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Attorneys for Putative Intervenor-Petitioner, TEXAS

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

WYOMING;)
MONTANA,)
)
Petitioners,)
)
NORTH DAKOTA,)
)
Intervenor-Petitioner,)
)
TEXAS)
)
Putative Intervenor-Petitioner,)
)
WESTERN ENERGY ALLIANCE;)
INDEPENDENT PETROLEUM)
ASSOCIATION OF AMERICA,)
)
Consolidated-Petitioners,)
)
v.)
)
UNITED STATES DEPARTMENT OF)
THE INTERIOR; RYAN ZINKE, in his)
official capacity as Secretary of the)
Interior; UNITED STATES BUREAU)
OF LAND MANAGEMENT; and)
MICHAEL NEDD, in his official)
capacity as Acting Director of the)
Bureau of Land Management,)
)
Respondents,)
)

Case No. 2:16-cv-00285-SWS
consolidated with
2:16-cv-00280-SWS

WYOMING OUTDOOR COUNCIL;)
 CENTER FOR BIOLOGICAL)
 DIVERSITY; CITIZENS FOR A)
 HEALTHY COMMUNITY; DINÉ)
 CITIZENS AGAINST RUINING OUR)
 ENVIRONMENT; ENVIRONMENTAL)
 DEFENSE FUND; ENVIRONMENTAL)
 LAW AND POLICY CENTER;)
 MONTANA ENVIRONMENTAL)
 INFORMATION CENTER; NATIONAL)
 WILDLIFE FEDERATION; NATURAL)
 RESOURCES DEFENSE COUNCIL;)
 SAN JUAN CITIZENS ALLIANCE;)
 SIERRA CLUB; WILDERNESS)
 SOCIETY; WESTERN)
 ORGANIZATION OF RESOURCE)
 COUNCILS; WILDERNESS)
 WORKSHOP; AND WILDEARTH)
 GUARDIANS,)
)
 Intervenor-Respondents,)
)
 EARTHWORKS,)
)
 Intervenor-Respondent,)
)
 CALIFORNIA;)
 NEW MEXICO,)
)
 Intervenor-Respondents.)

TEXAS’S UNOPPOSED MOTION TO INTERVENE AS PETITIONER FOR REVIEW OF FINAL AGENCY ACTION

Pursuant to Federal Rule of Civil Procedure 24(a)(2) and U.S.D.C.L.R. 83.6(e), Texas moves for leave to intervene in this matter as of right or, in the alternative, permissively. In support of this motion, Texas has filed a memorandum of law and a proposed petition for review. Counsel for Texas has conferred with counsel for the parties to this matter, and they do not oppose Texas’s intervention, as reflected in the Certificate of Conference. (Texas agrees to the condition of Intervenor-Respondents regarding intervention.) In light of the significant interests Texas has at stake in this matter, Texas urges the Court to grant its motion to intervene.

Respectfully submitted on this the 21st day of March, 2017,

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*ATTORNEYS FOR PUTATIVE
INTERVENOR-PETITIONER, TEXAS*

* Application for Admission *Pro Hac Vice*
filed and pending approval

CERTIFICATE OF CONFERENCE

Counsel for Putative Intervenor-Petitioner, Texas, sought conference via e-mail with counsel in the above styled and numbered cause. Responses were as follows:

1. Petitioners do not oppose Texas's intervention.
2. Intervenor-Petitioner does not oppose Texas's intervention.
3. Consolidated-Petitioners do not oppose Texas's intervention.
4. Respondents take no position on Texas's intervention.
5. Intervenor-Respondents take no position on Texas's intervention on the condition that Texas join the briefing of one of the existing Petitioners/Intervenor-Petitioner and otherwise do not affect the briefing schedule already set forth by the Court.

/s/ Austin R. Nimocks
Austin R. Nimocks

CERTIFICATE OF SERVICE

I, Austin R. Nimocks, hereby certify that on this the 21st day of March, 2017, a true and correct copy of the foregoing document was transmitted via using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Daniel B. Frank
Daniel B. Frank

**UNITED STATES DISTRICT COURT
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 TEXAS,)
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GUARDIANS,)
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CALIFORNIA;)
NEW MEXICO,)
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Intervenor-Respondents.)

ORDER GRANTING TEXAS’S MOTION TO INTERVENE

Before the Court is Texas’s Unopposed Motion to Intervene as Petitioner for Review of Final Agency Action. The motion is meritorious and should be GRANTED.

It is, therefore, ORDERED that Texas’s motion is GRANTED.

It is, further, ORDERED that Intervenor-Petitioner, Texas, is granted leave to intervene under Federal Rule of Civil Procedure 24.

It is, further, ORDERED that Texas’s Petition for Review of Final Agency Action, attached to its motion to intervene, is hereby deemed filed, and the Clerk is ordered to separately docket the same as filed on the date of this order.

SO ORDERED this the ____ day of _____, 2017.

KELLY H. RANKIN
UNITED STATES MAGISTRATE JUDGE

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*Attorneys for Petitioner-
Intervenor, TEXAS*

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TEXAS’S PETITION FOR REVIEW OF FINAL AGENCY ACTION

Petitioner-Intervenor, Texas, respectfully petitions for review of final agency action under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706, and U.S.D.C.L.R. 83.6.

On November 18, 2016, the Department of the Interior (“DOI”), Bureau of Land Management (“BLM”) published in the Federal Register its final rule regulating the venting and flaring of natural gas from oil and natural gas production facilities on federal and Indian lands. *See* “Waste Prevention, Production Subject to Royalties, and Resources Conservation: Final Rule,” 81 Fed. Reg. 83,008 (Nov. 18, 2016) (“Final Rule”).

1. The BLM’s issuance of the Final Rule constitutes a final agency action subject to review by this Court. 5 U.S.C. §§ 551(13), 704.

2. The APA requires courts to hold unlawful and set aside any final agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). Additionally, the APA requires courts to hold unlawful and set aside any final agency action that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C).

3. The Final Rule exceeds the statutory authority granted to the BLM under the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–84, and the Mineral Leasing Act, 30 U.S.C. §§ 181–287.

4. The Final Rule regulates air quality, which is solely within the purview of the U.S. Environmental Protection Agency (“EPA”) and EPA-authorized state and Tribal programs under the authority granted by Congress in the Clean Air Act (“CAA”), 42 U.S.C. §§ 7401 *et seq.* The CAA made the States and EPA “partners in the struggle against air pollution,” *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990), wherein the nation’s air quality will be protected “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 cannot regulate air quality because it lacks the Congressionally-delegated authority to do so. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (holding that an administrative agency’s power to promulgate regulations is limited to the authority delegated to it by Congress).

5. The Final Rule unlawfully seizes State regulatory authority over non-federal minerals when State and federal tracts are combined through communitization agreements. 43 C.F.R. § 3217.11. 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 RCC). Because the Final 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 unique split-estate situation, the Final Rule directly preempts Texas’s authority over a significant number of oil and gas units within her borders.

6. The Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1331 (federal question) and 5 U.S.C. §§ 701–706 (APA).

7. Venue is proper pursuant to 28 U.S.C. § 1391(e) because DOI and BLM are departments of the United States government; Ryan Zinke and Michael Nedd Bail are now named in place of Sally Jewell and Neil Kornze, formerly named in this suit as officers of the United States; and the actions complained of relate to public lands located in the District of Wyoming and elsewhere.

Respectfully submitted this 21st day of March, 2017.

/s/ Daniel B. Frank

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