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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING, STATE OF MONTANA, STATE OF NORTH DAKOTA, and STATE OF TEXAS	)	
Petitioners,	)	Case No. 16-cv-00285-SWS [Lead]
v.	)	Consolidated with:
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*	)	Case No. 16-cv-00280-SWS
Respondents,	)	

JOINT MOTION BY THE STATES OF NORTH DAKOTA AND TEXAS TO LIFT THE STAY ENTERED DECEMBER 29, 2017 AND TO ESTABLISH EXPEDITED SCHEDULE FOR FURTHER PROCEEDINGS

INTRODUCTION

Petitioner-Intervenors the State of North Dakota and the State of Texas (the "States") move the Court to lift the stay of proceedings entered by the Court's Order of December 29, 2017, ECF No. 189 ("Stay Order"), and to order the completion of merits briefing and decide this case on an expedited basis, in light of the preliminary injunction recently issued in related cases in the U.S. District Court for the Northern District of California, *State of California, et al. v. Bureau of Land Management, et al.*, Nos. 17-cv-07186 and 17-cv-07187 (N.D. Cal. filed Dec. 19, 2017) ("California Litigation").

This Court's basis for the Stay Order was that addressing the merits would be a waste of judicial resources, in light of i) the Bureau of Land Management's ("BLM" or the "Agency") expressed intent to revise the rule challenged here, entitled Waste Prevention, Production Subject to Royalties, and Resource Conservation: Final Rule, 81 Fed. Reg. 83,008 ("Venting and Flaring Rule"); ii) the Agency's finalization on December 8, 2017, of a rule delaying certain effective dates of the Venting and Flaring Rule, 82 Fed. Reg. 58,050 ("Delay Rule"); and iii) the substantive challenges to the Delay Rule that had already been asserted in the California Litigation. This Court issued the stay "while the [Delay] Rule is effective, subject to the parties' available judicial rights and remedies to seek lifting of the stay should circumstances change warranting such relief." ECF No. 189 at 5.

The circumstances warranting lifting the stay occurred on February 22, 2018, when the Northern District of California preliminarily enjoined the Delay Rule in the California Litigation, thus reinstating the original effective dates of the Venting and Flaring Rule and reviving with full force the harms caused to North Dakota and Texas by the Venting and Flaring Rule, *see* ECF

No. 143 at 11-22. The Delay Rule is no longer "effective," while the Venting and Flaring Rule is now fully effective.

With the extraordinary circumstances of the Delay Rule removed, the Court should complete its judicial review of the Venting and Flaring Rule. The States request that this case be considered and decided on an expedited basis, since the Rule is in effect and the harm it causes North Dakota, Texas, and other parties is occurring now. This matter is well-suited to expeditious consideration: briefing of the merits of the States' challenge to the Venting and Flaring Rule was almost complete on the expedited schedule the Court had ordered when the Stay Order was issued, and only the States' reply brief remains to be filed. The States are prepared to file their reply within five days of the Court lifting the stay, and request that a hearing be scheduled promptly thereafter.

BLM's proposal to revise the Venting and Flaring Rule, *see* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 7,924 (Feb. 22, 2018) ("Proposed Revision Rule"), does not change this conclusion. A mere proposal to change a rule that is in full force and effect and causing harm every day to the States is not grounds to stay a challenge to the underlying rule. On January 22, 2018, a unanimous U.S. Supreme Court concluded on closely comparable facts that plaintiffs like the States maintain a "concrete interest" in their challenge to an agency rule, regardless of the agency's efforts to delay or revise the rule, so long as the rule is still "on the books." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. __, at n. 5 (2018). There is no doubt that the Venting and Flaring Rule is "still on the books;" indeed it was "still on the books" after BLM promulgated the Delay Rule and during the entire time this matter has been held in abeyance. Therefore, in accordance with the Supreme Court's recent express direction, and the basis

enunciated by this Court when it issued the Stay Order, this Court should promptly lift the stay, set an expedited schedule to complete the briefing, and set a hearing on the merits of the States' challenge to the Venting and Flaring Rule.

BACKGROUND

1. On December 27, 2017, BLM, the States of Wyoming and Montana, the Independent Petroleum Association of America, and the Western Energy Alliance filed a "Corrected Joint Motion to Stay" these proceedings, arguing that it would not be a wise use of resources to adjudicate the merits given BLM's issuance of the Delay Rule and the Agency's promises to revise the Venting and Flaring Rule. *See* ECF No. 183.

2. North Dakota and Texas opposed the stay motion, arguing that the Delay Rule merely postponed certain compliance dates, that the Venting and Flaring Rule remained in place and continued to harm the States, and that none of the "sovereignty, jurisdictional, or legal issues," raised by the States were ameliorated by the Delay Rule. *See* ECF No. 182.

3. This Court's Stay Order, dated December 29, 2017, stayed all proceedings in this case pending any changed circumstances, but only until December 1, 2018, unless BLM, by then, has finalized a revised Venting and Flaring Rule. ECF No. 189 at 5. The Court explained that "moving forward to address the merits of the present *Petitions for Review* in these cases, in light of the now finalized [Delay] Rule and BLM's continued efforts to revise the [Venting and Flaring] Rule, would be a waste of resources," as these actions may render Plaintiffs' claims moot at some time in the future. ECF 189 at 4. The Court also reasoned that, because "Intervenor-Respondents' lawsuits in the Northern District of California raise substantive challenges to the [Delay] Rule and seek to reinstate the [Venting and Flaring] Rule in its entirety . . . . piecemeal analysis of the issues would likewise be an inefficient use of judicial resources."

Id. However, the Stay Order was issued "while the [Delay] Rule is effective, subject to the parties' available judicial rights and remedies to seek lifting of the stay should circumstances change warranting such relief." ECF No. 189 at 5.

4. The Delay Rule was challenged in the Northern District of California by the States of California and New Mexico and a number of Citizen Groups. *See* Complaints, California Litigation, Doc. Nos. 1 (Dec. 19, 2017). The Plaintiffs in those cases also sought a preliminary injunction against the Delay Rule while their claims are adjudicated on the merits. *See* Motions for Preliminary Injunction, California Litigation, Doc. Nos. 3 (Dec. 19, 2017). On February 22, 2018, the court in those cases granted the motions and preliminarily enjoined the Delay Rule. *See* Order Denying Motion to Transfer Venue and Granting Preliminary Injunction, California Litigation, Doc. No. 89 (Feb. 22, 2018) (attached as Exhibit 1). In making that decision, that court expressly avoided making any judgments or comments about the validity of the Venting and Flaring Rule, determining that was not necessary or even relevant to its opinion regarding the Delay Rule, and recognizing the pending litigation in this Court. *See id*. at 8.

5. Also on February 22, 2018, BLM published a proposed rule to revise the Venting and Flaring Rule. *See* Proposed Revision Rule. In the Proposed Revision Rule, BLM continues to assert federal jurisdiction over all state and private oil and gas operations with the slightest connection with operations involving federal mineral interests, the central issue over which the States are challenging the existing Venting and Flaring Rule. *See* Proposed Revision Rule; *see also* ECF No. 143 at 11-22.

GROUNDS FOR THIS MOTION

6. North Dakota and Texas had, and still have, a "concrete interest" in maintaining their challenge of the Venting and Flaring Rule even with the promulgation of the Delay Rule

because, in the words of the Supreme Court, the Venting and Flaring Rule was, and is, "still on the books." *Nat'l Ass'n of Mfrs.*, 583 U.S. at n. 5. BLM's Delay Rule did not remove the Venting and Flaring Rule from "the books." Further, the Stay Order was in large measure predicated on BLM's Delay Rule, with the proviso that the parties could petition to lift the stay in the event of "changed circumstances." Removing any doubt that the Venting and Flaring Rule is in full force and effect and ripe for expedited resolution, the preliminary injunction in the California Litigation has sidelined the Delay Rule, returning the effective dates of the Venting and Flaring Rule to their original dates. *See* Exhibit 1. This opens North Dakota and Texas up to the full measure of the Venting and Flaring Rule's harm to their state sovereignty. The preliminary injunction of the Delay Rule puts this case in a different posture than when this Court decided the motions for preliminary injunction presented here on January 16, 2017, observing that many of the requirements of the Venting and Flaring Rule would not take effect for a year. *See* ECF No. 92 at 25, 28. That year has now passed, and with the Delay Rule preliminarily enjoined, the key effective dates referred to by this Court are now in full force.

7. BLM's Proposed Revision Rule is also not a valid reason to continue the stay in this case. First, the Supreme Court has recently rejected federal agency efforts to stay challenges to rulemakings based on planned actions to revise or rescind the challenged rule, *see* Motion to Stay, *Nat'l Ass'n of Mfrs.*, Case No. 16-299 (2017); *see also* Order List April 3, 2017, *Nat'l Ass'n of Mfrs.*, Case No. 16-299 (2017), and subsequently observed that agency efforts to delay or revise regulations did not deprive parties' of their concrete interest in challenging such rules, *see Nat'l Assn. of Mfrs.*, 583 U.S. at n. 5. Second, proposed rules are not final, and their ultimate outcome is uncertain not only because one does not know what the final rule will look like, but also, as demonstrated by the Delay Rule, any final revision rule may also be successfully

challenged. The mere possibility of a revised final rule in the future does not render moot a challenge to a current rule that is "on the books" and causing harm. *See Nat'l Assn. of Mfrs.*, 583 U.S. at n. 5; *see also Am. Hosp. Ass'n v. Sullivan*, CIV A 88-2027 (RCL), 1990 WL 274639, at *4 (D.D.C. May 24, 1990). Third, BLM continues to insist it has jurisdiction over oil and gas operations on state and private lands, no matter how insignificant their potential connection to small federal mineral interests, a challenge to state sovereignty that is one of the central issues raised by North Dakota and Texas in this case. *See* ECF No. 143 at 11-22.

8. The Supreme Court recently rejected potential mootness and judicial economy arguments similar to those BLM made in seeking the stay in this case in a challenge to a rule issued by the Environmental Protection Agency and the Army Corps of Engineers defining the term "Waters of the United States" ("WOTUS") *See* Motion to Stay, *Nat'l Ass'n of Mfrs.*, Case No. 16-299 (the agencies argued that their motion to stay was justified because they planned on rescinding or revising the challenged rule); *see also* Order List April 3, 2017, *Nat'l Ass'n of Mfrs.*, Case No. 16-299 (denying the agencies' motion to stay). In acknowledgment of the Supreme Court's rejection of these types of arguments, this Court should similarly reject BLM's nearly identical arguments, and resume these proceedings.

9. In that same case, on January 22, 2018, the U.S. Supreme Court, in a unanimous decision, recognized that parties had a "concrete interest" in the WOTUS litigation, regardless of the government's plans to rescind or revise the WOTUS Rule, "[b]ecause the . . . Rule remains on the books for now." *Nat'l Ass'n of Mfrs.*, 583 U.S. at n. 5 (citing *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)). Similarly, BLM's failed efforts to delay the Venting and Flaring Rule, and its Proposed Revision Rule, "do[] not purport to rescind the . . . Rule," and the States maintain their concrete interest in this case, and their challenges should be heard on the merits. *See id.*; *see also*

Am. Hosp. Ass'n, CIV A 88-2027 (RCL), 1990 WL 274639, at *4 (finding that, despite an agency's commitment not to enforce its policies . . . "Defendants' assurances for the purposes of this suit do not give plaintiffs the kind of final decision they deserve . . . .").

10. Furthermore, BLM's Proposed Revision Rule reproduces the same fatally flawed jurisdictional errors that unlawfully infringe on state sovereignty, failing to address the central arguments made by North Dakota and Texas in this case. *See* Proposed Revision Rule; *see also* ECF No. 143. BLM continues to assert federal jurisdiction over state and private mineral interests that may have a potential connection to federal mineral interests, no matter how minute the latter may be, or how speculative the connection. *See* Proposed Revision Rule. This is in spite of the fact that, in promulgating the now enjoined Delay Rule, BLM recognized the jurisdictional shortcomings of the Venting and Flaring Rule. *See* Delay Rule at 58,050. Thus, though speculative proposed rules are not, as the Supreme Court has observed, a basis for staying litigation challenging final agency action, the Proposed Revision Rule does not even attempt to cure the jurisdictional flaws that are central to the challenges brought by North Dakota and Texas in this case, making the Proposed Revision Rule even less relevant to the issue of lifting the stay in this case and proceeding expeditiously to the merits.

11. With the Venting and Flaring Rule in full force and effect, this Court should exercise its jurisdiction and decide the merits of this challenge to this Rule. *See* ECF No. 1 at 2 (citing 28 U.S.C. § 1331); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (holding that federal courts have a "virtually unflagging" obligation to exercise their jurisdiction). There is no basis in this case for taking the extraordinary action of staying a challenge to a final agency action that is in effect, must be complied with, and which is causing harm to North Dakota, Texas, and other parties. This challenge has been filed in the

normal course, the rule being challenged is undeniably final agency action and, in the words of Supreme Court, is currently "on the books," *see Nat'l Assn. of Mfrs.*, 583 U.S. at n. 5, and thus this Court is obligated to proceed to the merits.

12. This case is ready to proceed on the merits. North Dakota and Texas request that this be done on an expedited basis, since the Delay Rule has been enjoined, the original effective dates of the Venting and Flaring Rule have been reinstated, and the harms North Dakota and Texas have expressed concern about in this case are occurring now. It will be more efficient and timely if the Court addresses the merits on an expedited basis now, rather than entertain renewed motions for preliminary injunction, which will initiate an entirely new briefing schedule.

13. Briefing is complete with the exception of the Plaintiffs' reply briefs. North Dakota and Texas are prepared to file their reply briefs no later than five days after this Court lifts the stay. Further, nothing in the California Litigation poses any complication or conflict with this case: in its decision preliminarily enjoining BLM's Stay Rule, that Court expressly avoided rendering any opinion on the underlying Venting and Flaring Rule, recognizing the well-advanced litigation on that issue in this Court. *See* Exhibit 1 at 8.

14. The Court should also set a date for a hearing on the merits of these challenges to the Venting and Flaring Rule fourteen days after the briefing is completed.

MOTION TO LIFT THE STAY

15. For these reasons, the State of North Dakota and the State of Texas respectfully move the Court to:

a. GRANT the States' motion to lift the stay of proceedings entered on December 29, 2017;

b. SET a briefing schedule to complete Plaintiffs' reply briefing for five days after the issuance of this order; and

c. SET a hearing on the merits for fourteen days after reply briefing has been completed.

CERTIFICATE OF CONFERRAL

On February 23, 2018 and through the time of filing, counsel for the State of North Dakota and the State of Texas conferred with all parties regarding their position on the proposed motion to lift the stay and to complete the briefing on the merits. As of the filing of this motion: Counsel for the State of Wyoming and the State of Montana each indicated they do not oppose lifting the stay, but take no position on the motion concerning completion of the merits briefing. Counsel for Industry Groups indicated they do not oppose lifting the stay of the litigation, but are evaluating the motion's proposed completion of the merits briefing and will file a pleading with the Court informing it of their position. Counsel for Conservation Group Intervenors, the State of California, and the State of New Mexico indicated they take no position on the motion to lift the stay. The Department of the Interior did not provide a position on the motion to lift the stay.

Dated: February 26, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of February, 2018, a true and correct copy of **JOINT MOTION BY THE STATES OF NORTH DAKOTA AND TEXAS TO LIFT THE STAY ENTERED DECEMBER 29, 2017 AND TO ESTABLISH EXPEDITED SCHEDULE FOR FURTHER PROCEEDINGS** was filed with the Clerk of the Court using CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ *Paul M. Seby*