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U.S. DISTRICT COURT
DISTRICT OF WYOMING

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STEPHAN HARRIS, CLERK
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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

TRI-STATE GENERATION AND
TRANSMISSION ASS'N, INC.,
BASIN ELECTRIC POWER COOPERATIVE, and
WESTERN FUELS-WYOMING, INC.,

Petitioners,

v.

Case No. 16-cv-319-F

SALLY JEWELL, in her official
capacity as Secretary of the U.S.
Department of the Interior; and
GREGORY J. GOULD, in his
official capacity as Director of the
Office of Natural Resources Revenue,

Respondents.

PETITION FOR THE REVIEW OF FINAL AGENCY ACTION

Tri-State Generation and Transmission Association, Inc. (“Tri-State”), Basin Electric Power Cooperative (“Basin Electric”), and Western Fuels-Wyoming, Inc. (“WFW”) (together, “Co-Op Petitioners”) submit this Petition under the Administrative Procedure Act, 5 U.S.C. §§ 701–706 (“APA”), and Local Rule 83.6. On July 1, 2016, the U.S. Department of the Interior’s Office of Natural Resources Revenue (“ONRR”) issued a final rule substantially changing, among other things, how Federal and Indian coal are valued for royalty purposes. *See Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform*, 81 Fed. Reg. 43,338 (July 1, 2016) (“Final Rule”). Co-Op Petitioners are filing this Petition to challenge the Final Rule.

1. Tri-State is a wholesale generation and transmission electric power supplier that generates and transmits electric power to its member systems in a 250,000 square-mile service territory across Colorado, Nebraska, New Mexico, and Wyoming. These members supply power to their own residential, commercial, industrial, and agricultural customers (approximately 600,000 customer meters), predominately located in rural areas.

2. Basin Electric is a cooperative that provides wholesale electric power to member rural electric systems in Colorado, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Dakota, and Wyoming. Its members’ service territories cover about 540,000 square miles, and its members provide electricity to approximately 2.9 million customers.

3. Tri-State’s and Basin Electric’s members are the sole state-certified providers of electric service to retail (residential and business) customers within their designated service territories.

4. Tri-State and Basin Electric are participants in the Missouri Basin Power Project, the owner of the Laramie River Station (“LRS”) in Wheatland, Wyoming. LRS is a coal-fired

electric generating facility using coal from federal leases. Tri-State and Basin Electric take electricity generated at LRS in kind and deliver it to their members.

5. Basin Electric owns 92.9% of the Dry Fork Station (“DFS”). DFS is a coal-fired electric generating facility located adjacent to the Dry Fork Mine (“DFM”) in Gillette, Wyoming. DFS utilizes coal from federal leases. In addition to DFS and LRS, Basin Electric has two coal-fired generating facilities in North Dakota. Basin Electric delivers electricity generated at its facilities to its members.

6. Tri-State and Basin Electric are the lessees of record under Federal Coal Lease WYW-5035 in Campbell County, Wyoming. This Federal Coal Lease is included in the DFM Logical Mining Unit.

7. WFW owns and operates the DFM which produces coal from federal and state leases for LRS, DFS, and Basin Electric’s Leland Olds Station (“LOS”) in North Dakota. In 2017, the DFM anticipates producing more than 6 million tons of coal and has remaining commercial reserves of 300.9 million tons (both state and federal coal). WFW is a single member cooperative in which Western Fuels Association, Inc. (“WFA”) is the single member. Tri-State and Basin Electric are Class A members of WFA. WFW’s contracts provide for a direct pass through of the full amount of royalties as a separate component of the overall price paid for the coal. All of Tri-State’s and Basin Electric’s costs, including their fuel costs, are included in their charges to their members and their members’ cost of service rates to their retail customers.

8. Respondents Sally Jewell and Gregory J. Gould are officers of the United States, which has waived its sovereign immunity under the APA, § 702.

9. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1346.

10. Venue is proper under 28 U.S.C. § 1391(e) because the Final Rule affects Co-Op Petitioners' property and operations in this district.

11. Since January 1989, Federal coal has been valued for royalty purposes based on either gross proceeds from an arms-length sale of the coal or, in the case of a non-arms-length sale of the coal, the **first applicable** benchmark of four benchmarks. The regulations provide that only if none of the four benchmarks is applicable, then a "net-back method or any other reasonable method shall be used to determine value." 30 C.F.R. § 1206.257(c)(2)(v).

12. The Final Rule abolishes all of the benchmarks and requires that all coal sold under non-arm's-length contracts be valued based solely using a net-back methodology starting with the first arm's-length sale of the coal or, if none, then the first arm's-length sale of a different commodity, the electricity generated from the coal. The Final Rule also adds a new definition of a "coal cooperative" which "means an entity organized to provide coal or coal-related services to the entity's members (who may or may not also be owners of the entity), partners, and others. The entity may operate as a **coal lessee**, operator, payor, logistics provider, **or electricity generator**, or any of their affiliates, and may be organized to be non-profit or for-profit." (Emphasis added.) The Final Rule provides that for coal cooperatives, if coal is sold or transferred to another member of the coal cooperative and used in a power plant for the generation and sale of electricity, then the coal must be valued on the power plant's arm's-length sale of the electricity or, if the electricity is not sold in an arm's-length transaction, then ONRR will determine the value of the coal for royalty purposes.

13. The Final Rule is arbitrary and capricious and contrary to law because (i) it does not base royalty on the value of coal, the product which is removed from the federal lease, as required by ONRR's statutory authority but, instead, on the value of an entirely different

commodity, electricity, or on a value to be determined by ONRR; (ii) it establishes a valuation procedure where it is impossible for federal coal lessees (such as Co-Op Petitioners) who provide coal in non-arm's-length transactions to coal cooperatives to determine with any certainty how to comply with their legal obligation to calculate and pay royalty; (iii) it improperly discriminates among similarly situated lessees of federal leasable minerals in that oil and gas lessees with non-arm's-length sales may use published index prices to value their production instead of being required to use a net-back method based on commodities produced from the oil or gas; (iv) it improperly ignores well-established legal principles regarding the nature of business and corporate entities and determination of control relationships among such entities as well as ONRR's long established definitions of "affiliate" and non-affiliate;" and (vi) for other reasons which will be set forth in the briefing.

Dated: December 29, 2016.

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Respectfully submitted,

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December 29, 2016

Via Hand Delivery

Clerk of U.S. District Court
2120 Capitol Avenue, Room 2131
Cheyenne, WY 82001-3658

Re: Filing of new civil action- Tri-State Generation and Transmission Association, Inc., Basin Electric Power Cooperative and Western Fuels-Wyoming, Inc. v. Sally Jewell in her official capacity as Secretary of the U.S. Dept. of the Interior, and Gregory J. Gould in his official capacity as Director of the Office of Natural Resources Revenue

Enclosed for filing please find the following documents:

1. Petition for the Review of Final Agency Action
2. Civil Cover Sheet
3. Corporate Disclosure Statements of Basin Electric Power Cooperative and Western Fuels-Wyoming, Inc.
4. Corporate Disclosure Statement of Tri-State Generation and Transmission Association, Inc.

Also enclosed is a check in the amount of \$400.00 to cover the cost of the filing.

Please issue the enclosed summonses for service on the respondents/defendants.

Thank you very much for your assistance and please do not hesitate to contact me should you have any questions.

Sincerely,



Erin Murphy
for
DAVIS GRAHAM & STUBBS LLP

EM: at