No. 17-2005

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WESTERN ENERGY ALLIANCE,
Petitioner-Appellee,
v.
RYAN ZINKE, Secretary, United States Department of the Interior, *et al.*,
Respondents,

THE WILDERNESS SOCIETY, *et al.*,
Appellants-Applicants for Intervention.

On Appeal from the United States District Court for the District of New Mexico
Civil Action No. 1:16-cv-00912-WJ-KBM
The Honorable Judge William Johnson

REPLY BRIEF OF APPELLANTS-APPLICANTS FOR INTERVENTION

April 19, 2017

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INTRODUCTION

Plaintiff-Appellee Western Energy Alliance's (WEA) Complaint asserts a far-reaching interpretation of the Mineral Leasing Act that would harm the interests of Proposed Intervenors-Appellants The Wilderness Society, et al. (collectively, the Conservation Groups) by requiring the Federal Defendants (collectively, BLM) to hold more oil and gas lease sales. Indeed, WEA's stated goal in bringing this case is to increase leasing and drilling on public lands. Because the Conservation Groups' interests will be harmed if WEA succeeds, and because BLM may not adequately represent their interests, the Conservation Groups are entitled to intervene.

In its response brief, WEA repeatedly accuses the Conservation Groups of misrepresenting its claims. In fact, the opposite is true. WEA's brief at various places both ignores its own Complaint and flatly misrepresents the allegations in that Complaint. WEA also says nothing about the arguments and evidence it presented in the district court, which alleged that WEA has standing to bring this case because the requested relief likely will result in more oil and gas lease sales. WEA is trying to rewrite its claims in an effort to bar the Conservation Groups from the courthouse. Notably, however, WEA has never amended the Complaint to reflect its new arguments or narrow the relief sought in this case. That Complaint remains the operative pleading in this case, and WEA's disregard of its

own allegations must fail. See Nat'l Parks Conservation Ass'n v. U.S. Envtl. Prot. Agency, 759 F.3d 969, 973-74 (8th Cir. 2014) (NPCA).

But even accepting WEA's re-characterization of the case, its requested relief would harm the Conservation Groups' interests by requiring BLM to find replacement leases to offer before postponing a lease sale. Such a requirement would make it more difficult for BLM to defer selling leases and short-circuit the process for public participation when offering the replacement leases. WEA does not dispute (or even mention) these practical impacts, but they meet the Rule 24 impairment requirement.

WEA makes no attempt to show that BLM will adequately represent the Conservation Groups' interests in this lawsuit. To the contrary, WEA acknowledges that the new presidential administration may "withdraw its opposition to [WEA's] lawsuit or modify existing leasing schedules." WEA Br. at 31. WEA also recognizes that "the new presidential administration may choose to promote policies more favorable to the oil and gas industry" and may "make changes to the [BLM leasing reforms] that Appellants hope to preserve." Id. at 30. WEA's argument that these prospects are "irrelevant," id., has no support in either Rule 24 or this Court's precedent. BLM's reversal of position in this Court — now opposing the request to intervene after previously taking no position — further

demonstrates that the agency does not represent the Conservation Groups' interests.

The record is clear in this case that WEA seeks major changes to the federal oil and gas program that would require more leasing on public lands, while limiting opportunities for public participation and environmental review. The Conservation Groups have a right to intervene to oppose such far-reaching claims.

ARGUMENT

WEA and the district court have not disputed that the Conservation Groups meet two of the four requirements for intervention of right: (a) their motion was timely; and (b) the Groups have a significant legally-protectable interest in the subject matter of this case because of their advocacy for BLM's 2010 leasing reforms (the Leasing Reform Policy) and their work to protect public lands from the impacts of oil and gas drilling. Open. Br. at 15; see WEA Br. at 7-8. WEA errs, however, in asserting that: (c) its claims will not impair the Conservation Groups' interests and that (d) those interests will be adequately represented by BLM. WEA Br. at 8.

I. WEA'S REQUESTED RELIEF WILL IMPAIR THE CONSERVATION GROUPS' INTERESTS.

The impairment requirement presents a "minimal burden" that requires the movant to show "only that impairment of its substantial legal interest is possible if intervention is denied." WildEarth Guardians v. Nat'l Park Serv., 604 F.3d 1192,

1198-99 (10th Cir. 2010) (emphasis added); Utah Ass'n of Ctys. v. Clinton, 255 F.3d 1246, 1253 (10th Cir. 2001) (UAC). Here, the relief WEA seeks may harm the Conservation Groups in three ways. First, if WEA's claims are successful, increased oil and gas leasing on public lands is not only possible, but very likely. In fact, that is WEA's stated goal in bringing this case. Open. Br. at 21-22. Second, WEA asks the court to interpret the Mineral Leasing Act (the Act) in a manner that will require more frequent lease sales and limit BLM's ability to consider environmental protection and public input before offering leases for sale. Id. at 22-30. Third, WEA seeks to revise or rescind BLM's Leasing Reform Policy, which would reverse reforms that the Conservation Groups worked for years to achieve. Id. at 30-33.

While WEA now downplays the impact of its claims, its own allegations show that harm to the Conservation Groups' interests is "possible" if WEA prevails in this case. Nat'l Park Serv., 604 F.3d at 1198-99; UAC, 255 F.3d at 1253. That possibility satisfies Rule 24.

A. If Successful, WEA's Case Is Very Likely to Result in More Leasing and Drilling on Federal Lands.

WEA's strenuous efforts to recast its claims leave a reader wondering why it bothered to pursue this litigation at all. But in the district court, WEA made its objective clear — it brings this case to increase oil and gas leasing on public lands. WEA's Complaint objects to "illegal" delays in holding lease sales, which it claims

have limited oil and gas development. Open. Br. at 21. And in response to a November 2016 motion by BLM to dismiss the Complaint for lack of standing, WEA submitted evidence to show that its members have suffered injuries that would be remedied through this lawsuit. For example, WEA offered affidavits and correspondence alleging that lease sale delays have prevented members' oil and gas projects from being developed. Appx 296-300; Open. Br. at 21. WEA also alleged that its requested relief would promote more oil and gas development on public lands. That outcome would impair the Conservation Groups' interests in protecting those lands. Open. Br. at 21-22.

In this Court, WEA tries to disregard its stated goal and the evidence it presented below. WEA Br. at 8-10; see also BLM Br. at 8-10 (failing to address issue). WEA contends that it does not seek "more lease sales" but only that lease sales be conducted "consistent with the requirements of the Mineral Leasing Act." WEA Br. at 9. This is a distinction without a difference: the premise of WEA's Complaint is that BLM has violated the Act by failing to hold four lease sales per year in many states. Compl. ¶¶ 111-125 (Appx 39-41). WEA's argument, if successful, would necessarily require more frequent lease sales in those states. WEA's current position conflicts with its standing arguments and its stated goal of increasing leasing on public lands.

Moreover, WEA's claim that it just seeks to enforce the Act is irrelevant to the impairment question. The Rule 24 intervention inquiry asks what the practical impact of WEA's requested relief will be on the Conservation Groups — not whether WEA is legally entitled to that relief. See Nat'l Park Serv., 604 F.3d at 1198-99. If successful, WEA's claims are very likely to increase leasing and development on federal lands, thus impairing the Conservation Groups' interests in protecting those lands. Id. That likely harm satisfies the impairment requirement.[1]

B. If Accepted by the Court, WEA's Mineral Leasing Act Interpretation Will Harm the Conservation Groups.

Under current law, BLM has broad discretion to determine which public lands are "eligible" and "available." BLM has interpreted the Act as allowing it to postpone lease sales when necessary to address public input or to do additional analysis as part of the leasing review process. Open. Br. at 4-5. In contrast, WEA's Complaint asserts a much more restrictive interpretation of eligible and available that would limit the agency's ability to postpone quarterly lease sales. Id. at 12. Based on that interpretation, WEA's Complaint alleges that the linchpin of BLM's Leasing Reform Policy — its rotating lease sale schedule — violates the Act. Id. at 13. WEA also challenges numerous BLM decisions postponing oil and

[1] This impact also would establish the Conservation Groups' Article III standing, if that were required for intervention. See WEA Br. at 20 n.4 (noting that Supreme Court is expected to decide the issue in a pending case); see also Open. Br. at 7 (collecting cases in which Conservation Groups had standing as plaintiffs and successfully challenged the issuance of leases).

gas lease sales. Id. at 13, 24-25. If WEA's argument succeeds, it would accelerate lease sales and deny BLM the time needed to prepare robust environmental analyses, schedule site visits, and respond to public input. Id. at 23-25. Such an outcome would directly conflict with the Conservation Groups' interests.

WEA's argument to the contrary, WEA Br. at 10-17, fails for several reasons. First, even accepting WEA's re-writing of its legal claims, they will harm the Conservation Groups' interests. WEA asserts that it is "not challenging the environmental review process for any parcel" or BLM's ability to postpone leasing individual parcels. Id. at 10-15 (emphasis added). Instead, WEA "objects to the cancellation of an entire lease sale" due to deferral of parcels where BLM has not identified eligible and available replacement leases from other parts of the state that could be offered at that sale. Id. at 14 (emphasis original); Appx 416-17. In other words, WEA claims that BLM's rotating lease sale schedule must be modified so that BLM cannot remove all the leases from a particular sale without first looking for replacement leases to offer from elsewhere in the state. See WEA Br. at 14; see also Appx 355-56 (district court similarly interpreting WEA's argument).

But as described in the Conservation Groups' opening brief, such a requirement would harm them as a practical matter. Open. Br. at 27-28. It would significantly discourage the agency from deferring the sale of individual leases in

response to public input. Many of the lease sales WEA challenges were postponed because BLM decided that it needed more analysis on all the individual parcels scheduled for that sale (for example, because it was updating the governing resource management plan (RMP)). Id. Requiring BLM to find suitable replacement leases would make it considerably more difficult for the agency to take such a step — even when it agrees that postponing the original leases is warranted. Id. In practice, moreover, such a requirement would sharply limit public participation in the offering of replacement leases because they would typically be added to the lease sale very late in the process. Id. at 28-29. Both of these results would impair the Conservation Groups' interests.

WEA and BLM have no answer to this point. They do not dispute that a replacement lease requirement would have such impacts, or that they would impair the Conservation Groups' interests. Instead, BLM and WEA ignore this practical harm that WEA's requested relief would have on the Conservation Groups. See WEA Br. at 10-17; BLM Br. at 8-10.[2] As a result, the possible impairment to the Conservation Groups' interests is undisputed.

[2] As a party to this lawsuit, BLM also has waived its arguments in opposition to intervention. In the district court, BLM took no position on intervention. BLM now claims that stance was based on the allegations in WEA's Complaint, but the agency was well aware during district court proceedings that WEA asserted an "exceedingly narrow construction[ ]" of the Complaint. BLM Br. at 1, 5. BLM received multiple district court intervention filings by WEA in late 2016, and attended a December 2016 hearing, without changing its stance. See Appx 141-53

Moreover, WEA's claim that it "defers to BLM's interpretation" of eligible and available, WEA Br. at 16, conflicts with the entire premise of WEA's lawsuit. According to the Complaint, the Act's quarterly lease sale requirement — triggered "when eligible lands are available" — applies much more frequently that under BLM's existing practice. Compare Compl. ¶¶ 11-14, 18-19, 22-23 (Appx 17-20) with Open. Br. at 4 (BLM interpretation); BLM Br. at 2-3 (same). WEA's new claim of deference to BLM contradicts its own Complaint. See WEA Br. at 10-17.[3] The argument must fail because this Court looks to a plaintiff's Complaint in evaluating the Rule 24 requirements. See, e.g., Utahns for Better Transp. v. U.S. Dep't of Transp., 295 F.3d 1111, 1116-17 (10th Cir. 2002) (determining whether intervenor's interests would be impaired "requires our attention to the [plaintiff's] complaint" and relief requested); Coal. of Ariz./N.M. Ctys. For Stable Econ. Growth v. Dep't of the Interior, 100 F.3d 837, 844 (10th Cir. 1996) (Coal. of Ctys.) (holding that proposed intervenor's interest would be impaired if plaintiff was granted the relief requested in complaint); see also People for the Ethical

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(WEA opposition to intervention), 389 (BLM counsel present at hearing); WEA Supp. Appx 1-43 (WEA supplemental brief opposing intervention). BLM's new position is a transparent reversal by the new administration — not a response to new developments in the case. See infra pp. 17-22 (discussing adequacy of representation).

[3] In fact, WEA's argument completely ignores its Complaint. See WEA Br. at 10-17 (citing to district court order and arguments WEA made in district court, not to the Complaint). This section of WEA's brief does include one reference to the Complaint, but it is a mis-citation. See id. at 16 (citing Appendix page 25, which is a page of the Complaint, for statement not found in the Complaint).

Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., __ F.3d __, Nos. 14-4151 & 14-4165, 2017 WL 1160873, *4 (10th Cir. Mar. 29, 2017) (focusing on allegations in complaint, rather than the narrower characterization of those claims in plaintiff's briefing, to determine plaintiff's standing).

Nor do the Conservation Groups simply misunderstand WEA's case. WEA could have responded to the intervention motion by amending its Complaint to "more carefully tailor its scope" and narrow the legal arguments and relief being sought. NPCA, 759 F.3d at 974. WEA made no effort to do so, despite having ample opportunity.

Beyond the Complaint, many of WEA's arguments directly conflict with BLM's view of the law. For example, WEA stated in the district court that it was challenging the postponement of lease sales during revision of the governing RMP for an area. Open. Br. at 25. WEA also contended that BLM lacks the authority to postpone lease sales based on "workload priorities," where the "workload" involves performing additional environmental review and tribal consultation as part of the pre-leasing review process. Id. at 24. But BLM's Leasing Reform Policy interprets the Act as allowing the agency to postpone lease sales for both of these reasons. Id. at 10-11, 31 n.17. And WEA has acknowledged — both in the district court and this Court — that it is "[r]equesting that the court require BLM to revise [the Leasing Reform Policy] to make [it] consistent with controlling law."

WEA Br. at 22 n.6; Appx 146 n.2. Such a request would be unnecessary if WEA were deferring to BLM's interpretation of the Act.[4]

The district court's statement that it will "hold" WEA to its statements about the scope of this case, BLM Br. at 5, does not avoid injury to the Conservation Groups. For example, the district court accepted WEA's claim that it would not challenge BLM's "discretion to decide which parcels are offered for lease" or the agency's authority to "determine when further environmental analysis is necessary for any parcel of land." Appx 347-48; see also WEA Br. at 6-7, 9, 22-23 (similar). But WEA's argument (as understood by the district court) would nevertheless harm the Conservation Groups by requiring BLM to find replacement lands to offer elsewhere in the state before canceling a lease sale. See supra pp. 7-8; Appx 356 (discussing requirement for replacement parcels). That practical impact satisfies the impairment requirement. UAC, 255 F.3d at 1253 (stating Rule 24(a)(2) "refers to impairment 'as a practical matter' " and "is not limited to consequences of a strictly legal nature" (quoting Nat. Res. Def. Council v. U.S. Nuclear Regulatory Comm'n, 578 F.2d 1341, 1345 (10th Cir. 1978)).

Moreover, the only interpretation of "eligible" and "available" WEA provided in the district court was the restrictive view stated in its Complaint. WEA

[4] In contrast, WEA's new claim that it challenges only postponement of sales "after BLM has identified parcels as eligible and available" has no support in its Complaint or the record. See WEA Br. at 17 (offering no citation for this statement).

offered no alternative reading to which the district court can now hold it. See Appx 194-95 n.3 (noting in district court that apart from its Complaint, WEA "never explains what it interprets [eligible and available] to mean"); Appx 345-48 & n.4, 350-57 (no discussion by district court of how eligible and available are defined). Instead, WEA conflated the terms eligible and available and repeatedly treated them as synonymous during intervention briefing. See, e.g., Appx 326 ("Plaintiff's position is just this: if 'eligible' parcels exist, then BLM must offer these for lease sale on a quarterly basis."); WEA Br. at 12 (same); Appx 142 (asserting WEA "does not seek in this lawsuit to amend the definition of 'eligible'" but not mentioning impact on meaning of "available"). Given WEA's evasiveness, the district court's order does not prevent WEA from returning to the interpretation offered by its Complaint.

In this Court, WEA continues to side-step the question of what "eligible" and "available" mean. WEA dismisses as "irrelevant" whether its interpretation "would classify more lands as eligible and available than BLM." WEA Br. at 17; see also id. at 6 (asserting that WEA has not "offered any interpretation of which lands are eligible and available"), 16 (claiming that "whether [WEA's] 'interpretation is more restrictive than BLM's' is not an issue"), 10 n.1 (arguing that quarterly leasing provision is "mandatory" where eligible lands are available, but not discussing what eligible and available mean). But this question is anything

but irrelevant — it involves the central issue in the case. WEA's Complaint shows that its highly restrictive view of the Act would seriously impair the Conservation Groups' interests.

C. WEA's Challenge to the Leasing Reform Policy Would Impair the Conservation Groups' Interests.

WEA also challenges BLM's Leasing Reform Policy. Compl. ¶¶ 16-17 (Appx 19). Its Complaint expressly requests an order "revis[ing] or rescind[ing]" the Leasing Reform Policy and any other agency guidance "that direct implementation of BLM's lease sale program in a manner contrary to law." Id. at 29 (Appx 42). Such an order would harm the Conservation Groups' interests by setting aside reforms that they worked for years to achieve. Open Br. at 30-33.

WEA denies challenging the Leasing Reform Policy and accuses the Conservation Groups of "misrepresent[ing]" its Complaint. WEA Br. at 18. But the Conservation Groups are simply citing WEA's own allegations. For example, WEA quotes part of a passage from its Complaint describing two Leasing Reform Policy provisions and asserts that "[n]either of these provisions is incompatible with" WEA's claims in this case. WEA Br. at 18-19 (quoting Compl. ¶¶ 15-16 (Appx 18-19)). WEA, however, does not mention the two sentences of the Complaint immediately following the quoted language. They allege that the Leasing Reform Policy:

> contains no provision accounting for the statutory requirement that quarterly '[l]ease sales shall be held for each State,' as opposed to State Office, 'where eligible lands are available.' . . . BLM's Instruction Memoranda do not have the force and effect of law and are not controlling when the provisions of a memorandum are inconsistent with the terms of relevant statutes or regulations.

Compl. ¶¶ 16-17 (Appx 19) (emphasis original). The full passage clearly shows that WEA challenges the Leasing Reform Policy as inconsistent with the Act. It is WEA's selective quotations — not the Conservation Groups — that misrepresent the Complaint.

WEA also has little to say about its Complaint's request for relief, which asks for an order revising or rescinding the Leasing Reform Policy. Id. at 29 (Appx 42). In a footnote, WEA downplays the request as just "cosmetic" because it supposedly would bring the Policy into compliance with the law. WEA Br. at 22 n.6 (requiring changes to the policy "cannot constitute a substantive attack on valid and enforceable leasing policies"). But the test for intervention is not whether WEA is legally entitled to its requested relief, but rather what the effect of that relief would be on Conservation Groups. Nat'l Park Serv., 604 F.3d at 1198-99. Requiring BLM to rescind or revise the Leasing Reform Policy would harm the Conservation Groups' interests, and they are entitled to intervene to oppose such an effort.

Moreover, regardless of whether WEA describes its case as a challenge to the Leasing Reform Policy per se, it seeks to set aside or modify the rotating sale

schedule that is the linchpin of that policy. Open. Br. at 10-11, 31. Such an outcome would impair the Conservation Groups' interests as a practical matter by eliminating a process that allows more time for public participation and environmental analysis. Id. In response, WEA claims that it does not actually challenge BLM's rotating lease sale schedule. WEA Br. at 11-12. But like WEA's other arguments, this theory conflicts with the allegations of the Complaint, which clearly attack the rotating schedule. Compl. ¶¶ 16-17, 23, 29, 121-123 (Appx 19-23, 41).[5]

Ironically, WEA's discussion of its challenge to the Leasing Reform Policy — in which it misrepresents the Complaint and asks the Court to disregard the Complaint's request for relief — is the only time WEA actually mentions the Complaint in its entire impairment of interests argument. See WEA Br. at 8-23. WEA's contortions in dealing with its own allegations illustrate how inconsistent its position is. WEA's effort to defeat intervention must fail because Rule 24

[5] Like the district court, WEA relies on an out-of-circuit district court case rather than Tenth Circuit law. WEA Br. at 19-23 (discussing Envtl. Integrity Proj. v. McCarthy, No. 16-842 (JDB), 2016 WL 6833931 (D.D.C. Nov. 18, 2016)). McCarthy is distinguishable for the reasons discussed in the Conservation Groups' opening brief. Open. Br. at 32 n.18. Moreover, WEA is simply wrong that the Conservation Groups are offering an inaccurate or "hyperbolic" description of the relief sought in this case, similar to the proposed intervenors in McCarthy. See WEA Br. at 20-23. And to the extent WEA reads McCarthy as allowing a plaintiff to defeat intervention by re-characterizing its case in a manner inconsistent with the Complaint, that would conflict with this Court's precedent. See Utahns for Better Transp., 295 F.3d at 1116-17; Coal. of Ctys., 100 F.3d at 844 (both relying on Complaint to assess Rule 24 factors).

requires only the "minimal" burden of showing it is "possible" that the Conservation Groups' interests "may" be impaired. See Nat'l Park Serv., 604 F.3d at 1198-99. The face of WEA's Complaint makes that showing, even if its characterization of those claims has been a moving target. NPCA, 759 F.3d at 973-74 (rejecting "gamesmanship" by plaintiff and focusing on allegations of complaint to find that Rule 24 requirements were met).

II. BLM DOES NOT ADEQUATELY REPRESENT THE CONSERVATION GROUPS' INTERESTS.

Rule 24's adequacy of representation test imposes only the "minimal" burden of showing that existing parties' representation of an intervenor's interests "may be" inadequate. See Open. Br. at 34; Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972). The Tenth Circuit has repeatedly recognized that where a government agency is charged with balancing different public and private interests, it is generally "impossible" for an agency to adequately represent a private intervenor. Open. Br. at 34; Nat'l Park Serv., 604 F.3d at 1200; Utahns for Better Transp., 295 F.3d at 1117; Coal. of Ctys., 100 F.3d at 845.

That is exactly the case here: BLM manages oil and gas leasing under a multiple-use mandate where it regularly compromises the Conservation Groups' interests in favor of oil and gas development. Open. Br. at 36-38. The record also shows that BLM may not adequately represent their interests in this case. Id. at 37-38. WEA's arguments to the contrary are meritless.

A. The Record Shows That the Conservation Groups Cannot Rely on BLM to Represent Their Interests.

The record amply demonstrates that BLM may not represent the Conservation Groups' interests. BLM regularly proceeds with oil and gas lease sales over the objections of the Conservation Groups. Id. at 36-38. In fact, the Conservation Groups are currently challenging some of the same sales addressed in WEA's Complaint. Id. at 37. Given BLM's multiple objectives, it may take positions in this case that differ sharply from those of the Conservation Groups or embrace some of WEA's oil and gas development goals. Id. at 38-40.

This prospect is especially likely under the new presidential administration. WEA itself anticipated that the Trump administration would take positions more favorable to WEA than the prior administration (which made the decisions challenged in this case). Id. at 40-42. BLM has already started these reversals: the agency now supports WEA's effort to keep the Conservation Groups out of the case after previously taking no position on the issue. See supra pp. 8-9 n.2. The district court also recognized this likelihood when it stayed proceedings in part to allow for shifts by the Trump administration. The district court's ruling that BLM will adequately represent the Conservation Groups' interests conflicts with its order staying the case. Open. Br. at 40-42.

WEA does not dispute that the new administration may "withdraw its opposition to [WEA's] lawsuit or modify existing leasing schedules." WEA Br. at

31. WEA also recognizes that "the new presidential administration may choose to promote policies more favorable to the oil and gas industry" and may "make changes to the [Leasing Reform Policy] that Appellants hope to preserve." Id. at 30. WEA asserts, however, that these prospects are "irrelevant" because they "would probably moot" this case and would represent new agency decisions that could be challenged by the Conservation Groups in a separate lawsuit. Id. at 31 & n.7. But WEA's admissions demonstrate exactly why the Conservation Groups need to represent their own interests in this case.

If BLM fails to defend this case, and instead (through settlement or otherwise) modifies its leasing schedules or the Leasing Reform Policy to reflect WEA's view of the law, that would directly conflict with the Conservation Groups' interests. Whether those steps would moot this case, or could be challenged separately by the Conservation Groups, is unclear at this point and irrelevant to the adequacy of representation question.[6] It is undisputed that BLM may "decide to embrace some of [WEA's] goals" and sacrifice those of the Conservation Groups. WildEarth Guardians v. U.S. Forest Serv., 573 F.3d 992, 997 (10th Cir. 2009) (USFS). Nothing more is required to show inadequate representation under Rule 24.

[6] WEA also claims that this outcome would "not translate into an interest" supporting intervention, WEA Br. at 30-31, but the issue here is adequacy of representation — not the Conservation Groups' interest. The Conservation Groups' legally-protectable interest in this case is undisputed. Open. Br. at 15.

Moreover, it is far from clear that any such steps by the new administration would moot this case. For example, BLM may modify its rotating lease sale schedule in a way that harms the Conservation Groups while not providing WEA all the relief it seeks. Or if WEA and BLM seek court approval of a settlement opposed by the Conservation Groups, further proceedings will be necessary.

In fact, the Trump administration has already begun backing away from other BLM oil and gas decisions that are being challenged in court by WEA, such as regulations addressing hydraulic fracturing and waste prevention.[7] In WEA's challenge to BLM's updated hydraulic fracturing regulation, the administration has asked this Court to stay the pending litigation rather than dismiss it as moot. Several Conservation Groups are intervenors in that case and have opposed BLM's request for a stay because (among other reasons) it would have the effect of indefinitely preventing the fracturing rule from taking effect.[8] It is entirely

[7] See Presidential Executive Order on Promoting Energy Independence and Economic Growth § 7(b), THE WHITE HOUSE (Mar. 28, 2017) (copy in Addendum) (directing Interior Department to review and potentially "revise, or rescind" regulations); see also State of Wyoming v. Zinke, Nos. 16-8068 & 16-8069 (10th Cir.) (WEA et al. challenging hydraulic fracturing regulation); Wyoming v. U.S. Dep't of Interior, No. 2:16-cv-00285-SWS, 2:16-cv-00280-SWS (D. Wyo.) (WEA et al. challenging waste prevention rule).

[8] See Federal Appellants' Motion To Continue Argument and Hold Case in Abeyance Pending Administrative Action at 2-3, State of Wyoming v. Zinke, Nos. 16-8068 & 16-8069 (10th Cir. Mar. 15, 2017); Intervenor-Respondent-Appellants' Preliminary Response In Opposition To Federal Appellants' Motion To Continue

foreseeable that a similar dynamic could occur in this case, further demonstrating that the Conservation Groups cannot rely on BLM to represent their interests.

Moreover, if the merits of this case are litigated, BLM's approach may differ substantially from that of the Conservation Groups. There is "no guarantee that the [agency] will make all of the environmental groups' arguments," N.M. Off-Highway Vehicle All. v. U.S. Forest Serv., 540 F. App'x 877, 881 (10th Cir. 2013) (NMOHVA) (unpublished), or even take positions that are consistent with those of the Conservation Groups. Open. Br. at 39. WEA dismisses this threat because "there are no policy arguments to make" in this case, WEA Br. at 29, but "policy arguments" are not the issue.

This case presents legal questions such as the meaning of "eligible" and "available," the history and purpose of that Mineral Leasing Act provision, and the flexibility BLM has in administering it. Especially under the new administration, the Conservation Groups' arguments may well differ from those advanced by the government. See, e.g., N.M. ex rel. Richardson v. BLM, 565 F.3d 683, 710 (10th Cir. 2009) (rejecting BLM argument that the Federal Land Policy and Management Act's (FLPMA) multiple-use mandate did not allow it to close ecologically important area to oil and gas leasing); W. Energy All. v. Salazar, No. 10-cv-0226, 2011 WL 3737520, *5 & n.10 (D. Wyo. June 29, 2011) (relying on Mineral

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Argument And Hold Case In Abeyance at 8-12, State of Wyoming v. Zinke, Nos. 16-8068 & 16-8069 (10th Cir. Mar. 15, 2017) (copies in Addendum).

Leasing Act legislative history provided by intervening conservation groups in rejecting WEA's legal claim). Moreover, if the district court rules in WEA's favor, BLM may choose to acquiesce in a decision that the Conservation Groups want to appeal. See Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1107 (9th Cir. 2002) (noting decision by government not to appeal injunction against Forest Service roadless rule), abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011).

WEA also errs in arguing that differences between BLM and the Conservation Groups will not affect any remedy proceedings in this case. WEA Br. at 29-30. According to WEA, the only relief it seeks from the court is "a declaration that BLM is not in compliance with applicable law." Id. Like many of WEA's arguments, this claim conflicts with the face of its Complaint. The Complaint seeks not only declaratory relief but also an order "[r]equiring BLM to immediately abandon all currently existing lease sale schedules that do not comply with the Mineral Leasing Act and to adopt promptly revised lease sale schedules that comply with the terms of the Mineral Leasing Act," as well as "[d]irecting BLM to revise or rescind all agency guidance and instructional memoranda, including [the Leasing Reform Policy], that direct implementation of BLM's lease sale program in a manner contrary to law." Compl. at 29 (Appx 42). WEA offers

no reason to believe that BLM's interests will align with those of the Conservation Groups when it comes to such remedies.

B. This Court's Quiet Title Act Intervention Decisions Do Not Apply in This Case.

WEA also contends the well-established law that showing inadequate representation is a "minimal burden" does not govern here, and that the Court instead should apply the more restrictive standard used in Quiet Title Act cases. WEA Br. at 26 (arguing that Kane Cty. v. United States, 597 F.3d 1129 (10th Cir. 2010), "controls this case"). In those cases challenging the government's title over federal property, this Court has presumed the government will adequately represent private intervenors absent some "basis to predict that the federal government will fail to" do so. Kane Cty., 597 F.3d at 1135 (alteration omitted); USFS, 573 F.3d at 997. WEA made the same argument unsuccessfully to the district court, Appx 359, and it should fail here as well.

First, the Conservation Groups satisfy the Rule 24 adequacy of representation requirement even under the Quiet Title Act standard. The facts of this case — such as WEA's acknowledgment that BLM may withdraw its opposition to WEA's lawsuit — overcome any presumption of adequacy because they provide a clear "basis to predict that [BLM] will fail to" represent the Conservation Groups' interests. See supra pp. 17-22.

Second, WEA's argument is wrong on the law. This Court has expressly distinguished the "unique circumstances" of Quiet Title Act cases from challenges to agency land management decisions because title disputes present only a "narrow ownership issue" where there is "no reason to believe" the government's interest differs from those of the proposed intervenors. NMOHVA, 540 F. App'x at 882 n.7 (discussing Kane County and another Quiet Title Act intervention decision, San Juan Cty. v. United States, 503 F.3d 1163, 1206-07 (10th Cir. 2007)); see also USFS, 573 F.3d at 996-97 (same). Even the Kane County quiet title case itself recognized this distinction: in evaluating adequacy of representation, it refused to rely on "inapplicable cases involving intervention in challenges to administrative action." 597 F.3d at 1135. The Tenth Circuit's distinction between title disputes and cases involving land management decisions makes WEA's reliance on Quiet Title Act decisions entirely misplaced.

WEA nevertheless argues that the Quiet Title Act standard should apply because this case involves a "ministerial obligation" by BLM — one that "does not implicate any policy questions or land management decision-making subject to agency discretion" or decisions where BLM "is obligated to consider a broad spectrum of views" that may conflict. WEA Br. at 2, 26-28, 31. Not surprisingly, WEA fails to offer a single case supporting this argument: it is wrong as a matter of law. The oil and gas leasing decisions that WEA challenges represent textbook

examples of discretionary agency actions governed by FLPMA's multiple-use management framework. Open. Br. at 2-5, 36-38.

Even if WEA prevails in this case, BLM would retain some discretion in the resulting expansion of leasing on public lands, such as selecting which individual leases to offer every three months in each state. WEA's "ministerial obligation" theory, in fact, conflicts with statements elsewhere in its brief recognizing that oil and gas leasing does involve discretionary decision-making by BLM. See WEA Br. at 6 (claiming that WEA does not seek to "curtail the Secretary's discretion over oil and gas leasing"), 9 (acknowledging "BLM's discretion to withhold nominated parcels from oil and gas leasing"), 11, 14, 22, 24 (similar).

WEA also suggests that the Quiet Title Act standard should apply here because BLM pursues only the "single litigation objective" of demonstrating that its lease sale postponements complied with the Mineral Leasing Act. Id. at 27. Again, WEA has no support for this argument. The adequacy of representation test looks to the underlying interests represented by each party — not whether the parties happen to take the same litigation position at the time intervention is being considered. UAC, 255 F.3d at 1255-56. This Court recognizes that "the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor" over the course of the lawsuit. USFS, 573 F.3d at 996 (quoting UAC, 255 F.3d at 1256).

"The possibility that the interests of the applicant and the parties may diverge 'need not be great' in order to satisfy th[e] minimal burden" required by Rule 24. UAC, 255 F.3d at 1254.

Moreover, the federal government almost always has the "single litigation objective" of showing that its decisions complied with the law. If WEA's theory were correct, the Quiet Title Act standard would apply to almost every case involving government land management decisions. For example, when the shoe is on the other foot and Conservation Groups challenge BLM leasing decisions, oil and gas companies and trade associations routinely intervene to defend their interests. See, e.g., Mont. Envtl. Info. Ctr. v. BLM, 615 F. App'x 431 (9th Cir. 2015) (unpublished) (WEA and other trade associations intervened); N.M. ex rel. Richardson, 565 F.3d at 683 (trade association); Colo. Envtl. Coal. v. Salazar, 875 F. Supp. 2d 1233 (D. Colo. 2012) (companies); Mont. Wilderness Ass'n v. Fry, 310 F. Supp. 2d 1127 (D. Mont. 2004) (same). But under WEA's theory, its member companies would be required to rely on BLM to represent them in most cases where the agency is defending its leasing decision.

WEA cannot have it both ways — if the more restrictive Quiet Title Act standard applies to the Conservation Groups in this leasing challenge, it also applies to WEA and its members in other cases. Tenth Circuit law, however, is

clear: the "minimal burden" test for inadequate representation applies in cases like this one.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PERMISSIVE INTERVENTION.

In the alternative, the district court should have granted permissive intervention by the Conservation Groups. It denied permissive intervention on grounds that were arbitrary and capricious because they conflicted with the court's other holdings and were unsupported the record. As a result, the denial should be reversed as an abuse of discretion. Open. Br. at 44-48.

In response, WEA asserts that the Conservation Groups will delay proceedings in this case by "obfuscat[ing] the relevant issues" and thus "complicat[ing] the adjudication of this otherwise narrowly focused case." WEA Br. at 33. But as described elsewhere, the Conservation Groups have accurately characterized the issues in this case and are relying simply on WEA's own allegations. Open. Br. at 11-14, 44-46; supra pp. 4-15. This case has been delayed because of WEA's gamesmanship and mischaracterizations of its own claims — not by the Conservation Groups. Had WEA stipulated to intervention, briefing on the merits could be well underway.

WEA's assertion that the Conservation Groups have no interest in this case "different from any other member of the public" is plainly wrong. WEA Br. at 33-34. The district court held that the Conservation Groups have a legally-protectable

interest in this case, Appx 349, and WEA has not challenged that ruling in this Court.

If this Court does not allow the Conservation Groups to intervene as of right in this case, it should reverse the district court's denial of permissive intervention.

CONCLUSION

This Court should reverse the ruling denying intervention and direct the district court to grant the Conservation Groups' motion to intervene.

Respectfully submitted April 19, 2017,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

[X] this brief contains 6,495 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), or

[ ] this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point font size and Times New Roman, or

[ ] this brief has been prepared in a monospaced typeface using _____ with _____ characters per inch and ____.

Date: April 19, 2017

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Kaspersky Endpoint Security 10, Version 10.2.5.3201 (mr3), dated April 19, 2017, and according to the program are free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2017, I electronically filed the foregoing **REPLY BRIEF OF APPELLANTS-APPLICANTS FOR INTERVENTION** using the court's CM/ECF system which will send notification of such filing to the following:

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ADDENDUM

ADDENDUM INDEX

The White House

Office of the Press Secretary

For Immediate Release March 28, 2017

Presidential Executive Order on Promoting Energy Independence and Economic Growth

EXECUTIVE ORDER

- - - - - - -

PROMOTING ENERGY INDEPENDENCE AND ECONOMIC GROWTH

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. (a) It is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. Moreover, the prudent development of these natural resources is essential to ensuring the Nation's geopolitical security.

(b) It is further in the national interest to ensure that the Nation's electricity is affordable, reliable, safe, secure, and clean, and that it can be produced from coal, natural gas, nuclear material, flowing water, and other domestic sources, including renewable sources.

(c) Accordingly, it is the policy of the United States that executive departments and agencies (agencies) immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.

(d) It further is the policy of the United States that, to the extent permitted by law, all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic.

(e) It is also the policy of the United States that necessary and appropriate environmental regulations comply with the law, are of greater benefit than cost, when permissible, achieve environmental improvements for the American people, and are developed through transparent processes that employ the best available peer-reviewed science and economics.

Sec. 2. Immediate Review of All Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources. (a) The heads of agencies

shall review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. Such review shall not include agency actions that are mandated by law, necessary for the public interest, and consistent with the policy set forth in section 1 of this order.

(b) For purposes of this order, "burden" means to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.

(c) Within 45 days of the date of this order, the head of each agency with agency actions described in subsection (a) of this section shall develop and submit to the Director of the Office of Management and Budget (OMB Director) a plan to carry out the review required by subsection (a) of this section. The plans shall also be sent to the Vice President, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the Council on Environmental Quality. The head of any agency who determines that such agency does not have agency actions described in subsection (a) of this section shall submit to the OMB Director a written statement to that effect and, absent a determination by the OMB Director that such agency does have agency actions described in subsection (a) of this section, shall have no further responsibilities under this section.

(d) Within 120 days of the date of this order, the head of each agency shall submit a draft final report detailing the agency actions described in subsection (a) of this section to the Vice President, the OMB Director, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the Council on Environmental Quality. The report shall include specific recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency actions that burden domestic energy production.

(e) The report shall be finalized within 180 days of the date of this order, unless the OMB Director, in consultation with the other officials who receive the draft final reports, extends that deadline.

(f) The OMB Director, in consultation with the Assistant to the President for Economic Policy, shall be responsible for coordinating the recommended actions included in the agency final reports within the Executive Office of the President.

(g) With respect to any agency action for which specific recommendations are made in a final report pursuant to subsection (e) of this section, the head of the relevant agency shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, those actions, as appropriate and consistent with law. Agencies shall endeavor to coordinate such regulatory reforms with their activities undertaken in compliance with Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs).

Sec. 3. Rescission of Certain Energy and Climate-Related Presidential and Regulatory Actions. (a) The following Presidential actions are hereby revoked:

(i) Executive Order 13653 of November 1, 2013 (Preparing the United States for the Impacts of Climate Change);

(ii) The Presidential Memorandum of June 25, 2013 (Power Sector Carbon Pollution Standards);

(iii) The Presidential Memorandum of November 3, 2015 (Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment); and

(iv) The Presidential Memorandum of September 21, 2016 (Climate Change and National Security).

(b) The following reports shall be rescinded:

(i) The Report of the Executive Office of the President of June 2013 (The President's Climate Action Plan); and

(ii) The Report of the Executive Office of the President of March 2014 (Climate Action Plan Strategy to Reduce Methane Emissions).

(c) The Council on Environmental Quality shall rescind its final guidance entitled "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews," which is referred to in "Notice of Availability," 81 Fed. Reg. 51866 (August 5, 2016).

(d) The heads of all agencies shall identify existing agency actions related to or arising from the Presidential actions listed in subsection (a) of this section, the

reports listed in subsection (b) of this section, or the final guidance listed in subsection (c) of this section. Each agency shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding any such actions, as appropriate and consistent with law and with the policies set forth in section 1 of this order.

Sec. 4. Review of the Environmental Protection Agency's "Clean Power Plan" and Related Rules and Agency Actions. (a) The Administrator of the Environmental Protection Agency (Administrator) shall immediately take all steps necessary to review the final rules set forth in subsections (b)(i) and (b)(ii) of this section, and any rules and guidance issued pursuant to them, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules. In addition, the Administrator shall immediately take all steps necessary to review the proposed rule set forth in subsection (b)(iii) of this section, and, if appropriate, shall, as soon as practicable, determine whether to revise or withdraw the proposed rule.

(b) This section applies to the following final or proposed rules:

(i) The final rule entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64661 (October 23, 2015) (Clean Power Plan);

(ii) The final rule entitled "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64509 (October 23, 2015); and

(iii) The proposed rule entitled "Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; Proposed Rule," 80 Fed. Reg. 64966 (October 23, 2015).

(c) The Administrator shall review and, if appropriate, as soon as practicable, take lawful action to suspend, revise, or rescind, as appropriate and consistent with law, the "Legal Memorandum Accompanying Clean Power Plan for Certain Issues," which was published in conjunction with the Clean Power Plan.

(d) The Administrator shall promptly notify the Attorney General of any actions taken by the Administrator pursuant to this order related to the rules identified in

subsection (b) of this section so that the Attorney General may, as appropriate, provide notice of this order and any such action to any court with jurisdiction over pending litigation related to those rules, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, pending the completion of the administrative actions described in subsection (a) of this section.

Sec. 5. Review of Estimates of the Social Cost of Carbon, Nitrous Oxide, and Methane for Regulatory Impact Analysis. (a) In order to ensure sound regulatory decision making, it is essential that agencies use estimates of costs and benefits in their regulatory analyses that are based on the best available science and economics.

(b) The Interagency Working Group on Social Cost of Greenhouse Gases (IWG), which was convened by the Council of Economic Advisers and the OMB Director, shall be disbanded, and the following documents issued by the IWG shall be withdrawn as no longer representative of governmental policy:

(i) Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (February 2010);

(ii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (May 2013);

(iii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (November 2013);

(iv) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (July 2015);

(v) Addendum to the Technical Support Document for Social Cost of Carbon: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide (August 2016); and

(vi) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (August 2016).

(c) Effective immediately, when monetizing the value of changes in greenhouse gas emissions resulting from regulations, including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates, agencies shall ensure, to the extent permitted by law, that any such

estimates are consistent with the guidance contained in OMB Circular A-4 of September 17, 2003 (Regulatory Analysis), which was issued after peer review and public comment and has been widely accepted for more than a decade as embodying the best practices for conducting regulatory cost-benefit analysis.

Sec. 6. Federal Land Coal Leasing Moratorium. The Secretary of the Interior shall take all steps necessary and appropriate to amend or withdraw Secretary's Order 3338 dated January 15, 2016 (Discretionary Programmatic Environmental Impact Statement (PEIS) to Modernize the Federal Coal Program), and to lift any and all moratoria on Federal land coal leasing activities related to Order 3338. The Secretary shall commence Federal coal leasing activities consistent with all applicable laws and regulations.

Sec. 7. Review of Regulations Related to United States Oil and Gas Development.
(a) The Administrator shall review the final rule entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources," 81 Fed. Reg. 35824 (June 3, 2016), and any rules and guidance issued pursuant to it, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules.

(b) The Secretary of the Interior shall review the following final rules, and any rules and guidance issued pursuant to them, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules:

(i) The final rule entitled "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands," 80 Fed. Reg. 16128 (March 26, 2015);

(ii) The final rule entitled "General Provisions and Non-Federal Oil and Gas Rights," 81 Fed. Reg. 77972 (November 4, 2016);

(iii) The final rule entitled "Management of Non Federal Oil and Gas Rights," 81 Fed. Reg. 79948 (November 14, 2016); and

(iv) The final rule entitled "Waste Prevention, Production Subject to Royalties, and Resource Conservation," 81 Fed. Reg. 83008 (November 18, 2016).

(c) The Administrator or the Secretary of the Interior, as applicable, shall promptly notify the Attorney General of any actions taken by them related to the rules identified in subsections (a) and (b) of this section so that the Attorney General may, as appropriate, provide notice of this order and any such action to any court with jurisdiction over pending litigation related to those rules, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, until the completion of the administrative actions described in subsections (a) and (b) of this section.

Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,
March 28, 2017.

Nos. 16-8068, 16-8069

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING; STATE OF COLORADO; INDEPENDENT PETROLEUM ASSOCIATION; and WESTERN ENERGY ALLIANCE,

Petitioners-Appellees

and

STATE OF NORTH DAKOTA; STATE OF UTAH; and UTE INDIAN TRIBE,

Intervenors-Appellees

v.

RYAN ZINKE; KRISTIN BAIL; U.S. DEPARTMENT OF THE INTERIOR; and U.S. BUREAU OF LAND MANAGEMENT,

Respondents-Appellants

and

SIERRA CLUB; EARTH WORKS; WESTERN RESOURCE ADVOCATES; WILDERNESS SOCIETY; CONSERVATION COLORADO EDUCATION FUND; and SOUTHERN UTAH WILDERNESS ALLIANCE,

Intervenors-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, NOS. 15-CV-41/43 (HON. SCOTT W. SKAVDAHL)

FEDERAL APPELLANTS' MOTION TO CONTINUE ARGUMENT AND HOLD CASE IN ABEYANCE PENDING ADMINISTRATIVE ACTION

On March 9, 2017, this Court ordered BLM to confirm whether its position in these appeals has changed due to the recent change of Administration. For the reasons stated below, BLM respectfully requests this Court to continue the oral argument and hold these appeals in abeyance pending a new rulemaking by BLM. *See*

Fed. R. App. P. 2, 27. Petitioners-Appellees do not oppose this motion. The Citizen Group Intervenors-Appellants oppose this motion. For the following reasons, good cause exists to grant the motion:

1. On March 26, 2015, BLM published a rule governing hydraulic fracturing on federal and Indian lands. "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands," 80 Fed. Reg. 16,128 (Mar. 26, 2015) ("2015 Final Rule"). Petitioners challenged the 2015 Final Rule in the district court, and the district court set the rule aside. As a result, the 2015 Final Rule is not currently in effect. BLM and the Citizen Group Intervenors appealed to this Court, which ordered briefing and scheduled oral argument for March 22, 2017.

2. As the Court is aware, a new Administration took office on January 20, 2017, and a new Secretary of the Interior was sworn in on March 1, 2017.

3. Consistent with the President's January 30, 2017, Executive Order on *Reducing Regulation and Controlling Regulatory Costs,* the Department of the Interior has been reviewing existing regulations to determine whether revisions or rescissions are appropriate to streamline the regulatory process and eliminate duplicative regulations. As part of this process, the Department has begun reviewing the 2015 Final Rule (and all guidance issued pursuant thereto) for consistency with the policies and priorities of the new Administration. This initial review has revealed that the 2015 Final Rule does not reflect those policies and priorities. Accordingly, the Department through the BLM has begun the process to prepare a notice of proposed rulemaking for

publication in the Federal Register to rescind the 2015 Rule. The Department intends to publish that notice as soon as it and any necessary supporting documents are completed, and to conduct the rulemaking expeditiously and in compliance with applicable law. The BLM expects to issue the notice within 90 days of the date of filing of this motion. *See* Declar. of Richard Cardinale (attached).

4. To conserve the Court's and the parties' resources, and in light of the proposed rulemaking process outlined above, BLM respectfully requests that the Court continue the oral argument and hold these appeals in abeyance pending the outcome of the proposed rulemaking process. *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 389 (D.C. Cir. 2012) (explaining that the Court may "hold the case in abeyance pending resolution of [a] proposed rulemaking, subject to regular reports from [the agency] on its status").

5. BLM proposes to file a status report 90 days from the date of the Court's order abating these appeals.

Respectfully submitted,

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Acting Assistant Attorney General

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MARCH 15, 2017
90-5-1-4-20425

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this motion complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 475 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

s/ *Nicholas A. DiMascio*
NICHOLAS A. DIMASCIO

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, et al.,	)	
	)	
Petitioners-Appellees	)	
	)	
v.	)	Nos. 16-8068, 16-8069
	)	
RYAN ZINKE, Secretary of the Interior, et al.,	)	
	)	
Respondents-Appellants.	)	

DECLARATION OF RICHARD CARDINALE

1. My name is Richard T. Cardinale. I am over 21 years of age and am fully competent and duly authorized to make this declaration. The facts contained in this declaration are based on my personal knowledge, and are true and correct.

2. I have been employed by the U.S. Department of Interior (Department) for over 19 years, the last 10.5 years as chief of staff to the Assistant Secretary for Land and Minerals Management. I am presently Acting Assistant Secretary for Land and Minerals Management at Departmental headquarters (Udall Building) located at 1849 C St, N.W., Washington, DC 20240. As Acting Assistant Secretary, I oversee the policies and activities of the Bureau of Land Management and three other bureaus within the Department.

3. I am familiar with BLM's statutory authorities, its oil and gas operating regulations, and its processes and procedures. I am familiar with the final hydraulic fracturing rule, which was signed by the Assistant Secretary for Land and Minerals Management, and published on March 26, 2015. 80 Fed. Reg. 16128 (2015) [2015 Rule]. I am also familiar with the substantive issues

raised in the litigation concerning the 2015 Rule in the United States District Court for the District of Wyoming, and in this Court.

4. I also understand the current Administration's policies and priorities concerning the regulation of hydraulic fracturing on Federal and Indian lands. Pursuant to the President's January 30, 2017, Executive Order on *Reducing Regulation and Controlling Regulatory Costs*, the Department has been reviewing existing regulations to determine whether changes are appropriate to streamline the regulatory process and eliminate duplicative regulations. As part of that process, the Department is reviewing the 2015 Rule (and all guidance issued to implement that rule) for consistency with the policies and priorities of the new Administration. The initial review has revealed that the 2015 Rule does not reflect those policies and priorities.

5. Accordingly, the Department, through the BLM, is preparing a notice of proposed rulemaking for publication in the Federal Register to rescind the 2015 Rule. The Department intends to publish that notice as soon as it and any necessary supporting documents are completed, and to conduct the rulemaking expeditiously and in compliance with applicable law. The BLM expects to issue the notice within 90 days.

I submit this Declaration under penalty of perjury.

Richard T. Cardinale

Date: March 15, 2017

Nos. 16-8068, 16-8069

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, *et al.*,
Petitioner-Appellees,

v.

RYAN ZINKE, Secretary, United States Department of the Interior, *et al.*,
Respondent-Appellants,

SIERRA CLUB, *et al.*,
Intervenor-Respondent-Appellants.

On Appeal from the United States District Court for the District of Wyoming
Civil Action No. 2:15-CV-00043-SWS
The Honorable Scott W. Skavdahl

INTERVENOR-RESPONDENT-APPELLANTS' PRELIMINARY RESPONSE IN OPPOSITION TO FEDERAL APPELLANTS' MOTION TO CONTINUE ARGUMENT AND HOLD CASE IN ABEYANCE

After seven years of rulemaking and litigation, Respondents-Appellants Ryan Zinke et al. (collectively, BLM) have now moved to continue the March 22 oral argument, and to hold this appeal in abeyance indefinitely while the agency begins the process of rescinding its hydraulic fracturing rule, 80 Fed. Reg. 16,128 (Mar. 26, 2015) (the Rule). The Court should deny BLM's request because the issue in this appeal – whether BLM lacks legal authority to regulate hydraulic fracturing on public lands – will be just as central to BLM's new process as it is to evaluating the 2015 Rule. Any decision by BLM to rescind the Rule will

necessarily be informed by whether it has legal authority to manage oil and gas development on public lands. The agency's reversal of position does not eliminate the need for appellate review here.

Moreover, the abeyance requested by BLM would unfairly prejudice Intervenor-Respondent-Appellants the Sierra Club, et al. (collectively, the Citizen Groups), by indefinitely shielding from appellate review the district court's far-reaching ruling stripping the agency of its well-established authority. An indefinite abeyance also would allow BLM to effectively rescind the Rule without the notice-and-comment rulemaking and reasoned decision-making required under the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq.

In addition, the requested abeyance will harm the public interest by allowing thousands of new oil and gas wells to be drilled indefinitely under outdated 30-year-old standards that fail to adequately protect public health and the environment.

Alternatively, if the Court does vacate the March 22 oral argument, any postponement in this appeal should be strictly limited to minimize the prejudice to the Citizen Groups and public interest. Oral argument should be continued only until the May 2017 calendar, and the parties directed in the meantime to submit supplemental memoranda fully addressing the issues presented by BLM's motion. These include not only: (a) whether this appeal should be held in abeyance, but

also, (b) if this appeal is stayed, what the status of the Rule should be during BLM's new rulemaking effort, and (c) what the status of the district court's order should be during that process.

BACKGROUND

Every year, thousands of oil and gas wells are drilled and completed on federal and Indian lands. 80 Fed. Reg. at 16,130. Today, approximately 90% of those wells are hydraulically fractured. Id. at 16,131. BLM, however, manages oil and gas production under regulations that were last updated more than thirty years ago. Id. The agency's current regulations were issued in the early 1980s, "long before the latest hydraulic fracturing technologies were developed or became widely used." Id.

BLM recognized that updated regulations and "additional regulatory effort and oversight" were needed to address these technological developments, prevent groundwater contamination from faulty well construction, and protect the public. See id. at 16,128, 16,131. The agency undertook an extensive, nearly five-year-long rulemaking effort in which it heard from industry, states, tribes, experts, other federal agencies and more than one million public commenters. Citizen Groups' Op. Br. 5 (Aug. 12, 2016). This input extensively documented the need for updated well construction standards, better waste management requirements, and improved BLM oversight. Id. at 5–9.

On March 26, 2015, BLM published the Rule. It was immediately challenged by the Petitioner-Appellees, who moved for a preliminary injunction preventing it from taking effect. Appellants' App. 30–32. On June 24, 2015, the district court issued an order "postponing" the effective date of the Rule, which it later followed on September 30, 2015 with a nationwide preliminary injunction. Appellees' App. 3217–18, 3350–51. This injunction made the unprecedented legal ruling that BLM lacks the legal authority to regulate hydraulic fracturing on public lands. Id. at 3214–17. The injunction effectively denied BLM the tools it determined were necessary to adequately manage the 90% of oil and gas wells on public lands that are hydraulically fractured.

Even prior to BLM's motion today, the industry trade associations and states challenging the Rule (collectively, Petitioner-Appellees) had gone to great lengths to delay appellate review of the district court's ruling. BLM and the Citizen Groups appealed the 2015 preliminary injunction order, see Citizen Groups' Op. Br. 10 (Aug. 12, 2016), but Petitioner-Appellees slowed those appellate proceedings by filing a meritless motion to dismiss the preliminary injunction

appeal, and by opposing a request to expedite the appeal.[1] These efforts prevented the injunction appeal from being heard during this Court's May 2016 calendar.[2]

At the same time, Petitioner-Appellees successfully opposed the Citizen Groups' request to stay district court proceedings pending the injunction appeal, and similar requests by BLM to expedite appellate review of the central issues in the case. Ex. B at 12–13. Remarkably, Petitioner-Appellees even opposed a request for the district court to enter judgment in Petitioner-Appellees' favor, which would have quickly moved the entire case to this court. Ex. A at 3; Ex. B at 11–13. As a result, merits briefing proceeded simultaneously in the district court and in the preliminary injunction appeal.

Briefing in the injunction appeal was completed on June 20, 2016.[3] On the very next day, June 21, 2016, the district court entered a final merits decision setting aside the Rule on the ground that it was outside of BLM's legal authority.

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[1] See Intervenor-Resp't-Appellants' Reply in Supp. of Appellants' Joint Mot. to Expedite Argument at 1–4, Wyoming v. Sierra Club, Nos. 15-8126 & 15-8134 (10th Cir. Feb. 24, 2016) (Attached as Exhibit A); Intervenor-Resp't-Appellants' Resp. in Opp'n to Mot. to Dismiss at 2–3, Wyoming v. Sierra Club, Nos. 15-8126 & 15-8134 (10th Cir. Feb. 19, 2016) (Attached as Exhibit B).

[2] See Order at 2, Wyoming v. Sierra Club, Nos. 15-8126 & 15-8134 (10th Cir. Feb. 24, 2016) (denying Appellants' motion to expedite appeal, and Petitioner-Appellees' motion to dismiss); Order at 1–2, Wyoming v. Sierra Club, Nos. 15-8126 & 15-8134 (10th Cir. Mar. 10, 2016) (resetting opening brief deadline from February 16, 2016 to March 21, 2016).

[3] See Intervenor-Resp't-Appellants' Reply Br., Wyoming v. Sierra Club, Nos. 15-8126 & 15-8134 (10th Cir. June 20, 2016).

Appellants' App. 320–21. This Court subsequently dismissed the preliminary injunction appeals as moot and ordered the district court to vacate the preliminary injunction.[4]

Within a week after it was issued, both BLM and the Citizen Groups appealed the district court's final order on June 24, and June 27, 2016, respectively. Appellants' App. 324–27. Briefing in this appeal was completed in October 2016, and oral argument scheduled on the January 2017 calendar. However, this Court sua sponte vacated the January argument and rescheduled it for the March 2017 calendar. That postponement gave the new presidential administration two months after taking office to evaluate its position in this appeal.

Prior to the March 9 direction from this Court, BLM gave absolutely no indication that it was unprepared to defend its Rule at the March 22 argument. But now, after defending the Rule for two years in the district and appeals courts, BLM has informed the Court that it plans to rescind the Rule. The agency, however, offers no date for when that rescission might be completed.

ARGUMENT

This Court's rules strongly disfavor postponing oral argument. "Only in extraordinary circumstances will an argument be postponed." 10th Cir. R.

[4] Order at 3–4, Wyoming v. Sierra Club, Nos. 15-8126 & 15-8134 (10th Cir. July 13, 2016), 2016 WL 3853806, at *1.

34.1(A)(3). "Where a movant seeks relief that would delay court proceedings by other litigants he must make a strong showing of necessity." Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc., 713 F.2d 1477, 1484 (10th Cir. 1983) (Chilcott).

Moreover, when a party seeks an order staying a proceeding the Court should consider whether the stay "will substantially injure the other parties interested in the proceeding; and . . . where the public interest lies." Nken v. Holder, 556 U.S. 418, 428, 434 (2009) (quotation omitted); see also Am. Petroleum Inst. v. Envtl. Prot. Agency, 683 F.3d 382, 387 (D.C. Cir. 2012) (considering "hardship to the parties" in deciding whether to hold case in abeyance). The party seeking a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." Chilcott, 713 F.2d at 1484 (quotation omitted).

BLM's request falls well short of meeting the heavy burden for delaying oral argument and holding this appeal in abeyance.

I. BLM Has Not Met The Requirements For Postponing Oral Argument.

BLM does not even suggest that a postponement of the March 22 argument is necessary. To the contrary, the agency apparently was prepared to go ahead

with the argument as scheduled: BLM only filed its motion after the Court asked for confirmation of the agency's position in this appeal.[5]

Moreover, proceeding with oral argument and resolution of this appeal is important even in light of BLM's decision to launch a process to repeal the Rule. The issue before the Court—BLM's authority to regulate oil and gas development on public lands—is just as relevant for that new effort as it is in defending the Rule. Whether BLM has this authority is a purely legal question that will inevitably affect whatever new decision the agency makes. The Court should proceed with oral argument and this appeal in order to resolve the uncertainty created by the district court's unprecedented decision.

II. The Requested Abeyance Will Prejudice The Citizens Groups And Is Contrary To The Public Interest.

BLM's request for abeyance will prejudice the Citizen Groups and harm the public interest. It will shield from appellate review the district court's far-reaching ruling that BLM lacks legal authority to regulate well construction, waste management, and other activities on 90% of the oil and gas wells drilled on public lands—a decision that has impacts reaching well beyond the Rule itself. At the

[5] Moreover, BLM's request is untimely under this Court's rules. "Except in an emergency, a motion to postpone must be made more than 20 days before the scheduled argument date." 10th Cir. R. 34.1(A)(3); accord Fed. R. App. P. 34(b) ("A motion to postpone the argument . . . must be filed reasonably in advance of the hearing date."). BLM seeks postponement only seven days before the scheduled argument—without claiming that any emergency exists.

same time, an abeyance would allow BLM to achieve what the APA prohibits: an indefinite stay of the Rule without notice-and-comment rulemaking or a reasoned explanation.

First, the abeyance will unfairly prejudice the Citizen Groups by preventing them from pursuing their appeal of the district court's ruling. Independent of BLM, the Citizen Groups filed their own appeal in June 2016. While that appeal has been consolidated with the federal government's appeal, the Citizen Groups' right to proceed should not be held captive to BLM's new position. "An intervenor, whether by right or by permission, normally has the right to appeal an adverse final judgment by a trial court." Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 375–76 (1987); see also Barnes v. Harris, 783 F.3d 1185, 1191 (10th Cir. 2015) ("[W]hen a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party." (quoting Alvarado v. J.C. Penney Co., 997 F.2d 803, 805 (10th Cir. 1993)); Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. Dep't of Interior, 100 F.3d 837, 844 (10th Cir. 1996) (an "intervenor becomes no less a party than others").

BLM apparently proposes to leave the district court's decision setting aside the Rule in effect while the agency undertakes a new rulemaking effort. But it is hardly unprecedented for an intervenor to continue defending a law on appeal even when a federal agency no longer chooses to do so. See, e.g., United States v.

Windsor, 133 S. Ct. 2675, 2689 (2013) (Defense of Marriage Act); Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207, 1211 (10th Cir. 2005) (Forest Service Roadless Rule); Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1107 (9th Cir. 2002) (same), abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011).

Moreover, shielding the district court's ruling from appellate review could have far-reaching impacts to the Citizen Groups and public interest that extend well beyond just this Rule. For example, much of the court's reasoning—such as its view that BLM lacks authority under the Mineral Leasing Act to issue rules protecting groundwater on public lands—would invalidate BLM's existing regulations. Citizen Groups' Op. Br. 23, 28 (Aug. 12, 2016). Similarly, the district court's view that the Federal Land Policy and Management Act, 43 U.S.C. § 1701 et seq., is just a "planning statute" that does not allow the agency to adopt comprehensive rules and regulations, may have far-reaching impacts that extend to numerous other activities on public lands such as grazing, wildlife management and surface water protections. Citizen Groups' Op. Br. 43–45 (Aug. 12, 2016).

Second, BLM cannot make the Rule disappear merely by deciding that it wants to rescind it. Notice-and-comment rulemaking will be required before rescinding the regulation, a point the agency acknowledges. Mexichem Specialty Resins, Inc. v. Envtl. Prot. Agency, 787 F.3d 544, 557 (D.C. Cir. 2015); Nat'l

Parks Conservation Ass'n v. Salazar, 660 F. Supp. 2d 3, 5 (D.D.C. 2009). That process takes time. Nearly five years elapsed between November 2010, when BLM began work on the Rule and March 2015, when the Rule was finalized. 80 Fed. Reg. at 16,128.

Because it shields the district court's ruling from appellate review and potential reversal, BLM's requested abeyance would effect an indefinite stay of the Rule despite the fact that no notice-and-comment rulemaking process has been completed to rescind it. Notably, BLM offers no date by which it expects to finalize a decision rescinding the Rule, and its notice-and-comment process is likely to take multiple years. BLM's motion asks for three months just to publish a notice of the proposed rulemaking. This is not a case where the agency has been at work on a new rule for years at the time oral argument is scheduled. See Wyoming, 414 F.3d at 1211 (appeal mooted when Forest Service finalized new rule four years after new administration took office).

Third, the requested abeyance will harm the public interest by allowing numerous oil and gas wells to be drilled under outdated and inadequate standards while BLM reconsiders its new Rule. If the notice-and-comment process takes two more years, BLM's own estimate indicates that 5,600–7,600 new wells will be completed during that time. See 80 Fed. Reg. at 16,130 (2,800–3,800 wells hydraulically fractured per year). And if BLM rescinds the Rule without replacing

it with new standards, see Cardinale Decl. ¶ 5 (Mar. 15, 2017) (BLM preparing notice of proposed rulemaking "to rescind the 2015 Rule" with no mention of replacement), many thousands of additional wells would continue to be drilled based on the same inadequate 1980s regulations.

Those thousands of wells will pose an unnecessary risk to federal lands and to members of the public who live, work, or recreate nearby. And when they do cause groundwater contamination or other accidents, those wells will result in substantial unnecessary costs to remediate—if they can be cleaned up at all. BLM must undertake a reasoned process, and allow notice-and-comment, before abandoning its updated standards.

The prejudice to Citizen Groups and the public interest would be especially inequitable given the lengthy delays that have already occurred in this case. It has now been nearly two years since the district court blocked the Rule from taking effect. During that time, the parties have fully briefed two separate appeals seeking review of the district court's holding that BLM lacks legal authority to promulgate the Rule. And thousands of wells have been drilled and completed under outdated standards. The Court should not postpone appellate review yet again. See Chilcott, 713 F.2d at 1484 ("The right to proceed in court should not be denied except under the most extreme circumstances" (quotation omitted)).

III. Any Delay In This Appeal Should Be Limited And For The Purposes Of Fully Briefing BLM's Abeyance Motion.

Alternatively, if the Court does vacate the March 22 oral argument, any postponement in this appeal should be strictly limited to minimize the prejudice to the Citizen Groups and public interest. Oral argument should be continued only until the May 2017 calendar, and the parties directed in the meantime to submit supplemental memoranda fully addressing the issues presented by BLM's motion. These include not only: (a) whether this appeal should be held in abeyance, but also, (b) if this appeal is stayed, what the status of the Rule should be during BLM's new rulemaking effort, and (c) what the status of the district court's order should be during that process.

CONCLUSION

The Citizen Groups respectfully request that the Court deny BLM's motion to continue oral argument and hold this appeal in abeyance. The appeal should be argued on March 22 as scheduled.

Alternatively, if the Court does vacate the March 22 oral argument, any postponement in this appeal should be strictly limited to minimize the prejudice to the Citizen Groups and public interest. Oral argument should be continued only until the May 2017 calendar, and the parties directed in the meantime to submit supplemental memoranda fully addressing the issues presented by BLM's motion.

Dated: March 15, 2017

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