
Nos. 14-9529, 14-9530, 14-9533 & 14-9534

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

STATE OF WYOMING, et al.,
Petitioners,

vs.

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

and

POWDER RIVER BASIN RESOURCE COUNCIL, et al.,
Intervenors.

ON PETITION FOR REVIEW OF A FINAL RULE FROM THE
ENVIRONMENTAL PROTECTION AGENCY

**BASIN ELECTRIC POWER COOPERATIVE'S RESPONSE IN OPPOSITION TO
CONSERVATION ORGANIZATIONS' MOTION TO PROCEED SEPARATELY**

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INTRODUCTION

The Court should deny the Conservation Organizations’ Motion to Proceed Separately, and should temporarily defer oral argument in these four consolidated appeals until Basin Electric and EPA conclude their ongoing settlement efforts with the Tenth Circuit Mediation Office. Proceeding to argument now on only one of these four inter-related cases would be inefficient and a waste of the Court’s and the parties’ resources, is likely to cause confusion of the issues, and could interfere with efforts by Basin Electric and EPA to resolve a substantial part of the appeal. Also, proceeding with argument of all the cases at this time, before Basin Electric and EPA are able to conclude their settlement discussions, would be disruptive to those discussions and would cause an unnecessary waste of resources.

BACKGROUND ON SETTLEMENT NEGOTIATIONS

Basin Electric and EPA have been participating in serious and ongoing settlement discussions through this Court’s mediation office for the past several months, in an attempt to resolve Basin Electric’s appeal in its entirety. In order to facilitate those ongoing discussions, the mediation office has extended the oral argument of these consolidated cases until March 2016. But because of the very complex nature of this case—which involves federal agency action on pollution controls for nitrogen oxides (NO_x) to address regional haze—Basin Electric does not anticipate that any settlement can be finalized within the next two months,

prior to a March argument date. However, Basin Electric is optimistic that a settlement might be achievable within the next three to six months.¹

An oral argument of some or all of this case at this time would disrupt those ongoing settlement efforts. Certainly, it would detract from the significant amount of time and effort Basin Electric and EPA are now expending on the settlement process. It also could impact the parties' settlement posture and their weighing of the very issues they are now trying to resolve. And it is likely to be a waste of the parties' and the Court's resources, to the extent that one of the four related appeals may well be resolved without any need for this Court's intervention.

ARGUMENT

The Conservation Organizations' motion rests on the incorrect assumption that its appeal "involv[es] unrelated issues" that are "wholly distinct" from the other three appeals. Mot. at 1, 6. But the Court and the parties have from the earliest stages of this case treated the four appeals as inter-related. In fact:

- All four appeals challenge the same EPA final rule, which approved in part and disapproved in part Wyoming's regional haze state implementation plan for NO_x and replaced the disapproved portions with a federal implementation plan.

¹ Basin Electric's counsel do not recall ever suggesting that the negotiations would conclude or that the settlement process (which will require EPA to put a draft settlement agreement out for notice-and-comment) would be complete by mid-October. See Mot. at 3-4, 5.

- Most of the petitioners intervened in each of the four appeals. The Conservation Organizations intervened in the other three appeals, and all three of the other petitioners (Wyoming, Basin Electric, and PacifiCorp) intervened in the Conservation Organizations’ appeal.
- The Conservation Organizations recognized early on in the case that “consolidation of the four petitions for review for purposes of briefing, argument, and decision is appropriate[.]” Joint Status Report (Doc. No. 01019248374) at 4-5.
- The Court consolidated the appeals “for the purposes of submission, and, if applicable, oral argument” and it issued a coordinated schedule, including staggered briefing by the petitioners, a combined response brief by EPA, and a single appendix for all four appeals. 5/15/14 Order (Doc. 01019250447) at 3, 4-7.
- Pursuant to the Court’s directive, “the state and industry parties . . . consolidate[d] briefing whenever possible and . . . maximize[d] the opportunity provided by the staggered briefing schedule to avoid duplicative argument” *Id.* at 5. *See also* 4/29/14 Order (Doc. 01019241623) at 3 (directing the parties, in conjunction with advancing proposals for briefing and record preparation, to “confer with each other about how best to consolidate and organize the briefing and the record preparation process for these matters in order to eliminate duplicative argument and minimize the work of counsel”).

- The parties' briefs contain various cross-references to briefs filed by the other parties and in the other appeals. For instance, Wyoming and PacifiCorp cited and/or incorporated portions of Basin Electric's briefs in their briefs supporting their own appeals, *see* PacifiCorp Op. Br. (Doc. 01019398104) at 14-15, 18 n.6, 23 n.9; Wyo. Reply Br. (Doc. 01019398645) at 1, 7, 12 n.3; PacifiCorp Reply Br. (Doc. 01019398116) at 6 n.8, 15-16, and they cited portions of Basin Electric's brief as well as their briefs from their own appeals in their responses to the Conservation Organizations' appeal, *see* Wyo. Resp. Br. (Doc. 01019398633) at v, 3-4 n.1; PacifiCorp Resp. Br. (Doc. 01019398110) at 3, 13 n.5, 19 n.12.

- The briefs in these four appeals address similar core legal issues, including the statutory requirements for establishing the Best Available Control Technology ("BART"); the State's role in the process of selecting BART and weighing the five BART factors, including, in particular, the cost and visibility improvement of potential pollution control options; the level of deference required to the State's judgment on those issues; and the interpretation and application of EPA's Guidelines in weighing the cost and visibility factors and selecting BART.

Thus, there is considerable overlap in the four cases, and the Conservation Organizations' appeal cannot readily be severed from the other three appeals.

For the same reasons, proceeding now with argument on one of these four cases would *not* serve the interests of judicial economy but, rather, would lead to

piecemeal appeals. The Court would need to conduct two separate oral arguments and issue two separate decisions on very similar issues relating to the same agency rule—one in the next few months on the Conservation Organizations’ appeal and another a few months later on the other three appeals (including Basin Electric’s appeal if it does not settle). Moreover, a decision on one portion of this case could prejudice the parties in later presenting their issues to the Court, as the Court likely would be bound by *stare decisis* by any rulings it had made in the first portion of the case—despite the fact that those issues would have been considered and decided without the Court or the parties having the benefit of addressing all the inter-connected issues at once. It also would likely cause some confusion as to what matters were at issue and what matters were not, at each stage of the case.

In order to minimize such confusion and address the issues that were not fully briefed in the Conservation Organizations’ appeal—because the parties (including Basin Electric) were relying on the assumption that the Court would have read and considered *all* the briefs in *all* the appeals—the parties probably would need to resubmit their briefs for the Conservation Organizations’ appeal, making a March argument of even that portion of this case difficult in any event.

Finally, a relatively short abatement of this entire consolidated appeal until Basin Electric and EPA complete their settlement discussions will not unfairly prejudice the Conservation Organizations (or any other party). Most likely, the

delay will be for only a few additional months. And, if Basin Electric and EPA are able to reach a settlement, it will eliminate some of the complicated matters this Court otherwise will need to address in the appeal and will allow the remaining parties to streamline their arguments for more efficient resolution by the Court.

CONCLUSION

For the foregoing reasons, as well as those stated in the other responses, Basin Electric respectfully asks the Court to deny the Conservation Organizations' Motion to Proceed Separately and to temporarily defer oral argument in these four consolidated appeals as Basin Electric and EPA continue working with the Court's mediation office in an effort to resolve their issues. To the extent necessary, Basin Electric is willing to provide periodic status reports to the Court of the progress of the settlement efforts, and to notify the Court when that process is complete, in order to ensure that if and when a settlement agreement is signed (or settlement efforts cease) the Court can quickly resume the appeal and decide how the remaining parties and appeals should proceed.

Dated: January 7, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2016 a copy of this **RESPONSE IN OPPOSITION TO CONSERVATION ORGANIZATIONS’ MOTION TO PROCEED SEPARATELY** was served electronically on all counsel of record through the Court’s CM/ECF system.

s/ Christina F. Gomez

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

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s/ Christina F. Gomez