

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN LUNG ASSOCIATION,
et al.,

Petitioners,

Case No. 19-1140 (and
consolidated cases)

v.

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY, *et al.*,

Respondents.

On Petition for Review of Final Action of the
United States Environmental Protection Agency

UNOPPOSED MOTION FOR LEAVE TO INTERVENE

Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), the State of Nevada hereby moves for leave to intervene in support of petitioners American Lung Association, *et al.* (“Petitioners”), in these consolidated cases, for the reasons set forth below:

These consolidated cases petition this Court for review of the final action by respondent United States Environmental Protection Agency

and Acting Administrator Andrew Wheeler (collectively, “EPA”), titled “Repeal of the Clean Power Plan’ Emissions Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations,” published in the Federal Register at 84 Fed. Reg. 32,520 on July 8, 2019 (the “ACE Rule”).

The State of Nevada has compelling interests in challenging the ACE Rule; specifically, that it must rigorously perform its duty to protect and preserve the health and welfare of its citizens by ensuring that the EPA appropriately regulates carbon dioxide and other greenhouse gas pollution from coal-fired power generators in a manner consistent with prevailing science regarding air pollutants and climate change, and that it may face some increased costs relating to developing source-specific plans for coal power generators within the State.

PROCEDURAL HISTORY

On July 8, 2019, the ACE Rule was published in the Federal Register.

Petitioners American Lung Association and American Public Health Association filed their Petition for Review on July 8, 2019 (19-1140).

Petitions for Review brought by other petitioners were timely filed pursuant to 42 U.S.C. § 7607(b)(1) on August 13, 2019 (19-1165), August 14, 2019 (19-1166), August 29, 2019 (19-1173), September 4, 2019 (19-1177), and September 6, 2019 (19-1188).

ARGUMENT

The State of Nevada Satisfies the Standard for Intervention.

“Rule 15(d) does not provide standards for intervention, so appellate courts have turned to the rules governing intervention in the district courts under Fed.R.Civ.P. 24.” *Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 517–18 (7th Cir. 2004). The language of Rule 24 “underscores . . . the need for a liberal application in favor of permitting intervention.” *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967). Nevada satisfies the requirements of Rule 24(a) because its motion is timely, it has a cognizable interest in the case, its absence will impair its ability to protect its interests, and its interests are not adequately represented by the existing parties.

A. The State of Nevada’s Motion is Timely.

This motion is timely under Rule 15(d), because it is filed within 30 days of the Petition for Review in case nos. 19-1173, 19-1177, and

19-1188. Pursuant to Circuit Rule 15(b), this motion also constitutes a motion to intervene in all petitions for review of the challenged administrative action, including later filed cases.

The proposed intervention will not unduly delay or prejudice the rights of any other party. This litigation is in its very early stages, and intervention will not interfere with any schedule set by the Court. Procedural and substantive deadlines for motions have not yet passed and briefing has not yet begun.

B. The State of Nevada Has a Cognizable Interest in this Case.

The Clean Air Act specifically charges the EPA with “establishing Federal standards of performance for new sources” and to “promulgat[e] a standard of performance” for existing sources, which includes standards for emissions of “greenhouse gases, [which] fit well within the Clean Air Act’s capacious definition of ‘air pollutant.’” 42 U.S.C § 7411; *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007). The State of Nevada is under threat of continued climate change related harm, which the ACE Rule fails to adequately address. For example, a report published by the University of California Davis and the Tahoe Environmental Research Center predicts that Lake Tahoe Basin temperatures

will continue to rise and the percentage of precipitation falling as snow will continue to decline as CO₂ emissions continue. Univ. of Cal. Davis Tahoe Env'tl. Research Ctr., Tahoe: State of the Lake Report 2019 6.7–6.8 (2019). Reduced snowfall is extremely deleterious to an area known for its winter recreation activities and the local industry supporting winter recreation, including resort properties, recreation services, gaming, and food and beverage services. The repeal of the Clean Power Plan and the ACE Rule will contribute to climate change harm suffered by the State of Nevada.

The State of Nevada's current responsibilities for regulation of the small number of coal-fired power generators are limited, but the ACE Rule will require Nevada to develop unit-specific standards of performance based on source-specific factors. 84 Fed. Reg. 32,549–61. The development of source-specific standards will require additional resources to accomplish. While states with larger numbers of coal-fired power generators will certainly see a large cost associated with developing a large number of plans, there is arguably an opportunity for greater reduction in greenhouse gas emissions in those states. In Nevada, creating standards for the small number of coal-fired

generators may result in little, or even no, net reductions in greenhouse gas emissions by those generators under the guidelines proposed under the ACE Rule at a disproportionate cost to the State.

C. The State of Nevada Would Not be Adequately Represented to protect its Interest.

The State of Nevada is in a unique position as a State with a small number of coal-fired power generators still in operation. To implement the ACE Rule, Nevada may have to expend a disproportionate amount of resources to develop plans that may ultimately render little or no benefit to the State's air quality. While other states may allege greenhouse gas related climate change as a basis for their interests sought to be protected, each state maintains an "independent interest 'in all the earth and air within its domain.'" *Massachusetts v. EPA*, 549 U.S. at 519 (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). As such, Nevada's interest in its own environmental conditions may not be equal to that of other interested states.

Counsel for State Intervenor sought the position of Respondents and Petitioners in Case No. 19-1140 and the cases consolidated therewith by electronic mail communication to counsel of record at

7:54 A.M. PDT on September 26, 2019. Counsel for Respondents in Case No. 19-1140 and the consolidated cases has stated that they do not oppose the motion. Counsel for Petitioners in Case No. 19-1140 have stated that they do not oppose the motion. Counsel for Petitioners in Cases Nos. 19-1166, 19-1173, 19-1175, 19-1176, 19-1179, 19-1185 have stated that they take no position on the motion. Counsel for Respondent-Intervenors National Mining Association; Public Service Company of Oklahoma, Wheeling Power Company, Kentucky Power Company, Appalachian Power Company, Southwestern Electric Power Company, AEP Generation Resources, Inc., and AEP Generating Company have stated that they take no position on the motion. Counsel for Petitioners and Respondent-Intervenors in the remaining consolidated cases had not stated a position as of the time of this filing.

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Based upon the foregoing, the State of Nevada respectfully requests that this Court grant its motion to intervene.

Dated: October 4, 2019

Respectfully Submitted,

THE STATE OF NEVADA

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CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the type volume limitation of Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure because it contains 1,154 words, excluding parts exempted by Rule 32(f) of the Federal Rules of Appellate Procedure, according to the count of Microsoft Word. The foregoing motion also complies with Rules 27(d)(1)(E), 32(a)(5), and 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in 14-point Century Schoolbook type.

Dated: October 4, 2019

Respectfully submitted,

THE STATE OF NEVADA

AARON D. FORD

Attorney General

By: Heidi Parry Stern

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CERTIFICATE OF PARTIES

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), State of Nevada furnishes this list of parties, intervenors, and amici curiae that have appeared before this Court in Case No. 19-1140 (and consolidated cases) as an addendum to its motion to intervene.

Petitioners: The Petitioners are the American Lung Association and American Public Health Association (case no. 19-1140); States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Wisconsin, District of Columbia, and Cities of Boulder, Chicago, Los Angeles, New York, Philadelphia, and South Miami (FL) (case no. 19-1165); Appalachian Mountain Club, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, and Sierra Club (case no. 19-1166); Chesapeake Bay Foundation, Inc. (case no. 19-1173); The North American Coal Corporation (case no. 19-1179);

Robinson Enterprises, Inc., (case no. 19-1175); Westmoreland Mining Holdings, LLC (case no. 19-1176); Biogenic CO2 Coalition (case no. 19-1185); City and County of Denver (CO) (case no. 19-1177); Advanced Energy Economy (case no. 19-1186); American Wind Energy Association, (case no. 19-1187); Consolidated Edison, Inc., (case no. 19-1188).

Respondents: The Respondents in this Case are the United States Environmental Protection Agency and Andrew R. Wheeler, in his capacity as Administrator of the EPA.

Intervenors: Intervenors in this Case are the National Rural Electric Cooperative Association; the Chamber of Commerce of the United States of America; the National Mining Association; America's Power; Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, AEP Generating Company, AEP Generation Resources Inc., and Wheeling Power Company; Westmoreland Mining Holding LLC; and Murray Energy Corporation.

Motions for leave to intervene have been filed by Wyoming, Utah, Texas, South Dakota, South Carolina, Oklahoma, Ohio, Nebraska,

Montana, Missouri, Mississippi Public Service Commission, Phil Bryant, Louisiana, Kentucky, Kansas, Indiana, Georgia, Arkansas, Alaska, Alabama, and West Virginia [ECF 1806337]; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO [ECF 1806910]; International Brotherhood of Electrical Workers, AFL-CIO [ECF 1806911]; and United Mine Workers of America, AFL-CIO [ECF 1806915].

The State of Nevada is without knowledge as to whether these motions have been granted.

Amici Curiae: To the knowledge of Nevada, there are no amici curiae as of the time of this filing.

Dated: October 4, 2019

Respectfully submitted,

THE STATE OF NEVADA

AARON D. FORD

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Circuit Rule 15(a), a copy of the foregoing Motion to Intervene was served on October 4, 2019 by first class mail, postage prepaid on the following:

Andrew Wheeler, Administrator
Office of the Administrator (1101A)
Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Correspondence Control Unit
Office of General Counsel (2311)
1200 Pennsylvania Ave., NW
Washington, DC 20460

William Barr
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20460

/s/ Sandra Geyer

SANDRA GEYER, an employee of
Office of the Nevada Attorney General