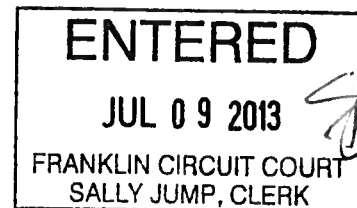


COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 13-CI-584



APPALACHIAN VOICES, INC., et al.

PLAINTIFFS

V.

ORDER

ENERGY AND ENVIRONMENT CABINET

DEFENDANT

This matter is before the Court on the Defendant's Motion to Dismiss. Having heard the arguments of the parties, reviewed the record, and otherwise being sufficiently advised, the Court hereby **OVERRULES** the Defendant's Motion for the reasons set forth below.


As grounds for its Motion, the Cabinet states that Petitioners have failed to name an indispensable party pursuant to CR 19. Petitioners failed to name Frasure Creek as a party to their appeal before this Court. However, Petitioners are seeking judicial review under KRS 13B.140(1) of the Secretary's Order pursuant to KRS 224.10-470, which states in pertinent part, "The cabinet shall be named respondent, and service shall be had on the secretary." *Id.* Here, Petitioners named the Cabinet as respondent and served the Secretary, Dr. Len Peters.

Petitioners cite to *LWD Equipment, Inc., et al., v. Revenue Cabinet*, 136 S.W.3d 472 (Ky. 2004) arguing for strict compliance of the statute. In that case, the Revenue Cabinet argued that the case should have been dismissed for lack of jurisdiction for failure to name the Board of Tax Appeals on the appeal. The facts are analogous here. Petitioners here are appealing the Secretary's Final Order, arguing the Cabinet's action is arbitrary and capricious, an abuse of discretion, contrary to law, and not supported by substantial evidence. The appeal is thus governed by KRS 224.10-470, which only requires the Cabinet to be named as a party, with service to the Secretary. Petitioners have satisfied strict compliance.

In addition to adhering with the statute, Petitioners took protective action to make Frasure Creek aware of the suit by providing service to Frasure Creek's corporate office, its Kentucky Registered Agent, and its counsel. Petitioners went above and beyond contacting counsel for Frasure Creek by telephone and offering to join them in a Motion to Lift the Bankruptcy Stay so they could intervene in this matter.

Accordingly, the Court hereby **OVERRULES** the Defendant's Motion, as KRS 224.10-470 does not require that Frasure Creek be named as a necessary party. Although Frasure Creek is not an indispensable party under CR 19.01, they may petition the bankruptcy court to lift the bankruptcy stay and intervene under CR 24.02.

So **ORDERED** this the 8th day of July, 2013.


PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

DISTRIBUTION:

Mary Varson Cromer
Appalachian Citizens' Law Center, Inc.
317 Main Street
Whitesburg, KY 41858

Mary Stephens
Office of General Counsel
200 Fair Oaks Lane, First Floor
Frankfort, KY 40601

Frasure Creek Mining, LLC
4978 Teays Valley Rd.
Scott Depot, WV 25560

Registered Agent for Frasure Creek Mining, LLC
National Corporate Research
828 Lane Allen Rd, Suite 219

Lexington, KY 40504

Anne Adams Chesnut
John C. Bender
Greenebaum Doll & McDonald PLLC
300 W. Vine St., Suite 1100
Lexington, KY 40507