Wayne Stenehjem
Attorney General of North Dakota
500 N. 9th Street
Bismarck, ND 58501
Phone: (701) 328-2925
ndag@nd.gov

Paul M. Seby (*Pro Hac Vice*)
Special Assistant Attorney General
Greenberg Traurig, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Phone: (303) 572-6584
sebyp@gtlaw.com

Howard Holderness
Greenberg Traurig, LLP
4 Embarcadero Ctr, Ste. 3000
San Francisco, CA 94111-5983
Phone: (415) 655-1308
holdernessh@gtlaw.com

Attorneys for Proposed Defendant-Intervenor State of North Dakota

KEN PAXTON
Attorney General of Texas
JEFFREY C. MATEER
First Assistant Attorney General
BRANTLEY D. STARR
Deputy First Assistant Attorney General
JAMES E. DAVIS
Deputy Attorney General for Civil Litigation
DAVID J. HACKER
Special Counsel for Civil Litigation
AUSTIN R. NIMOCKS (*PRO HAC VICE*)
Special Counsel for Civil Litigation

ATTORNEY GENERAL OF TEXAS
P.O. Box 12548, Mail Code 001
Austin, Texas 78711-2548
(512) 936-1414
austin.nimocks@oag.texas.gov

Attorneys for Proposed Defendant-Intervenor Texas

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 RESPONSE TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

Hearing Date: February 7, 2018
Hearing Time: 2:00 p.m.
Courtroom: 4, 17th Floor

[The Hon. Judge William H. Orrick]

Trial Date: None Set

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I. INTRODUCTION

The Department of Interior's Bureau of Land Management (BLM or the "Agency") 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"), rides roughshod over North Dakota and Texas's sovereign interests in administering their own distinct regulatory programs governing oil and gas production and air quality within their borders. If reinstated in full as Plaintiffs request, that Rule will further frustrate and impede North Dakota and Texas's several sovereign interests in administering their distinct oil and gas programs, their air quality programs, and the orderly development of the States' natural resources. The Venting and Flaring Rule irreparably harms North Dakota's interests by transferring regulatory authority and enforcement powers over almost half of the oil and gas units in North Dakota from the North Dakota Industrial Commission (NDIC) to the BLM. Similarly, in Texas, the Venting and Flaring Rule preempts the Texas Railroad Commission's ("RRC") authority over a significant number of oil and gas units within her borders. At bottom, the Venting and Flaring Rule usurps the congressionally-granted authority of the states and the U.S. Environmental Protection Agency (EPA) to regulate air quality, as the Rule far exceeds BLM's statutory authority.

BLM recognizes the many harms caused by of the Venting and Flaring Rule, and has promulgated a separate rule to delay certain compliance deadlines, which rule is the subject of this litigation. Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58,050 (Dec. 8, 2017) ("Delay Rule"). The Delay Rule partially alleviates some of the harms caused by the Venting and Flaring Rule while BLM considers rescinding the Rule or revising it more substantially. Importantly, the Delay Rule preamble published in the Federal Register substantiates numerous material and substantive problems with the Venting and Flaring Rule, even beyond BLM's lack of statutory authority to regulate air quality matters. As the Delay Rule preamble explains, a number of those material and substantive problems with the Venting and Flaring

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Rule provide a sound and reasonable basis for the Delay Rule. Notwithstanding that the Delay Rule alleviates certain problems with the Venting and Flaring Rule, however, Plaintiffs here challenge the Delay Rule, asking this Court to preliminarily enjoin the Delay Rule and thereby reinstate the deeply flawed Venting and Flaring Rule in full.

Plaintiffs have not demonstrated that they meet the requirements for the extraordinary remedy of a preliminary injunction. They have failed to demonstrate that they will succeed on the merits of their challenge, and also failed to demonstrate the irreparable harm they allegedly would suffer if the Delay Rule is not enjoined and the original (undelayed) compliance deadlines of the Venting and Flaring Rule reinstated. Furthermore, Plaintiffs have not fully weighed the balance of harms, as they neglect entirely any consideration of the harms to North Dakota and Texas's sovereignty if the Venting and Flaring Rule is reinstated in full. When those harms are taken into consideration, it is clear that the balance of harms does not swing in Plaintiffs' favor. Finally, the public interest favors allowing the Delay Rule to partially alleviate the serious harms imposed by the Venting and Flaring Rule while BLM reconsiders that Rule more fully.

Granting Plaintiffs motions for preliminary injunction would have a number of deleterious results. First, it would reward Plaintiffs forum shopping. The District Court for the District of Wyoming has already devoted substantial time and attention to addressing the Venting and Flaring Rule in a previously-filed case in that court. Plaintiffs here, who are also defendant-intervenors in the case in Wyoming, nevertheless filed this case—thereby imposing duplicative costs and burdens on the parties and the courts—in an apparent attempt to obtain what they perceive as a more favorable forum. North Dakota and Texas believe this action should be consolidated with the previously-filed case in the District Court for the District of Wyoming to avoid this result. Second, issuing the requested injunction would create the possibility of inconsistent rulings, as the court in Wyoming may decide differently from this Court if the cases are not consolidated. Inconsistent rulings regarding a rule of national applicability would produce

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regulatory uncertainty by creating a patchwork of the Venting and Flaring Rule's validity—effective in some places, but not effective in others. This would be particularly troublesome in this case, as the state parties here are also parties to the case in Wyoming. Finally, if this Court grants Plaintiffs' request to enjoin the Delay Rule and reinstate the Venting and Flaring Rule, it would reinstate the full harm of the latter Rule. That would compound the inappropriateness of Plaintiffs' forum shopping, because numerous parties, including North Dakota and Texas are challenging the validity of the Venting and Flaring Rule in the District of Wyoming, and an injunction here would be disruptive of that litigation.

The Court should, therefore, deny Plaintiffs preliminary injunction motions, and grant the separate motions filed both by North Dakota and Texas and by the Federal Defendants to transfer this case to the District Court for the District of Wyoming to avoid piecemeal litigation of these issues.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Venting and Flaring Rule and the Wyoming Litigation Challenging It.

On November 18, 2016, BLM published the Venting and Flaring Rule in the Federal Register. The Rule imposes detailed air emissions restrictions on the venting and flaring of natural gas of a type that have generally been issued and administered by the states and the EPA. The Venting and Flaring Rule is BLM's first foray into the business of promulgating and enforcing air quality regulations, is outside the scope of BLM's statutory authority, and usurps the regulatory authority of EPA and the states. The Rule also imposes a number of new regulatory requirements and redefines the royalty obligations of oil and gas lessees. These air quality regulations apply not only on federal and tribal land, but also on any private or state land or mineral interest that is communitized with (*i.e.*, interspersed with) a federal property interest, no matter how small. As such, the Venting and Flaring Rule is an unlawful attempt to extend the BLM's jurisdiction into state and private property and mineral interests.

Immediately after the Venting and Flaring Rule was promulgated, the States of Wyoming and Montana petitioned for judicial review of the Rule in the District Court for the District of Wyoming, and

North Dakota and Texas separately intervened as petitioners, along with several other groups. *See Wyoming, et al. v. Dep't of Interior*, No. 16-cv-00285-SWS (D. Wyo.) ("Wyoming Litigation"). Plaintiffs here also intervened in the Wyoming Litigation, on behalf of the BLM. The District Court for the District of Wyoming has already engaged in substantive proceedings that have required it to devote significant time and attention to the details of the Venting and Flaring Rule and the Delay Rule. North Dakota and Texas have argued in that case 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 interests and operations on non-federal 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).

B. Delaying the Venting and Flaring Rule.

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 as directed by 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 and New Mexico, et al. v. Bureau of Land Mgmt.*, 3:17-cv-03885-EDL (N.D. Cal.). This Court granted North Dakota's motion to intervene in that litigation. *See* Order Granting North Dakota's Motion to Intervene, *California, et al. 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 has appealed to the Ninth Circuit. *See* Judgment, *California, et al. v. Bureau of Land Mgmt.*, 3:17-cv-03885-EDL, Dkt. 66 (N.D. Cal., Oct. 4, 2017); *see also* Notice of Appeal, *California, et al. 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, which delays by one year certain compliance deadlines of the Venting and Flaring Rule, but otherwise leaves the Venting and Flaring Rule in effect and unchanged. On December 26, 2017, BLM moved to stay the Wyoming Litigation, on the ground that BLM was reconsidering the Venting and Flaring Rule during the one-year delay of certain 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. On December 29, 2017, the District Court for 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 and the BLM's proposal to reconsider and revise the Venting and Flaring Rule. *See* Order Granting Joint Motion to Stay, *Wyoming v. Dep't of Interior*, No. 16-cv-00285-SWS, Dkt. 189 (D. Wyo. Dec. 29, 2017).

C. Challenging the Delay Rule.

On December 19, 2017, Plaintiffs filed these consolidated actions, challenging the validity of the Delay Rule and demanding that the original compliance dates of the Venting and Flaring Rule be reinstated so that that Rule is implemented and enforced in its entirety. Plaintiffs filed their motions for preliminary injunction on the same day, arguing that the Delay Rule is unlawful and that 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. Rather than addressing the validity of the Delay Rule in the District Court for the District of Wyoming Litigation, where they were already parties and where the court is already well-versed in the lengthy history of the Venting and Flaring Rule and BLM's actions to delay certain aspects of the Rule, Plaintiffs attempted to move the litigation to a venue of their choosing by challenging the Delay Rule here.

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

North Dakota and Texas challenged the Venting and Flaring Rule in the Wyoming Litigation, and have moved to intervene in this litigation implicating the Rule, because the Rule frustrates and impedes their several sovereign interests in administering and enforcing the States' Constitutions, laws, and regulations governing their own 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 not only over federal lands, but over non-federal lands and property interests as well. In North Dakota, this federal power-grab seizes regulatory authority over almost half of the non-federal 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. BLM also reserves the right to bring its own enforcement actions, 81 Fed. Reg. at 83,035, thus 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 also 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 that contain private property or minerals.

The Venting and Flaring Rule improperly puts BLM in 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 EPA. *See* 42 U.S.C. § 7401 et seq. Although their substance closely resembles, and in

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places duplicates, regulations issued under the CAA, the Venting and Flaring Rule's provisions completely ignore the procedural and substantive structure of the CAA, which were 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 (providing for "state implementation plans" to regulate air quality); *see also* https://www.epa.gov/compliance/demonstrating-compliance-new-source-performance-standards-and-state-implementation-plans ("States have the primary role for enforcing [state implementation plans]"). 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 oil and gas sources (subject to different regulatory schemes under the CAA) squarely with the BLM.

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. The term "communitization" refers to units that are created out of these different ownership interests within the same geographic formation or reservoir to more efficiently (both economically and environmentally) develop oil or gas reservoirs in accordance with geological structure, rather than following arbitrary property boundaries. 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. *See* ECF No. 51-2 ¶ 12. The federal government retained the mineral rights to these tiny tracts when it resold the surface to private owners, and those small federal mineral interests 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 tribal trust responsibility, known as the Dakota Prairie Grasslands and the Fort Berthold Indian Reservation, are

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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 its 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 or mineral interests that are more than 30% privately and state-owned, pulled into BLM's ambit by their proximity to the most miniscule of federal mineral interests. ECF No. 51-2 ¶¶ 12–14.

By delaying certain compliance deadlines in the Venting and Flaring Rule, the Delay Rule partially alleviates some of the harms the Rule imposes on North Dakota and Texas. Indeed, the Delay Rule's preamble identifies various provisions in the Venting and Flaring Rule that are of questionable legality or efficacy, and explains that the Delay Rule is necessary and appropriate because of those problematic provisions. *See* 82 Fed. Reg. at 58,050. Nonetheless, much of the Venting and Flaring Rule remains in force despite the Delay Rule, and because the two rules are interrelated, their legality should be—and indeed must be—considered together. That can only be done in the Wyoming Litigation because the validity of the underlying Venting and Flaring Rule is not at issue in this case.

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[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. ECF No. 51-2 ¶ 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.

III. STANDARD OF REVIEW

Plaintiffs must pass a high hurdle to obtain a preliminary injunction. In *Munaf v. Green*, 553 U.S. 674, 689-90 (2008), the Supreme Court held that "[a] preliminary injunction is an extraordinary and drastic remedy," and is "never awarded as of right." Plaintiffs must satisfy all four factors of the test set forth by the Supreme Court in *Winters v. NRDC* to secure a preliminary injunction: likelihood of success on the merits, likelihood that the movant will suffer irreparable harm in the absence of preliminary relief, the balance of the equities tips in the movant's favor, and the injunction is in the public interest. *Winter v. NRDC*, 555 U.S. 7, 20 (2008). Furthermore, this "extraordinary remedy . . . should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion," in proving these four factors. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original). Plaintiffs have failed to make such a "clear showing" that these factors require the injunction they seek.

IV. ARGUMENT

A. Plaintiffs Have Failed to Demonstrate that They Are Likely to Succeed on the Merits.

i. BLM Has Not Neglected Its Statutory Duties as Plaintiffs Claim.

Plaintiffs argue that the Delay Rule is invalid because BLM has a mandatory duty to regulate waste from oil and gas extraction, and therefore BLM has no authority to defer the compliance deadlines of the Venting and Flaring Rule. That argument is both misleading and incorrect. Plaintiffs repeatedly quote a single sentence from the MLA, which refers to a "condition" that all leases under the Act must "use all reasonable precautions to prevent waste of oil or gas developed in the land." *See, e.g.*, Conservation and Tribal Groups Motion, *Sierra Club, et al. v. Zinke*, 3:17-cv-07187-WHO, Dkt. 4-1 at 2 (N.D. Cal., Dec. 19, 2017) (quoting 30 USC § 255). While BLM does have authority to regulate waste, that authority extends only to lessees of federal mineral interests. The Venting and Flaring Rule unlawfully extends BLM's authority over waste from oil and gas operations on non-federal property and minerals communitized with the interests of federal lessees.

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Plaintiffs thus misconstrue the reach of BLM's authority by quoting from sections of the MLA that provide requirements for lessees of federal mineral interests, rather than Section 189 of the Act, which sets forth BLM's authority to issue regulations under the Act. That section does not impose any mandatory duty on BLM, but rather confers only discretionary authority. There are no words requiring specific rules or regulations within Section 189's grant of authority: "The Secretary of the Interior is *authorized* to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this chapter." MLA § 189 (emphasis added).

In fact, the only nondiscretionary part of this delegation of regulatory authority is the statutory directive that it shall not affect the rights of the states to exercise any rights they may have: "Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States." MLA § 189. Notably, the Venting and Flaring Rule neglects this statutory requirement, by trampling on the sovereign interests of states like North Dakota and Texas.

The Delay Rule is an attempt to partially rectify the harm imposed by the Venting and Flaring Rule by deferring certain compliance deadlines. In their preliminary injunction motion, Plaintiffs ask the Court to enjoin the Delay Rule and thereby reinstate the full force and effect of the Venting and Flaring Rule. Contrary to Plaintiffs' argument, nothing in the MLA mandates that result, and indeed that result would contravene Section 189's directive to avoid interfering with states' rights—which the Venting and Flaring Rule plainly does. Plaintiffs therefore have failed to demonstrate they are likely to succeed on the merits of their "mandatory duty" claim.

Plaintiffs also argue that BLM's promulgation of the Delay Rule is arbitrary and capricious, because, in their view, the Delay Rule makes substantive changes to the Venting and Flaring Rule that are

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not supported by the Agency's findings. However, the Delay Rule merely extends select compliance dates contained within the Venting and Flaring Rule for a limited amount of time (one year), and for a specific purpose (to allow BLM time to revise these regulations). To the extent the Delay Rule constitutes a material change to the Venting and Flaring Rule, the change is amply supported by BLM's discussion of its findings in the Delay Rule preamble. For example, the preamble states "[t]he BLM found that some provisions of the 2016 final rule add considerable regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." 82 Fed. Reg. at 58,050. Furthermore, the underlying Venting and Flaring Rule itself is unlawful, and the Delay Rule preamble shows that as well. BLM states that "[r]eexamination of the 2016 final rule is also needed because the BLM is not confident that all provisions of the 2016 final rule would survive judicial review," and "questions have been raised over to what extent [sic] Federal regulations should apply to leases in communitization agreements when Federal mineral ownership is very small." *Id.*

ii. Plaintiffs Attempt to Limit BLM's Authority to Reconsider Its Own Rules.

Every federal agency, including BLM, has the authority to reconsider its own rules. Reconsideration of rules and regulations is, in fact, an indispensable duty required of, and legal authority given to, BLM and all federal agencies. In asking the Court to invalidate the Delay Rule and reinstate the Venting and Flaring Rule, Plaintiffs essentially argue that the only way BLM can execute its authority to regulate waste is through the Venting and Flaring Rule. Agencies should be given great deference when it comes to the methods by which they fulfill their responsibilities, but Plaintiffs would take away BLM's discretion to reconsider the Venting and Flaring Rule. That is particularly inappropriate here, where BLM has been specifically directed by Executive Order 13783 to reevaluate that Rule. Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093 (Mar. 28, 2017). Plaintiffs have no basis for asking the Court to remove or limit BLM's discretion to do so, and for this reason as well they cannot demonstrate they will clearly succeed on the merits of this case.

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B. Plaintiffs Have Failed to Demonstrate Irreparable Harm.

Plaintiffs make repeated assertions about the irreparable environmental harm they believe they will suffer as a result of the Delay Rule. However, many of these estimations are out of proportion and out of context, as the Delay Rule only represents a limited, one-year delay of certain deadlines in the Venting and Flaring Rule. There is no credible support for the notion that this limited action will lead to environmental injury. Contrary to Plaintiffs misrepresentations, the Venting and Flaring Rule still remains in place, and the following sections are untouched by the Delay Rule: "Definitions clarifying when lost gas is "avoidably lost," and therefore subject to royalties (§3179.4); restrictions on the practice of venting (§ 3179.6); limitations on royalty-free venting and flaring during initial production testing (§ 3179.103); limitations on royalty-free flaring during subsequent well tests (§ 3179.104); and restrictions on royalty-free venting and flaring during "emergencies" (§3179.105)." 82 Fed. Reg. at 58,052.

Furthermore, the provisions delayed by the Delay Rule were not in effect prior to this litigation, as their compliance deadlines had not yet run. So, at the very most, Plaintiffs are in the exact same place as they were prior to the Delay Rule. That circumstance can hardly be considered a "harm" caused by the Delay Rule, and certainly not an "irreparable harm." Plaintiffs have failed to demonstrate this necessary requirement for a preliminary injunction to issue.

C. The Balance of Equities and the Public Interest Support Denial of the Requested Injunction.

i. Plaintiffs Have Failed to Consider the Harms to North Dakota and Texas's Sovereign Interests When Balancing the Equities.

As Plaintiffs California and New Mexico acknowledge, "injuries where 'sovereign interests and public policies [are] at stake' are irreparable." ECF No. 3 at 22 (quoting *Kansas v. United States*, 249 F.3d 1213, 1228 (10th Cir. 2001)). North Dakota and Texas's interest in challenging the Venting and Flaring Rule and, by extension, participating in this case where the enforceability of that Rule is implicated, stem from the States' interests in the lands, natural resources, and air quality within their borders, as well as

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their regulatory programs involving the same or similar subject matter as the Venting and Flaring Rule. North Dakota and Texas have sovereign interests in regulating the oil and gas industry within their borders. The Venting and Flaring Rule seizes power from state regulatory agencies, diminishes state tax revenue, and creates a system of duplicative regulations. These harms are irreparable, as the States are not allowed to collect monetary damages from the federal government as a remedy. *Chamber of Commerce v. Edmonson*, 594 F.3d 742, 770-71 (10th Cir. 2010).

North Dakota and Texas would be particularly harmed if this Court grants Plaintiffs' requested injunction and reinstates the Venting and Flaring Rule in full because, given the States' distinctive split-estate circumstances, the Venting and Flaring Rule governs not only federal and tribal lands, but also state and private lands within the States' borders. Under the Rule, therefore, BLM regulates waste from oil and gas extraction beyond just federal and Indian lands, which is the only place the MLA and the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-08, authorize BLM to address such waste. BLM has no authority to regulate waste beyond these lands, specifically on non-federal lands, yet Plaintiffs ask the Court to enjoin the Delay Rule and fully reinstate the Venting and Flaring Rule so the Agency can do exactly that. If the Court were to do so, it would trample upon North Dakota and Texas's sovereign interests in regulating oil and gas operations on state and private lands within their borders. This harm is irreparable and weighs against granting the Plaintiffs' requested injunction.

The Venting and Flaring Rule also usurps the authority congressionally delegated to the states and EPA to regulate air quality. Plaintiffs' briefs make it clear that the Venting and Flaring Rule is as much an air quality rule as it is a waste regulating rule. BLM's extensive venting and flaring regulations extend far beyond the Agency's authority to regulate waste and into the realm of air quality regulations. While BLM does have the authority to reconsider its own rulemaking, it has no authority to regulate air quality, as that power has not been "expressly granted" to the Agency. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 239 (2009) ("the Court 'refused to find implicit in ambiguous sections of the CAA an authorization

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to consider costs that has elsewhere, and so often, been expressly granted.'") (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 467 (2001)). That authority was delegated to EPA and the states through the federal CAA. *See* 42 U.S.C. § 7410. This usurpation of EPA and state authority to promulgate air quality regulations is a clear and irreparable injury to both EPA and the states' sovereign interests.

Plaintiffs neglected to consider the very real and ongoing harm to North Dakota and Texas's sovereign interests when discussing the potential harms from full reinstatement of the Venting and Flaring Rule. When *all* of the potential harms are considered, even if the Court does consider Plaintiffs harms to be irreparable, which North Dakota and Texas dispute, the balance of equities would not tip in Plaintiffs' favor, because North Dakota and Texas are already suffering irreparable harm which would be heightened by the reinstatement of the Venting and Flaring Rule in its entirety.

ii. The Public Interest Favors Maintaining the Delay Rule.

The public interest also favors allowing the Delay Rule to remain in place to partially alleviate the harms of the Venting and Flaring Rule and avoid regulatory uncertainty while BLM continues with its proposed rulemaking to more fully reconsider the Rule. Invalidating the Delay Rule and reinstating the Venting and Flaring Rule would require industry and state regulators like North Dakota's NDIC and Texas's RRC to hastily come into compliance with the Rule's requirements and would continue to allow BLM's improper expansion of its own jurisdiction and authority. BLM forecasted its intentions to revise the unlawful Venting and Flaring Rule in March 2017, only a few months after the Rule was promulgated, and certainly early enough for industry and regulators to suspend their efforts to ready themselves for the next year's compliance dates (in January 2018). *See* BLM Secretarial Order No. 3349, American Energy Independence (Mar. 29, 2017). BLM has stated that it will promulgate the newly revised Venting and Flaring Rule by January 2019, and so if the Delay Rule is enjoined and compliance required now, industry and state regulators like the NDIC in North Dakota and the RRC in Texas will have to scramble to comply and then shift gears again when the new rule is issued next year. Furthermore, if this Court grants

Plaintiffs' requested injunction, the District Court for the District of Wyoming may lift the stay and issue a conflicting ruling. The possibility of conflicting rulings and the knowledge of an impending revised rule are certain to create regulatory confusion and inconsistencies. Conflicting rulings, confusion, inconsistent compliance, and unlawful expansions of jurisdiction and authority are undoubtedly not in the public interest.

D. Plaintiffs Improperly Seek an Injunction Here to Attempt Piecemeal Resolution of the "Inextricably Intertwined" Issues Posed by the Delay Rule and the Venting and Flaring Rule, Which Are Already Being Addressed by the Same Parties in the District Court for the District of Wyoming.

This action is very closely related to, and largely overlaps, the Wyoming Litigation, which involves all the same parties (with one exception) involved in this case, and has been pending in the U.S. District Court for the District of Wyoming since November of 2016. Plaintiffs are engaging in classic forum shopping. In the Wyoming Litigation, they are defendant-intervenors, and thus find themselves in the venue selected by the plaintiffs in that case. By initiating their own action in a separate court, they seek to move disputes regarding the Venting and Flaring Rule from the forum selected by the original plaintiffs into a forum of their choice, imposing substantial and duplicative burdens on this Court and on parties that have already invested considerable time and resources briefing closely related issues in the Wyoming Litigation. This is inconsistent with prudential concepts of efficient use of judicial resources and creates the risk of inconsistent rulings on similar issues involving a rule of national applicability.

Plaintiffs attempt to move litigation involving the Venting and Flaring Rule here under the guise that this case is merely a challenge to the Delay Rule, but, as the District Court for the District of Wyoming has explicitly recognized, the Delay Rule cannot be considered outside of the context of the Venting and Flaring Rule. *See* Order Granting Joint Motion to Stay, Wyoming Litigation, Dkt. 189 (D. Wyo., Dec. 29, 2017. The Delay Rule and the Venting and Flaring Rule are "inextricably intertwined," *id.*, and the validity of these two related rules should not be decided piecemeal. As BLM explained in the

District Court for the District of Wyoming, the Delay Rule is one part of a three-pronged reconsideration strategy: "This plan involves (1) postponement of the upcoming January 2018 compliance deadlines, (2) notice and comment rulemaking to propose suspension of certain provisions of the Rule already in effect and extend the compliance dates of requirements not yet in effect, and (3) publication of a separate proposed rule for notice and comment that would permanently rescind or revise the Rule." Order Granting Motion to Extend Briefing Deadlines, Wyoming Litigation, Dkt. 133 at 2 (D. Wyo. June 27, 2017). Part one of this plan resulted in the BLM's promulgation of the Administrative Delay Order. BLM fulfilled step two of this plan by promulgating the Delay Rule, and intends on revising or rescinding the Venting and Flaring Rule (step three) before the end of the Delay Rule's deferment period. This case has challenged only a small piece in a broader puzzle, the Delay Rule, whereas the Wyoming Litigation is considering the "inextricably linked" underlying issues posed by the Venting and Flaring Rule. By asking the Court to invalidate the Delay Rule and thus reinstate the Venting and Flaring Rule in full, as part of their motion for preliminary injunction, Plaintiffs seek not only to forum shop, but also to shoehorn into this case a validation of the Venting and Flaring Rule on the merits as well. *See* ECF No. 3. The parties have already thoroughly briefed the issue of the legal status of the Venting and Flaring Rule in the Wyoming Litigation, and the Court there is very familiar with these issues. There is no need for a new court to familiarize itself with the issues that the District Court for the District of Wyoming has already been handling.

North Dakota, Texas, and the other parties (including Plaintiffs here), as well as the District Court for the District of Wyoming, have already invested substantial time and resources considering issues integral to this case, including both substantive issues surrounding the Venting and Flaring Rule and questions of timing that raise many of the same issues Plaintiffs raise here. Specifically, on January 6, 2017, the District Court for the District of Wyoming heard argument on several motions for preliminary injunction, devoting several hours to oral argument. *See* Minute Order, Wyoming Litigation, Dkt. 18 (D.

Wyo., Nov. 20, 2016). At that hearing, the parties presented both legal argument and testimony. State officials from North Dakota attended the hearing and testified regarding North Dakota's comprehensive venting and flaring regulations and the potential impact of the Venting and Flaring Rule on these existing programs. In addition, the briefing on those motions ran for hundreds of pages, including sworn declarations and exhibits, and dealt with highly technical questions of administrative law and oil and gas law. *See* Wyoming Litigation, Dkts. 21, 22, 39, 40, 69, 70, 84, 85, and 86. The Venting and Flaring Rule alone, along with its preamble, fills eighty-five small-print pages of the Federal Register. Both the District Court for the District of Wyoming and the parties have invested long hours in understanding these issues and litigating them in the District of Wyoming.

The District Court for the District of Wyoming denied the motions for preliminary injunction in a detailed, 29-page decision that addressed both the merits of the legal arguments presented and questions of timing. Order Denying Motion for Preliminary Injunction, Wyoming Litigation, Dkt. 92 (D. Wyo., Jan. 16, 2017). At the same time, the court issued an expedited merits briefing schedule. The court extended that briefing schedule in light of the Administrative Delay Order, which it is familiar with. Order Granting Motion to Extend Briefing Deadlines, Wyoming Litigation, Dkt. 133 (D. Wyo., June 27, 2017. The court subsequently stayed the proceedings in light of the Delay Rule (about which it has already been briefed), BLM's stated intention to reconsider portions of the Venting and Flaring Rule, and this litigation. *See* Order Granting Joint Motion to Stay, Wyoming Litigation, Dkt. 189 (D. Wyo., Dec. 29, 2017). In the Wyoming Litigation the parties have resolved disputes regarding the content of the administrative record and have filed their merits briefs. In fact, Plaintiffs here have no additional briefs to file in the Wyoming Litigation—the only remaining briefs are any reply briefs that may be filed.

Granting the injunction requested here could result in a nationwide patchwork of regulatory compliance. The court in the Wyoming Litigation issued an Order to Stay that litigation, but on the condition that plaintiffs there (including North Dakota and Texas) could move to lift the stay if the Delay

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Rule is invalidated, and ask the court for a decision on the merits of their challenge to the Venting and Flaring Rule itself. If this Court makes a decision on the Delay Rule it will necessarily implicate the legal status of the Venting and Flaring Rule, as Plaintiffs have argued. If the District Court for the District of Wyoming then makes a separate, different decision on the merits of the Rule, industry and regulators would be unsure of which ruling they should follow. Such regulatory uncertainty and inconsistent rulings should be avoided by transferring this case to the District Court for the District of Wyoming, where it can be consolidated with the Wyoming Litigation.

The District Court for the District of Wyoming has already received extensive briefing on the underlying factual and regulatory issues involved in this case as well as many of the arguments raised by Plaintiffs here, issued a lengthy order denying a preliminary injunction, and is deeply versed in the agency actions and issues that are now being presented piecemeal in this Court. The parties before the Court here, including Plaintiffs California, New Mexico, and Citizen Groups; and Proposed Intervenors Western Energy Alliance, Independent Petroleum Association of America, American Petroleum Institute, and the States of North Dakota and Texas, have all appeared in the District Court for the District of Wyoming from the outset of that case, demonstrating their willingness and ability to litigate in that forum. As such, the District Court for the District of Wyoming is clearly the appropriate venue for this action as well. This case should be transferred to the District Court for the District of Wyoming, as has been requested in separate motions to change venue filed both by North Dakota and Texas and by the Federal Defendants in this case. The Wyoming court has already taken a deep dive into these issues.

In addition, the federal doctrine of comity strongly suggests that this case should be transferred to the District Court for the District of Wyoming, because that litigation was filed first. As this Court previously held, the doctrine of federal comity, or the "first-to-file" rule "supports staying, dismissing, or transferring a second-filed action . . . 'on an issue which is properly before another district.'" *Alioto v. Hoiles*, 2004 U.S. Dist. LEXIS 21398, *12–*13 (N.D. Cal. 2004) (quoting *Church of Scientology of Calif.*

v. U.S. Dep't of Army, 611 F.2d 738, 749-50 (9th Cir. 1979), *overruled on other grounds, Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016) (citations omitted)). Furthermore, "increasing calendar congestion in the federal courts makes it imperative to avoid concurrent litigation in more than one forum whenever consistent with the rights of the parties.'" *Alioto*, 2004 U.S. Dist. LEXIS 21398 at *17–*18 (quoting *Crawford v. Bell*, 599 F.2d 890, 893 (9th Cir. 1979)).

The doctrine of comity requires the Court to consider the following three factors: "(1) the chronology of the two actions; (2) the similarity of the parties, and (3) the similarity of the issues." *Alioto*, 2004 U.S. Dist. LEXIS 21398 at *13–*14 (citing *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 625–26 (9th Cir. 1991); *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982)). All three factors favor transferring this case to the District Court for the District of Wyoming. As discussed above, these two cases involve virtually all the same parties, with only one exception, and substantially interrelated issues. Therefore, these freshly-filed consolidated cases should be transferred to the District Court for the District of Wyoming, where the more mature Wyoming Litigation has been pending for over a year.

CONCLUSION

For the reasons stated above, North Dakota and Texas urge this Court to deny Plaintiffs' Motions for Preliminary Injunction.

Respectfully submitted this 16th day of January, 2018.

Wayne Stenehjem
Attorney General of North Dakota
500 N. 9th Street
Bismarck, ND 58501
Phone: (701) 328-2925
ndag@nd.gov

/s/ Paul M. Seby
Paul M. Seby (*Pro Hac Vice*)
Special Assistant Attorney General
Greenberg Traurig, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Phone: (303) 572-6584
Fax: (303) 572-6540
sebyp@gtlaw.com

Howard Holderness
Greenberg Traurig, LLP
4 Embarcadero Ctr, Ste. 3000
San Francisco, CA 94111-5983
Phone: (415) 655-1308
Fax: (415) 707-2010
holdernessh@gtlaw.com

ATTORNEYS FOR PROPOSED DEFENDANT-INTERVENOR STATE OF NORTH DAKOTA

KEN PAXTON
Attorney General of Texas
JEFFREY C. MATEER
First Assistant Attorney General
BRANTLEY D. STARR
Deputy First Assistant Attorney General
JAMES E. DAVIS
Deputy Attorney General for Civil Litigation
/s/ David J. Hacker
DAVID J. HACKER
Special Counsel for Civil Litigation
AUSTIN R. NIMOCKS (*PRO HAC VICE*)
Special Counsel for Civil Litigation

ATTORNEY GENERAL OF TEXAS
P.O. Box 12548, Mail Code 001
Austin, Texas 78711-2548
(512) 936-1414
austin.nimock@oag.texas.gov

ATTORNEYS FOR PROPOSED DEFENDANT-INTERVENOR TEXAS

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