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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB; CENTER FOR BIOLOGICAL DIVERSITY; ENVIRONMENTAL DEFENSE FUND; NATIONAL WILDLIFE FEDERATION; NATURAL RESOURCES DEFENSE COUNCIL; THE WILDERNESS SOCIETY; CITIZENS FOR A HEALTHY COMMUNITY; DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT; EARTHWORKS; ENVIRONMENTAL LAW AND POLICY CENTER; FORT BERTHOLD PROTECTORS OF WATER AND EARTH RIGHTS; MONTANA ENVIRONMENTAL INFORMATION CENTER; SAN JUAN CITIZENS ALLIANCE; WESTERN ORGANIZATION OF RESOURCE COUNCILS; WILDERNESS WORKSHOP; WILDEARTH GUARDIANS; and WYOMING OUTDOOR COUNCIL, Plaintiffs, v. RYAN ZINKE, in his official capacity as Secretary of the Interior; BUREAU OF LAND MANAGEMENT; and UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants.	Case No. 3:17-cv-3885-EDL Consolidated with Case No. 3:17-cv-3804-EDL Date: September 5, 2017 Time: 9:00 a.m. Courtroom: Courtroom E, 15th Floor Judge: Hon. Elizabeth D. Laporte **CONSERVATION AND TRIBAL CITIZEN GROUPS' NOTICE OF MOTION, MOTION FOR SUMMARY JUDGMENT, AND MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT**

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NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

On September 5, 2017, at 9:00 a.m., or as soon as possible thereafter, Plaintiffs Sierra Club, et al. (collectively "Conservation and Tribal Citizen Groups") will move for summary judgment pursuant to Federal Rule of Civil Procedure 56. Conservation and Tribal Citizen Groups seek an order setting aside the June 15, 2017 decision by the Bureau of Land Management ("BLM") to indefinitely stay parts of its Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule ("Waste Prevention Rule" or "Rule"), which took effect on January 17, 2017. 82 Fed. Reg. 27,430 (June 15, 2017) ("Stay Notice").

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE ISSUES

Last year, following government reports documenting a serious problem of the waste of publicly-owned natural gas as a result of oil and gas drilling on federal and tribal lands, and years of study and public input, BLM promulgated a rule to prevent such waste. Before the Waste Prevention Rule became effective, the Rule's challengers moved for a judicial stay, but the district court concluded that they were not likely to succeed on the merits and would not be irreparably harmed and so denied the stay. As a result, the Rule went into effect in January 2017. In response to industry's claims that operators needed additional time to comply, many of the Rule's key provisions have compliance deadlines in January 2018. But just last month—without any notice, public input, or consideration of the impacts of his action—Secretary of the Interior Ryan Zinke issued the Stay Notice staying compliance with those January 2018 deadlines. The Secretary did not have authority to do so.

While a new administration may seek to change the policies of previous ones, no federal agency has authority to change the compliance dates in a duly promulgated effective rule without first providing notice and an opportunity for public comment, thoroughly explaining its decision, and pointing to facts in the record to support the change, pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*. The Secretary attempts to circumvent these important constraints on agency authority by relying on the "relief pending review" provision of the APA, 5 U.S.C. § 705,

which permits agencies, when "justice so requires," to postpone the effective date of new rules pending judicial review. This provision does not authorize the Stay Notice for three reasons.

First, section 705 cannot be used to "postpone" the effective date of a rule that has already gone into effect. The Waste Prevention Rule went into effect five months before the Secretary issued the Stay Notice. Second, section 705 stays must be for the purpose of allowing for *judicial* review, not *administrative* reconsideration. Third, an agency seeking to stay a new rule under section 705 must demonstrate that "justice … requires" a stay by showing that the four traditional factors for such equitable relief are met. At minimum, it is arbitrary for an agency to issue such a stay without considering both sides of the equity scale. Yet, the brief Stay Notice fails to address the four equitable factors or to consider *any* of the Rule's benefits that will be lost a result of the stay, such as reduced waste of public resources, increased royalty payments to states, tribes, and local communities, and decreased air pollution. Given the Secretary's failure to follow the required procedures under the APA, this Court should vacate the unauthorized Stay Notice.

RELEVANT FACTS

I. BLM Promulgates the Waste Prevention Rule.

Under the Mineral Leasing Act ("MLA"), BLM has a duty to ensure that oil and gas companies developing publicly-owned natural resources "use all reasonable precautions to prevent waste of oil or gas." 30 U.S.C. § 225. Pursuant to this provision and other statutory mandates, BLM has long regulated venting and flaring of natural gas produced on public lands and determined when operators must pay royalties to the federal government for wasted gas. *See* 81 Fed. Reg. 83,008, 83,017 (Nov. 18, 2016) (discussing BLM regulation under Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases (NTL-4A), 44 Fed. Reg. 76,600 (Dec. 27, 1979)).

In 2008 and 2010, the Government Accountability Office ("GAO") identified a pervasive problem of preventable natural gas waste and associated air pollution on public and tribal lands and found that BLM's existing venting and flaring requirements were "insufficient and outdated." 81 Fed. Reg. at 83,009–10. BLM had not updated its regulations addressing natural gas waste and royalty payments in more than three decades. *Id.* at 83,017. Meanwhile, technology had advanced:

new drilling and gas capture technologies fundamentally changed both how much gas is wasted and how much can be captured and put to use. *Id*. at 83,009, 83,017.

BLM estimates that federal oil and gas lessees vented or flared more than 462 billion cubic feet of natural gas on public and tribal lands between 2009 and 2015—enough gas to serve over 6.2 million homes for a year. *Id.* at 83,015. This wasted gas is vented or flared from wells and associated equipment—sometimes by design, but also often due to improper functioning. And that figure does not even account for the significant amount of gas that leaks from wells and storage site equipment. *Id.* Much of this wasted gas could be captured or avoided using proven technologies. *Id*. at 83,010–11. Doing so would save millions of dollars in lost royalty revenues for federal, state, and tribal governments that could be used for schools, health care, and infrastructure. *Id.* at 83,014.

Venting, flaring, or leaking natural gas into the air also harms human health and the environment. Natural gas is made up of methane, a powerful greenhouse gas, as well as other smog-forming volatile organic compounds ("VOCs") and carcinogenic hazardous air pollutants, which cause serious negative public health effects. *Id.* at 83,009, 83,014. In addition to preventing waste, BLM also has an obligation under the Federal Land Policy and Management Act ("FLPMA") to manage public lands "in a manner that will protect … environmental, [and] air and atmospheric … values." 43 U.S.C. § 1701(a)(8).

In 2014, BLM commenced a rulemaking process to study and address wasteful venting, flaring, and leaking of natural gas on public and tribal lands. *Id.* at 83,010. After soliciting extensive stakeholder feedback from states, tribes, companies, trade organizations, non-governmental organizations, and citizens, BLM issued a proposed rule in early 2016. *Id*. BLM then considered more than 330,000 public comments, and finalized the Waste Prevention Rule on November 18, 2016. *Id.* The Rule's effective date was January 17, 2017. *Id.* at 83,008.

Among the Rule's requirements, operators must capture and sell natural gas that would otherwise be vented or flared, based on a phased-in capture target that tightens from 85% in January 2018 to 98% by 2026. *Id.* at 83,082 (discussing 43 C.F.R. § 3179.7(b)). Operators also must comply with specific performance standards to reduce waste from some types of equipment, like storage tanks and pneumatic controllers, and periodically inspect their facilities for leaks and

promptly repair any leaks identified. *Id.* at 83,011–12. Operators were required to comply with some of the Rule's requirements, such as the requirement to submit waste minimization plans with applications for permits to drill, starting on January 17, 2017. In response to comments requesting additional time to comply with the Rule, BLM chose to phase in other Rule requirements, including the capture requirements and leak detection and repair program, to ease potential burdens on operators. *See id.* at 83,024, 83,033. For those provisions, BLM set a compliance deadline of January 17, 2018, one year after the Rule's effective date. *Id.* at 83,033, 83,082.

BLM estimated that the Rule would reduce wasteful venting of natural gas by 35% and wasteful flaring by 49%, and increase royalties by up to $14 million per year. *Id.* at 83,014. It further found that the Rule would significantly benefit local communities, public health and the environment by increasing royalty revenues, reducing the visual and noise impacts associated with flaring, protecting communities from smog and carcinogenic air toxic emissions, and reducing greenhouse gas pollution. *Id.* at 83,014, 83,021. BLM concluded that the Waste Prevention Rule's benefits outweighed its costs "by a significant margin," with "net benefits ranging from $46 million to $199 million per year." *Id.* at 83,013. Even for the smallest companies, the compliance costs are modest, reducing profits by around 0.15% annually on average. *Id.* at 83,013–14.

II. Industry and Some States Unsuccessfully Attempt to Block the Waste Prevention Rule from Taking Effect.

Shortly after BLM finalized the Waste Prevention Rule, the Western Energy Alliance ("WEA"), the Independent Petroleum Association of America, and the states of North Dakota, Wyoming, and Montana sought to preliminarily enjoin the Rule prior to its effective date of January 17, 2017. *Wyoming v. U.S. Dep't of the Interior*, No. 2:16-cv-285-SWS, 2017 WL 161428, at *1 (D. Wyo. Jan. 16, 2017). BLM opposed the motion, arguing:

> The waste of public resources and the associated loss of royalty revenues are ongoing harms suffered by the American public and federal, state, and tribal governments that far outweigh Petitioners' speculative economic harms. Because Petitioners have failed … to overcome the public's strong interest in utilizing, rather than wasting, domestic energy sources, their request for a preliminary injunction must be denied.

Fed. Resp'ts' Consolidated Opp'n to Pet'rs' & Pet'r-Intervenor's Mots. for Prelim. Inj. ("Fed. Opp'n to Prelim. Inj.") at 2, *Wyoming*, No. 2:16-cv-285-SWS (D. Wyo. Dec. 15, 2016), ECF No. 70.[1] On January 16, 2017, following briefing and argument, the district court denied the preliminary injunction requests. *Wyoming*, 2017 WL 161428, at *12. Thus, the Rule became effective on January 17, 2017.

WEA, the American Petroleum Institute ("API") and other industry groups, as well as some states, also lobbied members of Congress to repeal the Rule using the Congressional Review Act. The Congressional Review Act resolution to repeal the Rule was blocked in the Senate, with a majority of Senators voting against the motion to proceed to debate on the resolution on May 10, 2017. 163 Cong. Rec. S2851, S2853 (May 10, 2017).[2] As a result, the Rule remained in effect until BLM issued the stay challenged in this case.

III. Secretary Zinke Stays Future Compliance Dates in the Waste Prevention Rule Without Notice and Comment.

On June 15, 2017, without advance notice or an opportunity for public comment, Secretary Zinke issued the Stay Notice, purportedly under section 705, staying all sections of the Rule with compliance dates one year or more after the effective date of the Rule "pending judicial review." 82 Fed. Reg. 27,430, 27,431 (June 15, 2017). The stayed provisions include requirements to capture gas, reduce flaring, upgrade or replace certain equipment, and inspect for and repair leaks. *Id.*

The Stay Notice emphasizes that BLM is conducting an "ongoing" administrative review of the Rule, pursuant to Executive Order No. 13,783, issued by President Donald J. Trump, directing Secretary Zinke to "review" the Waste Prevention Rule and "if appropriate, publish for notice and comment a proposed rule suspending, revising, or rescinding the Rule." *Id.* (citing Exec. Order No. 13,783, Promoting Energy Independence and Economic Growth, at § 7(b)(iv), 82 Fed. Reg. 16,093,

[1] Pursuant to Federal Rule of Evidence 201, this court "may take judicial notice of papers filed in other courts." *Hott v. City of San Jose*, 92 F. Supp. 2d 996, 998 (N.D. Cal. 2000), *aff'd*, 22 F. App'x 799 (9th Cir. 2001); *accord Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir. 1998).

[2] Available on Congress' website at: www.congress.gov/crec/2017/05/10/CREC-2017-05-10.pdf (last visited July 24, 2017).

16,096 (Mar. 28, 2017)). Secretary Zinke issued Secretarial Order No. 3349 to begin implementing this directive on March 29, 2017. *Id.*[3]

Secretary Zinke also emphasized that he issued the Stay Notice in response to letters from WEA and API arguing that the Rule is too costly. *Id.*[4] Although the Stay Notice points to the Waste Prevention Rule's costs as a justification for the stay, the *only* evidence cited is the same Regulatory Impact Analysis (RIA) that BLM had previously used to support adoption of the Rule and oppose industry efforts seeking to preliminarily enjoin the Rule, and which demonstrates that the Rule's costs are justified. *Id.*[5] In the Stay Notice, Secretary Zinke also concludes a stay is necessary because of the uncertain future of the requirements due to pending litigation and the administration's decision to reconsider the Rule. *Id.* The Stay Notice makes no mention of any of the Rule's benefits that would be lost as a result of the stay.

The Stay Notice states that the January 17, 2018 compliance dates are stayed "pending judicial review." *Id.* But just days after announcing the stay, BLM sought to delay that judicial review by moving to postpone the briefing in the challenge to the Rule in the District of Wyoming, arguing that the agency needs time to "propose to revise or rescind the Rule." Fed. Resp'ts' Mot. to Extend Briefing Deadlines ("Fed. Extension Mot.") at 3, *Wyoming*, No. 2:16-cv-285-SWS (D. Wyo. June 20, 2017), ECF No. 129. Indeed, BLM asserted that it would be a waste of the court's resources to review the case while BLM revises the Rule, and that BLM's ongoing administrative

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[3] Secretarial Order No. 3349 is available on the U.S. Department of the Interior's website at: https://www.doi.gov/sites/doi.gov/files/uploads/so_3349_-american_energy_independence.pdf (last visited July 24, 2017).

[4] Both letters are available on BLM's website. Letter from Kathleen M. Sgamma, WEA, to Secretary of the Interior Ryan Zinke (Apr. 4, 2017), https://www.blm.gov/sites/blm.gov/files/WEA_Letter_VF.pdf (last visited July 24, 2017); Letter from Jack N. Gerard, API, to Secretary of the Interior Ryan Zinke (May 16, 2017), https://www.blm.gov/sites/blm.gov/files/API_Letter_VF.pdf (last visited July 24, 2017). In these letters, both WEA and API acknowledged that a suspension or postponement of the Rule would require BLM to undertake notice and comment rulemaking.

[5] The RIA is publicly available as part of the rulemaking docket for the Waste Prevention Rule on Regulations.gov, a website maintained by the U.S. Environmental Protection Agency, Office of Management and Budget, and several other federal agencies: https://www.regulations.gov/document?D=BLM-2016-0001-9127 (last visited July 24, 2017).

review might obviate any need for judicial review. *Id.* at 4. On June 27, 2017, the court granted BLM's request—delaying briefing in that case while BLM proceeds with administrative reconsideration of the Rule. Order at 3, *Wyoming*, No. 2:16-cv-285 (D. Wyo. June 27, 2017), ECF No. 133. As a result, the vast majority of the waste reduction benefits BLM anticipated from the Rule have been stayed indefinitely. *See* RIA at 6 Table 1-3(d).[6]

STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Rule 56 allows a party to file for summary judgment "at any time" until 30 days after the close of discovery. Fed. R. Civ. P. 56(b). Accordingly, plaintiffs may move for summary judgment "at the commencement of an action." Fed. R. Civ. P. 56(b) advisory committee's note to 2010 amendment.[7]

Under the APA, judicial reversal of an agency action is appropriate when the agency decision is "arbitrary, capricious, [or] an abuse of discretion," "in excess of statutory … authority," or made "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D). An agency's action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible

[6] Table 1-3(d) quantifies the Rule's estimated annual benefits between 2017 and 2026. The stayed provisions, which include everything other than liquids unloading, account for 85% of the upper range of the Rule's quantified benefits.

[7] The Conservation and Tribal Citizen Groups seek prompt resolution of this case through a motion for summary judgment because the compliance deadlines that Secretary Zinke has illegally stayed are less than six months away. There is no need for this Court to await the completion of the administrative record because the Stay Notice is facially invalid and time is of the essence. *See* Order Denying Mot. to Hold Mot. for Partial Summ. J. in Abeyance, *Yurok Tribe v. U.S. Bureau of Reclamation*, No. 16-cv-06863-WHO (N.D. Cal. Dec. 13, 2016), ECF No. 41. Moreover, the Stay Notice relies on only five documents—Executive Order No. 13,783, Secretarial Order No. 3349, letters from WEA and API, and the RIA—all of which are publicly available in the Federal Register or on government websites and therefore subject to judicial notice. *See* 44 U.S.C. § 1507 ("The contents of the Federal Register shall be judicially noticed."); *Eidson v. Medtronic, Inc.*, 981 F. Supp. 2d 868, 879 (N.D. Cal. 2013) (noting that "public records and government documents available from reliable sources on the Internet" are typically subject to judicial notice (quotation omitted)).

that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"). Furthermore, when an agency reverses course from its previous position, it must provide a "reasoned analysis." *Id.* at 42, 57; *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (requiring a "reasoned explanation" for "disregarding facts and circumstances that underlay or were engendered by the prior policy") (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) ("*Fox*")).

An agency is not entitled to deference to its interpretation of a statute that it is not charged with implementing, such as the APA. *Air N. Am. v. Dep't of Transp.*, 937 F.2d 1427, 1436 (9th Cir. 1991).

ARGUMENT

This case is appropriate for summary judgment because the Stay Notice by its plain terms violates the law. The APA requires that to revise a duly promulgated regulation, including its compliance deadlines, an agency must undergo a notice-and-comment rulemaking, develop a record to support its action, and thoroughly explain its decision. In a bid to circumvent these important procedures and quickly stay the Waste Prevention Rule, Secretary Zinke attempts to force a square peg into a round hole by invoking section 705's authority to *postpone* a *not-yet-effective* rule pending *judicial* review, to instead *stay* an *effective* rule so that BLM may *administratively* reconsider it. In doing so, he has exceeded his authority. While the Court may invalidate the stay on this basis alone, the Secretary also entirely failed to demonstrate in the Stay Notice that "justice so requires" a stay, as section 705 mandates. Finally, as demonstrated through their declarations, the Conservation and Tribal Citizen Groups have standing to challenge the Secretary's unlawful reliance on section 705.

I. Secretary Zinke Lacks Authority to Alter the Rule's Compliance Dates Without a Notice-and-Comment Rulemaking.

Absent statutory authorization, which (as explained in Part II below) is lacking here, Secretary Zinke cannot alter a rule's compliance deadlines by extending them indefinitely without providing notice and an opportunity for public comment under the APA, 5 U.S.C. § 553(b)–(c), and

justifying the extension under the relevant substantive statutes. Because Secretary Zinke issued the stay of compliance deadlines without any notice, public input, or explanation of how it is consistent with the relevant statutes, the stay is unlawful.

As the D.C. Circuit held in striking down the Environmental Protection Agency's ("EPA") recent similar bid to delay oil and gas methane regulations, an agency has no "inherent authority" to stay compliance with its own duly promulgated regulations. *Clean Air Council v. Pruitt*, --F.3d--, No. 17-1145, 2017 WL 2838112, at *4 (D.C. Cir. July 3, 2017). Absent specific statutory authority to stay a regulation, an agency must enforce that regulation until it has validly changed it. *Id.* And as the courts have held repeatedly, "an agency decision which effectively suspends the implementation of important and duly promulgated standards … constitutes rulemaking subject to notice and comment requirements of 5 U.S.C. § 553." *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983); *see Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 764 (3d Cir. 1982) ("*NRDC*") ("The indefinite postponement of the effective date of a final rule fits the APA definition of 'rule.'"); *see also Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 206 (2d Cir. 2004) ("*Abraham*") ("[B]ecause the February 2 delay was promulgated without complying with the APA's notice-and-comment requirements, and because the final rule failed to meet any of the exceptions to those requirements, it was an invalid rule.").

The Third Circuit has explained that if an agency was not required to go through notice and comment rulemaking to revise a rule's effective date or compliance dates, "it would mean that an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date." *NRDC*, 683 F.2d at 762. This type of end run around the APA's procedures is not permitted.

But that is precisely what Secretary Zinke seeks to do here. BLM promulgated its Waste Prevention Rule following years of study and extensive public input and provided a thorough explanation of how the Rule addresses the growing problem of natural gas waste. In contrast, Secretary Zinke issued the Stay Notice indefinitely suspending the key compliance deadlines *without any notice or public input*, much less careful study and a thorough explanation for undoing waste control measures that BLM previously deemed necessary and justified. Moreover, the effect of the

stay is to create a regulatory void with respect to waste prevention: BLM's Stay Notice does not even revert to the prior outdated regulatory regime, NTL-4A.[8] The APA's procedural requirements are aimed at preventing just this type of sudden, major change in policy without any public input or explanation. *See id.* at 760–64; *see also Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1486 (9th Cir. 1992) ("It is a fundamental tenet of the APA that the public must be given some indication of what the agency proposes to do so that it might offer meaningful comment thereon."). Because Secretary Zinke lacks authority to alter the Waste Prevention Rule's compliance dates without complying with the APA's procedures, the Stay Notice is invalid.

II. APA Section 705 Does Not Authorize the Secretary to Stay Compliance Dates in an Already-Effective Rule While BLM Considers Revisions to the Rule.

Having failed to undertake the effort to revise the rule pursuant to the APA, Secretary Zinke unlawfully attempts to shoehorn the stay into BLM's authority under section 705, which provides:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705. Section 705 allows an agency to stay the effective date of a rule while its validity is being adjudicated; it does not give agencies free rein to repeal rules without complying with the APA's required procedures simply because the agency is having second thoughts, as the Secretary has done here. Indeed, the Secretary's reliance on section 705 is unlawful for three reasons.

A. Section 705 Does Not Authorize the Secretary to Postpone a Rule that Is Already in Effect.

The court's "first step" in interpreting statutory language is to determine whether it has a "plain and unambiguous meaning." *W. Watersheds Project v. Interior Bd. of Land Appeals*, 624 F.3d 983, 987 (9th Cir. 2010) (quotation omitted)). If the statute is "unambiguous, the agency, like

[8] BLM determined that NTL-4A is outdated, not "particularly effective," and "subject to inconsistent application." 81 Fed. Reg. at 83,015, 83,017, 83,038. But even NTL-4A provided more protection from natural gas waste than BLM provides in the wake of its Stay Notice. For example, NTL-4A required operators to justify and get BLM approval on a case-by-case basis for venting and flaring, and to measure and report vented and flared gas. 44 Fed. Reg. at 76,601.

the courts, must follow Congress's express will." *R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1065 (9th Cir. 1997). Here, section 705's plain text only authorizes BLM to "postpone the effective date of action taken by it" under certain circumstances. 5 U.S.C. § 705. It does not authorize BLM to stay a rule that is already in effect, as it has done here.

The Waste Prevention Rule's "effective date" was January 17, 2017. 81 Fed. Reg. at 83,008 ("The final rule is effective on January 17, 2017."). BLM cannot "postpone" this deadline because it has already passed. Postpone means "to put off to a later time." *Postpone*, Merriam-Webster, www.merriam-webster.com/dictionary/postpone (last visited July 24, 2017). "[O]ne can only postpone something that has not yet occurred." *Merriweather v. Sherwood*, 235 F. Supp. 2d 339, 342 (S.D.N.Y. 2002) (construing Prison Litigation Reform Act provision authorizing courts to "postpone the effective date of an automatic stay"). BLM's attempt to postpone the Rule's January 17, 2017 effective date on June 15, 2017 is no more plausible than the example given by the court in *Merriweather*: "If a wedding occurs on September 2, one cannot 'postpone' the wedding until September 30 on September 5." *Id.*

The D.C. Circuit has squarely rejected just such an attempt by the EPA to "postpone the effective date" of an already effective rule pursuant to section 705. *Safety-Kleen Corp. v. EPA*, No. 92-1629, 1996 U.S. App. LEXIS 2324, at *2–3 (D.C. Cir. Jan. 19, 1996) (per curiam); *see also* 60 Fed. Reg. 55,202, 55,203–04 (Oct. 30, 1995) (EPA's stay notice). The court held that section 705 "permits an agency to postpone the effective date of a not yet effective rule, pending judicial review. It *does not* permit an agency to suspend without notice and comment a promulgated rule." *Safety-Kleen*, 1996 U.S. App. LEXIS, at *2–3 (emphasis added).

Without offering any support or rationale, the Stay Notice asserts that future compliance dates are "within the meaning of the term 'effective date' as that term is used in section 705 of the APA." 82 Fed. Reg. at 27,431. This interpretation—for which BLM does not receive any deference, *see Air N. Am.*, 937 F.2d at 1436—is inconsistent with the plain language and intent of the statute. Section 705's use of "effective date" in the singular demonstrates Congress' understanding that a rule or other action has one effective date—the date when it goes into effect—not a series of effective dates tied to compliance deadlines. *See CTS Corp. v. Waldburger*, 134 S.Ct.

2175, 2186–87 (2014) (noting that a statute's reference to the covered time period for a statute of limitations in the singular would be an "awkward way" to refer to two different time periods).[9]

Another APA provision reinforces this straightforward reading. *See Torres v. Lynch*, 136 S. Ct. 1619, 1626 (2016) (holding that courts must "interpret the relevant words not in a vacuum, but with reference to the statutory context" (quotation omitted)). Section 553(d), which sets forth the APA's rulemaking procedures, states that "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date." 5 U.S.C. § 553(d). This provision would make no sense if "effective date" means any "compliance date" and might permit agencies to defer publication of portions of a substantive rule until long after the rule takes effect.

As the APA's legislative history indicates, this publication requirement was intended to "afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of rules may prompt." S. Rep. No. 79-752, at 201 (1945).[10] Thus, section 553(d) provides time for challengers of a rule to seek immediate relief from a court or an agency where they believe a rule should be stayed pending judicial review, just as the challengers to the Waste Prevention Rule did (unsuccessfully) here. But the window of time for a section 705 stay ends when the Rule goes into effect. Otherwise, a rule's detractors could make an end run around the APA's procedures by seeking a 705 stay years after a rule takes effect.

Indeed, the Secretary's interpretation would turn the APA's process for orderly rulemaking and implementation of rules on its head by creating tremendous regulatory uncertainty. *See Price v. Stevedoring Servs., Inc.*, 697 F.3d 820, 830 (9th Cir. 2012) (en banc) (noting that the APA's formal rulemaking procedures are intended to provide "predictability to regulated parties"). Rejecting an agency's attempt to stay a rule's future compliance dates under a different legal authority, the

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[9] Indeed, regulations often have multiple compliance dates that may be triggered years following the rule's effective date. *See, e.g.*, 80 Fed. Reg. 67,838, 67,882-83 (Nov. 3, 2015) (setting multiple compliance dates for different provisions of power plant effluent limitations guidelines, requiring compliance with some provisions by the rule's effective date, and deferring compliance with others until eight years after rule's effective date).

[10] Available on the U.S. Department of Justice's website, https://www.justice.gov/sites/default/files/jmd/legacy/2014/03/20/senaterept-752-1945.pdf (last visited July 24, 2017).

Second Circuit reasoned that it was "inconceivable" that Congress would authorize agencies to amend or revoke their regulations without notice and comment up until various compliance dates have passed, in part because it "would completely undermine any sense of certainty." *Abraham*, 355 F.3d at 197. This is particularly true for a rule like the Waste Prevention Rule, which contains ongoing compliance deadlines that become more stringent over time. Under Secretary Zinke's counter-textual reading of section 705, agencies could stay compliance obligations many years after a rule has become effective, creating significant uncertainty for regulated entities and public beneficiaries alike.

This plain language reading—that a rule has one "effective date"—is also the way in which BLM used the term in the Waste Prevention Rule. In the preamble to the Rule, BLM uses the term "effective date" more than 70 times to refer to January 17, 2017, *not* to future compliance dates. *E.g.*, 81 Fed. Reg. at 83,013 ("The final version … makes clear that for competitive leases issued after the effective date of this rule, the BLM has the flexibility to set rates at or above 12.5 percent."). In fact, some of the compliance dates that BLM is seeking to postpone by claiming they are themselves the "effective date" are in fact measured by reference to the "effective date" of January 17, 2017. *See, e.g.*, 43 C.F.R. §§ 3179.201(d), 202(h) ("The operator must replace the pneumatic [device](s) not later than 1 year after the effective date."); *id.* § 3179.203(c) ("[N]o later than one year after the effective date … the operator must" take certain steps to reduce emissions from storage vessels). For other provisions that specifically reference the January 17, 2018 compliance date, like the capture requirements, BLM explained in the preamble that this date was one year from the "effective date" of the final rule. 81 Fed. Reg. at 83,011, 83,021–22. Secretary Zinke's new interpretation is not only contrary to the text of the statute, but is contrary to the way agencies have long used the term "effective date," including in the Waste Prevention Rule.[11]

[11] EPA also has previously interpreted section 705 as not authorizing postponements of effective dates that have already passed. *See* 76 Fed. Reg. 28,318, 28,326 (May 17, 2011) ("[T]he effective date of the [rules] has already passed and thus a stay under APA section 705 is not appropriate."); 76 Fed. Reg. 4780, 4788 (Jan. 26, 2011) ("Postponing an effective date implies action before the effective date arrives."); 75 Fed. Reg. 49,556, 49,563 (Aug. 13, 2010) (similar); 61 Fed. Reg. 28,508, 28,508 (June 5, 1996) (on remand from *Safety-Kleen*, distinguishing the effective date of the rule from "the compliance dates by which different requirements of the final rule must be met").

BLM's attempt to stay the Waste Prevention Rule violates section 705's plain and unambiguous text, which authorizes BLM to postpone the effective date of a rule, and not to stay a rule that is already in effect.

B. Secretary Zinke Illegally Issued the Stay to Allow for Administrative Reconsideration, and Not Judicial Review.

Secretary Zinke also violates section 705's plain text by staying the rule to enable BLM's administrative reconsideration, and not to allow for "judicial review," as required by the statute. 5 U.S.C. § 705. BLM's statements and actions demonstrate that the Stay Notice's claim that the Rule is being stayed pending litigation is simply a pretext for relieving operators from their obligation to control waste while BLM reconsiders the Rule.

The APA's plain language provides that agencies may postpone a regulation's effective date only "pending judicial review." *Id.*; *see also Bakersfield City Sch. Dist. v. Boyer*, 610 F.2d 621, 624 (9th Cir. 1979) ("The agency … may postpone or stay agency action pending such judicial review."). The legislative history of that provision confirms that it was intended to "afford parties an adequate *judicial* remedy," H.R. Rep. No. 79-1980, at 277 (1946) (emphasis added),[12] and to "provide[] intermediate *judicial* relief … in order to make *judicial* review effective," S. Rep. No. 79-752, at 213 (emphases added).

Section 705 does not provide the Secretary authority to stay a rule pending administrative reconsideration. *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 33–34 (D.D.C. 2012) (holding a stay under section 705 "plainly must be tied to the underlying pending litigation" and not used to alter a rule "pending reconsideration"). Accordingly, an agency seeking to stay a rule under section 705 "must have articulated, at a minimum, a rational connection between its stay and the underlying litigation." *Id.* at 34. Moreover, courts will look beyond an agency's stated rationale where it appears that the agency is relying on judicial review as a pretext for a stay pending reconsideration. In *Jackson*, the court rejected EPA's rationale for its section 705 stay, noting that "although EPA

[12] Available on the U.S. Department of Justice's website, https://www.justice.gov/sites/default/files/jmd/legacy/2014/06/09/houserept-1980-1946.pdf (last visited July 24, 2017).

paid lip service to the pending litigation," the purpose and effect of EPA's action was to stay the rules "pending reconsideration, not litigation." *Id.* at 33–34. The court concluded: "This sl[e]ight of hand is not authorized either by the Clean Air Act or the APA." *Id.* at 34; *see also Woods Petroleum Corp. v. Dep't of Interior*, 47 F.3d 1032, 1040 (10th Cir. 1995) (admonishing the Interior Department for using a statutory provision "as a mere vehicle to achieve an ulterior objective otherwise unattainable").

Secretary Zinke attempts the same sleight of hand here. The Stay Notice justifies the stay based on both the "pending litigation *and* administrative review of the Rule." 82 Fed. Reg. at 27,431 (emphasis added). But just five days after staying the Rule, BLM asked the District of Wyoming to *delay* briefing in that litigation for 90 days, and the court granted the motion. *See supra*, at 6–7.

BLM's statements in that extension request demonstrate that, just as in *Jackson*, Secretary Zinke is paying "lip service" to the pending litigation as a pretext for his desire to relieve operators of supposed compliance burdens during BLM's administrative reconsideration process. BLM explained that it has "developed a three-step plan … to revise or rescind the Rule" while ensuring that industry will not have to comply in the meantime. Fed. Extension Mot. at 3, *supra*, at 6. The first step is the illegal section 705 stay at issue in this case, which is designed to stay the regulation in order to allow more time for further administrative procedures to reconsider the Rule's requirements, and not to allow for judicial review. *See id.* Indeed, in urging the court to delay the challenge, BLM argued that the "extension will allow BLM to devote its resources to developing and promulgating a [new] rule … rather than to the defense of a Rule that BLM is actively reconsidering," and "ensure that the Court's and Parties' time and resources are not wasted litigating a Rule which may soon be replaced." *Id.* BLM acknowledged that its reconsideration might ultimately obviate the need for judicial review altogether. *Id.* To claim under these facts that Secretary Zinke intends the Stay Notice to afford an opportunity for judicial review stretches the limited statutory authority conferred by section 705 beyond its breaking point.

The timing of BLM's request also confirms that the stay was motivated by reconsideration plans and not judicial review. The District of Wyoming litigation has been pending since November 2016. BLM previously argued that a stay of all the Rule's provisions pending litigation was not

warranted. *See supra*, at 4–5. BLM's position changed only when the Trump administration ordered BLM to undertake administrative reconsideration to revise or rescind the Rule. 82 Fed. Reg. at 27,431. Thus, the section 705 stay is plainly intended to facilitate this administrative review, not to allow for resolution of the Rule's legality by the courts. This court should not countenance this abuse of section 705. *See Woods Petroleum Corp.*, 47 F.3d at 1040.

C. BLM Failed to Demonstrate That Justice Requires a Stay.

Section 705 does not grant BLM unfettered discretion to issue a stay—the agency is limited to situations where "justice … requires" a stay. 5 U.S.C. § 705. BLM must provide support for this determination in the Stay Notice. *Clean Air Council*, 2017 WL 2838112, at *5 ("'[A] reviewing court ... must judge the propriety of [agency] action solely by the grounds invoked by the agency' when it acted." (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947))). Here, BLM failed to support its conclusion that "justice … requires" a stay because the Stay Notice failed to apply the traditional four-part test for issuing a stay, or to meet even the most minimal consideration of "justice," which at least requires that an agency consider both sides of the scale when determining whether to postpone the effectiveness of an action. Here, BLM's Stay Notice limited its consideration of the equities to the costs to industry while ignoring the many public benefits of the Rule that will be foregone as a result of the stay, such as reduced waste and air pollution.

The standard for a "stay at the agency level is the same as the standard for a stay at the judicial level: each is governed by the four-part preliminary injunction test." *Jackson*, 833 F. Supp. 2d at 30. Congress confirmed this understanding in the legislative history by equating agencies' and courts' authority to issue a stay. Congress stated that section 705 "permits *either agencies or courts,* if the proper showing be made, to maintain the status quo…. The authority granted is equitable and should be used by *both agencies and courts* to *prevent irreparable injury or afford parties an adequate judicial remedy*." S. Rep. No. 79-752, at 213 (emphases added); *see Jackson*, 833 F. Supp. 2d at 31.[13] Thus, in order to provide a stay, BLM must show that (1) challengers of the Rule are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of a stay,

[13] Though the current version of section 705 differs slightly from the 1946 version, the changes are only stylistic. *See Jackson*, 833 F. Supp. 2d at 21 n.4.

(3) the balance of equities tips in favor of a stay, and (4) a stay is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.* 555 U.S. 7, 20 (2008). BLM has entirely failed to consider those factors here.

Indeed, after extensive briefing and oral argument by all sides, a district court concluded that the Rule's challengers had failed to demonstrate a likelihood of success on the merits, or that they would be irreparable harmed, and thus denied the challengers' bid to stay the Rule. *Wyoming*, 2017 WL 161428, at *12. In contrast, Secretary Zinke issued the short Stay Notice solely in response to industry's allegations of harm with no input from the public and no consideration of whether any of the four factors had been met—something no court could have done. The agency provides no rational explanation for its belief that its authority exceeds that of the courts. *See Jackson*, 833 F. Supp. 2d at 30–31 (noting that EPA failed to provide any "persuasive reason why it should be treated any differently from a court when staying agency actions pending judicial review").

Even if there is a different standard for agencies, the agency's discretion is not entirely unfettered. Rather, a "proper showing" is required that "justice … requires" use of this "equitable" relief. 5 U.S.C. § 705; S. Rep. No. 79-752, at 213. Secretary Zinke's rationale for the stay fails to meet this standard and is a textbook example of arbitrary decision making.

Secretary Zinke's sole justification for the stay is that operators will face "substantial cost[s]" to comply with the regulations; the Stay Notice completely ignores the other side of the equities scale. 82 Fed. Reg. at 27,431. The Secretary cannot reasonably claim that he adequately considered whether "justice … requires" a stay when the Stay Notice focuses exclusively on the Rule's costs to industry while ignoring the Rule's many benefits to the public. As the Supreme Court has recognized, "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (emphasis added); *cf. Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (holding an agency "cannot tip the scales" with respect to its decision "by promoting possible benefits while ignoring their costs").

Here, Secretary Zinke ignored the significant benefits the Waste Prevention Rule would have delivered absent the Stay Notice. Most fundamentally, BLM adopted the Rule to prevent the waste of publicly-owned natural gas that can be sold and used productively. 81 Fed. Reg. at 83,014,

83,019–20 (discussing BLM's statutory mandates to prevent the waste of assets that belong to the public and to manage public lands in the public interest). BLM estimates that the Rule will save $44 million worth of the public's natural gas by the end of 2018. RIA at 109. By ignoring the increased waste that will occur as a result of the stay, Secretary Zinke "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43, 52.

Secretary Zinke also ignored the Rule's many other benefits that would be lost, including: (1) $14 million a year in additional royalty payments that would go to states, tribes, and local communities and could be used to fund schools, health care, and infrastructure, 81 Fed. Reg. at 83,010, 83,014; (2) substantial reductions in the release of methane (a potent greenhouse gas), smog-forming pollutants, and carcinogenic compounds such as benzene, *id.* at 83,010, 83,014, 83,069; (3) improved safety for workers and those living near wells as a result of limits on the venting of high-pressure, flammable gas, *id.* at 83,020–21; and (4) fewer nuisances from noisy and unsightly flares, *id.* at 83,014. Secretary Zinke's failure to consider the extent to which these many advantages—all relevant to BLM's statutory mandates—would be lost renders the stay arbitrary and capricious.

Moreover, the Secretary's conclusion that the costs are unwarranted represents a dramatic and unexplained change in position. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 968–69 (9th Cir. 2015) (en banc) (holding agency must supply a reasoned explanation when changing course and adopting a position contradicted by its previous determinations); *Fox*, 556 U.S. at 515 (same). Just a few months ago, BLM determined that the Waste Prevention Rule set forth "economical, cost-effective, and reasonable measures that operators can take to minimize gas waste." *Id.* at 83,009. Even for the smallest companies, the compliance costs are expected to reduce profits by only 0.15% annually on average. *Id.* at 83,013–14. In opposing industry's request for a preliminary injunction, BLM argued that the Rule entails only "modest compliance costs," which are justified based on the many benefits of the Rule. Fed. Opp'n at 66, *Wyoming v. U.S. Dep't of the Interior*, No. 2:16-cv-285 (D. Wyo. Dec. 15, 2016), ECF No. 70. Moreover, the Stay Notice cites only to the RIA that BLM had previously used to demonstrate that the Rule's costs are justified. 82 Fed. Reg. at 27,431. The RIA demonstrates that the Rule's provisions would have minimal costs

to small business, would not impact employment within the drilling industry in any material way, and would in some cases pay for themselves in a short period of time. *See* RIA at 115, 118, 119, 121, 129–130.[14] Secretary Zinke's failure to offer any explanation or factual support for BLM's dramatic change in position regarding the Rule's costs casts doubt on the veracity of the claims and renders the decision arbitrary and capricious.

III. Conservation and Tribal Citizen Groups Have Standing to Challenge the Stay.

A plaintiff satisfies Article III's standing requirements by showing "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000) (citation omitted). Under the doctrine of associational standing, "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). The Conservation and Tribal Citizen Groups meet all of these requirements.

A. The Conservation and Tribal Citizen Groups Have Standing to Bring Suit on Behalf of Their Members.

The second and third requirements for associational standing are satisfied because the interests at stake are germane to the Conservation and Tribal Citizen Groups' purpose, and no participation by individual members is necessary.

[14] The RIA concludes that the Rule will not alter the investment or employment decisions of operators because there are provisions exempting operators from compliance if compliance costs would force the operator to stop developing the resource. RIA at 119. All of the substantive stayed provisions are subject to such exemptions. *See* 43 C.F.R. §§ 3179.8(a) (creating exemption for § 3179.7); 3179.201(b)(4); 3179.202(f); 3179.203(c)(3); 3179.303(c).

Indeed, reducing waste and air and climate pollution from oil and gas development on public lands is central to the Conservation and Tribal Citizen Groups' institutional missions.[15] These organizations and their members and staff have submitted numerous and extensive comments during the scoping process and on the proposed Waste Prevention Rule,[16] met with federal officials to encourage a stronger rule,[17] lobbied Congress to maintain the rule in the face of the Congressional Review Act repeal threat,[18] and defended the Rule in court.

Furthermore, because this lawsuit raises pure questions of law, the court need not consider injuries of individual members in order to decide the merits or resolve the claim for relief. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 287–88 (1986) (holding that participation of individual members was not required where case raised "a pure question of law," and the relief requested did not require considering each member's "unique facts"). Accordingly, the Conservation and Tribal Citizen groups meet the second and third requirements for associational standing.

B. The Conservation and Tribal Citizen Groups' Members Have Standing to Sue.

Individual Conservation and Tribal Citizen Group members and staff (collectively "members") also have standing to sue in their own right, satisfying the first requirement for associational standing. Members will suffer imminent, concrete injuries due to the indefinite stay of the Waste Prevention Rule's compliance dates. Those injuries will be exacerbated by the stay and would be remedied by a decision from this Court setting aside the stay.

1. Members are injured by the stay.

Many members live in states or are members of tribes that benefit from royalty payments that fund education, infrastructure, and other critical needs.[19] These members are injured because their

[15] All of the Conservation and Tribal Citizen Groups standing declarations are included in Exhibit 1, which is sequentially Bates stamped. *See* Ex. 1 to Pls.' Mot. for Summary Judgment: Standing Declarations 1, 75, 90–91, 102, 106, 119, 128, 136 (hereinafter Ex. 1).

[16] *Id.* at 2, 39, 59–60, 86, 92–93, 107, 121, 123, 128, 150.

[17] *Id.* at 1 at 117, 121, 128, 157.

[18] *Id.* at 1 at 86, 94, 121, 128, 166–67.

[19] *Id.* at 33, 47, 55, 61, 72, 80, 87–88, 114, 117, 123, 124, 130–31, 134, 139, 157, 161, 165–66.

governments will receive lower royalty payments because of the illegal stay. Other members own tribal mineral rights held in trust by the federal government that are impacted by the Rule.[20] As a result of the illegal stay, they will receive less money through royalty payments than if the Rule were in effect.[21] This economic harm is sufficient to support standing. *See Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 853–54 (9th Cir. 1989) (holding the National Wildlife Federation suffered economic injury as a result of the sale of mining leases for less than market value where that reduced the amount of money available to the state for ameliorating the impacts of coal mining's social and economic impacts).

Many members also live and work on or near public and tribal lands impacted by oil and gas drilling and production and the venting, flaring, and leaking associated with these practices.[22] Others enjoy recreational activities on or near public and tribal lands where venting and flaring is common.[23] These members' use and enjoyment of these lands will be diminished as a result of the stay. For example, the stay will allow more smog-forming VOCs and carcinogenic compounds like benzene to be emitted, which increases the risk of health impacts to members living and working in these areas. *See Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001) ("[E]vidence of a credible threat to the plaintiff's physical well-being from airborne pollutants falls well within the range of injuries to cognizable interests that may confer standing."). Indeed, some members suffer from respiratory cardiovascular, and other illnesses exacerbated by smog, and others have already limited their outdoor activity due to concerns about the health effects of breathing polluted air.[24] *See generally Laidlaw*, 528 U.S. at 184–85 (holding that reasonable fear of harm from pollution is an injury in fact). And some members have experienced direct health injuries associated with exposure to air

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[20] *Id.* at 158, 167.

[21] *Id.* at 167.

[22] *Id.* at 10, 13, 50, 63–64, 68–69, 81, 117–18, 123, 125–26, 137, 141, 145–46, 152–53, 161–62, 165.

[23] *Id.* at 4, 37, 46, 67, 75, 85, 97–99, 109, 114, 123, 128–29, 153.

[24] *Id.* at 7–8, 53, 71–72, 124–25, 129, 133–34, 145–46, 158, 167.

toxins from oil and gas drilling on federal and tribal lands, including headaches, nosebleeds, respiratory issues, and other ailments.[25] The stay will only increase the risk of these health impacts.

For example, ever since the oil and gas drilling picked up on the Fort Berthold Indian Reservation in North Dakota in 2007 and 2008, Ms. Theodora Bird Bear can "see that there's dirty air visible in the horizon."[26] As a result, Ms. Bird Bear has stopped her regular walks outside near her home because she is concerned about the impacts to her health.[27] Francis Don Schreiber, a rancher who lives on split-estate lands in Rio Arriba County, New Mexico, has described the impacts of the more than 120 wells either on or immediately adjacent to his ranch, all of which would be subject to the Rule. As he rides, walks, and drives around the ranch, he has witnessed "vapors escaping from leaking wells distorting the air and creating shadows on the ground," the "roar of a nearby well suddenly venting, which can sound like a jet engine," and "the near-constant smell from leaking wells … which make[s] breathing uncomfortable and often cause [him] to leave affected areas as quickly as possible."[28] Mr. Schreiber is aware that oil and gas development has contributed to elevated ozone levels in the San Juan Basin where he lives, and that people with cardiovascular disease are at a higher risk for health impacts from elevated ozone.[29] Because he has had open heart surgery for congestive heart failure, he worries about the impact of elevated ozone in the region on his health.[30]

Members' enjoyment of public and tribal lands and their own property also is reduced by unsightly and noisy flaring that would have been reduced absent the stay of the Waste Prevention Rule.[31] Members of the Mandan, Hidatsa, and Arikara Nation (also know as the Three Affiliated Tribes of the Fort Berthold Indian Reservation) living on the reservation in areas surrounded by oil

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[25] *Id.* at 28, 52, 99, 113, 118, 163.

[26] *Id.* at 167.

[27] *Id.*

[28] *Id.* at 52.

[29] *Id.* at 52–53

[30] *Id.* at 53.

[31] *Id.* at 67, 79, 87, 100, 109–11, 126, 130, 138, 142, 154, 158, 163, 167.

and gas development have described the noise associated with flares as "loud, like a large jet taking off continuously … for 24-hours."[32] According to Ms. Theodora Bird Bear, the glare from a flare near her house "lit up the hills all night long."[33] Ms. Lisa DeVille described the drilling near her home: "Every direction you look there are gas flares that sound like a roaring jet plane that rumbles the ground like a train passing by. At night the sky is lit up like it is still day."[34] These impacts have "changed [their] way [of] life and [their] quality of life."[35] Those injuries will continue as a result of the stay and are sufficient to establish injury in fact. *See Laidlaw*, 528 U.S. at 182–84 (finding standing where pollution "directly affected . . . affiants' recreational, aesthetic, and economic interests"); *Gingery v. City of Glendale*, 831 F.3d 1222, 1227 (9th Cir. 2016) (holding plaintiff's diminished enjoyment of public park constituted injury in fact).

Finally, the illegal stay also causes procedural injury to the Conservation and Tribal Citizen Groups and their members because it was issued without an opportunity for public comment. *See* 82 Fed. Reg. at 27,430–31. Conservation and Tribal Citizen Groups and their members submitted extensive comments on the proposed Waste Prevention Rule.[36] If BLM had provided notice and an opportunity to comment, as required by law, these groups and their members would have submitted comments on the stay.[37] The denial of this legally-required opportunity to comment is sufficient to confer standing. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 970 (9th Cir. 2003); *see also WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015) (recognizing violation of procedural requirement as concrete injury).

[32] *Id.* at 167.

[33] *Id.*

[34] *Id.* at 158.

[35] *Id.*

[36] *Id.* at 2, 39, 59–60, 86, 92–93, 107, 121, 123, 128, 150.

[37] *Id.* at 88–89, 122, 150.

2. These members' injuries are caused by the stay and would be redressed if this Court sets it aside.

The injuries discussed above are "fairly traceable" to the stay of the Waste Prevention Rule's compliance deadlines because the provisions would have reduced waste of royalty-bearing resources and reduced emissions of air pollutants and greenhouse gases. BLM estimated that the Rule would reduce wasteful venting by 35% and wasteful flaring by 49%, increase royalties by up to $14 million per year, and significantly benefit local communities, public health, and the environment by reducing the visual and noise impacts associated with flaring, protecting communities from smog and carcinogenic air toxic emissions, and reducing greenhouse gas emissions. 81 Fed. Reg. at 83,009, 83,014. These significant reductions, and attendant benefits to health and welfare, will be delayed indefinitely because of the Stay Notice. The Conservation and Tribal Citizen Groups' procedural harm also is fairly traceable to the decision to issue the Stay Notice without providing for notice and comment. *See WildEarth Guardians*, 795 F.3d at 1154 ("Once plaintiffs seeking to enforce a procedural requirement establish a concrete injury, 'the causation and redressability requirements are relaxed.'" (quoting *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011))).

All of these injuries would be redressed by a favorable decision from this Court vacating the stay and instructing BLM to implement the Waste Prevention Rule. A judicial ruling that notice and comment is required before altering the Rule's compliance deadlines after its effective date would also redress the Conservation Group's procedural injuries by providing the Conservation and Tribal Citizen Groups and their members an opportunity to comment on any proposed substantive changes to the Rule. Because their members have standing to sue in their own right, the Conservation and Tribal Citizen Groups have met all three requirements for associational standing.

CONCLUSION

Because Secretary Zinke exceeded his legal authority under section 705, the Court should grant summary judgment to plaintiffs and declare the Stay Notice invalid.

DATED: July 27, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2017, I mailed true and correct copies of the Conservation and Tribal Citizen Groups' Notice of Motion, Motion for Summary Judgment, and Memorandum of Points and Authorities in Support and Exhibit 1 – Standing Declarations by Certified Mail Return Receipt Requested, postage prepaid to the following parties:

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