



STATE OF MINNESOTA

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January 10, 2008

U.S. Court of Appeals
Ninth Circuit
P.O. Box 192929
San Francisco, CA 94119-3939

**RE: Motion for Leave to Intervene, People of the State of California v. United States Environmental Protection Agency
Case No. 08-70011**

Dear Clerk of Court:

Enclosed for filing pursuant to Rule 15 of the Federal Rules of Appellate Procedure, please find a Motion for Leave to Intervene in the above-entitled. It is our understanding that several other states filed a similar motion on January 2, 2008. We respectfully request that our Motion be consolidated with the Motions of the other states in this matter. Also enclosed in an affidavit of service. Pursuant to Rule 15(d), by copy of this letter, service is made on other known Intervenors and Respondent and three extra copies are enclosed for clerk service upon Respondent.

Sincerely,

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Enclosures
AG: #1931694-v1



**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STATE OF CALIFORNIA by and through
ARNOLD SCHWARZENEGGER, GOVERNOR,
And the CALIFORNIA AIR RESOURCES
BOARD,

Petitioners,

Docket No. 08-70011

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, AND STEPHEN L.
JOHNSON, ADMINISTRATOR,

Respondents.

MOTION FOR LEAVE TO INTERVENE AS A PETITIONER

The State of Minnesota moves to intervene in this action as a party-petitioner pursuant to Fed. R. App. Proc. 15(d).

1. On January 2, 2008, the State of California (“California”), by and through Governor Arnold Schwarzenegger, and the California Air Resources Board (“CARB”), filed a Petition for Review with this Court seeking review of a final action by the United States Environmental Protection Agency (“EPA”), and its Administrator, Stephen L. Johnson. That final agency action denied California’s request, under section 209(b) of the Clean Air Act (“CAA”),

42 U.S.C. § 7543(b), for a waiver of preemption for California's regulations to control greenhouse gas emissions from new motor vehicles. These regulations would require reductions in fleet-average greenhouse gas emissions, including carbon dioxide (CO₂) methane (CH₄), nitrous oxide (N₂O), and hydrofluorocarbons (HFCs), for most new passenger motor vehicles sold in California, beginning with the 2009 model year. This final agency action was issued by EPA on December 19, 2007.

2. By motion filed with this Court on January 2, 2008, the states of New York, Arizona, Connecticut, Delaware, Illinois, Maine, Maryland, New Jersey, New Mexico, Oregon Rhode Island, Vermont, Washington, the Commonwealth of Massachusetts and the Commonwealth of Pennsylvania's Department of Environmental Protection moved to intervene as Petitioners in this action.

3. The Proposed Intervenor, state of Minnesota, has a strong interest in reviewing EPA's decision because Minnesota has enacted greenhouse gas reduction planning legislation that requires reductions from all greenhouse gas emission sectors. Reductions from the transportation sector requires consideration of whether to adopt California's motor vehicle greenhouse gas emissions regulations.

BACKGROUND

Statutory Background: California's Authority to Set Emission Standards for Motor Vehicles.

4. The CAA authorizes EPA to regulate tailpipe emissions from new motor vehicles. 42 U.S.C. § 7521. Although CAA § 209(a), 42 U.S.C. § 7543(a), generally prohibits states from adopting their own emission standards for new motor vehicles, CAA § 209(b), 42 U.S.C. § 7543(b), grants California the authority to set its own emission standards because of that state's long-standing, severe air pollution problems, as well as its "pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation." *Motor and Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1110-1111 (D.C. Cir. 1979) (explaining reasons for California's unique status). Under CAA § 209(b), California must request and be granted a waiver of preemption from EPA before it may enforce any emissions regulations.

5. In 1977, Congress added CAA § 177, 42 U.S.C. § 7507, which authorizes other states to adopt and enforce emission standards for new motor vehicles that are identical to those of California for which a waiver has been granted by EPA.

California's Adoption of Greenhouse Gas Emission Regulations and Request for Waiver.

6. Recognizing that motor vehicles are the second largest source of greenhouse gas emissions in California, CARB approved regulations in September, 2004, that limit the amount of greenhouse gases that may be emitted by light-and medium-duty passenger vehicles sold in California beginning in model year 2009. *See, e.g.*, 2005 Cal. Regulatory Notice Reg. 1427 (Sept. 30, 2005) (noting 2004 amendments).

7. On December 21, 2005, pursuant to CAA § 209(b), California requested a waiver of preemption from EPA for California's greenhouse gas emission regulations.

8. By letter dated December 19, 2007 to Governor Arnold Schwarzenegger, Administrator Johnson denied California's request.

The Proposed Intervenor Has A Direct And Substantial Interest In This Action.

9. Pursuant to their authority under CAA § 177, 42 U.S.C. § 7507, many of the Proposed Intervenors that moved to intervene on January 2, 2008, have adopted greenhouse gas emissions regulations for motor vehicles that are identical to California's regulations or are in the process of adopting or are contemplating adopting such regulations. The detailed explanation of the Proposed Intervenors' measures is in the Proposed Intervenors motion of January 2, 2008.

10. During its 2007 legislative session, Proposed Intervenor, State of Minnesota, adopted legislation that includes provisions to control greenhouse gas emissions. Next Generation Energy Act of 2007, 2007 Minn. Laws ch. 136, art. 5. The legislation establishes that Minnesota intends to reduce statewide greenhouse gas emissions across all sectors producing greenhouse gas emissions to a level at least 15% below 2005 levels by 2015, at least 30% below 2005 levels by 2025 and least 80% below 2005 levels by 2050. *Id.* at sec. 2, subd. 1. The Next Generation Energy Act of 2007 also provides for Minnesota's participation in a regional strategy to reduce greenhouse gas emissions. *Id.* at sec. 2, subd. 6. The reductions sought are ambitious. The California greenhouse gas emission standards are one option that has been under discussion in the State of Minnesota to reduce greenhouse gas emissions from the transportation sector.

11. However, because EPA's decision preempts California's regulations, Proposed Intervenor's option to adopt the California regulations is also preempted unless EPA's decision is overturned.

12. Like California and the other intervenor states, the state of Minnesota recognizes that motor vehicles are one of the significant sources of the greenhouse gases that cause global warming. Global warming is already seriously and negatively impacting the public health, economy and environment of the Proposed

Intervenor and its effects are expected to worsen in the absence of effective abatement prompted by immediate governmental action.

ARGUMENT

A. The Interests of the Proposed Intervenor Warrants a Grant of Intervention Under Fed. R. App. Pro. 15(d).

13. Fed. R. App. Pro. 15(d) requires that a party seeking to intervene must explain its interest in the proceeding and move to intervene within 30 days after the petition for review is filed. Intervention under Rule 15(d) is permitted where the intervenor has a direct and substantial interest in the outcome of the action. *See, e.g., New Mexico Dep't of Human Services v. HCFA*, 4 F.3d 882, 884 n.2 (10th Cir. 1993) (permitting intervention because intervenors had substantial and unique interest in outcome); *Bales v. NLRB*, 914 F.2d 92, 94 (6th Cir. 1990) (granting Rule 15(d) intervention to party with “substantial interest in the outcome of the petition”); *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 744 (D.C. Cir. 1986) (allowing Rule 15(d) intervention because petitioners were “directly affected by application” of agency policy).

14. The State of Minnesota has a direct and manifest interest in the outcome of this case because its strategy for greenhouse gas emissions reduction depends, in part, on reductions from the transportation sector, which requires consideration of the California vehicle emission regulations. If the California

regulations cannot be enforced because they are preempted in the absence of a CAA § 209(b) waiver from EPA, Minnesota is effectively precluded from considering vehicle emission standards as part of its statewide and regional strategy. EPA's denial of California's waiver thus preempts Minnesota's option to adopt the regulations as well as preempting California's regulations.

15. The application of effective greenhouse gas emission regulations would, at a minimum, begin the process of reducing the greenhouse gas emissions that cause global warming. It is not necessary that Minnesota show that the regulations would solve the problem all at once. *Massachusetts v. EPA*, 127 S.Ct. 1438, 1457, 1458-1459, 167 L.Ed.2d 248, 75 USLW 4149 (2007) ("Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.")

B. The Liberal Intervention Policies Underlying Fed. R. Civ. Pro. 24 Further Support Granting Intervention Here.

16. The intervention policies underlying Fed. R. Civ. Pro. 24 provide guidance in analyzing intervention under Rule 15(d), although the requirements of Rule 24 do not directly apply to motions to intervene in challenges to administrative actions in the federal appellate courts. *See United States v. Bursey*, 515 F.2d 1228, 1238 n. 24 (5th Cir. 1975) (policies underlying intervention in the district courts maybe applicable in the appellate courts, but are not controlling).

17. Addressing intervention as of right, Fed. R. Civ. Pro. 24(a)(2)

provides that:

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.

Rule 24(a) is construed liberally in favor of granting intervention. *See United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002); *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001); *Fed. Savings & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993). The Proposed Intervenor meets Rule 24(a)(2)'s criteria.

18. EPA's denial of California's waiver application plainly "impairs or impedes" Minnesota's efforts to reduce greenhouse gas emissions. It is unlikely that Minnesota can achieve its greenhouse gas emission reductions without realizing reductions from the transportation sector. Vehicle emissions are a significant part of the emissions from the transportation sector. Minnesota must have the latitude to consider adopting the California regulations. Without a CAA § 209(b) waiver from EPA to California, however, consideration of adopting vehicle emission regulations is futile. *See Yniguez v. Arizona*, 939 F.2d 727, 737 (9th Cir. 1991) ("the question...is whether the district court's decision will result

in *practical* impairment” of the interests of the applicants for intervention”) (emphasis in original); *United States v. City of Los Angeles*, 288 F.3d at 398 (“By allowing parties with a practical interest in the outcome of a particular case to intervene, we often simplify future litigation involving related issues”) (citation omitted). The courts are especially sensitive to the needs of states to intervene in actions that implicate state laws and policy interests. *See Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967) (allowing California to intervene as of right in an antitrust enforcement action to assert (California interests in a competitive system”). As a related matter, standing under the CAA is clear where a state sues on its own behalf to vindicate the administration of its air program. *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004); *Massachusetts v. EPA*, 127 S. Ct. 1438, at 1444-1445 (a state suing to protect its sovereign interests is entitled to special solicitude in a standing analysis under the CAA).

19. Fed. R. Civ. P. 24(b), which provides for permissive intervention, gives a federal court discretion to allow intervention when the proposed intervenor makes a timely application demonstrating that its “claim or defense and the main action have a question of law or fact in common.” In exercising such discretion, courts “shall consider whether the intervention will unduly delay or prejudice the rights of the original parties.” *Id.*; *see also Citizens for an Orderly Energy Policy*,

Inc. v. Suffolk County, 101 F.R.D. 497, 502 (E.D.N.Y. 1984) (possibly of undue delay or prejudice is the “principal consideration”).

20. As described above, EPA’s denial of California’s waiver application also effectively preempts Minnesota’s ability to adopt the regulations because it could not enforce the regulations without a waiver from EPA. *See, e.g., Motor Vehicle Manufacturers Assoc. v. Jorling*, 17 F.3d 521, 534 (2nd Cir. 1994) (New York can adopt, but not enforce, California emissions standards without a waiver from EPA).

C. California May Not Adequately Represent Minnesota’s Interests.

21. Unlike Fed. R. Civ. P. 24(a), Fed. R. App. Pro. Rule 15(d) does not, on its face, require an intervenor to show inadequate representation by the parties in the litigation. Nevertheless, Proposed Intervenor would satisfy this element of Rule 24(a). According to the Supreme Court, “[t]he requirement of the Rule is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.” *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972).

22. As this Court stated in *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983):

This court has consistently followed *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10, 92 S. Ct. 630, 636 n.10, 30 L.Ed.2d 686 (1972) in holding that the requirement of inadequacy of

representation is satisfied if the applicant shows that representation of its interests “may be” inadequate and that the burden of making this showing is minimal.

Id., at 528. See also *Southwest Center for Biological Diversity*, 268 F.3d at 822-23. Thus, the proposed intervenor need only show that the representation of its interest may be inadequate, not that representation will in fact be inadequate. See *Diamond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). Moreover, “[a] governmental party that enters a lawsuit solely to represent the interests of its citizens ... differs from other parties, public or private, that assert their own interests, even when these interests coincide.” *United States v. Hooker Chems. Plastics Corp.*, 749 F.2d 968, 992 n.21 (2d Cir. 1984) (emphasis added). Any doubts about intervention should be resolved in favor of it. See *Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993).

23. Minnesota’s authority to enforce emissions regulations that it might adopt is derived from California as a result of that state’s unique status under the Clean Air Act. California, however, may prosecute or settle this action in a manner that does not square with Minnesota’s interests. This potential difference between Minnesota’s interests and California’s is typified by previous situations in which states have opposed certain actions California has taken under its unique CAA status. See, e.g., *Assoc. of Int’l Auto Mfrs. v. Comm’r, Mass. Dep’t of Env.*

Prot., 208 F.3d 1, 5, 7-8 (1st Cir. 2000) (when California repealed its “Zero Emissions Vehicle” (ZEV) program and entered into a Memorandum of Understanding (MOA) with auto manufacturers, Massachusetts could not adopt the MOA for its own regulatory program because the content of the MOA was not considered “standards” under CAA §§ 209, 177). Accordingly, Minnesota’s interests may not be adequately represented by California.

D. The State of Minnesota’s Intervention Is Timely.

24. Fed. R. Civ. P. 15(d) provides in relevant part that a motion for intervention is timely if filed within 30 days after the petition for review is filed. California’s petition for review was filed on January 2, 2008. This Motion for Leave to Intervene is being filed within 30 days of January 2, 2008, and is therefore timely.

25. Allowing the state of Minnesota to intervene to protect its own rights will also not unduly delay or prejudice the rights of any other party.

26. On January 10, 2008, the Minnesota Attorney General’s Office informed the Department of Justice, representing EPA, of Proposed Intervenors’ intent to file of this motion.

CONCLUSION

WHEREFORE, for the foregoing reasons, the state of Minnesota respectfully requests that this Court grant its motion to intervene as a party-petitioner.

Dated: January 10, 2008

Respectfully submitted,

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AFFIDAVIT OF SERVICE VIA U. S. MAIL

**Re: People of the State of California v. United States Environmental
Protection Agency
Court File No. 08-70011**

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Brenda Finch, being first duly sworn, deposes and says:

That at the City of St. Paul, County of Ramsey and State of Minnesota, on January 10, 2008, she caused to be served **Motion for Leave to Intervene as Petitioners** by depositing the same in the United States mail at said city and state, true and correct copy(ies) thereof, properly enveloped with prepaid first class postage, and addressed to:

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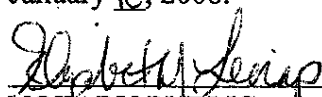
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Brenda Finch

Subscribed and sworn to before me on
January 16, 2008.


NOTARY PUBLIC

