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

STATE OF WYOMING,)	
)	
Petitioner,)	Case No. 2:15-cv-00043-SWS
)	
v.)	
)	
UNITED STATES DEPARTMENT OF)	
THE INTERIOR; SALLY JEWELL,)	
in her capacity as Secretary of the)	
Interior; BUREAU OF LAND)	
MANAGEMENT; and NEIL)	
KORNZE, in his capacity as Director,)	
Bureau of Land Management,)	
)	
Respondents.)	
)	

**MEMORANDUM IN SUPPORT OF STATE OF NORTH DAKOTA’S UNOPPOSED
MOTION TO INTERVENE AS A PETITIONER**

On March 26, 2015, the Department of the Interior (“DOI”) Bureau of Land Management (“BLM”) published in the Federal Register its final rule regulating hydraulic fracturing on federal and Indian lands (“Final Rule”). The Final Rule is entitled “Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands,” 80 Fed. Reg. 16128 (Mar. 26, 2015) (to be codified at 43 C.F.R. Part 3160).

On March 26, 2015, the State of Wyoming (“Wyoming”) petitioned this Court for judicial review of the Final Rule. *See* Petition for Review of Final Agency Action (“Petition”). ECF No. 1. Wyoming seeks an Order from the Court declaring that the Final Rule violates the Administrative Procedure Act (“APA”) and the Safe Drinking Water Act (“SDWA”) and asks the Court to set aside and vacate the Final Rule. ECF No. 1 at 6.

The State of North Dakota (“North Dakota”) respectfully submits this Motion to Intervene pursuant to Federal Rule of Civil Procedure 24 and Local Rule 83.6(e)¹ as a Petitioner in order to protect its several legally cognizable interests in administering the laws and regulations that authorize and define North Dakota’s authority and discretion for regulating underground injections and hydraulic fracturing. North Dakota’s regulatory role and authority is diminished and displaced by the Final Rule. In promulgating the Final Rule, Federal Respondents have exceeded their statutory authority by seeking to regulate the underground

¹ Pursuant to Local Rule 83.6(c), this brief follows the formatting and length requirements in Fed. R. App. P. 32(a)(7).

injection of fluids and proppants under the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. §§ 1701-84, and the Mineral Leasing Act (“MLA”), 30 U.S.C. §§ 181-287. The Final Rule also contravenes SDWA’s Underground Injection Control Program, which has enabled states like North Dakota to obtain and exercise the exclusive authority from the Environmental Protection Agency (“EPA”) to regulate underground injections. 42 U.S.C. § 300h-1; 42 U.S.C. § 300h(b)(1)(A). North Dakota respectfully requests that the Court grant its Motion to Intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2), or alternatively for permissive intervention under Fed. R. Civ. P. 24(b)(1)(B).

INTRODUCTION

North Dakota is the second largest producer of oil and natural gas in the United States with an annual production of approximately 400 million barrels of oil in 2014. Declaration of Lynn Helms, 4 ¶ 8, attached as Appendix 1. Energy producers in North Dakota extract over 1 million barrels of oil per day from hydraulically fractured horizontal drilling wells pursuant to a comprehensive state regulatory program. Helms Decl. 4 ¶ 9; 5 ¶ 15. One-third of the oil produced in North Dakota is from Indian lands and five percent is from federal lands. Helms Decl. 4 ¶ 10. While federal minerals in many states occur in large contiguous blocks of federal minerals, North Dakota’s federal minerals occur in small blocks and are interspersed with State- and privately-owned minerals. If permitting is

delayed because one or more drilling wells penetrate federal minerals, then development of all wells on the entire multi-well pad will be delayed. Helms Decl. 11 ¶ 36.

The State of North Dakota supports the responsible development of the State's natural resources by regulating hydraulic fracturing, which enables the production of otherwise inaccessible oil and natural gas resources from shale formations. Helms Decl. 2 ¶ 4; *see also* N.D. Cent. Code § 38-08-25 (designating hydraulic fracturing as an acceptable form of oil and natural gas recovery). Shale in its natural state contains pockets of trapped hydrocarbons that do not naturally flow into a traditional horizontal wellbore. 80 Fed. Reg. 16130-31. As a result, energy producers must physically alter these formations in order to extract the resources. *Id.* They do so through the hydraulic fracturing process, which uses pressurized fluid injections to create fissures in the rock that enable the oil and gas pockets to migrate from the shale into the drilling well. *Id.* at 16131. Water and proppants like sand, used to keep the fissures open while the oil and natural gas flows to the well, comprise between ninety-eight and ninety-nine percent of the injection fluid. *Id.* Chemical additives used to prevent corrosion of the well casing and to limit the growth of bacteria comprise the remaining percentage of the injection fluid. *Id.*

The North Dakota Industrial Commission (“NDIC”) regulates hydraulic fracturing in North Dakota through two distinct but statutorily-related regulatory programs: comprehensive hydraulic fracturing statutes and regulations (the “ND Hydraulic Fracturing Program”) and the underground injection control program (the “ND UIC Program”). Helms Decl. 2 ¶ 5. The ND Hydraulic Fracturing Program regulates well construction, well bore pressure testing requirements, and comprehensive chemical disclosure. N.D. Admin. Code Chapter 43-02-03-27.1. It requires operators to obtain permits from the NDIC before commencing any well-site preparation or drilling. Helms Decl. 5 ¶ 15.

The NDIC also regulates the flowback water produced by hydraulic fracturing through the ND UIC Program. N.D. Admin Code Chapter 43-02-05. The NDIC has administered the ND UIC Program effectively since 1983 pursuant to a primacy delegation from the EPA under the SDWA. Helms Decl. 6 ¶ 21. Under the ND UIC Program, any party seeking to construct or operate a well must first obtain a permit from the NDIC. N.D. Admin Code 43-02-03-16; Helms Decl. 7 ¶ 23. Through the ND UIC Program, North Dakota seeks to ensure that all parties conducting hydraulic fracturing comply with the State’s stringent environmental protection regulations.

Disposition of this litigation in Respondents’ favor would frustrate and impede North Dakota’s several interests in administering its distinct ND Hydraulic

Fracturing Program and ND UIC Program and the development of North Dakota's oil and gas resources. North Dakota's regulatory role and authority is diminished and displaced by the Final Rule. North Dakota has a legally cognizable interest in protecting its lawful authority and discretion under the SDWA by continuing to administer the ND UIC Program in order to protect the safety of its underground drinking water supplies and the economic well-being of the State and its citizens. Implementation of the Final Rule harms North Dakota's several interests in administering its laws and regulations for regulating hydraulic fracturing and underground injections by subjecting the State to an additional regulatory program that is inconsistent (duplicative, less stringent, and more stringent) than the State's comprehensive regulatory program. The Final Rule has been promulgated in violation of the BLM's lawful authority. Furthermore, Wyoming, as a distinct sovereign entity, cannot adequately represent North Dakota's specific sovereign authority and interests in protecting drinking water supplies in North Dakota or in regulating hydraulic fracturing in North Dakota. North Dakota satisfies the requirements for intervention under Rule 24(a). For these reasons, North Dakota respectfully requests that the Court grant its motion to intervene as a petitioner-intervenor as of right pursuant to Fed. R. Civ. P. 24(a)(2), or alternatively to intervene permissively under Fed. R. Civ. P. 24(b)(1)(B).

ARGUMENT

I. North Dakota Is Entitled to Intervene As A Matter of Right.

Federal Rule of Civil Procedure 24(a)(2) states in pertinent part:

Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Thus, a party seeking intervention of right must demonstrate that (1) its application is timely; (2) it has a cognizable interest in the property or transaction; (3) its interest would be impaired by disposition of the action; and (4) its interests are not adequately represented by existing parties. These Rule 24(a)(2) factors “are not rigid, technical requirements” under the Tenth Circuit’s “somewhat liberal line in allowing intervention.” *Id.* (citing *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 995 (10th Cir. 2009) and *San Jan County v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007) (*en banc*)). North Dakota satisfies each of these four requirements.

A. North Dakota’s Application For Intervention Is Timely.

Fed. R. Civ. P. 24(a) requires that a motion to intervene be timely filed. A court will determine a motion’s timeliness “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.” *Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001) (citation omitted).

North Dakota files this Motion to Intervene within one week after the filing of this case. Respondents have not yet responded to the Petition and the Court has not yet issued any substantive orders or schedules. Granting North Dakota’s motion will therefore not cause any delays or prejudice any party or the Court. The State of Wyoming does not object to North Dakota’s participation in this case, and counsel for Respondents has not yet entered an appearance. Thus, North Dakota’s motion is timely under Rule 24(a)(2).

B. North Dakota Has Significant Legally Cognizable Interests That Are Affected By This Litigation.

North Dakota has “an interest relating to the property or transaction that is the subject of the action[.]” Fed. R. Civ. P. 24(a)(2). This interest element serves as “a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *WildEarth Guardians*, 604 F.3d at 1198 (quoting *San Juan County*, 503 F.3d at 1195). North Dakota satisfies the “interest” test under Rule 24(a). As the Tenth Circuit has clarified, the relevant interest is not whether an intervenor-applicant has an interest in the litigation, but is instead “measured by whether the interest the intervenor claims is *related to the property that is the subject of the action.*” *Utah Ass’n of*

Counties, 255 F.3d at 1250 (citation omitted) (emphasis in original). North Dakota participated in the BLM rulemaking by submitting comments and appearing at the public hearing in Bismarck, North Dakota. North Dakota clearly has a cognizable interest in the lands and natural resources within its state borders and its regulatory programs involving the same or similar subject matter as the Final Rule, both of which are adversely impacted by the Final Rule.

North Dakota is the second largest oil producing state in the country with an annual production of approximately 400 million barrels of oil. Helms Decl. 4 ¶ 8. The State produces over 1 million barrels of oil per day from hydraulically fractured wells. Helms Decl. 4 ¶ 9. One-third of the oil produced in North Dakota is from Indian lands and another five percent of oil production within North Dakota is from federal lands. Helms Decl. 4 ¶ 10. At least 2,832 of the spacing units within North Dakota have well bores that contain federal minerals. Helms Decl. 4 ¶ 11. The Bakken Shale in North Dakota encompasses 25,000 square miles of embedded oil, with billions of barrels of recoverable oil. *See* U.S. Geological Service, *Assessment of Undiscovered Oil Resources in the Bakken and Three Forks Formations, Williston Basin Province, Montana, North Dakota, and South Dakota* (April 2013), *available at* pubs.usgs.gov/fs/2013/3013/fs2013-3013.pdf (estimating the Bakken and Three Forks Formations to contain 7.4 billion barrels of recoverable oil). As such, North Dakota has significant legally cognizable and

protectable interests in enforcing its laws and regulations concerning underground injections and hydraulic fracturing in order to enable responsible extraction of natural resources within its state boundaries.

The North Dakota legislature specifically designated hydraulic fracturing as an acceptable form of oil and natural gas recovery. N.D. Cent. Code § 38-08-25. The NDIC regulates all aspects of hydraulic fracturing—including comprehensive chemical disclosure, well construction, well bore pressure testing requirements, and flowback water requirements—and has done so pursuant to its ND UIC Program since 1983, Helms Decl. 7 ¶ 21, and its Hydraulic Fracturing Program since 2012. Helms Decl. 4 ¶ 13; *see* N.D. Admin. Code Chapter 43-02-03 (setting forth the regulations for oil and gas conservation); N.D. Admin. Code 43-02-05-01.1 (requiring that all underground injection wells be subject to applicable oil and gas conservation regulations). North Dakota established these regulatory programs to specifically account for the geology of the Williston Basin, which encompasses a large portion of the oil and natural gas reserves within North Dakota. Helms Decl. 5 ¶ 14. The Williston Basin is unique and contains multiple rock layers thousands of feet thick, which contain between two and nine layers of sub-surface salts between the fractured formations and the underground sources of drinking water. Helms Decl. 5 ¶ 14.

North Dakota implements the ND UIC Program pursuant to a delegation of authority from EPA under the SDWA, which allows EPA to delegate primacy to states for the regulation of underground injections in order to protect underground drinking water resources. Helms Decl. 6-7 ¶¶ 21-22; *see* 42 U.S.C. § 300h(b)(1)(B). EPA granted North Dakota this primary enforcement authority for underwater injection control in 1983. Helms Decl. 7 ¶ 21; *see also* 42 U.S.C. § 300(h)-1. The NDIC has directly implemented EPA's permitting, inspection, and enforcement of underground injections since this time, and it has exercised this right within the exterior boundary of Fort Berthold Indian Reservation and on all other federal lands within the state. Helms Decl. 7 ¶ 22.

Both the ND Hydraulic Fracturing Program and the ND UIC Program require operators to obtain a permit from the NDIC prior to commencing any well-site preparation, drilling, or underground injection. N.D. Admin Code §§ 43-02-03-16; 43-02-05-04. North Dakota also ensures that all drilling activities are conducted in accordance with state law by sending NDIC field inspectors to conduct monthly monitoring of well constructions and underground injection. Helms Decl. 6 ¶¶ 18-19; 7 ¶¶ 24-25. In fact, North Dakota has the lowest ratio of wells-to-underground injection control inspectors of any state in the country. Helms Decl. 8 ¶ 28. Through these permitting and inspection processes, North Dakota ensures that project applicants meet the stringent requirements necessary to

drill in North Dakota and to protect the State's underground drinking water supply from any potential adverse effects of hydraulic fracturing. Helms Decl. 5 ¶ 15.

Accordingly, North Dakota has significant and cognizable interests in continuing to regulate underground injections and hydraulic fracturing involving the development of natural resources within its borders. Continued regulation would further the goals of its long-running regulatory program. North Dakota's restrictions on hydraulic fracturing have protected the health of the State's citizens by ensuring the safety of the underground drinking water supply. North Dakota's protection of its own drinking water supplies and its regulation of its oil and natural gas resources have resulted in an enormous economic benefit to North Dakota and its citizens. For example, North Dakota's unemployment rate of 2.9 percent is the second lowest in the country and well below the federal average of 5.5%. See Department of Numbers, North Dakota Unemployment (last accessed Mar. 28, 2015), www.deptofnumbers.com/unemployment/north-dakota/. North Dakota wishes to continue the regulations of responsible oil and gas development within its borders. As such, North Dakota has significant and legally cognizable interests that are adversely affected by the Final Rule.

C. Disposition of this Action May Impair or Impede North Dakota's Ability to Protect Its Interests.

Disposing of this litigation in Respondents' favor "may as a practical matter impair or impede [North Dakota's] ability to protect [its] interests." Fed. R. Civ. P.

24(a)(2). An intervenor-applicant “must show only that the impairment of its substantial legal interest is *possible* if intervention is denied.” *Utah Ass’n of Counties*, 255 F.3d at 1253 (citation omitted) (emphasis added). “This burden is minimal.” *Id.*

As detailed above, North Dakota has a legally cognizable interest in protecting the ND UIC Program and the continued protection and regulation of North Dakota’s natural resources. The Final Rule will impair these interests by impeding or replacing North Dakota’s right to primacy of enforcement for its ND UIC Program, as delegated by EPA under the SDWA. North Dakota has exercised its primacy since 1983 and has carried out EPA’s direct implementation role of permitting, inspection, and enforcement of underground injections within the Fort Berthold Indian Reservation and on all other federal lands within North Dakota since that time. Helms Decl. 7 ¶ 22. This statutory delegation cannot be revoked (or diminished) by the Final Rule promulgated by the BLM, a separate and distinct federal agency with no statutory or other legal authority to do so. *See* 5 U.S.C. § 706(2)(A), (C) (requiring a reviewing court to set aside agency action not in accordance with law or in excess of statutory jurisdiction). The Final Rule will cause real and immediate harm to North Dakota by displacing the primacy of North Dakota’s regulatory authority on these lands.

Indeed, BLM's presumed authority to regulate hydraulic fracturing is also outside the scope of the BLM's jurisdiction under FLPMA. FLPMA enables BLM to manage public lands for sustained yields and multiple use, 43 U.S.C. § 1732(a); to prevent unnecessary and undue degradation of public lands, 43 U.S.C. § 1732(b); and to protect the quality of environmental, ecological, and water resources on public lands, 43 U.S.C. § 1701(a)(8). However, FLPMA does not enable BLM to affect "any law governing . . . use of . . . water on public lands," and cannot be construed "as superseding, modifying, or repealing . . . existing laws applicable to the various Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto." Pub. L. No. 94-579, § 701, 90 Stat. 2786-87 (1976) (uncodified). Similarly, while the MLA permits the Secretary of the Interior to regulate certain aspects of the oil and gas leasing and development, the statute contains no authorization related to regulating underground injections. *See generally* 30 U.S.C. § 181 et seq. Thus, the Final Rule harms North Dakota by subjecting the State to duplicative and conflicting regulation implemented in excess of the BLM's statutory authority.

Furthermore, the Final Rule will adversely impact North Dakota's ability to protect the well-being of its economy and its citizens by imposing additional and unlawful restrictions on the State's highly productive oil and gas industry. *See*

United States v. Albert Inv. Co., Inc., 585 F.3d 1386, 1398 (10th Cir. 2009) (“An interest in preventing an economic injury is certainly sufficient for intervention as of right.”). The Final Rule contains many provisions that are duplicative of North Dakota’s regulations. Helms Decl. 9-10 ¶¶ 31-33. As a result of this duplication, operators will be required to obtain permits from both North Dakota and the BLM before conducting hydraulic fracturing. Operators applying for drilling permits generally wait between nine months and 1.5 years before receiving a permit from BLM. Helms Decl. 11 ¶ 35. As a result of this delay in receiving federal permits, operators will need to postpone hydraulic fracturing activity in North Dakota even if the operators possess the relevant state permits. Helms Decl. 11 ¶¶ 35-36. This delay will frustrate and interfere with North Dakota’s regulatory role and authority.

The Final Rule’s provision allowing a state to obtain a variance if state regulations are deemed equal to or more protective than BLM’s rules does not mitigate these harms. *See* 80 Fed. Reg. at 16130. Rather, it imposes an immediate injury through the imposition of a new requirement by requiring North Dakota to request federal permission despite the State’s primacy to enforce the ND UIC Program pursuant to the SDWA. Accordingly, a ruling in Respondents’ favor would impair North Dakota’s ability to protect its several distinct interests.

D. North Dakota's Interests Are Not Adequately Represented by Existing Parties

A movant may satisfy Rule 24(a)(2)'s fourth requirement by demonstrating only that representation "may be inadequate." *Utah Ass'n of Counties*, 255 F.3d at 1254 (citing *Sanguine, Ltd. v. U.S. Dept. of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984)). "The possibility that the interests of the applicant and the parties may diverge 'need not be great' in order to satisfy this minimal burden." *Utah Ass'n of Counties*, 255 F.3d at 1254 (citing *Natural Res. Defense Council v. U.S. Nuclear Reg. Comm'n*, 578 F.2d 1341, 1346 (10th Cir. 1978)). "Merely because parties share a general interest in the legality of a program or regulation does not mean that their particular interests coincide so that representation by the agency alone is justified." *Am. Horse Prot. Ass'n, Inc. v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001).

While the State of Wyoming appears to share the State of North Dakota's overall concerns with the legal defects of the Final Rule, the State of Wyoming respectfully, does not and cannot represent North Dakota's sovereign interests in North Dakota's separate and distinct state laws and regulatory structure, or its economic interests. The ND UIC Program and related regulatory schemes pertain exclusively to North Dakota and cannot be implemented by Wyoming or another sovereign state. North Dakota has specific and independent objectives of protecting its hydraulic fracturing regulations and its ability to utilize those

regulations to best provide for the safety and economic well-being of its citizens. Furthermore, North Dakota specifically developed its hydraulic fracturing regulations in order to account for specific geographic, geologic, and ecologic occurrences within its borders. Helms Decl. 4 ¶ 13. These include the circumstances present in the Williston Basin of North Dakota, which is located outside the boundaries of Wyoming. Helms Decl. 5 ¶ 14. Moreover, beyond their different interests and objectives in this case, North Dakota and Wyoming may disagree about issues during the course of litigation, especially the nature of any potential remedy or the terms of any potential settlement of the case. *See NRDC v. Castle*, 561 F.2d 904, 906-08, 912-13 (D.C. Cir. 1997) (interest in implementation of settlement sufficient grounds for intervention as of right). North Dakota therefore satisfies the “minimal burden” of showing that Federal Respondents’ representation “may be inadequate.”

II. In the Alternative, the Court Should Grant North Dakota Permissive Intervention Pursuant to Federal Rule of Civil Procedure 24(b).

Alternatively, this Court should allow North Dakota to intervene permissively in this action under Federal Rule of Civil Procedure 24(b), which provides in relevant part:

Upon timely application, anyone may be permitted to intervene in an action . . . when an applicant’s claim or defense and the main action have a question of law or fact in common.

Fed. R. Civ. P. 24(b)(1)(B). North Dakota satisfies these requirements for permissive intervention.

As demonstrated herein, North Dakota's motion is timely because it is filed within one week of Petitioner's Petition for Review of Final Agency Action. North Dakota's claims also share a question of law and fact in common with the Petitioner's, as North Dakota will be impacted by the implementation of Respondents' Final Rule. North Dakota has been actively involved in regulating hydraulic fracturing and underground injections for decades. Helms Decl. 4 ¶ 13, 6 ¶ 21. The State will present factual and legal arguments related specifically to the Final Rule's adverse impacts on hydraulic fracturing in North Dakota, which will contribute to the full development of the issues presented and will demonstrate why North Dakota is entitled to the requested relief. The direct and threatened harm to North Dakota's interest provide a further basis to meet the minimal requirements of Rule 24(b). North Dakota therefore satisfies the requirements under Rule 24(b) and requests that this Court grant it permissive intervention in this matter.

CONCLUSION

The Court should grant North Dakota's Motion to Intervene as of right as a petitioner pursuant to Fed. R. Civ. P. 24(a)(2). In the alternative, The State should be granted permissive intervention pursuant to Fed. R. Civ. P. 24(b).

Respectfully submitted this 1st day of April, 2015.

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