to intervene on the side of the Defendants were granted in that proceeding, the Court had no difficulty denying the intervention motion of Systems Fuels. As the Court pointed out:

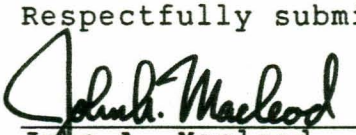
> "§ 526(a) requires that petitions for judicial review be filed within 60 days from the date of the action subject to review. Systems Fuels' motion to intervene was not filed until March 17, 1978, well beyond 60 days after the promulgation of the regulations on December 13, 1977. To allow Systems to intervene at this stage would totally circumvent the 'statute of limitations' provision of § 526(a)." Memorandum Opinion & Order, April 18, 1978, p. 2 (Attachment A).

The identical situation exists here -- except that the intervention motions of Cordero and Thunder Basin are even more untimely and the prejudice to other parties is even greater. Because the "statute of limitations" for challenges to decisions of the Administrator was not complied with, intervention at this date, which would circumvent that provision, may not be granted.

III. Conclusion

For each and all of these reasons, the motions for intervention filed by Cordero and Thunder Basin should be denied.

Respectfully submitted,



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ATTACHMENT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SURFACE MINING REGULATION LITIGATION,) Civil Action No. 78-162 (Master File Number)

MEMORANDUM OPINION & ORDER

This matter comes before the court on the motion of Systems Fuels, Inc. to intervene as a plaintiff-petitioner in one of the actions for judicial review of the regulations promulgated by the Secretary of the Interior pursuant to the Surface Mining Control & Reclamation Act, 30 U.S.C. § 1201 et seq. Systems Fuels is a wholly-owned subsidiary of several public utilities and procures coal on their behalf. Systems has coal purchase contracts with Peabody Coal Co., one of the plaintiffs, and asserts that the regulations to be reviewed may result in the reduced availability of coal and additional costs to Systems. Systems further asserts that the other parties will not adequately represent its interests and therefore, they seek to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) or, in the alternative, permissively pursuant to Rule 24(b)(2).

Before the court can address the standards of Rule 24, the defendants have raised a statutory issue concerning the proposed intervention. Section 526(a) of the Surface Mining Control & Reclamation Act states:

> A petition for review of any action subject to judicial review under this subsection shall be filed within sixty days from the date of such action ... . Any such petition may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary.

Defendants contend that this section precludes Systems from becoming a plaintiff-intervenor in these cases because it did not participate in the administrative proceedings. Systems argues that use of the word "may" in the statute makes the requirement permissive and thus, it does not preclude their intervening. Systems' interpretation, however, would make the language of the statute have no meaning. If anyone who is aggrieved may file a petition for judicial review, there would be no need for the language in the statute concerning participation in the administrative proceedings. It appears more logical to read Congress' use of the word "may" to mean that a participant in the administrative proceedings was left the choice of either to file a petition for judicial review or not to file such a petition. Thus, this court is of the opinion that § 526(a) requires petitioners to have been participants in the administrative proceedings and therefore, Systems Fuels may not intervene as a plaintiff-intervenor.

Furthermore, § 526(a) requires that petitions for judicial review be filed within 60 days from the date of the action subject to review. Systems Fuels' motion to intervene was not filed until March 17, 1978, well beyond 60 days after the promulgation of the regulations on December 13, 1977. To allow Systems to intervene at this stage would totally circumvent the "statute of limitations" provision of § 526(a).

Finally, with respect to Systems' attempt to intervene as of right under Rule 24(a)(2), it appears that their interests will be adequately represented by the petitioners in the twenty-two cases before this court and, in particular, Peabody Coal Co. Certainly Peabody will just as vigorously oppose, as Systems would, regulations that will curtail its production or increase its costs. For all of the reasons stated above,

especially the discussion concerning the timeliness of the application for intervention, the court would also not be inclined to allow Systems to intervene under the permissive intervention provisions of Rule 24(b)(2).

Therefore, in accordance with the memorandum opinion above, it is, by this court, this 17th day of April, 1978,

ORDERED that the motion of Systems Fuel, Inc. to intervene in Civil Action No. 78-163, be, and the same hereby is, denied.

H. Thomas Flaherty

UNITED STATES DISTRICT JUDGE