

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge John L. Kane

Civil Action No. **08-cv-02167-AP**

WILDEARTH GUARDIANS,

Plaintiff,

v.

UNITED STATES FOREST SERVICE, et al.,

Defendants.

ORDER

Kane, J.

This matter is before me on the Motion to Intervene (Doc. #5), filed by Mountain Coal Company (MCC) on December 11, 2008. Having carefully considered the Motion, the responses to it filed by Plaintiff and the Federal Defendants, MCC's reply, and all applicable legal authorities, and being fully advised in the premises, I DENY the motion.

The Federal Defendants oppose the reasonable condition for permissive intervention that any participation of MCC be coordinated with them so as to avoid duplication and to promote the efficient conduct of proceedings. An unwillingness on the part of the Federal Defendants to confer and consolidate briefs with MCC where possible so as to avoid excessive and redundant pleadings and briefs means that a limited permissive participation by MCC would not be feasible.

More to the point, the reasons asserted by MCC for intervention of right or permissive intervention are insufficient. There is no basis, for example, upon which to

assert that the Federal Defendants will not adequately defend and represent the valid interests alleged by MCC. Nor is there any basis for asserting that MCC's interests, as a practical matter, will be impaired or impeded.

This is a record review case and the Federal Defendants' actions will be upheld, if at all, on the basis articulated by the Defendant United States Forest Service itself. No court can uphold an agency action on grounds not relied upon by the agency. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994), is controlling.

IT IS SO ORDERED.

Dated this 22nd day of January, 2009.

s/ John L. Kane
John L. Kane, Senior District Judge
United States District Court