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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11

12 CENTER FOR BIOLOGICAL DIVERSITY,
13 et al.,
14 Plaintiffs,

15 v.

16 DEB HAALAND, U.S. Secretary of the Interior,
17 et al.,
18 Defendants,

19 WASHINGTON CATTLEMEN'S
ASSOCIATION, et al.,
20 Private Landowner Intervenors

21 STATE OF ALABAMA, et al.,
22 State Intervenors,

23 AMERICAN FARM BUREAU FEDERATION,
24 et al.,
25 Industry Intervenors.

No. 4:19-cv-05206-JST

Related Cases: 4:19-cv-06013-JST
4:19-cv-06812-JST

**PRIVATE LANDOWNER
INTERVENORS, STATE
INTERVENORS, AND INDUSTRY
INTERVENORS' JOINT MOTION
FOR EXPEDITED DECISION
WITHOUT ORAL ARGUMENT ON
MOTION FOR STAY PENDING
APPEAL**

Judge: The Hon. Jon S. Tigar

INTRODUCTION

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2 Pursuant to Local Rules 6-3 and 7-1(b), the Private Landowner Intervenors,¹ the State
3 Intervenors, and the Industry Intervenors² (collectively, the “Defendant Intervenors”) respectfully
4 move this Court to rule on their Motion for Stay Pending Appeal, ECF No. 171 (the “Stay
5 Motion”),³ on an expedited timeframe, and without oral argument, as soon after August 4, 2022, as
6 is practicable.

7 These cases center on the United States Fish and Wildlife Service (FWS) and the National
8 Marine Fisheries Service’s (NMFS) (together, the “Services”) revised regulations for implementing
9 the Endangered Species Act (ESA), finalized on August 27, 2019 (together, the “2019 Rules”).
10 Three sets of plaintiffs (the “Plaintiffs”) challenged the 2019 Rules in three separate lawsuits
11 brought in late 2019. On July 5, 2022, in response to a motion for voluntary remand filed by the
12 Federal Defendants and a request by the Plaintiffs that remand be accompanied by vacatur, this
13 Court remanded and vacated the 2019 Rules. ECF No. 168 (the “Vacatur Order”). In doing so, the
14 Court granted the Plaintiffs complete relief—setting aside final agency action without first
15 determining whether the action was unlawful and reinstating the regulatory regime that was
16 previously in effect, *see Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). As such, when the
17 Court’s Final Judgment takes effect on August 4, 2022, *see* Fed. R. Civ. P. 62(a), the Defendant
18 Intervenors will be immediately subjected to the pre-2019 regulatory regime—a regime which they
19 contend was unlawful, and fought to reform. *See* ECF No. 171 at 11–17. And they will be subjected
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22 ¹ For purposes of this Motion the Private Landowner Intervenors are Washington Cattlemen’s
Association and Pacific Legal Foundation.

23 ² The Industry Intervenors are the American Farm Bureau Federation, American Forest Resource
24 Council, American Petroleum Institute, Federal Forest Resource Coalition, National Alliance of
25 Forest Owners, National Association of Home Builders, National Cattlemen’s Beef Association,
and Public Lands Council.

26 ³ This Court has related three cases: *Center for Biological Diversity v. Haaland*, No.
27 19-cv-5206; *California v. Haaland*, No. 19-cv-6013; and *Animal Legal Def. Fund v. Haaland*, No.
28 19-cv-06812. The Defendant Intervenors are filing an identical motion in each case. The remainder
of this Motion will make reference to the ECF numbers in the lowest numbered case: *Center for
Biological Diversity v. Haaland*.

1 to this regime without having been afforded the opportunity to defend the 2019 Rules on the merits
2 or even participate in the Administrative Procedure Act’s notice and comment process.

3 The Defendant Intervenors have filed—or intend to file imminently—notices appealing the
4 Vacatur Order. They also jointly moved for a stay pending appeal pursuant to Federal Rule of Civil
5 Procedure 62 and Federal Rule of Appellate Procedure 8(a)(1)(A). *See* ECF No. 171. In accordance
6 with Civil Local Rule 7-2, which requires a motion be set for hearing at least 35 days after the date
7 of filing and service, the Stay Motion is currently set for hearing on October 20, 2022—the earliest
8 date available. *See* Yates Decl. ¶ 11. By that time the Defendant Intervenors will have been subject
9 to the unlawful pre-2019 regime for over 75 days. *Id.* ¶ 11.

10 With this Motion the Defendant Intervenors jointly request that this Court resolve their Stay
11 Motion on an expedited basis, and without oral argument, as soon after August 4, 2022, as
12 practicable. The Defendant Intervenors recognize that Civil Local Rule 7-3(a)’s timeframes for
13 opposition and reply will govern the exact date of submission, and that date may occur after
14 August 4, 2022. They also appreciate the Court’s current workload. As such, they request that the
15 Court resolve the Stay Motion as soon after August 4, 2022, as both factors will permit.

16 Good cause exists for the Court to grant this Motion. When the Court’s judgment takes
17 effect, the Defendant Intervenors will be irreparably harmed. They will be subject once again to the
18 pre-2019 regulations that many of them challenged as unlawful. And they will be required to endure
19 the numerous harms to their sovereign interests, business activities, and property rights that regime
20 imposed upon them. *See* ECF No. 171 at 23–28. These harms will increase and accumulate with
21 each day that the Stay Order remains in effect. As such, being required to wait until October 20,
22 2022, to seek their requested relief would lead to irreparable injury. However, by expediting its
23 decision to grant the Stay Motion, this Court would mitigate the irreparable harm resulting from
24 ongoing application and enforcement of the pre-2019 regulatory regime. Moreover, if the Court is
25 not inclined to grant the Stay Motion, an expedited decision to that effect would allow the
26 Defendant Intervenors to seek timely appellate relief, as necessary. *See* Fed. R. App. P. 8(a)(1).

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1 The Defendant Intervenors advised counsel for Plaintiffs and Federal Defendants that they
2 will make this request for an expedited ruling without oral argument. Federal Defendants advised
3 that they do not oppose this Motion. Plaintiffs advised that they oppose this Motion.

4 ARGUMENT

5 **I. There Is Good Cause to Resolve the Stay Motion on an Expedited Timeframe and** 6 **Without Oral Argument**

7 As discussed at greater length in their Stay Motion, absent a stay of the Vacatur Order, the
8 Defendant Intervenors will be irreparably harmed by this Court’s reinstatement of the pre-2019
9 regulatory regime. *See* ECF No. 171. These harms will increase and accumulate with each day that
10 the Court’s Vacatur Order remains active. And being required to wait until October 20, 2022, for
11 the opportunity to move for a stay would greatly exacerbate this irreparable harm. By that stage
12 the Defendant Intervenors will have been subject to the pre-2019 regulatory regime for over 75
13 days. The longer it takes this Court to rule on the Stay Motion, the greater the cumulative harm
14 that will occur to the Defendant Intervenors. Three factors counsel that expedited treatment of the
15 Stay Motion is necessary.

16 **First**, the Court’s Vacatur Order taking effect will cause an irreparable procedural injury
17 to the Defendant Intervenors. *See id.* at 24–25. This procedural injury will only increase with each
18 day that passes. The longer the Vacatur Order remains in effect, the more entrenched the
19 procedure-less reimposition of the pre-2019 regulations will become. And the greater the harm to
20 the Defendant Intervenors who must conform their conduct to the pre-2019 regime—conformity
21 that must now occur in the absence of any ability to exercise their right to participate in the
22 regulatory process via the APA’s notice and comment procedures.

23 **Second**, the Vacatur Order will result in significant substantive harm to the Defendant
24 Intervenors. *See id.* at 25–28. These substantive harms will increase and accumulate with each day
25 the Vacatur Order remains in effect.

26 The State Intervenors—exercising their “primary authority and responsibility for
27 protection and management of fish, wildlife, and plants and their habitats,” 81 Fed. Reg. 8663,
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1 8663 (Feb. 22, 2016)—administer numerous programs which were greatly benefited by the 2019
2 Rules. For example, the 4(d) rule enabled many of the State Intervenor to engage landowners in
3 creative conservation efforts that aligned the incentives of all stakeholders; the Section 4 Rules
4 eliminated significant regulatory uncertainty in the listing process and prevented the Services from
5 withholding management authority from the States Intervenor for species that no longer qualify
6 as threatened as endangered; and the Section 7 Rules improved cumbersome interagency
7 consultation requirements that fall especially heavily on those State Intervenor with large amounts
8 of federal land within their bounds. *See id.* at 25–27 (citing declaration evidence). But the Vacatur
9 Order will eliminate the State Intervenor’s ability to pursue their sovereign interests free from the
10 uncertainty created by the pre-2019 regulatory regime. And with each day that the Vacatur Order
11 remains in effect, this irreparable injury will renew. This will have a cumulative impact—the
12 longer the Vacatur Order remains in effect, the more likely that the State Intervenor will be left
13 with no choice but to reorient their programs and priorities to conform to the pre-2019 regulatory
14 regime. This will irreparably damage their long-term abilities to pursue their sovereign interests.

15 Absent expedited treatment of the Stay Motion, similar real-world harm will occur to the
16 Private Landowner Intervenor and the Industry Intervenor. Washington Cattlemen’s Association
17 and the Industry Intervenor’s memberships’ abilities to run their businesses, enter beneficial
18 contracts, and manage their properties were significantly burdened by FWS’ pre-2019 blanket
19 prohibition on take, the Services’ pre-2019 regime for designating unoccupied critical habitat, and
20 the Service’s pre-2019 Section 7 consultation rules. *See id.* at 26–28 (citing declaration evidence).
21 As a result, reforms included in the 2019 regulations afforded Washington Cattlemen’s
22 Association and the Industry Intervenor’s memberships significant regulatory relief. *See id.* (citing
23 declaration evidence). But an abrupt return to the pre-2019 regulatory regime will eviscerate this
24 regulatory relief and require an immediate and costly adaptation. *See id.* (citing declaration
25 evidence). This vital regulatory relief will be denied for as long as the Vacatur Order remains in
26 effect. And the longer the Vacatur Order remains in effect, the more costs will be accrued, and the
27 more likely it is that significant regulatory decisions affecting members’ properties will be
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1 finalized under the burdensome pre-2019 regulations. This irreparable harm can, however, be
2 mitigated via expedited treatment of the Stay Motion.

3 *Third*, on the other side of the equation, an expedited ruling on the Stay Motion will not
4 harm the Plaintiffs. Nor will it harm the Federal Defendants—who in fact opposed Plaintiffs’
5 request for vacatur. *See* ECF No. 154. The Defendant Intervenors are *not* requesting the Court
6 shorten Civil Local Rule 7-3(a)’s ordinary timeframes for the Parties to brief the Stay Motion. As
7 such, nothing in this request will prejudice the Parties’ abilities to fully respond to the Stay Motion.
8 And any argument that a decision without oral argument will prejudice the Plaintiffs should be
9 viewed with skepticism, given the Plaintiffs’ prior position that it would be acceptable for the
10 Federal Defendants’ motion for remand to be decided on the papers. *See* ECF No. 148.

11 **II. The Defendant Intervenors Have Conferred with Plaintiffs and Federal Defendants**

12 In compliance with the Local Rules, counsel for the Private Landowner Intervenors
13 contacted counsel for the Plaintiffs and counsel for the Federal Defendants on July 19, 2022. Yates
14 Decl. ¶ 14. The purpose of this communication was to gain a stipulation to resolution of the Stay
15 Motion on an expedited basis and without oral argument. *Id.* Counsel were unable to reach
16 agreement to a stipulation. *Id.* ¶¶ 14–16. The Plaintiffs indicated that they oppose this Motion. *Id.*
17 ¶ 15. The Federal Defendants indicated that they do not oppose this Motion, provided the Defendant
18 Intervenors are not requesting that this Court expedite the Civil Local Rule 7-3(a) timeframe for
19 Federal Defendants to respond to the Defendant Intervenors’ Motion for Stay Pending Appeal. *Id.*
20 ¶ 16.

21 **CONCLUSION**

22 For the foregoing reasons, and for good cause shown, the Defendant Intervenors’
23 respectfully request that the Court grant this Motion and decide their Motion for Stay Pending
24 Appeal on an expedited basis, and without oral argument, as soon after August 4, 2022, as is
25 practicable. The Defendant Intervenors recognize that Civil Local Rule 7-3(a)’s timeframes for
26 opposition and reply will govern the exact date of submission, and that date may occur after
27 August 4, 2022. They also appreciate the Court’s current workload. As such, they request that the
28 Court resolve the Stay Motion as soon after August 4, 2022, as both factors will permit.

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DATED: July 21, 2022

In compliance with Local Rule 5-1, the filer of this document attests that all signatories listed have concurred in the filing of this document.

Respectfully submitted,

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