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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 COMBINED RESPONSE BY THE STATES OF NORTH DAKOTA AND TEXAS TO MOTIONS TO LIFT STAY BY PLAINTIFFS THE STATES OF WYOMING AND MONTANA AND PLAINTIFF-INTERVENOR INDUSTRY GROUPS

INTRODUCTION

Petitioner-Intervenors States of North Dakota and Texas (the "States") respectfully submit this Joint Combined Response to the States of Wyoming and Montana's Motion to Lift Stay and Suspend Implementation Deadlines and Petitioner-Intervenor Industry Groups' Motion to Lift Litigation Stay and for Preliminary Injunction or Vacatur. On December 29, 2017, this Court entered an order, *see* ECF No. 189 ("Stay Order"), staying this challenge to the Bureau of Land Management's (BLM or "Agency") Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule, 81 Fed. Reg. 83,008 ("Venting and Flaring Rule"), in light of the Agency's decision to delay certain effective dates of the Rule, 82 Fed. Reg. 58,050 ("Delay Rule"), and the substantive challenges to the Delay Rule filed in the U.S. District Court for the Northern District of California, *see 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").

North Dakota and Texas intervened in the California Litigation to, in part, emphasize the distinction between those cases and these proceedings, and arguing that the Northern District of California should decline the invitation by the plaintiffs in that case to rule on the validity of the Venting and Flaring Rule, as that issue was already properly before this Court. When the court in the California Litigation granted those plaintiffs' motions for preliminary injunction of the Delay Rule, the court stated that "I express no judgment whatsoever in this opinion on the merits of the Waste Prevention Rule," showing great deference to this Court in deciding the merits of this Venting and Flaring Rule litigation. *see* Order Denying Motion to Transfer Venue and Granting Preliminary Injunction, California Litigation, Doc. No. 89 at 8 (Feb. 22, 2018). Just four days after the California court's decision, North Dakota and Texas moved this Court lift the stay in

light of the now "changed circumstances" contemplated by this Court in the Stay Order, *see* ECF No. 194 ("North Dakota and Texas Motion").

North Dakota and Texas are pleased that, in their subsequently-filed motions, Plaintiff States Wyoming and Montana and Plaintiff-Intervenors Industry Groups agree with North Dakota and Texas that the Court's Stay Order should be lifted. *See* Wyoming and Montana Motion to Lift Stay at 1, ECF No. 195 ("Plaintiff States Motion"); Industry Groups Motion to Lift Stay at 1, ECF No. 196 ("Industry Motion"). Those parties also agree with North Dakota and Texas that the current situation – with the Delay Rule abruptly enjoined, and BLM considering a potential new rule – creates "chaos" and an untenable environment for the States and industry members facing this "morass" of regulatory uncertainty. *See* Plaintiff States' Motion at 5; Mem. In Supp. of Mot. for Prelim. Inj., ECF No. 197 at 17.

However, the Plaintiff States Motion, Industry Motion, and North Dakota and Texas Motion materially differ with regard to how this Court should proceed once the stay is lifted. While North Dakota and Texas request that this Court proceed on the merits as expeditiously as possible, Wyoming and Montana ask the Court to stay only a portion of the Venting and Flaring Rule pursuant to Section 705 of the Administrative Procedure Act (APA), *see* ECF No. 195 at 3, and the Industry Groups request only a preliminary injunction of certain provisions of the Venting and Flaring Rule, *see* ECF No. 196 at 2. For the reasons discussed herein, North Dakota and Texas maintain that the best course of action is to promptly proceed to the merits of Plaintiffs' challenges to the Venting and Flaring Rule, as requested in their Motion.

I. The Plaintiff States Motion.

Plaintiff States Wyoming and Montana have asked this Court to issue a stay under Section 705 of the APA of only those provisions of the Venting and Flaring Rule suspended by the now

enjoined Delay Rule, to be dissolved sometime in the indeterminate future should the BLM issue a final Venting and Flaring revision rule. *See* ECF No 195 at 3. North Dakota and Texas believe a Section 705 Stay is an incomplete and unduly narrow solution to the acknowledged "chaos and uncertainty resulting from BLM's decision to revise the Waste Prevention Rule." *See* Plaintiff States' Motion, ECF No. 195 at 1.

Given the virtual certainty that any future BLM attempt to revise the Venting and Flaring Rule will also be challenged in the Northern District of California, a Section 705 stay that is dissolved upon BLM's publication of a revised or rescinded Venting and Flaring Rule, without a decision on the Venting and Flaring Rule itself, runs the likely risk that the Venting and Flaring Rule could be reinstated by a federal court striking down the BLM's newly-proposed revision rule. In other words, we would be right back to where we started, with even more chaos and uncertainty because of the passage of even more time. A more complete course of action, as requested by the North Dakota and Texas Motion—lifting the stay and immediate completion of the already well underway merits briefing and hearing—is a far more sensible path to quell this mounting "chaos."

Nevertheless, should this Court decide that it has the authority impose a Section 705 stay and that such a stay is appropriate, North Dakota and Texas respectfully insist that any such action should stay the entirety of the Venting and Flaring Rule, rather than be limited to those provisions previously postponed by the now preliminarily enjoined Delay Rule. As the States explained in their response to BLM's motion to stay these proceedings, the harm to North Dakota and Texas's state sovereignty and BLM's unlawful assertion of jurisdiction over State and private mineral interests continues, even when the Delay Rule was operative, because certain provisions of the Venting and Flaring Rule impinging on State sovereignty were not affected by the Delay

Rule that had already gone into effect. *See* ECF No. 187 at 3-4. The proposal that a partial stay be lifted upon publication of BLM's revised rule is similarly flawed since, as North Dakota and Texas pointed out in their Motion to Lift Stay, BLM's proposed revision rule contains the same unlawful assertions of jurisdiction. *See* ECF No. 194 at 5. Thus, any stay that does not encompass the entirety of the Venting and Flaring Rule will not accomplish its goal of preventing "irreparable injury" to all the parties. *See* ECF No. 195 at 5. Regardless, any Section 705 stay this Court issues, whatever the scope, should only be used as an interim measure while merits briefing continues and the Court proceeds to make a decision on the merits: such a stay of the Rule should not encompass a stay of this litigation.

II. The Industry Motion.

The Industry Motion asks this Court to issue a nationwide preliminary injunction of only certain provisions of the Venting and Flaring Rule, which they label the "Core Provisions." *See* ECF No. 196 at 2. This Court has already heard three motions for preliminary injunction and has declined to grant all of them, and the Industry Groups' much later motion for preliminary injunction was voluntarily withdrawn. *See* ECF Nos. 21, 39, and 92. While the circumstances have changed significantly since those motions were filed, and North Dakota and Texas would not oppose a preliminary injunction of the *entire* Venting and Flaring Rule, this solution is also plagued by many of the same issues discussed above. Not only is a partial preliminary injunction an incomplete solution for the same reasons the Petitioner States' suggested Section 705 partial stay is an incomplete solution, but a preliminary injunction would require yet another full round of briefing from the parties, further delaying this case and wasting this Court's time and resources. Much of the merits briefing is already complete, and so, rather than backtracking and hearing the arguments for or against a preliminary injunction, this Court should move forward

and proceed to the merits of Petitioners' challenges to the Venting and Flaring Rule, as North Dakota and Texas request in their Motion to Lift the Stay. *See* ECF No. 194.

Furthermore, as with Petitioner States' request for a Section 705 stay, any preliminary injunction granted by this Court should not only be nationwide in scope, but should also encompass the entirety of the Venting and Flaring Rule. Otherwise, the harms to North Dakota and Texas's state sovereignty will remain, because those harms are provisions of the Venting and Flaring Rule other than the "Core Provisions" that would be addressed by the preliminary injunction the Plaintiff States propose. *See* ECF No. 187 at 3-4. Any preliminary injunction that is issued should only be used as a temporary measure while the merits briefing is completed and this Court decides the validity of the Venting and Flaring Rule.

III. Lifting the Stay and Promptly Deciding the Merits Is the Best Course of Action.

Throughout the course of this litigation, BLM has utilized "band-aid" solutions in an attempt to remedy the fact that they did not have the legal authority to issue the Venting and Flaring Rule in the first place. BLM has argued time and again that these its ill-fated attempts are valid justification for repeatedly holding this case in abeyance and avoiding a decision on the merits. However, each of these "fixes" has proved ineffectual. The original Section 705 Administrative Stay and the Delay Rule were struck down and preliminarily enjoined in the Northern District of California. While BLM recently proposed a rule purporting to revise the Venting and Flaring Rule, that proposal does not satisfy the concerns raised by North Dakota and Texas in this litigation, and Respondent-Intervenors will certainly be ready to challenge it as soon as it is published in the Federal Register, also in the Northern District of California.

If anything, the judicial history of the BLM Venting and Flaring Rule has shown that "band-aid" solutions will never resolve the issues presented in these consolidated cases—they can

only prolong this litigation and continue the "chaos" and "morass" caused by BLM's poor attempts to delay, suspend, revise, and rescind the Venting and Flaring Rule. *See* Plaintiff States Motion at 5. Wyoming, Montana and Industry offer incomplete solutions. Rather than hanging its hat on a partial Section 705 stay or a partial preliminary injunction and waiting for BLM to potentially revise or rescind the Rule at some indefinite time in the future, this Court should proceed to the merits of the case, as the North Dakota and Texas request, and decide Plaintiff's challenges to the Venting and Flaring Rule. Anything less could cause even more "chaos" and confusion down the line when another related challenge comes along in the Northern District of California.

IV. Suggested Schedule for Continuing to the Merits.

Wyoming and Montana request that the Court "permit the federal respondents the opportunity to respond to the existing merits briefing as they have not yet done so." ECF No. 195 at 6. North Dakota and Texas disagree with the latter part of this sentence—BLM filed their Response to Petitioners' Merits Briefs on December 11, 2017, *see* ECF No. 176, but voluntarily chose to dedicate a significant number of their allowed pages to *instead* requesting that this Court issue the present stay, rather than fully responding to the arguments presented in the Petitioners' briefs. Nevertheless, if the Court does decide to lift the stay and proceed to the merits, North Dakota and Texas would not oppose allowing BLM an additional opportunity to file a merits response brief, to be filed within thirty days of this Court's decision to lift the stay. If the Court allows BLM this additional response brief, North Dakota and Texas request that the Court set a deadline of seven days later for reply briefs, and a hearing on the merits set for fourteen days after that.

CONCLUSION

For the reasons set forth above, North Dakota and Texas respectfully request that the Court lift the stay and proceed to the merits of this case pursuant to the schedule suggested in their Motion to Lift the Stay, ECF No. 194, or by the alternate schedule suggested herein.

Respectfully submitted this 2nd day of March, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of March, 2018, a true and correct copy of **JOINT RESPONSE BY THE STATES OF NORTH DAKOTA AND TEXAS TO MOTIONS TO LIFT STAY BY PLAINTIFFS THE STATES OF WYOMING AND MONTANA AND PLAINTIFF-INTERVENOR INDUSTRY GROUPS** 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*