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UNITED STATES DISTRICT COURT

DISTRICT OF WYOMING

CLOUD PEAK ENERGY, et al., Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Respondents, and STATE OF CALIFORNIA and STATE OF NEW MEXICO, State Intervenor-Applicants.	Case No. 2:19-cv-00120-SWS Assigned: Hon. Scott W. Skavdahl **MEMORANDUM IN SUPPORT OF STATE INTERVENOR-APPLICANTS' MOTION TO INTERVENE AS RESPONDENTS**

INTRODUCTION

On July 1, 2016, the U.S. Department of the Interior's Office of Natural Resources Revenue ("ONRR") finalized the "Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform" rule (the "Valuation Rule" or "Rule") after five years of public engagement, including public workshops and an extended notice-and-comment period. 81 Fed. Reg. 43,338 (July 1, 2016). The Valuation Rule responded to dramatic changes that have taken place in domestic energy markets by providing much-needed revisions to decades-old regulations governing the valuation of coal, oil, and gas produced from leases on federal and Indian lands. *Id.* By offering greater simplicity, clarity, and consistency in product valuation, and eliminating loopholes that resulted in lower royalty calculations, the Rule ensures that American taxpayers receive royalties reflecting the fair market value for fossil fuel resources extracted from public lands and provides certainty to industry and ONRR that companies pay every dollar due. *Id.* The Rule became effective on January 1, 2017.

However, after the presidential election and change in administrations in January 2017, ONRR embarked on a series of efforts to roll back the Rule that were subsequently found to be illegal. First, the agency's new leadership attempted to "postpone the effectiveness" of the Rule after it had already become effective, asserting authority to do so under Section 705 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 705. 82 Fed. Reg. 11,823 (Feb. 27, 2017). As the result of a legal challenge by the State of California and the State of New Mexico ("State Intervenor-Applicants"), the U.S. District Court for the Northern District of California found this action to be a violation of the plain text of APA Section 705, and an improper end-run around the APA's notice-and-comment requirements. *Becerra v. U.S. Dep't of Interior*, 276 F. Supp. 3d 953 (N.D. Cal. 2017).

On a parallel track, ONRR also initiated a rulemaking to repeal the Valuation Rule in its entirety, claiming that there were "serious questions concerning the validity or prudence" of certain provisions of the Rule. 82 Fed. Reg. 16,325 (Apr. 4, 2017). The agency finalized this rule just four months later. 82 Fed. Reg. 36,934 (Aug. 7, 2017). Again, State Intervenor-Applicants brought suit. On March 29, 2019, the U.S. District Court for the Northern District of California found that ONRR had failed to provide any reasoned explanation for repealing the Valuation Rule, and failed to allow for meaningful public comment on its proposal, again in violation of the APA. *State of California v. U.S. Dep't of the Interior,* 381 F. Supp. 3d 1153 (N.D. Cal. 2019). Consequently, the court vacated the repeal rule, and the 2016 Valuation Rule is now back in effect. *See id*. at 1179.

Petitioners Cloud Peak Energy, Inc., National Mining Association, and Wyoming Mining Association, *et al*. ("Petitioners") now seek to have the 2016 Valuation Rule set aside, asserting that the Rule exceeds the authority of ONRR under applicable statutes and lease terms, is arbitrary and capricious, and violates the Export Clause of the U.S. Constitution, among other claims. Case No. 19-cv-120-S; Related Case Nos. 19-cv-121-S and 19-cv-126-S.

State Intervenor-Applicants satisfy each of Federal Rule of Civil Procedure 24(a)'s requirements and are therefore entitled to intervene as of right as respondents in this action. First, State Intervenor-Applicants' Motion to Intervene is timely and will not unduly delay or prejudice the rights of any other party. Second, State Intervenor-Applicants have a compelling interest in the subject matter of this litigation. State Intervenor-Applicants have millions of acres of federal and tribal lands that are managed by Respondents for multiple uses, including energy production, and stand to receive significant additional royalty income from federal mineral extraction within their states as a result of the Valuation Rule. Ensuring the implementation of

the Valuation Rule will also provide for the more efficient and consistent management of fossil fuel resources on public lands within the states' boundaries. Third, given that Petitioners seek to set aside the Valuation Rule, State Intervenor-Applicants' interests may be impaired as a result of this litigation. Finally, State Intervenor-Applicants' interests are not adequately represented by the existing Petitioners or Respondents in light of their demonstrated hostility to the Rule.

Consequently, State Intervenor-Applicants respectfully request that this Court grant their intervention as of right pursuant to Rule 24(a). In the alternative, this Court should grant State Intervenor-Applicants permissive intervention under Rule 24(b).

ARGUMENT

I. STATE INTERVENOR-APPLICANTS ARE ENTITLED TO INTERVENE AS OF RIGHT.

Under Federal Rule of Civil Procedure 24(a), a movant seeking to intervene as of right must show: (1) the motion is "timely"; (2) the movant "claims an interest relating to the property or transaction that is the subject of the action"; (3) "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest"; and (4) existing parties to the action do not "adequately represent" that interest. Fed. R. Civ. P. 24(a)(2); *see* Local Rule 83.6(e) (providing that intervention in review of agency actions "shall be governed by Fed. R. Civ. P. 24"). The Tenth Circuit has stated that its tendency is to "follow a somewhat liberal line in allowing intervention." *Nat'l Farm Lines v. I.C.C.,* 564 F.2d 381, 384 (10th Cir. 1977). Here, State Intervenor-Applicants satisfy each of Rule 24(a)'s requirements and are therefore entitled to intervene in this action as of right.

A. The Motion to Intervene is Timely.

The timeliness of a motion to intervene is assessed "in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the

existing parties, prejudice to the applicant, and the existence of any unusual circumstances." *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984) (citations omitted). Here, this litigation is in its very early stages. The first Petition for Review of Final Agency Action was filed by Petitioner Cloud Peak Energy, Inc. on June 12, 2019, approximately seven weeks ago. Petitioners' July 19, 2019 motion for preliminary injunction has been set for hearing on September 4, 2019, and responses to that motion are not due until August 16, 2019. State Intervenor-Applications plan to file a response to the motion for preliminary injunction on or before August 16, 2019.

Upon learning of the action, State Intervenor-Applicants acted promptly to review the petitions, conduct their own analyses, obtain approvals, and retain local counsel. As a result, State Intervenor-Applicants' intervention will not interfere with any schedule set by the Court, nor will it unduly delay or prejudice the rights of any other party. This motion is therefore timely.

B. State Intervenor-Applicants Have a Compelling Interest in the Subject Matter of this Litigation.

To intervene as of right under Rule 24(a), the movant must demonstrate "an interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a). "The threshold for finding the requisite legal protectable interest is not high." *Forest Guardians v. U.S. Dept. of Interior*, 2004 WL 3426413, *6 (D.N.M. Jan. 12, 2004); *Romero v. Bd. of Cnty. Comm'rs for Curry*, 313 F.R.D. 133, 138 (D.N.M. 2016) (citing *Forest Guardians*). Moreover, the Tenth Circuit has deemed the mere "threat of economic injury from the outcome of litigation" to be sufficient for granting intervention. *See Utahns for Better Transp. v. United States Dep't of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002).

Here, State Intervenor-Applicants have a compelling interest in the subject matter of this litigation. State Intervenor-Applicants have millions of acres of federal and tribal lands within their borders that are managed by Respondents for multiple uses, including energy production, and receive hundreds of millions of dollars annually in royalties from federal mineral extraction. In 2016, ONRR found that the Valuation Rule would result in an "estimated annual increase in royalty collections of between $71.9 million and $84.9 million." 81 Fed. Reg. at 43,359. Half of these increased royalties are paid to the states where the resources are located. *See* 30 U.S.C. § 191(a) (requiring 50% of "[a]ll money received from sales, bonuses, royalties" to be paid to the state "within the boundaries of which the leased lands or deposits are or were located").

In California, the U.S. Department of the Interior, through the Bureau of Land Management ("BLM"), administers 15.2 million acres of public lands and 47 million of subsurface mineral estate.[1] These public lands contain approximately 600 producing oil and gas leases covering more than 200,000 acres and 7,900 usable oil and gas wells.[2] In California, fossil fuel extraction on public lands produced about 9.3 million barrels of oil and 12.91 billion cubic feet of natural gas in 2017.[3] California received $57.8 million in royalties in 2017 from federal mineral extraction within the State.[4] Royalties from federal oil and gas development in California are deposited into the State School Fund, which supports public education. *See* Cal. Edu. Code § 12320.

[1] U.S. Dep't of the Interior, BLM, California State Office (last accessed July 29, 2019), *available at*: https://www.blm.gov/office/california-state-office.
[2] U.S. Dep't of the Interior, BLM, California Oil and Gas (last accessed July 29, 2019), *available at*: https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about/california.
[3] ONRR "Statistical Information" (last accessed July 29, 2019), *available at*: https://revenuedata.doi.gov/explore/CA/.
[4] *Id*.

In New Mexico, BLM oversees over 13 million acres of public lands, 36 million acres of federal mineral estate, and approximately 8 million acres of Indian trust minerals.[5] More than one-third of New Mexico's land is federally-administered, and New Mexico is the second-highest state in the nation in the number of producing oil and natural gas leases on federal land. In 2017, New Mexico produced approximately 801 billion cubic feet of natural gas and 89 million barrels of crude oil on federal lands.[6] New Mexico received $988 million in federal mineral extraction royalties in 2017.[7] New Mexico, whose per-pupil education spending is below the national average,[8] uses its federal mineral leasing royalty payments for educational purposes. *See* NMSA 1978, § 22-8-34(A).

Further, State Intervenor-Applicants have a compelling interest in the efficient development of federal energy resources within their borders and ensuring that their residents are getting a fair return from the development of public resources. *See* 30 U.S.C. § 201(a)(1) (requiring Secretary of the Interior to receive "fair market value" for sale of federal coal resources); 43 U.S.C. § 1701(a)(9) (providing that the United States must "receive fair market value of the use of the public lands and their resources"). As ONRR stated in 2016, the purposes of the Valuation Rule is to "offer greater simplicity, certainty, clarity, and consistency in product valuation for mineral lessees and mineral revenue recipients," and "is focused on ensuring that

[5] U.S. Dep't of the Interior, BLM, New Mexico State Office (last accessed July 29, 2019), *available at:* https://www.blm.gov/office/new-mexico-state-office. Note that the BLM's administrative structure does not precisely track state lines with respect to oversight of Indian trust minerals.
[6] ONRR, "Statistical Information" (last accessed July 29, 2019), *available at*: https://revenuedata.doi.gov/explore/NM/.
[7] *Id*.
[8] United States Census, *Public Education Finance: 2013*, at 8, Table 8 (June 2015) (for most recent census data, 2013, national average is $10,700 per pupil, and New Mexico spends $9,012), *available at*: https://www.census.gov/content/dam/Census/library/publications/2015/econ/g13-aspef.pdf.

Federal and Indian mineral owners receive the royalties that are owed to them based on the value of the resources being sold." 81 Fed. Reg. at 43,338, 43,339.

Consequently, State Intervenor-Applicants have a compelling interest in Respondents' continued implementation of the Valuation Rule.

C. State Intervenor-Applicants' Interests May Be Impaired as a Result of this Litigation.

Rule 24(a) also requires State Intervenor-Applicants to show that the litigation "may, as a practical matter, impair or impede [their] interest." Fed. R. Civ. P. 24(a)(2); *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010). To satisfy this requirement, State Intervenor-Applicants "must show only that impairment of [their] substantial legal interest is possible if intervention is denied," a burden the Tenth Circuit has described as "minimal." *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001).

If the Petitioners succeed in this case, the Valuation Rule's benefits to State Intervenor-Applicants will be lost. If the Rule is enjoined or set aside, State Intervenor-Applicants will lose assurances that royalties are being properly calculated based on the true value of the resources being sold, and their share of up to $84.9 million per year in increased royalty payments will be lost, with resulting negative fiscal and societal impacts. Therefore, the outcome of this litigation could seriously impede the aforementioned interests of State Intervenor-Applicants.

D. State Intervenor-Applicants' Interests Are Not Adequately Represented.

Rule 24(a) further requires a showing that State Intervenor-Applicants' interests may not be adequately represented by existing parties. Fed. R. Civ. P. 24(a)(2); *Nat'l Park Serv.*, 604 F.3d at 1198. To meet this "minimal burden," the movant need only show "the possibility that representation may be inadequate." *Nat'l Park Serv.*, 604 F.3d at 1200.

The objectives of State Intervenor-Applicants are not identical to those of any existing party to this action. Petitioners seek to set aside the Valuation Rule, an objective that is adverse to the interests of State Intervenor-Applicants. Although Respondent ONRR was established to ensure the full payment of revenues owed for the development of federal energy resources from Federal and Indian lands, the agency's positions will not necessarily align with the interests of State Intervenor-Applicants as representatives of the interests of their citizens. In fact, following ONRR's attempts to both delay and repeal the Valuation Rule, State Intervenor-Applications were forced to sue the agency in federal district court to have the Rule reinstated. *Becerra v. U.S. Dep't of Interior*, 276 F. Supp. 3d 953 (N.D. Cal. 2017); *State of California v. U.S. Dep't of the Interior,* 381 F. Supp. 3d 1153 (N.D. Cal. 2019).

Consequently, it is entirely possible that ONRR may take a position later in this litigation that diverges from, or is adverse to, State Intervenor-Applicants' interests in ensuring the continued implementation of the Valuation Rule, making this a situation where the federal government, with "multiple interests to pursue, [may] not adequately pursue the particular interest" of the State Intervenor-Applicants. *San Juan Cty., Utah v. United States*, 503 F.3d 1163, 1203–04 (10th Cir. 2007); *see also Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1107 (9th Cir. 2002) (observing that the George W. Bush administration ceased defending challenges to the Roadless Rule finalized during the Clinton administration). Thus, there is a distinct possibility that representation of State Intervenor-Applicants' interests by any other party to this litigation will be inadequate, and intervention should be granted.[9]

[9] To the extent that State Intervenor-Applicants seek the "same relief" as existing Respondents, State Intervenor-Applicants need not demonstrate standing to intervene in this action. *See Kane County, Utah v. United States*, 928 F.3d 877, 887 (10th Cir. 2019). In any event, State Intervenor-Applicants have standing to participate in this action under Article III of the U.S.

II. ALTERNATIVELY, THIS COURT SHOULD GRANT STATE INTERVENOR-APPLICANTS PERMISSIVE INTERVENTION.

In the alternative, this Court should grant State Intervenor-Applicants permissive intervention under Rule 24(b), which allows intervention where the movant timely files, and where the movant's claim and the main action have a question of law or fact in common. Fed. R. Civ. P. 24(b). The decision regarding whether to grant permissive intervention lies within the discretion of the district court. *See City of Stilwell v. Ozarks Rural Elec. Coop.*, 79 F.3d 1038, 1043 (10th Cir. 1996). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

As discussed in Part I.A, *supra*, this motion is timely filed. Because the litigation is in its very early stages, and State Intervenor-Applicants agree to adhere to all litigation deadlines that have been set thus far, intervention would not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Further, State Intervenor-Applicants' claims overlap with the main action in a key question of law: namely, whether the Valuation Rule is a valid exercise of ONRR's authority to ensure the proper payment of royalties for oil and gas produced from Federal leases and coal produced from Federal and Indian leases. Therefore,

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Constitution, which requires a litigant to demonstrate that it has "suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007). The Supreme Court has acknowledged that for purposes of invoking jurisdiction, states are "not normal litigants," but rather act subject to a "well-founded desire to preserve [their] sovereign territory… ." *Id*. at 518-19. As discussed above, State Intervenor-Applicants seek to intervene in order to ensure the proper and efficient management of natural resources within their sovereign territories, and to ensure that they receive royalties that are owed to them based on the true value of the resources being sold. Therefore, State Intervenor-Applicants' "stake in the outcome of this case is sufficiently concrete" for this Court to confer standing. *Id*. at 519.

State Intervenor-Applicants also satisfy the requirements for permissive intervention under Rule 24(b).

CONCLUSION

For the reasons discussed above, State Intervenor-Applicants respectfully request that the Court grant their intervention as of right pursuant to Rule 24(a). In the alternative, this Court should grant State Intervenor-Applicants permissive intervention under Rule 24(b)

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Respectfully Submitted,

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