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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SIERRA CLUB, et al., Plaintiffs, v. RYAN ZINKE, in his official capacity as Secretary of the Interior, et al., Defendants.	Case No. 3:17-cv-3885-EDL Consolidated with Case No. 3:17-cv-3804-EDL Date: September 25, 2017 Time: 10:00 a.m. Courtroom: Courtroom E, 15th Floor Judge: Hon. Elizabeth D. Laporte
STATE OF CALIFORNIA, by and through XAVIER BECERRA, ATTORNEY GENERAL, et al., Plaintiffs, v. UNITED STATES BUREAU OF LAND MANAGEMENT, et al., Defendants.	**CONSERVATION AND TRIBAL CITIZEN GROUPS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

In response to Secretary Zinke's unlawful and unilateral suspension of the already-effective Waste Prevent Rule, Plaintiffs swiftly brought these actions to secure meaningful relief. Secretary Zinke's first response is a bid to delay that relief, before asserting incorrectly that the Administrative Procedure Act ("APA") places *no limits* on his discretion to stay provisions of a duly promulgated regulation so long as they have future compliance dates and litigation happens to be pending. As this Court just held in a directly analogous case, Secretary Zinke's reading of section 705 is overbroad. Order Granting Pls.' Mot. for Summ. J., *Becerra v. U.S. Dep't of Interior*, No. 3:17-cv-02376-EDL (Aug. 30, 2017), ECF No. 47 ("*Becerra* Order"). Section 705 is a narrow provision that allows agencies only to "postpone the effective date" of a not-yet-effective regulation to afford an opportunity for judicial review where "justice so requires." 5 U.S.C. § 705. Just as in *Becerra*, those conditions are not met in this case.

Because Secretary Zinke seeks to revise an already-effective regulation, he must issue a proposal, allow for meaningful public comment, and justify any revision with a reasoned explanation supported by the record and consistent with his statutory duties. The Secretary may not stay provisions of a duly-promulgated regulation simply because he wishes to reconsider it. As this Court held, such unilateral and unexplained changes in the regulatory status quo are the antithesis of the requirements for procedural regularity contained in the APA. *Becerra* Order 16–17.

ARGUMENT

The decision in this case is controlled by this Court's decision in *Becerra*. Just as in *Becerra*, Secretary Zinke here has unlawfully suspended an already-effective regulation for the purposes of reconsidering it, contrary to the unambiguous language of section 705. *Becerra* Order 14. In addition—though the Court need not reach this argument to decide this case—Secretary Zinke failed to demonstrate that "justice . . . requires" a stay. There is no reason for this Court to allow the Secretary to take advantage of his illegal stay while the Bureau of Land Management ("BLM") puts together the administrative record. Plaintiffs' claims involve purely legal issues, the Stay Notice is unlawful on its face, and the Secretary has failed to identify *any* administrative record documents that the Court must consider to resolve Plaintiffs' claims. Finally, no additional remedy briefing is

necessary, and this Court should adopt the usual remedy of vacating the unlawful action thereby restoring the January 2018 compliance deadlines for important provisions of the Waste Prevention Rule that will decrease waste of publicly owned natural resources, increase royalties for State and local governments, and reduce dangerous pollution.

I. Secretary Zinke Unlawfully Sidestepped the APA's Rulemaking Requirements.

An action to stay or delay compliance with the provisions of an already-effective regulation is a substantive rulemaking subject to the APA's notice and comment requirements. *See* Citizen Group Pls.' Mot. for Summ. J. 8–10 (July 27, 2017), ECF No. 37 ("Pls.' Mot. Summ. J."); *e.g.*, *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983) ("[A]n agency decision which effectively suspends the implementation of important and duly promulgated standards . . . constitutes rulemaking subject to notice and comment requirements."). Despite this consistent case law, the Secretary makes the bald assertion that the "Rule remains in effect and the Notice has not altered the substance of any of the Rule's provisions." Defs.' Opp'n to Pls.' Mot. for Summ. J. 13, No. 17-cv-3804 (Aug. 25, 2017), ECF No. 52 ("BLM Opp."). But the Secretary *has* altered the substance of the Rule by extending the date by which industry must comply with its waste reduction measures. In doing so the Secretary—in the words of this Court—"put the cart before the horse" by *revising* the regulation without undergoing the proper procedures. *Becerra* Order 17.[1]

Secretary Zinke claims that the decisions in these cases "turned on the intricacies of [other] statutes," but gives no rationale for why these precedents do not apply here other than his assertion that here, unlike in those cases, section 705 provides authority for the stay. BLM Opp. 23. It does not, as explained *infra* in Part II. In an attempt to bolster his argument, Secretary Zinke points to *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 28 (D.D.C. 2012). But that case is entirely consistent with Plaintiffs' position because "in *Sierra Club*, unlike here, the agency properly invoked section

[1] At least one industry group that wrote to Secretary Zinke urging him to repeal the Rule, Western Energy Alliance (also a respondent-intervenor here), conceded as much when it acknowledged that "[b]ecause the . . . rule has already gone into effect, the proper rulemaking to rescind it and ensure that the repeal can stand up in a court of law must be done in a deliberative manner per the [APA]" and urged him to "expeditiously publish a notice in the Federal Register" because such a "suspension requires a thirty-day public notice and comment period." BLM Opp. Ex. C at 2, No. 17-cv-3804, ECF No. 52-3.

705 *before* the rule's effective date." *Becerra* Order 17 (emphasis added). This is not a "distinction without a difference," as the Secretary claims. BLM Opp. 22 n.11. The APA carved out narrow authority for agencies to "postpone the effectiveness" of their actions to maintain the status quo before those actions became effective and companies had to prepare to comply. *See Becerra* Order 15 ("After nearly five years of carrying out the requisite rulemaking milestones, as well as public workshops, and trainings leading up to the effective date, ONRR's suspension of the Rule did not merely 'maintain the status quo,' but instead prematurely restored a prior regulatory regime.").

The Secretary also claims that "the courts in those cases expressed concern that an agency could effectively repeal a rule if it were permitted to indefinitely postpone its effective date," a concern that he asserts "does not apply" here because the stay is limited to however long it takes to resolve the litigation. BLM Opp. 23. The Stay Notice, however, is also "indefinite" because the litigation, including any appeals, may last for years. Moreover, the critical question is not the duration of the stay, but whether it has a "substantive effect" or "jeopardizes the rights and interests of parties." *Gorsuch*, 713 F.2d at 814, 815 (quoting *Batterton v. Marshall,* 648 F.2d 694, 708 (D.C. Cir. 1980)) (holding stay was subject to notice and comment requirements where it relieved incinerators from having to comply with more stringent technical standards); *Council of the S. Mountains, Inc. v. Donovan,* 653 F.2d 573, 580 n.28 (D.C. Cir. 1981) (holding that delay of the effective date by six months was subject to notice and comment rulemaking because it "defer[ed] the requirement that coal operators supply life-saving equipment to miners"). Here the "substantive effect" of the Stay Notice is significant: drillers have been relieved of their obligation to implement reasonable waste prevention measures that will increase royalty payments and decrease air pollution. Because Secretary Zinke has no authority to stay an already-effective rule under section 705, he illegally sidestepped the APA's procedural requirements by failing to provide notice and a meaningful opportunity for public comment before altering the Rule's compliance deadlines.

II. APA Section 705 Does Not Authorize Secretary Zinke's Stay.

Secretary Zinke's opposition makes clear that he views section 705 as a blank check to postpone any future compliance deadline so long as litigation happens to be pending. *See, e.g.*, BLM Opp. 13 (claiming that section 705 "places no limitations on" an agency's determination of

what "justice so requires"). The Secretary is wrong. *See Becerra* Order 14. Through section 705, Congress placed three distinct limitations on agencies' authority: an agency may only (1) "postpone the effective date of action taken by it," (2) "pending judicial review," (3) when "justice so requires." 5 U.S.C. § 705. While this Court may decide this case based upon any one of these limitations, the Stay Notice fails all three.

A. Secretary Zinke Cannot "Postpone" the Effective Date of an Already-Effective Regulation.

As this Court recently held, "[t]he plain language of [section 705] authorizes postponement of the 'effective date,' *not* 'compliance dates'" of a rule. *Becerra* Order 14 (emphasis added) (quoting 5 U.S.C. § 705). Thus, the plain language of section 705 precludes Secretary Zinke's broad interpretation—to which he is owed no deference—that he may stay any future compliance deadline. *Id.* at 11–12, 14; *see* Pls.' Mot. Summ. J. 10–14. As this Court noted, the only other court to have addressed this question, the D.C. Circuit, rejected the Secretary's view, holding 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." *Becerra* Order 13–14 (quoting *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)).[2]

In response, the Secretary concedes that "effective date" is used in 5 U.S.C. § 553(d) and routinely by federal agencies to "refer to the date that a rule initially takes effect," and that his contrary interpretation would mean interpreting identical terms in the APA differently. BLM Opp. 17–18; *see also Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("[T]here is a presumption that a given term is used to mean the same thing throughout a statute."). The Secretary attempts to invoke an exception to that presumption because—in his words—"the only way to give full meaning" to other

[2] *Safety-Kleen* is directly on point. *Contra* BLM Opp. 20. There, EPA argued that although the effective date of the rule EPA sought to postpone had passed, because EPA had not yet approved many States' adoption of the rule and therefore EPA could not enforce compliance with the rule, it could rely on section 705 to postpone the effectiveness of the rule. *See* 60 Fed. Reg. 55,202, 55,205 (Oct. 30, 1995). The D.C. Circuit squarely rejected that argument.

words in section 705 and the intent of the provision is to give the term "effective date" different meanings in different parts of the statute. BLM Opp. 18. The plain meaning of "effective date," however, is fully consistent with the context and purpose of section 705.

Secretary Zinke asserts that the definition of "agency action" as including "the whole or a part of an agency rule, order, license [or] sanction," 5 U.S.C. § 551(13), has two implications that support his view. BLM Opp. 18–19. Neither does. First, he relies on the unremarkable conclusion that section 705 can be used to postpone the effective date of actions other than rulemakings (such as orders and licenses), while section 553(d) applies only to rulemakings. *Id.* As this Court has recognized, however, this "does not alter the plain meaning of 'effective date.'" *Becerra* Order 16. Nor does it suggest that this Court should not follow the general rule and treat the term "effective date" consistently within the APA when the agency action at issue is in fact a rulemaking. Second, he argues that to give full meaning to the definition of "agency action," an agency "would be forced to postpone either the whole rule or none of the rule." BLM Opp. 19. This limitation does not follow. Under the plain language of sections 551 and 705, an agency may "postpone the effective date" of "part of an agency rule." That all parts of a rule have the same effective date does not mean that under section 705 an agency may not delay that effective date for one part of the rule and not another. Thus, the statutory context does not dictate the Secretary's tortured reading of "effective date."

Next, the Secretary asserts that interpreting "effective date" identically in the two provisions would render section 705 "all but useless" because it would be "dependent upon the timing of a third-party's lawsuit." *Id.* at 19. That is not the case, as demonstrated by the facts here. Section 705 authorizes courts and agencies to postpone duly promulgated regulations—an extraordinary remedy—where "irreparable harm" will otherwise result or "justice . . . *requires*" such postponement. Under such circumstances, third parties will act quickly to bring their concerns to the courts' and agencies' attention, as they did here. The challengers to the Waste Prevention Rule filed their petition for review three days before the Rule was published in the Federal Register, and swiftly moved for a stay from both the agency and the Court well before the Rule's effective date. *See, e.g.*, Pet'n for Review of Final Agency Action, *W. Energy All. v. Jewell*, No. 16-cv-280 (D.

Wyo. Nov. 15, 2016), ECF No. 1; Mot. for a Prelim. Inj., *W. Energy All.*, No. 16-cv-280 (D. Wyo. Nov. 23, 2016), ECF No. 12; Ex. A to Mem. in Supp. of N.D.'s Mot. for Prelim. Inj. 2, *Wyoming v. U.S. Dep't of Interior*, No. 16-cv-285 (D. Wyo. Dec. 5, 2016), ECF No. 40-1 (requesting stay from BLM). BLM opposed the stay requests, and the court denied them. Although there is now a new administration, there is no indication—and the Secretary points to none—that Congress intended section 705 to be a "broad grant of authority" for a new administration to reverse with the stroke of a pen the result of years of rulemaking proceedings. *Contra* BLM Opp. 19.[3]

Finally, Secretary Zinke claims that his counter-textual reading makes sense because "compliance dates are frequently the dates with teeth, that is, the dates that have a direct impact on regulated parties and which will most significantly alter the status quo." *Id.* at 19. This Court squarely rejected that argument in *Becerra*, concluding that "rather than being toothless as of the effective date and only suddenly acquiring a set of teeth as of the . . . compliance date, in actuality the Rule imposed compliance obligations starting on its effective date . . . that increased over time but did not abruptly commence at the [compliance date]." *Becerra* Order 13. That is also the case here. As Secretary Zinke concedes, the stayed requirements "were to be phased in over time to allow operators time to come into compliance." BLM Opp. 2. Indeed, with respect to one of the stayed provisions—a requirement to detect and fix leaks at well sites—the Rule requires well sites that began production or were modified after the January 17, 2017 effective date to comply within "60 days of beginning production," which could be well *before* January 2018, and even before the Secretary issued the Stay Notice. 81 Fed. Reg. 83,008, 83,026 (Nov. 18, 2016). It is thus Secretary Zinke's view—that an agency may stay regulatory requirements up until the date that companies are required to comply—that would upend the status quo. *See Becerra* Order 14 ("Defendants' position undercuts regulatory predictability and consistency.").

[3] Further, as this Court noted in *Becerra*, section 705 does not foreclose all relief after an effective date has passed. *Becerra* Order 15–16. Rather, it permits courts "to 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 (emphasis added).

Secretary Zinke cannot invoke section 705's authority to "postpone the effective date" of a regulation after the effective date has passed. This Court may decide the case on this basis alone, but the Stay Notice also fails the other two limitations of section 705.

B. Secretary Zinke Cannot Stay a Rule Under the Pretense of Judicial Review in Order to Administratively Reconsider It.

Secretary Zinke does not dispute that section 705 authorizes him to stay a regulation only "pending judicial review," *not* reconsideration. But he asserts that as long as there is "currently pending litigation" over the Rule and the Stay Notice references that litigation, it is irrelevant that the agency has subsequently admitted that its plan is to facilitate reconsideration and not judicial review. BLM Opp. 11–12. This Court correctly rejected that logic in *Becerra*. Despite ONRR's explicit reference to the underlying litigation in the stay notice at issue there, this Court held that the agency's actions staying the litigation demonstrated that "ONRR improperly invoked section 705 to suspend the effective date of the Rule pending its ultimate repeal rather than pending judicial review as required by section 705." *Becerra* Order 14; *see also Jackson*, 833 F. Supp. 2d at 34 (rejecting EPA's reliance on section 705 where the agency paid "lip service" to pending litigation, but the "purpose and effect of the Delay Notice plainly are to stay the rules pending reconsideration"). Virtually the same facts should lead to the same result here.

The plain language of Section 705 authorizes Secretary Zinke to issue a stay "pending judicial review." 5 U.S.C. § 705. But this does not mean that Secretary Zinke can issue a stay simply because litigation "*happens to be pending*." *Jackson*, 833 F. Supp. 2d at 34 (emphasis in original). As the legislative history demonstrates, the provision is intended to "*afford* parties an adequate judicial remedy," H.R. Rep. No. 79-1980, at 277 (1946) (emphasis added), and "make judicial review effective," S. Rep. No. 79-752, at 213 (1945). To exercise its section 705 authority consistent with this intent, an agency must articulate why a stay is necessary to afford adequate and effective judicial review. *Jackson*, 833 F. Supp. 2d at 33. Here, BLM's own statements show that it issued the stay not to afford judicial review, but instead to allow for reconsideration. *See* Pls.' Mot. Summ. J. 15–16 (highlighting BLM's three-step plan to reconsider the Rule and asserting that such reconsideration might obviate the need for judicial review).

Secretary Zinke points to the Stay Notice's statements about "legal uncertainty" as a result of the pending litigation. BLM Opp. 10, 12 (quoting Stay Notice, 82 Fed. Reg. 27,430, 27,430–31 (June 15, 2017)). But this transparent pretense does not change the fact that Secretary Zinke moved to delay the litigation and acknowledged his intent to reconsider the Rule—*not* to have the Wyoming court resolve this legal uncertainty. *See Becerra* Order 14 (discounting ONRR's claims regarding judicial review where the agency sought to "block[] judicial review by obtaining a stay in the Wyoming litigation to pursue the Repeal Rule instead"); *see also Jackson*, 833 F. Supp. 2d at 35 (recognizing that EPA's Delay Notice "operates as a stay pending reconsideration and not litigation" because the agency sought abeyance of the litigation to accommodate a reconsideration process).

Secretary Zinke likewise argues that reconsideration is simply an additional reason for the Stay Notice that is necessarily intertwined with pending litigation. BLM Opp. 10, 12. But there is no question that reconsideration is the driving force behind Secretary Zinke's actions here. BLM was fully defending its Waste Prevention Rule in court until the administration changed and ordered the agency to revise or rescind the Rule. Only then did BLM determine that a stay was necessary. *See* Pls.' Mot. Summ. J. 15–16; *see also* Defs.' Mot. to Transfer 3, No. 17-cv-3804 (July 26, 2017), ECF No. 14 ("Transfer Mot.") (explaining that, pursuant to direction from President Trump, "the Department of the Interior developed a three-step plan to propose to revise or rescind the Rule and prevent any harm from compliance with the Rule in the interim"). While BLM is free to change its policy position, it cannot avoid notice and comment and other statutory requirements by using the pretense of pending litigation to justify reconsideration under section 705.

C. Secretary Zinke Failed to Demonstrate that "Justice . . . Requires" the Stay.

While the court need not reach this question, the Stay Notice is invalid for a third reason. It is undisputed that the Stay Notice does not consider the four-factor injunction test or the benefits that will be lost as a result of the stay. Instead, Secretary Zinke argues that section 705 "places *no limitations* on an agency's determination of what 'justice so requires.'" BLM Opp. 13 (emphasis added). Secretary Zinke's *ultra vires* view of his authority is inconsistent with section 705's plain language and intent and would render the "justice so requires" language meaningless. Pls.' Mot.

Summ. J. 16–17. Moreover, his failure to even mention the lost benefits, much less weigh them against the purported costs to industry, constitutes arbitrary decision making. *Id.* at 17–18.

Secretary Zinke argues that section 705 does not require agencies *or* courts to apply the four preliminary injunction standards. BLM Opp. 13–14. Courts, however, have routinely held that that a court may stay agency action only after finding that the four-factor test is met. *See*, *e.g.*, *Branstad v. Glickman*, 118 F. Supp. 2d 925, 934–35 (N.D. Iowa 2000) (collecting cases). And the only court to address the issue has determined that "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.[4] This makes perfect sense where, as in this case, an agency has spent years developing a rule, seeking public input, and rationalizing its decision based on this input and its statutory obligations. Before taking the extraordinary step of abruptly suspending the rule, the agency must be able to show that the four factors are met.[5]

Secretary Zinke further claims that the legislative history on which the *Jackson* court relied simply "paraphrases" the statutory text. BLM Opp. 14. But that is not accurate. The Senate Report states that the authority granted pursuant to section 705 "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 (1946) (emphasis added). Through this language, Congress expressed its

[4] Amicus curiae Trade Associations assert that *Jackson* is an "outlier," but the cases they cite prove no such thing. Amicus Curiae Br. of the Trade Ass'n Coal. 13–14, No. 17-cv-3804 (Sept. 6, 2017), ECF No. 66-1. In *Recording Industry Association of America v. Copyright Royalty Tribunal*, 662 F.2d 1, 14 (D.C. Cir. 1981), the court reviewed the final promulgation of an agency regulation, not a separate "postponement" notice of the rule issued after promulgation. Indeed, in that case, the agency never purported to postpone the effective date of the rule pursuant to Section 705. *See* 46 Fed. Reg. 891 (Jan. 5, 1980). In *Southern Shrimp Alliance v. United States*, 617 F. Supp. 2d 1334, 1347–48 (Ct. Int'l Trade 2009), the agency issued a section 705 stay because intervening precedent cast doubt on the constitutionality of its requirement, which goes directly to the four prongs of the test.

[5] BLM asserts that consideration of the likelihood of success would require it to "confess error." BLM Opp. 15. But such a finding does not bind BLM, just as it does not bind a court's resolution of the merits of a case after it determines that a preliminary injunction is warranted. Indeed, agencies often issue section 705 stays where there has been a change in the underlying law that calls into question the agency's action. For example, in *Safety-Kleen*, EPA issued the stay because intervening precedent cast doubt on the validity of EPA's regulation. *See* 60 Fed. Reg. at 55,202–03.

intent for courts and agencies to apply the same standards. By contrast, the legislative history Secretary Zinke cites does simply parrot the statutory language, and does not provide any further context regarding Congress' intent. *See* BLM Opp. 15. Furthermore, the full floor debate that the Secretary cites suggests that Congress intended to provide agencies with the same authority granted the courts, and not authority beyond that of the courts: "Of importance in the field of judicial review is the authority of courts to grant temporary relief pending final decision of the merits of a judicial-review action. Accordingly, section 10(d) provides that any agency may itself postpone the effective date of its action pending judicial review." S. Doc. No. 248, at 369 (1946).

Even if agencies are subject to a different standard, it does not follow that the Secretary has unfettered discretion in determining whether "justice . . . requires" a stay. Justice inherently involves consideration of both the advantages and disadvantages of a particular action. And "requires" suggests a high bar of necessity, not just convenience. *See, e.g.*, *Requires*, Merriam-Webster, https://www.merriam-webster.com/dictionary/requires (last visited Sept. 7, 2017) (defining "require" as "to demand as necessary or essential"). Moreover, under the APA, an agency's decision is arbitrary if the agency "entirely failed to consider an important aspect of the problem." *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (*State Farm*), 463 U.S. 29, 43 (1983). There is no rational argument that the impacts of the stay—including increased waste and air pollution—are not an important aspect of the problem in this case.

Secretary Zinke mischaracterizes Plaintiffs' claims by arguing that he is not required to conduct a formal cost-benefit analysis. BLM Opp. 16. The question before the Court is not the "level of analysis required," as the Secretary claims. *Id.* Here, Secretary Zinke has not even mentioned the benefits that will be lost as a result of the stay—benefits to taxpayers and public health that BLM previously determined greatly outweighed the costs to industry of implementing the Rule. By omitting *any* discussion of these lost benefits, BLM has ignored an important aspect of the problem and failed to demonstrate that "justice . . . requires" a stay.

Secretary Zinke offers the post hoc and disingenuous argument that he did not consider the lost benefits because they would not materialize, if at all, until January 2018, while the compliance costs would be felt in 2017 as industry prepares to comply. BLM Opp. 16–17. But the stay does not

terminate at the end of 2017, and the benefits will not accrue in 2018 if industry does not prepare to comply in 2017. Moreover, as the Secretary explained, the whole point of BLM's three-step plan is to "prevent any harm [to industry] from compliance with the Rule" pending BLM's efforts to revise or rescind the Rule. Transfer Mot. 3. Before undertaking the first step in relieving industry of compliance costs that it determined just last year were justified based on the many benefits of the Rule, the Secretary must at least consider those lost benefits and explain its change in position.

Secretary Zinke also claims that the Stay Notice does not represent an unexplained change in position because "circumstances have changed." BLM Opp. 17. But the costs to industry have not changed; indeed, the Stay Notice relies on the same regulatory impact assessment that BLM used to support adoption of the Rule. 82 Fed. Reg. at 27,431. What has changed is the agency's position with respect to whether those costs are justified. The agency has an obligation to acknowledge and explain its changed position. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (explaining that an agency must at least "display[] awareness that it is changing position" to comply with the APA (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009)). That explanation is entirely lacking.

The Stay Notice is thus also invalid because the Secretary failed to demonstrate that "justice . . . requires" the stay.

III. Plaintiffs' Motions for Summary Judgment Are Timely.

After stipulating to a briefing schedule for the summary judgment motions that did not provide for the filing of an administrative record, Secretary Zinke seeks to delay resolution of this case by having the Court set a schedule for filing the record and re-briefing motions for summary judgment. BLM Opp. 9. No such delay is warranted.[6] Plaintiffs' motions are timely filed. *See* Fed.

[6] This is not Secretary Zinke's first attempt to delay adjudication of this case. Earlier in this case, he unsuccessfully moved to stay briefing of Plaintiffs' motions for summary judgment while this Court considers his venue transfer motion, despite having just agreed to a briefing schedule that would permit this Court to address the venue transfer issue before deciding the merits. Order Den. Defs.' Mot. to Stay Briefing and Hr'g on Pls.' Mots. for Summ. J. 1, No. 17-cv-3804 (Aug. 23, 2017), ECF No. 51. Defendant-Intervenors have likewise attempted to delay the case by filing out of time "joinder" memoranda that contain extensive new arguments. Order Den. Proposed-Intervenors' Mot. for Admin. Relief 1–2, No. 17-cv-3804 (Aug. 28, 2017), ECF No. 58.

R. Civ. P. 56 (a party "may move for summary judgment at any time"). And the issues presented in Plaintiffs' motions are purely legal—based on the text of the APA and the face of the Stay Notice—and do not require an administrative record. *See* Pls.' Mot. Summ. J. 7 n.7. The current briefing schedule will, if Plaintiffs prevail, enable meaningful relief from the Secretary's unlawful attempt to stay key compliance deadlines that are now only five months away. But, as this Court has recognized, there is a "fair possibility of harm" to Plaintiffs if resolution of their motions is delayed. Order Den. Defs.' Mot. to Stay Briefing and Hr'g on Pls.' Mots. for Summ. J. 1, No. 17-cv-3804 (Aug. 23, 2017), ECF No. 51. This Court should reject the Secretary's attempt to achieve the same delay he unlawfully sought with the Stay Notice through delayed resolution of this case.

As this Court recognized by resolving the *Becerra* case without waiting for the Secretary to file an administrative record, no record is necessary to resolve the purely legal question of whether the Secretary can "postpone" the effective date of a rule that is already in effect—a ruling that is also dispositive in this case. The Secretary offers no argument to the contrary.

Instead, the Secretary points to Plaintiffs' additional claims—(1) that the Secretary issued the stay to allow for reconsideration and not to afford judicial review, and (2) that the Secretary failed to demonstrate that "justice . . . requires" a stay—to argue that there are "factual issues that require review of a complete record." BLM Opp. 7. Not so. As an initial matter, no documents in a potential administrative record could justify the facially unlawful action taken in the Stay Notice. *See State Farm*, 463 U.S. at 50 ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."); *SEC v. Chenery Corp.*, 332 U.S. 194, 197 (1947) ("If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable.").

Furthermore, contrary to the Secretary's claims, nothing prevents him from "mounting a full defense" or explaining to the court what "BLM did or did not consider" in issuing the Stay Notice. BLM Opp. 7. Although this case has been pending for two months, the Secretary has not identified a single record document (all of which are within his knowledge and possession) that raises "factual issues" for the Court to resolve. Instead, the Secretary has responded to Plaintiffs' claims with erroneous legal assertions. For example, the Secretary's merits argument is *not* that he did in fact

consider the lost benefits as demonstrated in a record document. Rather, the Secretary argues—incorrectly—that as a legal matter he can ignore the lost benefits because section 705 places "no limitations" on the agency's authority to stay future compliance deadlines if judicial review is pending. *Id.* at 13. It is therefore unclear—and the Secretary has not endeavored to make clear—what the administrative record would add to resolution of the legal issues in this case.

Secretary Zinke also wrongly claims that the APA "require[s]" the filing and review of an administrative record before a court may resolve a motion for summary judgment involving purely legal issues. *Id.* at 6. As this Court's order in *Becerra* and the cases cited in Plaintiffs' motion for summary judgment demonstrate, that is not the case. Pls.' Mot. Summ J. 7 n.7. Moreover, the cases cited by the Secretary, BLM Opp. 7–8 stand only for the principle that courts cannot conduct *de novo* fact finding *outside* of the administrative record. *See, e.g.*, *Fla. Power & Light v. Lorion*, 470 U.S. 729, 743–44 (1985) ("The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry."); *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985) ("*De novo* factfinding by the district court is allowed only in limited circumstances."). Given the Secretary's failure to show that there are any record documents that the Court must consider to resolve the legal issues in this time sensitive case, this Court should not provide the Secretary the continued benefit of his illegal stay by requiring the filing of an administrative record.

IV. The Appropriate Remedy Is Vacatur, and No Additional Briefing Is Necessary.

Rather than addressing the appropriate remedy in his opposition brief, Secretary Zinke again seeks to delay resolution of this case by requesting additional remedy briefing if Plaintiffs prevail. No such briefing is necessary in this case where the usual remedy of vacatur and remand to the agency is appropriate. Indeed, remand without vacatur "would hand the agency, in all practical effect, the very delay in implementation" that it has sought to achieve unlawfully. *See* Order, *Clean Air Council v. Pruitt*, No. 17-1145 (D.C. Cir. July 13, 2017), ECF No. 1683944.[7]

[7] If the Court determines that additional briefing is appropriate, Plaintiffs request a rapid schedule.

Pursuant to the APA, a "reviewing court *shall* . . . hold unlawful and *set aside* agency action . . . found to be . . . not in accordance with law." 5 U.S.C. § 706(2) (emphases added). Thus, vacatur is the usual remedy when a court concludes that an agency's conduct was illegal under the APA. *See Becerra* Order 18; *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) ("We order remand without vacatur only in 'limited circumstances.'" (quoting *Cal. Cmtys. Against Toxics v. EPA* (*CCAT*), 688 F.3d 989, 994 (9th Cir. 2012))); *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1048, 1053 & n.7 (9th Cir. 2010) (holding remand without vacatur is only warranted in "rare circumstances"); *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 109 F. Supp. 3d 1238, 1241 (N.D. Cal. 2015) ("When a court finds an agency's decision unlawful under the Administrative Procedure[] Act, vacatur is the standard remedy.").

The circumstances that might warrant deviation from the usual remedy are not present in this case. Courts leave an invalid rule in place *only* "when equity demands" that it do so. *Pollinator Stewardship Council*, 806 F.3d at 532 (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)). For example, courts are reluctant to vacate an agency action where it will undermine the purpose of the statute at issue. *See Idaho Farm Bureau*, 58 F.3d at 1405 (declining to vacate in an Endangered Species Act case where it would lead to the "potential extinction of an animal species"); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (declining to vacate an improperly promulgated clean air regulation to avoid defeating the purposes of the Clean Air Act). Here, we have the flipside of that coin: vacatur is entirely consistent with the waste-prevention purpose of the Mineral Leasing Act.

In determining whether to deviate from the usual remedy of vacatur, courts also may weigh "the seriousness of the agency's errors against the 'disruptive consequences'" vacatur may cause. *Pollinator Stewardship Council*, 806 F.3d at 532 (quoting *CCAT*, 688 F.3d at 992). Here, both factors support vacatur. First, Secretary Zinke's "errors could not be more serious insofar as [he] acted unlawfully, which is more than sufficient reason to vacate the rules." *Becerra* Order 18 (quoting *Nat. Res. Def. Council v. EPA*, 489 F.3d 1364, 1374 (D.C. Cir. 2007)). Second, there are no "disruptive consequences" sufficient to warrant remand without vacatur. Until at least mid-June, industry was readying to comply with the Waste Prevention Rule, having failed to persuade either

BLM or the Wyoming district court to issue a stay. Once the Secretary's unlawful stay is vacated, the industry (which acknowledged that the Secretary did not have authority to unilaterally stay the Rule, *see supra* 2 n.1) may continue those efforts in advance of the January 2018 deadline. Vacating the Rule is not akin to an "economically disastrous" threat to the "power supply" as in *CCAT*, 688 F.3d at 994. Rather, it would result in companies taking common-sense measures to increase capture of a valuable public resource, increase royalties that States and localities can use for schools, infrastructure and health care, and reduce emissions of dangerous pollutants.

This case is materially different from *Becerra* because no final rule to repeal the Waste Prevention Rule is about to take effect. *Contra Becerra* Order 18 (noting that "if the Court granted vacatur, the Rule would only be in place for a few days before the Repeal Rule takes effect"). Although BLM plans to propose a rule to delay compliance with the Waste Prevention Rule while Secretary Zinke reconsiders it, it has not yet done so, and the content, timing, and legality of any such rule remain wholly speculative.

The D.C. Circuit, vacating another unlawful stay, recently rejected EPA's bid to continue benefiting from the unlawful stay simply because EPA had also proposed another rule to continue the stay. *Clean Air Council v. Pruitt*, 862 F.3d 1, 4, 14 (D.C. Cir. 2017); *see also Nat. Res. Def. Council v. EPA*, 683 F.2d 752, 767–68 (3d Cir. 1982) (rejecting agency's contention that the plaintiff was "not entitled to a remedy because notice and comment procedures were held in connection with the proposed rule to continue the postponement . . . and those procedures cured any defect in the initial postponement" and instead "placing the parties in the positions they would have been in if the APA had not been violated"). Indeed, not vacating this unlawful stay would only embolden agencies to take similar unlawful steps in the future to immediately suspend rules they would prefer to rescind. Vacatur is appropriate here.

CONCLUSION

Plaintiffs respectfully request that this Court grant their motion for summary judgment, declare the Stay Notice unlawful and vacate the Stay Notice.

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