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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, et al., Plaintiffs, v. U.S. BUREAU OF LAND MANAGEMENT, et al. Defendants. SIERRA CLUB, et al. Plaintiffs, v. RYAN ZINKE, in his official capacity as Secretary of the Interior, et al. Defendants.	Case No. 3:17-cv-07186-WHO Consolidated with 3:17-cv-07187-WHO **PROPOSED-INTERVENORS NORTH DAKOTA AND TEXAS'S NOTICE OF UNOPPOSED MOTION TO INTERVENE; MEMORANDUM IN SUPPORT OF NORTH DAKOTA AND TEXAS'S MOTION TO INTERVENE AS DEFENDANTS** [Filed concurrently with Proposed Order; Declaration of Lynn Helms in Support; Declaration of Paul M. Seby in Support] REQUESTED Hearing Date: February 7, 2018 REQUESTED Hearing Time: 2:00 p.m. Courtroom: 4, 17th Floor [The Hon. Judge William H. Orrick] Trial Date: None Set

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NOTICE OF MOTION AND MOTION TO INTERVENE

TO THE COURT, AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on February 7, 2018 at 2:00 p.m. in Courtroom 4, 17th Floor, 450 Golden Gate Avenue, San Francisco, California 94102, of the above-titled Court, the States of North Dakota ("North Dakota") and Texas ("Texas"), will, and hereby do, move this Court for an Order granting North Dakota and Texas's Motion to Intervene in the above-titled action.

This Motion to Intervene meets the requirements of Fed. R. Civ. P. 24: (1) the intervention application is timely and will not cause any delays; (2) North Dakota and Texas have significant protectable interests relating to the regulatory matters that are the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede North Dakota and Texas's ability to protect their interests; and (4) the existing parties may not adequately represent North Dakota and Texas's interests. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). This Court granted North Dakota's motion to intervene in another recent case that, like this case, involves the Department of the Interior (DOI), Bureau of Land Management's (BLM) regulation of air emissions from oil and gas operations, and North Dakota and Texas believe that this motion to intervene should be granted as well.

The States of North Dakota and Texas respectfully submit the following Memorandum in Support of their Motion to Intervene as Defendants pursuant to Fed. R. Civ. P. 24.

INTRODUCTION

North Dakota and Texas are intervenor-petitioners in related litigation in the U.S. District Court for the District of Wyoming challenging the BLM Rule entitled "Waste Prevention, Production Subject to Royalties, and Resource Conservation: Final Rule," 81 Fed. Reg. 83,008 (Nov. 18, 2016) ("Venting and Flaring Rule"), the implementation of which is directly at issue in these consolidated cases. *See Wyoming v. Dep't of Interior*, No. 16-cv-00285-SWS (D. Wyo.). BLM recently promulgated a separate Rule in which BLM elected to temporarily delay the implementation of certain provisions of the Venting and Flaring Rule that would have taken effect in January 2018, in light of the pending litigation in Wyoming and BLM's own decision to reconsider and potentially revise or rescind the Venting and Flaring Rule in accordance with the Presidential Executive Order 13783 on Promoting Energy Independence and

Economic Growth, dated March 28, 2017. *See* Final Rule; Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Compliance Dates, 82 Fed. Reg. 58,050 (Dec. 8, 2017) ("Delay Rule").

Relying on BLM's Delay Rule and BLM's representations that it plans to propose and promulgate another rule significantly modifying or rescinding the Venting and Flaring Rule within the next twelve months, the District Court in Wyoming stayed the challenge to the Venting and Flaring Rule on December 29, 2017, noting that the parties could move to lift that stay in the event this litigation overturned the Delay Rule, and the deferred compliance dates in the Venting and Flaring Rule went back into effect. The preliminary injunction papers filed by Plaintiffs in this case indicate that they seek not only to reinstate the original compliance dates, but also argue that BLM has no discretion but to implement the Venting and Flaring Rule as originally promulgated, essentially seeking a decision on the underlying merits of the Venting and Flaring Rule itself. *See* ECF No. 1 ¶¶ 5, 49, 58, 68; *see also* ECF No. 3 at 9, 17–18. North Dakota and Texas have sovereign interests in ensuring that the compliance deadlines deferred by the Delay Rule do not come into effect before the BLM can fully reconsider the Venting and Flaring Rule; they thus oppose the preliminary injunction Plaintiffs in this case seek to prevent implementation of the Delay Rule. North Dakota and Texas also have sovereign interests that are at issue in any litigation or judicial decision regarding the legal status of the Venting and Flaring Rule itself, which North Dakota and Texas assert is unlawful, arbitrary and capricious, violates their sovereign interests, and impedes their authority to regulate oil and gas production and air quality.

I. Background

A. Procedural Background.

On November 18, 2016, BLM published the Venting and Flaring Rule in the Federal Register. The States of Wyoming and Montana promptly petitioned for judicial review in the District of Wyoming, and North Dakota and Texas separately intervened as petitioners, along with several other groups. *See Wyoming v. Dep't of Interior*, No. 16-cv-00285-SWS (D. Wyo.). North Dakota and Texas argue that the Venting and Flaring Rule exceeds BLM's statutory authority and unlawfully intrudes on state sovereignty by asserting complete regulatory authority over oil and gas operations on non-public lands and minerals,

and is an unlawful attempt to establish a comprehensive air emissions regulatory regime in contravention of the federal Clean Air Act (CAA).

In June 2017, BLM issued an administrative order extending the compliance dates for the Venting and Flaring Rule to give it time to (1) extend those compliance dates through notice and comment rulemaking; and (2) give BLM time to reconsider, modify, and possibly rescind the Venting and Flaring Rule in light of Executive Order 13783, 82 Fed. Reg. 16,093 (Mar. 28, 2017). Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430 (June 15, 2017) ("Administrative Delay Order"). That Order was challenged in this Court by many of the same Plaintiffs who brought the instant action. *See California v. Bureau of Land Mgmt.*, 3:17-cv-03885-EDL (N.D. Cal.). North Dakota successfully moved to intervene in that litigation. *See* Order Granting North Dakota's Motion to Intervene, *California v. Bureau of Land Mgmt.*, 3:17-cv-03885-EDL, Dkt. 53 (N.D. Cal., Aug. 28, 2017). On October 4, 2017, Magistrate Judge Elizabeth D. Laporte ruled that BLM's Administrative Delay Order was unlawful, a decision that BLM appealed. *See* Judgment, *California v. Bureau of Land Mgmt.*, 3:17-cv-03885-EDL, Dkt. 66 (N.D. Cal., Oct. 4, 2017); *see also* Notice of Appeal, *California v. Bureau of Land Mgmt.*, 3:17-cv-03885-EDL, Dkt. 68 (N.D. Cal., Dec. 4, 2017).

On December 8, 2017, BLM promulgated the Delay Rule, delaying by one year certain compliance deadlines, but otherwise leaving the Venting and Flaring Rule in effect and unchanged. On December 19, 2017, Plaintiffs filed this action, challenging the validity of the Delay Rule and demanding that the original compliance dates be reinstated and the Venting and Flaring Rule be implemented and enforced in its entirety. Plaintiffs filed motions for preliminary injunction on the same day, December 19, 2017, arguing that the Delay Rule was unlawful and the BLM has no discretion to prevent "waste" from oil and gas operations except in the manner set forth in the Venting and Flaring Rule. *See* ECF No. 1 ¶¶ 5, 49, 58, 68; *see also* ECF No. 3 at 9, 17–18.

On December 26, 2017, BLM moved to stay the Wyoming litigation, on the grounds that it was reconsidering the Venting and Flaring Rule during the one-year delay of the effective dates of that Rule engendered by the Delay Rule. North Dakota and Texas opposed the motion for stay, given that, apart from delaying certain effective dates by one year, the Venting and Flaring Rule remained unchanged and

in effect, and that the Plaintiffs in this action are raising substantive issues directly related to the legal status of the Venting and Flaring Rule. On December 29, 2017, the District of Wyoming stayed the proceedings in its court because it believed that proceeding further would be a waste of resources in light of the Delay Rule, the BLM's proposal to reconsider and revise the Venting and Flaring Rule, and because this litigation in this Court "raise[s] substantive challenges to the Suspension Rule and seek[s] to reinstate the Waste Prevention Rule in its entirety." Order Granting Joint Motion to Stay, *Wyoming v. Dep't of Interior*, No. 16-cv-00285-SWS., Dkt. 189 at 4 (D. Wyo. Dec. 29, 2017).

North Dakota and Texas now promptly seek to intervene here for the same reasons that they intervened in the underlying case in Wyoming and in the Administrative Delay Order case in this Court—because they support the Delay Rule as an interim measure while BLM more fully reconsiders the Venting and Flaring Rule, and because that Rule, if it fully goes into effect, will continue to ride roughshod over North Dakota and Texas's sovereign interests in administering their distinct and sovereign laws and regulations governing oil and gas production and air quality within their borders, and the Rule exceeds BLM's statutory authority to regulate "waste" from oil and gas operations on public lands.

As petitioners in the action challenging the Venting and Flaring Rule, which could be seriously affected by the outcome in this case, and as the two largest oil and gas producing states in the United States, North Dakota and Texas clearly meet the standard both for intervention as a matter of right and permissive intervention.

B. North Dakota and Texas's Interest in the Venting and Flaring Rule.

North Dakota and Texas challenged the Venting and Flaring Rule in the District of Wyoming because the Rule frustrates and impedes their several sovereign interests in administering and enforcing the States' Constitutions, laws, and regulations governing their distinct oil and gas programs, their air quality protection programs, and the orderly development of their natural resources. The Venting and Flaring Rule irreparably harms North Dakota and Texas's interests through BLM's unlawful seizure of full regulatory authority and enforcement powers. In North Dakota, this federal power-grab seizes regulatory authority over almost half of the non-public oil and gas operating units in the state from the North Dakota Industrial Commission ("NDIC"). Even where North Dakota is allowed to continue

enforcing its own laws, those laws must give way to the Venting and Flaring Rule when they conflict, and the BLM reserves the right to bring its own enforcement actions, 81 Fed. Reg. at 83,035, preventing North Dakota from effectively working with operators to resolve violations, as it has no authority to bind the BLM to a settlement. As part of its laws and regulations governing oil and gas production, Texas implements its own stringent venting and flaring restrictions on oil and gas production. *See* 16 Tex. Admin. Code § 3.32 (requiring venting and flaring under the authority of the Texas Railroad Commission ("RRC")). Because the Venting and Flaring Rule applies to, *inter alia*, "State or private tracts in a federally approved unit or communitization agreement," 81 Fed. Reg. at 83,079, and because of Texas's distinctive split-estate situation, the Final Rule directly preempts Texas's authority over a significant number of oil and gas units within her borders.

The Venting and Flaring Rule is the BLM's first foray into the business of promulgating and enforcing air quality regulations, in direct competition with the carefully designed federal-state framework established by the federal CAA, whereby air emissions are regulated jointly by state programs and those of the U.S. Environmental Protection Agency ("EPA"). *See* 42 U.S.C. § 7401 et seq. Although their substance closely resembles, and in places duplicates, regulations issued under the CAA, the regulations under the Venting and Flaring Rule completely ignore the procedural and substantive structure of the CAA, which was carefully designed by Congress to preserve the primary role of states and Indian tribes in developing and enforcing air quality regulations. *See generally* 42 U.S.C. § 7410. As the Supreme Court held, the CAA makes the states and *EPA* "partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). The Venting and Flaring Rule, by contrast, centralizes the authority for making and enforcing emissions standards for both new and existing sources (subject to different regulatory schemes under the CAA) squarely with the BLM.

Communitization refers to units that are created out of different ownership interests within the same geographic formation or reservoir to more efficiently (both economically and environmentally) develop reservoirs in accordance with geological structure, rather than follow arbitrary property boundaries. North Dakota and Texas have distinct land compositions that typically result in the combination of federal, state, and private mineral ownership within the same oil and gas spacing unit in the state. For example, numerous federal mineral interests in North Dakota were originally associated

with small farms scattered across the state that went into foreclosure during the Great Depression. Exhibit 2, Declaration of Lynn D. Helms, Director, NDIC ¶ 12 ("Helms Declaration"). The federal government retained the mineral rights to these tiny tracts when it resold the surface to private owners, and those small federal mineral estates have now been communitized with the surrounding state and private land, where the mineral interests are not owned by the federal government. *Id*. Even the handful of large tracks of federal mineral ownership or trust responsibility, the Dakota Prairie Grasslands and the Fort Berthold Indian Reservation, are interspersed with a checkerboard of private and state ownership.[1] *Id*. ¶ 16. Similarly, in Texas, federal land ownership is few and far between, as Texas did not relinquish control of its public lands when it joined the United States.[2] All federal lands in Texas were acquired either by purchase (*e.g.*, military bases) or donation (*e.g.*, national parks), and the State may still maintain ownership or control over the mineral estate underneath.

The BLM, in an unlawful exertion of it jurisdictional authority, applies the Venting and Flaring Rule in full to all operators—public and private—on any "communitized" unit that includes even a small percentage of federal minerals, without regard to the volume of federal minerals involved. 81 Fed. Reg. at 83,039. In North Dakota, the Venting and Flaring Rule will operate on more than 30% of private and state lands, pulled into BLM's ambit by their proximity to the most miniscule of federal mineral interests. Helms Decl. ¶¶ 12–14.

During the review and revision process for the Venting and Flaring Rule, North Dakota and Texas will continue to urge BLM to consider options that would protect BLM's interest in preventing the "waste" of federal oil and gas, without also extending detailed federal regulatory control over state and private mineral interests that are already being regulated by comprehensive and successful state programs. Temporarily delaying the January 2018 compliance deadlines, as the Delay Rule does, gives BLM time to consider options that might achieve that result before important state requirements are superseded by unnecessary, and hopefully short-lived, federal interference under the Venting and Flaring Rule.

[1] North Dakota oil and gas regulation also applies on the Fort Berthold Indian Reservation pursuant to a 2008 agreement with the Tribe, and is jointly administered by the State, Tribe, and federal government. Helms Decl. ¶ 17.

[2] Joint Resolution for annexing Texas to the United States, J. Res. 8, enacted March 1, 1845, 5 Stat. 797. Joint Resolution for the admission of the State of Texas into the Union, J. Res. 1, enacted December 29, 1845, 9 Stat. 108.

ARGUMENT

I. North Dakota and Texas Are Entitled to Intervene As a Matter of Right.

North Dakota and Texas satisfy all of the requirements for intervention as of right under Fed. R. Civ. P. 24(a)(2). The Ninth Circuit has described these requirements as follows: "(1) the intervention application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest." *Citizens for Balanced Use*, 647 F.3d at 897. These requirements are "broadly interpreted in favor of intervention," and the Court's review is "guided primarily by practical considerations, not technical distinctions." *Id.*; *see also Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (the Ninth Circuit construes intervention requirements broadly to support its "liberal policy in favor . . . [of] both efficient resolution of issues and broadened access to the courts.") (internal quotation marks omitted).

The "central purpose" of Fed. R. Civ. P. 24 is to allow intervention by those who might be "practically disadvantaged" by a case's disposition. *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 970 (3d Cir. 1998). Rule 24(a)(2) traditionally receives "liberal construction in favor of applicants for intervention." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003); *see Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). The Ninth Circuit has instructed that intervention should be granted so long as the moving papers state the legal and factual grounds for intervention. *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992).

North Dakota and Texas satisfy the requirements of Rule 24(a), and are therefore entitled to intervene in this action as of right—just as this Court allowed them to intervene in the litigation challenging the Administrative delay Order. *See California v. Bureau of Land Mgmt.*, 3:17-cv-03885-EDL (N.D. Cal.).

A. North Dakota and Texas's Application for Intervention Is Timely.

A motion to intervene must be timely filed. Fed. R. Civ. P. 24(a). The Ninth Circuit considers three criteria in assessing timeliness: "(1) the stage of the proceedings; (2) whether the parties would be

prejudiced; and (3) the reason for any delay in moving to intervene." *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836–37 (9th Cir. 1996).

This case is still in its very early stages. No answer has been filed, and a recently filed motion for preliminary injunction is still pending. *See* ECF No. 3. North Dakota and Texas will adhere to the briefing schedule set by the Court, to ensure that there will be no prejudice to the other parties or delay to the matter and will file an opposition to the motion for preliminary injunction on January 16, 2018, pursuant to the briefing schedule set forth by the Court. *See* ECF No. 23. The motion to intervene is timely. *See Citizens for Balanced Use,* 647 F.3d at 897 (motion to intervene filed less than three months after the complaint and after defendants filed answer was timely).

B. North Dakota and Texas Have Significant Legally-Cognizable Interests That Are Directly Affected by This Litigation.

A proposed intervenor has a "significant protectable interest" justifying intervention as of right if (1) the interest is "protectable under some law" and (2) "there is a relationship between the legally protected interest and the claims at issue." *Citizens for Balanced Use*, 647 F.3d at 897. "The 'interest' test is not a clear-cut or bright-line rule, because '[n]o specific legal or equitable interest need be established.'" *United States v. City of L.A.*, 288 F.3d 391, 398 (9th Cir. 2002) (quoting *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993)). The relationship requirement is met if the resolution of the plaintiff's claims actually will affect the intervenor. *Id*. "The requisite interest need not be direct as long as it may be impaired by the outcome of the litigation." *Cal. Dump Truck Owners Ass'n v. Nichols*, 275 F.R.D. 303, 306 (E.D. Cal. 2011) (citing *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135–36 (1967)).

Courts are required to make a "practical, threshold inquiry" to discern whether allowing intervention would be "compatible with efficiency and due process." *City of L.A.*, 288 F.3d at 398. "By allowing parties with a practical interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court." *Id*. (internal quotation marks omitted).

North Dakota and Texas have strong and legally-cognizable interests in ensuring that the deferred compliance deadlines of the Venting and Flaring Rule are not reinstated, as Plaintiffs seek in their motion

for preliminary injunction, s*ee* ECF No. 3, and in any decision this Court may render on the legal status and viability of the Venting and Flaring Rule—or BLM's legal authority related thereto. This interest flows from North Dakota and Texas's interests in the lands, natural resources, and air quality within their borders, as well as their regulatory programs involving the same or similar subject matter as the Venting and Flaring Rule, all of which are adversely impacted by the Venting and Flaring Rule. Further, the outcome of this litigation in California could have a direct effect on the litigation in Wyoming, litigation to which North Dakota and Texas are already parties. If the Court decides to grant Plaintiffs' Motion for Preliminary Injunction, it would fully reinstate the Venting and Flaring Rule—the Rule North Dakota and Texas seek to invalidate in Wyoming.

As the U.S. District Court for the District of Wyoming previously determined, North Dakota and Texas have sufficient interest in the application of the Venting and Flaring Rule to meet the standard for intervention in the Wyoming Litigation challenging the Venting and Flaring Rule. *See* Minute Order Granting North Dakota's Motion to Intervene, *Wyoming v. Dep't of Interior*, No. 16-cv-00285-SWS, Dkt. 23 (D. Wyo., Nov. 30, 2016); Order Granting Texas's Motion to Intervene, *Wyoming v. Dep't of Interior*, No. 16-cv-00285-SWS, Dkt. 107 (D. Wyo., Mar. 22, 2017). This Court similarly recognized North Dakota's legitimate interests in the Venting and Flaring Rule by granting North Dakota's motion to intervene in the litigation regarding BLM's Administrative Delay Order. *See* Order Granting North Dakota's Petition to Intervene, *California v. Bureau of Land Mgmt.*, 3:17-cv-03885-EDL, Dkt. 53 (N.D. Cal., Aug. 28, 2017).

i. North Dakota's Sovereign Oil and Gas Regulatory Interests.

North Dakota is the second largest oil producing state in the country, with an annual production of approximately 350 million barrels of oil. Helms Decl. ¶ 8. The North Dakota Legislature declared it to be in the citizens of North Dakota's interest

> [T]o foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state *in such a manner as will prevent waste*; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas be had and that the correlative rights of all owners be fully protected; and to encourage and to authorize cycling, recycling, pressure maintenance, and secondary recovery operations in order that the greatest possible economic recovery of oil and gas be obtained within the state to the

> end that the landowners, the royalty owners, the producers, and the general public realize and enjoy the greatest possible good from these vital natural resources."

N.D. Cent. Code § 38-08-01 (emphasis added).

Only five percent of the oil production within North Dakota is from federal lands, with an additional one-sixth of oil production coming from Indian lands, but the Venting and Flaring Rule will nonetheless regulate a much larger percentage of the oil and gas production in the state, due to a provision of the Rule that illegally extends BLM's jurisdiction to any "spacing unit" that contains any federal minerals. Helms Decl. ¶ 9. In North Dakota, spacing units are typically comprised of a mix of federal, state, and private mineral interests. Under the Venting and Flaring Rule, at least 2,832 of the spacing units within North Dakota are now subject to the Venting and Flaring Rule because they have well bores that contain *some* federal minerals, regardless of how small the federal interest. *Id*. ¶ 10. Based on this unique land configuration, North Dakota has significant, legally-cognizable, and protectable interests in enforcing its laws and regulations over oil and gas facilities within its sovereign state boundaries.

The NDIC has jurisdiction to administer North Dakota's comprehensive oil and gas regulations, found at North Dakota Administrative Code Chapter 43-02-03. These regulations include regulation of drilling, producing, and plugging of wells; the restoration of drilling and production sites; the perforating and chemical treatment of wells, including hydraulic fracturing; the spacing of wells; operations to increase ultimate recovery, such as cycling of gas; the maintenance of pressure and the introduction of gas, water, and/or other substances into producing formations; the disposal of saltwater and oil field wastes through the North Dakota Underground Injection Control Program; and all other operations for the production of oil and gas. *See* N. D. Admin Code § 42-02-03.

As part of its sovereign laws and regulations governing oil and gas production in the state, North Dakota implements its own stringent venting and flaring restrictions on oil and gas production operators. Helms Decl. ¶ 19; *see* N.D. Cent. Code § 38-08-06.4; *see also Vogel v. Marathon Oil Co.*, 2016 ND 104 (N.D. May 16, 2016) (describing North Dakota's "comprehensive regulatory scheme" for venting and flaring under the authority of the NDIC). Because the Venting and Flaring Rule applies to, *inter alia*, "State or private tracts in a federally approved unit or communitization agreement," 81 Fed. Reg. at 83,079, and because of North Dakota's distinctive split-estate situation, the Venting and Flaring Rule

directly preempts state authority over a significant number of oil and gas units in the state, along with the state and private tracts located therein. Helms Decl. ¶ 20.

The provisions of the Venting and Flaring Rule that would go into effect if this Court grants Plaintiffs' Motion for Preliminary Injunction and invalidates the Delay Rule implicate North Dakota's several underlying legal concerns with the Venting and Flaring Rule. The BLM's Delay Rule delays several Venting and Flaring Rule requirements, all of which overlap and conflict with North Dakota's Constitution, state law, and regulations. For example, while the Venting and Flaring Rule allows venting in certain specified circumstances, North Dakota regulations do not, except when authorized by the NDIC upon application, and after notice and comment. *See* N.D. Cent. Code § 38-08-06.4(6); *see also* N.D. Admin. Code § 43-02-03-60.2. This interference with the regulatory programs North Dakota has worked hard to establish and operate creates "a practical interest in the outcome of [this] particular case." *City of Los Angeles*, 288 F.3d at 398.

North Dakota also has distinct and significant economic interests that are adversely impacted by the Venting and Flaring Rule. North Dakota collected $6,048,792,082 in oil and gas taxes in the years 2013–2015, and $4,068,542,204 in the years 2011–2013. *52nd Biennial Report for the Biennial Period of July 1, 2013 through June 30, 2015*, North Dakota Department of Revenue at 16.[3] The additional regulatory requirements imposed by the Venting and Flaring Rule threaten to reduce oil and gas extraction and thereby substantially reduce the extent and amount of royalties to be paid to mineral owners and resulting taxes to be paid to the State of North Dakota. Helms Decl. ¶ 25.

ii. North Dakota's Sovereign Air Quality Regulatory Interests.

In addition to interfering with North Dakota's regulation of oil and gas development, a critical industry in the state and an important state interest, the Venting and Flaring Rule also interferes with its sovereign authority to enact and administer its own air quality regulations—a power that was carefully preserved by Congress in the CAA. *See, e.g.,* 42 U.S.C. § 7401.

[3] Available at https://www.nd.gov/tax/data/upfiles/media/52nd%20Biennial%20Report_with%20Bookmarks.pdf?20160602161614.

The North Dakota Department of Health ("NDDH") has jurisdiction to administer North Dakota's comprehensive and robust air-quality programs, which include N.D. Admin. Code § 23-25-01 *et seq.*, and federal CAA programs to implement the New Source Performance Standards, s*ee e.g.*, N.D. Cent. Code § 23-25-03; state permitting programs for stationary sources under Titles I and V of the CAA, s*ee id.* § 23-25-04.1; state implementation plans ("SIPs") for National Ambient Air Quality Standards ("NAAQS"), *see id.* § 23-25-03.6; and best available control technology determinations under the CAA's New Source Review provisions, *see id.* § 23-25-01.1; *see also, United States v. Minnkota Power Coop., Inc.*, 831 F. Supp. 2d 1109, 1127 (D. N.D. 2011).

The CAA made the states and *EPA* "partners in the struggle against air pollution." *Gen. Motors Corp.*, 496 U.S. at 532. As to stationary sources of emissions, the CAA contains several programs under which EPA sets standards, such as for the concentration of certain pollutants in ambient air, which are then implemented and administered by each state through the SIP that state prepared. *See generally* 42 U.S.C. § 7410. In this "experiment in cooperative federalism," *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001), the CAA establishes that improvement of the nation's air quality will be pursued "through state and federal regulation," *BCCA Appeal Group v. EPA*, 355 F.3d 817, 821–22 (5th Cir. 2003); *see also* 42 U.S.C. § 7401(a)(3) ("air pollution prevention . . . and air pollution control at its source *is the primary responsibility of States and local governments*" (emphasis added); and 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . ."). BLM's Venting and Flaring Rule impedes this partnership and rides roughshod over the authority Congress granted to the states and EPA by creating overlapping air quality regulations.

iii. Texas's Sovereign Oil and Gas Regulatory Interests.

Ownership of minerals in Texas initially resides with the owner of the surface land. If the government owns the land, the government may also own the minerals. If the land is privately owned, the minerals may also be privately owned. Over time, ownership is frequently separated through sales, with the land having one owner, the mineral rights other owners. Owners of the minerals may then lease out to a "lease operator," the right to produce the minerals, retaining a royalty interest.

The surface and mineral estates in Texas are split, like many sovereigns (*e.g.*, Pennsylvania,

Colorado, and Oklahoma). Texas recognizes separate ownership of the surface and mineral estates, and the distinct private property rights that are associated with each. Owners may stipulate severance of the surface from the subsurface rights, leading to a "split estate" system.

The common law rule of split estates is that the mineral estate is "dominant." Such dominance is subject to common law, statutory, or regulatory limitations.[4] The Supreme Court established rules for split estates. *See Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488 (1928). The rules are a template for split estate ownership involving the federal government. Where the mineral estate, or part of it, is owned by the federal government, but the surface is owned by another, the leasing process is managed by BLM. Otherwise, BLM is *not* in full control.

The Texas Railroad Commission ("RRC") regulates the exploration, production, and transportation of oil and gas in Texas, something it has done since 1919.[5] The RRC's primary responsibility is to conserve natural resources, prevent waste, protect the correlative rights of different interest owners, protect the environment, and ensure the safety in areas such as flaring and venting of natural gas.

The RRC oversees all oil and gas wells in Texas, as well as those who own wells or engage in drilling. Tex. Nat. Res. Code § 81.051. The RRC (1) prevents the waste of natural resources, (2) protects the rights of different interest owners, (3) prevents pollution, and (4) provides safety. It accomplishes

[4] Kendor P. Jones, John F. (Jeff) Welborn, Chelsey J. Russell "Split Estates and Surface Access Issues," *Landman's Legal Handbook*, ch. 9, p. 183, § 9.03, Rocky Mt. Min. L. Fdn., 5th ed. (2013)).

[5] The Texas Railroad Commission (RCC) had its origin in the demands of the shipping public in the late 1880s that insisted that railroads be subject to regulation based on public interest. The RCC was the first regulatory agency created in the State of Texas and originally had jurisdiction over the rates and operations of railroads, terminals, wharves and express companies. The legal focus was on intrastate passenger and freight activities. The RRC's authority was broadened beginning in 1917 with the passage of the Pipeline Petroleum Law (Senate Bill 68, 35th Legislature, Regular Session) that declared pipelines to be common carriers like railroads and placed them under the RCC's jurisdiction. This was the first act to designate the RCC as the agency to administer conservation laws relating to oil and gas. The RCC's regulatory and enforcement powers in oil and gas were increased by the Oil and Gas Conservation Law (Senate Bill 350 of the 36th Legislature, Regular Session), effective June 18, 1919. This act gave the RCC jurisdiction to regulate the production of oil and gas. Acting upon this legislation, the RCC adopted the first statewide rules regulating the oil and gas industry to promote conservation and safety in 1919. (Sources: *Guide to Texas State Agencies*, various editions; general laws and statutes; the Railroad Commission website (http://www.rrc.state.tx.us/about/index.php), accessed on February 9, 2009; and the records themselves.)

these goals through permitting and reporting requirements; field inspections, testing programs and monitoring activities; and through remedial programs regarding abandoned wells and sites.

The RRC also administers Texas's oil and gas regulations. 16 Tex. Admin. Code §§ 3.1–3.107. These regulations cover the drilling, producing, and plugging of wells; surface equipment removal; inactive wells; directional drilling; hydraulic fracturing; well spacing; operations to increase ultimate recovery; maintenance of pressure and the introduction of gas, water, and/or other substances into producing formations; disposal of saltwater and oil field wastes; and other operations. Texas has its own venting and flaring rules for oil and gas production. 16 Tex. Admin. Code § 3.32. Because the Venting and Flaring Rule applies to, *inter alia*, "State or private tracts in a federally approved unit or communitization agreement," 81 Fed. Reg. at 83,079, the Rule directly preempts Texas's authority over its distinctive split-estate situation and a significant number of oil and gas units within its borders.

To carry out its responsibilities, the RRC grants permits based on spacing and density rules. In addition, each month (1) the RRC assigns production allowables, (2) receives production reports, and (3) audits the oil disposition path. Allowables are assigned according to well capability, reservoir mechanics, market demand, and past production. The RRC also regulates injection and disposal wells. The RRC also conducts waste management through pits and landfarming, discharges, waste haulers, waste minimization, and hazardous waste management.

When Texas joined the Union in 1845, it did not relinquish control of its public lands.[6] Thus, Texas is the only U.S. sovereign to control its own public lands. All federal lands in Texas were acquired by purchase (*e.g.*, military bases) or donation (*e.g.*, national parks).[7] And because Texas's territorial waters originated as an independent republic, Texas owns territory far beyond its coastline—significantly more than other coastal states. *United States v. Texas et al.*, 363 U.S. 1, 50 (1960), *supplemented sub nom.*, *United States v. Louisiana*, 382 U.S. 288 (1965). All of these lands (and the oil and gas deposits beneath them) are managed by Texas.

[6] Joint Resolution for annexing Texas to the United States, J. Res. 8, enacted March 1, 1845, 5 Stat. 797. Joint Resolution for the admission of the State of Texas into the Union, J. Res. 1, enacted December 29, 1845, 9 Stat. 108.

[7] Texas's public lands were significantly enlarged by the U.S. Submerged Lands Act of 1953 and the resolution of the ensuing Tidelands Controversy.

Texas consists of split-estate lands adversely affected by the Venting and Flaring Rule. Nearly 3 million acres of federal land are located in Texas. These lands overlay oil and gas formations—mineral interests held by Texas and private citizens. These interests, and oil and gas produced therefrom, are subject to RRC regulation.

Across Texas, 429,232 acres of federal land were leased for oil and gas development in fiscal year 2014, producing 273,000 barrels of oil and 38,250 million cubic feet of natural gas. Texas produces thirty-five percent of U.S. crude oil—more than any other state.[8] Texas has over 190,000 oil wells and over 100,000 gas wells. They support two million jobs and a quarter of Texas's economy.[9] Because Texas's oil and gas industry is the largest in the nation, Texas is disproportionately impacted by the Venting and Flaring Rule.[10]

iv. Texas's Sovereign Air Quality Regulatory Interests.

The Texas Commission on Environmental Quality ("TCEQ") administers Texas's comprehensive and robust air-quality programs, including the Texas Clean Air Act (Tex. Health & Safety Code § 382.055, 30 Tex. Admin. Code 101.1 *et seq.*) and CAA programs.[11] The CAA made Texas and EPA "partners." *Gen. Motors Corp.*, 496 U.S. at 532. The CAA contains several programs where EPA sets standards implemented and administered by Texas. *See generally* 42 U.S.C. § 7410. In this "experiment in cooperative federalism," *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001), air quality is improved "through state and federal regulation," *BCCA Appeal Group v. EPA*, 355 F.3d 817, 821–22 (5th Cir. 2003). *See also* 42 U.S.C. § 7401(a)(3); 42 U.S.C. § 7407(a). BLM lacks the authority to regulate air

[8] *See* http://www.rrc.state.tx.us/oil-gas/research-and-statistics/production-data/texas-monthly-oil-gas-production/.

[9] The Texas oil and gas industry paid $13.8 billion in taxes and royalties in fiscal year 2015. The oil and gas industry contributes more than a half billion dollars annually to Texas's Permanent School Fund, which supports Texas's K-12 public schools. Texas school districts received $1.9 billion in oil and gas mineral property tax revenue in FY 2015. Counties received $632 million in oil and gas mineral property tax revenue. Texas's Rainy Day Fund is funded almost exclusively by oil and gas severance taxes. *See* https://www.txoga.org/texas-oil-and-natural-gas-industry-paid-13-8-billion-in-taxes-and-royalties-in-2015-second-most-in-texas-history/.

[10] *See* Texas RRC letter to Janet McCabe, EPA, December 3, 2015.

[11] *See*, *e.g.*, TCEQ Air Pollution Control Reference Guide (http://www.tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/airpoll_guidance.pdf).

quality. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (an agency's power is limited to the authority delegated by Congress).

C. Disposition of this Action May Impair or Impede North Dakota and Texas's Ability to Protect Their Sovereign Interests.

Disposing of this litigation in Plaintiffs' favor "may as a practical matter impair or impede [North Dakota and Texas's] ability to protect [their] interests." Fed. R. Civ. P. 24(a)(2). Intervention is appropriate where disposition of the case "may as a practical matter impair or impede" the ability of the intervenor to protect its interests. *See Donnelly*, 159 F.3d at 409. In considering whether an applicant's interests may be impaired by an action, the Ninth Circuit follows the guidance of the Rule 24 Advisory Committee notes, which states: "'[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.'" *Sw. Center for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (citation omitted). Thus, both legal harms and practical impediments should be considered.

This case presents large and adverse practical consequences for North Dakota and Texas. The Venting and Flaring Rule requirements would have become applicable in January 2018, but for the Delay Rule. The Venting and Flaring Rule impairs North Dakota and Texas's sovereign interests. First, it impedes or replaces North Dakota and Texas's right to primacy of administration and enforcement of its oil and gas and air quality programs, an effect that will be greatly magnified if Plaintiffs are successful here and the Court enjoins the Delay Rule and thereby reinstates the Venting and Flaring Rule in its entirety. Second, the Venting and Flaring Rule impedes or replaces North Dakota and Texas's air quality programs and new and existing source permitting authority, authority that was expressly preserved or delegated to the states in the CAA. Third, the Rule will diminish North Dakota and Texas's revenues from oil and gas activities in the state, an important source of state funds. For example, under the Venting and Flaring Rule, operators in North Dakota and Texas must now obtain permits not only from the NDIC or RRC, respectively, but also from BLM. It takes up to eighteen months to receive permits from BLM. Thus, operators must postpone activity even though they possess a state permit. These delays frustrate and interfere with North Dakota and Texas's authority, and hurt their economy. Though the Venting and Flaring Rule allows for variances, 43 C.F.R. §§ 3179.401; 3179.8, this displaces North Dakota and

Texas's expertise regarding their own oil and gas resources, and is unduly burdensome. This is an immediate injury, especially given that there is no assurance that variances will be granted, or on what terms. Therefore, failure to prevent all three of the above negative impacts will impair North Dakota and Texas's legally protected interests.

Further, the Plaintiffs are seeking not merely reinstatement of the delayed compliance deadlines, but a determination by this Court that BLM has little or no discretion in how it controls "waste" from federal oil and gas interests other than to implement the Venting and Flaring Rule as it was originally promulgated. Plaintiffs state several times throughout both their Complaint and Motion for Preliminary Injunction that BLM has disregarded its duty to prevent waste by promulgating the Delay Rule, suggesting BLM is entitled to absolutely no deference in reconsidering how it goes about fulfilling that duty. *See* ECF No. 1 ¶¶ 5, 49, 58, 68; *see also* ECF No. 3 at 9, 17–18. Agencies must be allowed to reconsider previous rulemaking without accusations of "blatantly disregard[ing] their duties." ECF No. 3 at 25. In fact, such reconsideration, when needed, is itself an indispensable duty (and legal authority) of federal agencies. Even though Plaintiffs insist that this litigation and the Delay Rule are completely unrelated to the Wyoming Litigation and the Venting and Flaring Rule, *See* ECF No. 52 at note 1, this argument makes their motives clear: they are attempting to use this litigation to obtain an advisory opinion aimed at circumventing the previously filed litigation in the District Court of Wyoming while limiting BLM's options, and their legal authority, as it reconsiders the Venting and Flaring Rule.

An applicant for intervention is impaired "if the resolution of the plaintiff's claims actually will affect the applicant." *Arakaki*, 324 F.3d at 1084. Because the relief requested by Plaintiffs impairs North Dakota and Texas's interests, they are entitled to intervene.

D. North Dakota and Texas's Sovereign Interests Are Not Adequately Represented by Existing Parties.

An applicant's burden to prove inadequate representation by existing parties is minimal. It is sufficient to show that representation *may be* inadequate. *Arakaki,* 324 F.3d at 1086. Indeed, the United States Supreme Court similarly held this "requirement of the rule is satisfied if the applicants show the representation of its interest 'may be' inadequate." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 (1972). Courts consider three factors: (1) whether the existing parties will "undoubtedly" make all the

intervenor's proposed arguments; (2) whether the parties are capable and willing to make such arguments; and (3) whether the intervenor would offer any necessary elements to the proceeding that other parties would neglect. *Arakaki*, 324 F.3d at 1086.

Here, North Dakota and Texas's interests cannot be adequately represented by the United States, because the United States is primarily focused on the integrity of its regulatory processes, minimizing litigation uncertainty, and avoiding the need to implement programs that will ultimately be revised or rescinded, not on how those activities will affect North Dakota and Texas and their regulatory programs. Further, North Dakota and Texas continue to be adverse to BLM in the Wyoming litigation regarding substantive issues as to BLM's statutory authority and exercise of its lawful jurisdiction, and expect that the parties will not be aligned on these issues in this action. At this early stage of litigation, before the Agencies have filed a responsive pleading or Plaintiffs have filed any additional pleadings besides their Motion for Preliminary Injunction, filed the same day as their Complaint, it is impossible to predict either the Plaintiffs' or the Agencies' ultimate position on the issues in this case. But, "it is not Applicants' burden . . . to anticipate specific differences in trial strategy. It is sufficient for Applicants to show that, because of the difference in interests, it is likely that Defendants will not advance the same arguments as Applicants." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 824. North Dakota and Texas's different interests, as detailed above, naturally support a different approach to this matter, and it is therefore likely that they will advance different arguments than the Federal Defendants.[12]

[12] Movants are not required to show that proposed Industry Intervenors, Western Energy Alliance and Independent Petroleum Association of America, or proposed Intervenor American Petroleum Institute, would not adequately represent their interests to satisfy the requirements of Fed. R. Civ. P. 24 because they are not, as yet, parties to this case. Nonetheless, the pleadings of the District of Wyoming litigation clearly demonstrate that proposed Industry Intervenors will not adequately represent North Dakota or Texas. In the District of Wyoming, North Dakota and Texas strongly opposed BLM's Joint Motion to Stay, and filed an opposition to the same stating that the Venting and Flaring Rule would continue to harm North Dakota and Texas if the court granted the motion. *See* Opposition to Joint Motion to Stay, *Wyoming v. Dep't of Interior*, 2:16-cv-00285-SWS, Dkt. 187 (D. Wyo. Dec. 27, 2017). Proposed Industry Intervenors, on the other hand, joined BLM in their motion to stay. *See* Joint Motion to Stay, *Wyoming v. Dep't of Interior*, 2:16-cv-00285-SWS, Dkt. 186 (D. Wyo. Dec. 26, 2017). These differing reactions to BLM's motion alone provide evidence enough that North Dakota and Texas's interests will not be adequately represented by proposed Industry Intervenors in this case. While the American Petroleum Institute did not join BLM's Joint Motion to Stay in the Wyoming Litigation, it will naturally have different interests than North Dakota and Texas as it is a regulated industry group, and not a regulating sovereign state.

The Ninth Circuit has emphasized that there is "no presumption that one governmental entity represents another." *U.S. v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002) (per curiam). "The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties." *Arakaki*, 324 F.3d at 1086. Two parties may seek the same relief, but provide the Court with very different reasoning. In fact, courts have recognized that an intervenor's interest in the terms of an action's resolution may differ substantially from that of the party the intervenor seeks to support. *See Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 132–33 (2d Cir. 2001) (party may have interest in ending litigation through settlement that is against the interest of potential intervenors); *NRDC v. Costle*, 561 F.2d 904, 906–08, 912–13 (D.C. Cir. 1977) (interest in implementation of settlement sufficient grounds for intervention as of right).

II. In the Alternative, the Court Should Grant North Dakota and Texas Permissive Intervention Pursuant to Federal Rule of Civil Procedure 24(b).

Alternatively, this Court should allow North Dakota and Texas to intervene permissively in this action under Fed. R. Civ. P. 24(b), which provides in relevant part:

> Upon timely application, anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common.

Fed. R. Civ. P. 24(b)(1)(B). North Dakota and Texas satisfy these requirements for permissive intervention.

North Dakota and Texas's motion is timely and shares common questions of law and fact because North Dakota and Texas have a clear interest is in the validity of the Delay and Venting and Flaring Rules, both of which will be considered by the Court in this litigation, and because it is filed before Plaintiffs' Motion for Preliminary Injunction has been fully briefed and considered. The States will present factual and legal arguments related specifically to the Venting and Flaring Rule's adverse impacts on North Dakota and Texas and the beneficial effects of its delay and suspension, which will contribute to the full development of the issues presented. The direct and threatened harm to North Dakota and Texas's interests provides a further basis to meet the minimal requirements of Rule 24(b). North Dakota and Texas therefore satisfies the requirements under Rule 24(b) and requests that this Court grant them permissive intervention in this matter.

CONCLUSION

The Court should grant North Dakota and Texas's Motion to Intervene as a matter of right as a defendant pursuant to Fed. R. Civ. P. 24(a)(2). In the alternative, the States should be granted permissive intervention pursuant to Fed. R. Civ. P. 24(b).

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Respectfully submitted this 9th day of January, 2018.

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