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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

CITIZENS FOR CLEAN ENERGY, et al., Plaintiffs, and THE NORTHERN CHEYENNE TRIBE, Plaintiff,	Case No. 4:17-cv-30-BMM **PLAINTIFFS' JOINT BRIEF IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO STAY**

v.

U.S. DEPARTMENT OF THE INTERIOR, et al.,

Defendants,

and

STATE OF WYOMING, et al.,

Defendant-Intervenors.

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR, et al.,

Defendants,

and

STATE OF WYOMING, et al.,

Defendant-Intervenors.

Case No. 4:17-cv-42-BMM
(consolidated case)

Plaintiffs in these consolidated proceedings jointly request that this Court deny Federal Defendants' Motion to Stay because delay in these proceedings risks further harm to Plaintiffs from new coal leasing with no likely benefit for judicial economy or avoided hardship for Defendants. Noting the change in presidential administrations, Federal Defendants seek their second abeyance while they review Secretarial Order 3348, the "Zinke Order" that Plaintiffs challenge in this case together with the Final Environmental Assessment released in February 2020. However, Federal Defendants have not demonstrated that a 90-day abeyance is necessary while they conduct this review, nor have they provided any indication that their review is likely to result in timely policy changes that could obviate the need for briefing and resolution of this case. Indeed, the April 16, 2021 Secretarial Order directing Federal Defendants' review of the Zinke Order gave Federal Defendants 60 days—until June 15, 2021—to complete their review and submit a report with their "plan and timeline to reverse, amend or update" the coal-leasing policy embodied by the Zinke Order.[1] Thus, at best, Federal Defendants' stay motion is premature and they should be required to re-submit it after they have announced a timeline and plan for reversing or revising

[1] Sec'y of the Interior, Revocation of Secretary's Orders Inconsistent with Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Secretarial Order No. 3398 § 5 (Apr. 16, 2021) ("SO 3398"), at https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3398-508_0.pdf.

the action that is the subject of this litigation—if they ultimately take such action. At this time, Federal Defendants have not demonstrated circumstances warranting a stay under the governing standard.

Accordingly, the State Plaintiffs in Case Number CV-17-42-GF-BMM and Tribe and Conservation Plaintiffs in Case No. CV-17-30-GF-BMM respectfully request that Federal Defendants' stay motion be denied.

PROCEDURAL BACKGROUND

This case has been ongoing since March 29, 2017, when then-Interior Secretary Zinke issued Secretarial Order 3348, rescinding a coal-leasing moratorium that had protected federal public lands from coal leasing and production. As this Court found, the Zinke Order violated the National Environmental Policy Act ("NEPA"). Citizens for Clean Energy v. U.S. Dep't of the Interior, 384 F. Supp. 3d 1264 (2019) [Doc. No. 141]. Yet Federal Defendants have continued leasing coal, both in the interim between the Zinke Order's effective date and this Court's April 2019 decision, and subsequent to this Court's Order, as recently as January 2021. Supp_AR-18.[2] Most of the coal leased since March 29, 2017 would have remained unleased but for the Zinke Order. In February 2020, Federal Defendants made a belated attempt to prepare NEPA

[2] News Release, BLM North Dakota Coal Lease Sale Jan. 15 (Jan. 4, 2021), https://www.blm.gov/press-release/blm-north-dakota-coal-lease-sale-jan-15.

documentation for their 2017 action, as required by this Court, but as Plaintiffs explain in their opening briefs on the supplemental complaints, Federal Defendants' truncated environmental review does not satisfy NEPA's standards for informed decision-making. See State Pls.' Brief in Supp. of Mot. for Summ. J. (May 18, 2021) [Doc. 201]; Brief in Supp. of Mot. for Summ. J. on Supp. Compl. (May 18, 2021) [Doc. 203].

Against this backdrop, Federal Defendants now make a second request to delay proceedings to accommodate a policy review of the Zinke Order. Their first request, filed March 11, 2021, sought a 60-day delay. As justification, Federal Defendants' first request referenced President Biden's January 20, 2021 Executive Order 13990, which directed federal agencies "to immediately review and, as appropriate and consistent with applicable law, take action to address" certain climate policies of the previous administration, including the Zinke Order.[3] Unopposed Mots. for Extension of Time ¶ 2 (Mar. 11, 2021) [Doc. 197] (stating that the requested extension would be "effectively a 60-day stay of these cases"). Despite the clear direction in Executive Order 13990, Federal Defendants stated in

[3] Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order No. 13990 § 1, 86 Fed. Reg. 7,037 (Jan. 25, 2021); see also White House, Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021), at https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/.

their stay motion that "there is no guarantee that this review will actually take place or, if so, when or how it might play out," but that "there at least seems a reasonable possibility that this review may occur and may affect this case." Id. ¶ 2. This Court granted Federal Defendants' unopposed motion. However, that stay elapsed without any action by Federal Defendants to address the Zinke Order and, indeed, more than four months after the Executive Order, Federal Defendants have yet to provide any indication that review of the Zinke Order is underway or that any such review will conclude in a timeframe that could reasonably address Plaintiffs' injuries from ongoing coal leasing.

Federal Defendants now seek a further delay of 90 days, again invoking the need to review the Zinke Order. This time, however, Federal Defendants cite their need to respond to Secretarial Order 3398, issued by Interior Secretary Haaland on April 16, 2021 (the "Haaland Order" or "SO 3398"). Doc. 199, ¶ 2. Although that Order purported to revoke the Zinke Order, the Interior Department clarified that the nominal revocation did not reinstate the former coal-leasing moratorium or "take any action on coal development," and thus as a practical matter leaves the

Zinke Order in place.[4] Nor did the Order withdraw or otherwise affect the Final Environmental Assessment ("Final EA") that Plaintiffs challenge in this case.

The Haaland Order further requires review of the previous administration's policies, including the Zinke Order:

> Within 60 days of the issuance of this Order, the Assistant Secretaries will submit to the Secretary a report listing each Bureau's/Office's policies, guidance documents, rules, or regulations that may warrant further action to be consistent with this Order and EO 13990. The report will include the Bureau's/Office's plan and timeline to reverse, amend or update those policies, guidance documents, rules, or regulations, and will provide recommendations regarding additional steps the Department may take to honor the Nation's trust responsibilities and conserve and manage the Nation's natural resources and cultural heritage consistent with this policy.

SO 3398 § 5 (emphasis added). Thus, by June 15, 2021, Federal Defendants must provide a plan and timeline for further action regarding the Zinke Order and federal coal leasing only if the relevant Assistant Secretary first determines that the federal coal leasing program "may warrant further action." Id. If, on the other hand, the Assistant Secretary determines that nominal rescission of the Zinke Order (but not the harm it continues to impose on the public) is sufficient to be consistent with the Haaland Order and EO 13990, then no further action would be directed under the Haaland Order, which is the sole basis for Federal Defendants'

[4] Assoc. Press, Interior Head Haaland revokes Trump-era orders on energy (Apr. 16, 2021), at https://apnews.com/article/joe-biden-climate-climate-change-summits-environment-9802db0231a662c6849316acafee3250.

current Motion. Nonetheless, rather than waiting for the results of that review to inform this Court's analysis of whether an abeyance is warranted to serve judicial economy and the interests of the parties, Federal Defendants prematurely seek to stay this case for 90 days without providing any commitment that the required review will redress the legal violations or harm at issue in this case.

STANDARD OF REVIEW

When a party moves to stay or hold in abeyance judicial proceedings, "the competing interests which will be affected by the granting or refusal to grant a stay must be weighed." Lockyer v. Mirant Corp., 398 F.3d 1098, 1110 (9th Cir. 2005) (quoting CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962)). The Ninth Circuit has identified three such competing interests: "[(1)] the possible damage which may result from the granting of a stay, [(2)] the hardship or inequity which a party may suffer in being required to go forward, and [(3)] the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." Id. As for the first two considerations, "'if there is even a fair possibility that the stay … will work damage to someone else,' the party seeking the stay 'must make out a clear case of hardship or inequity.'" Id. at 1112 (quoting Landis v. N. Am. Co., 299 U.S. 248, 255 (1936)). As for the third consideration, "case management standing alone is not necessarily a sufficient ground to stay proceedings." Dependable

Highway Express, Inc. v. Navigators Ins. Co., 498 F.3d 1059, 1066 (9th Cir. 2007) (citing Lockyer, 398 F.3d at 1112). As discussed below, these factors warrant denial of Federal Defendants' Motion.

ARGUMENT

Federal Defendants have failed to mention, let alone meet, the standard for abeyance. Federal Defendants remain free to issue federal coal leases that harm Plaintiffs' demonstrated interests (and have done so) and there is more than a "fair possibility" that a stay or abeyance would damage those interests. Landis, 299 U.S. at 255. Meanwhile, Federal Defendants have failed to establish "a clear case of hardship or inequity in being required to go forward." Id. Accordingly, Federal Defendants' motion should be denied.

I. PLAINTIFFS MAY BE HARMED BY FURTHER DELAY

Federal Defendants' request for an abeyance of these proceedings should be denied because there is more than a "fair possibility" that delaying the Court's ruling at this stage will "work damage" to Plaintiffs' members and the public. Lockyer, 398 F.3d at 1109 (quoting Landis, 299 U.S. at 255).

Plaintiffs face a significant threat of harm from the challenged action. This case challenges Federal Defendants' decision to revoke a federal coal-leasing moratorium and thereby open millions of acres of federal public lands to coal leasing. Citizens for Clean Energy, 384 F. Supp. 3d at 1279 (describing effect of

Zinke Order). Because of Federal Defendants' action, BLM remains free to issue coal leases, and indeed, it has issued leases for more than 4,000 acres of public land and approximately 40 million tons of coal since the Zinke Order was issued. Supp_AR-18 (Final EA). Lease applications remain pending for thousands of acres encompassing at least one billion tons of coal. Supp_AR-22-23. As this Court has recognized, the issuance of pending coal leases harms Plaintiffs because, among other things, coal leasing "impacts the air and water quality on the [Northern Cheyenne] reservation, destroys the habitats of sensitive species, and destroys important cultural sites, including sites used for Cheyenne ceremonies." Citizens for Clean Energy, 384 F. Supp. 3d at 1274-75 (addressing Plaintiffs' standing). In addition, coal production, transportation, and consumption adversely affect air and water quality, and contribute significantly to climate change. Id. This Court also recognized Plaintiffs' procedural injury from Federal Defendants' noncompliance with NEPA, which "deprived Plaintiffs of a meaningful opportunity to influence the disposition of coal-lease applications" before leases are issued. Id. at 1275.

This litigation is essential to Plaintiffs' ability to prevent those harms. Plaintiffs' experience demonstrates that once coal leases have issued, they are exceedingly difficult to vacate even when a court has determined they were unlawfully issued. See Utah Physicians for a Healthy Env't v. U.S. Bureau of

Land Mgmt., No. 2:19-CV-00256-DBB, 2021 WL 1140247, at *9 (D. Utah Mar. 24, 2021) (finding that BLM's issuance of the Alton coal lease violated NEPA, but declining to vacate the lease after mining commenced); see also WildEarth Guardians v. U.S. Bureau of Land Mgmt., 870 F.3d 1222, 1240 (10th Cir. 2017) (declining to vacate leases that "are currently being mined"). In other words, issuing these leases without adequate consideration of their cumulative and programmatic impacts "risks locking in for decades the future development of large quantities of coal under current rates and terms that the PEIS may ultimately determine to be less than optimal," Supp_AR-5426—i.e., the very harm that the former coal-leasing moratorium was designed to prevent. Without an opportunity to prevent further leasing through the present litigation, Plaintiffs lack adequate recourse to protect their interests against further leasing and mining.

Federal Defendants' motion does not assure that Plaintiffs' interests will not be harmed by the requested stay. Federal Defendants assert that they do "not anticipate holding any coal lease sales or issuing any leases or leasing decisions, including for lease modifications, of the type that were subject to the pause in leasing, within the next 110 days." Doc. 199 ¶ 4. However, even accepting Federal Defendants' "anticipat[ion]" as a guarantee—which they declined to give—a stay of proceedings still presents more than a "fair possibility" of harming Plaintiffs because the delayed briefing would foreclose Plaintiffs' opportunity to

obtain a ruling on the merits of their claims and associated remedy that could prevent the harms threatened by any lease Federal Defendants may issue on the 111th day or soon thereafter. Lockyer, 398 F.3d at 1109.[5]

Moreover, even if Federal Defendants exercise "complete diligence" in their review of the federal coal-leasing program, "the ordinary uncertainty in the rulemaking process … creates at least a 'fair possibility' of harm." California v. EPA, 360 F. Supp. 3d 984, 993 (N.D. Cal. 2018) (quoting Landis, 299 U.S. at 254–55) (denying motion to stay proceedings). But "complete diligence" here is doubtful. Federal Defendants' motion offers no information or commitments regarding their review of the Zinke Order. Instead, Federal Defendants assert only that a stay is necessary "while further review occurs." Doc. 199 ¶ 3. And while the Haaland Order requires Federal Defendants to submit the results of their review by June 15, 2021, Federal Defendants do not in their motion mention or commit to meeting this deadline. Id. Indeed, faced with the earlier presidential directive to review the Zinke Order, Federal Defendants conceded that "there is no guarantee that this review will actually take place or, if so, when or how it might play out." Doc. 197 ¶ 2. Without more, Federal Defendants cannot demonstrate that the

[5] If Federal Defendants were to commit to stop issuing coal leases while this litigation is pending, harm to Plaintiffs would be averted and a stay may be appropriate.

requested stay presents no reasonable possibility of harm to Plaintiffs' demonstrated interests.

II. FEDERAL DEFENDANTS WILL NOT EXPERIENCE ANY HARDSHIP OR INEQUITY JUSTIFYING ABEYANCE

Because there is more than a "fair possibility" of harm to Plaintiffs if a ruling in this matter is delayed, Federal Defendants must "make out a clear case of hardship or inequity in being required to go forward." Landis, 299 U.S. at 255. Yet Federal Defendants have not demonstrated any hardship or inequity if the abeyance is denied, let alone the "clear case" or "exceptional circumstances" the law requires. Id. Rather, their motion appears to be nothing more than an attempt to "stave off judicial review" by indicating that they may, or may not, take further administrative action regarding the Zinke Order. Am. Petroleum Inst. v. EPA, 683 F.3d 382, 388 (D.C. Cir. 2012). If that were enough to obtain a stay of proceedings, "a savvy agency could perpetually dodge review." Id. But that is not the law; Federal Defendants must establish a clear case of hardship, which they have failed to do.

Federal Defendants' motion evinces no hardship absent a stay. Federal Defendants claim only that a stay is warranted "while further review [of the Zinke Order] under Secretarial Order 3398 occurs." Doc. 199 ¶ 3. But Federal Defendants can conduct their review even while this case proceeds. If this Court rules for Plaintiffs and vacates the Zinke Order and Final EA, Federal Defendants'

review of coal leasing under the Haaland Order would inform their actions upon remand. On the other hand, should this Court determine that the previous administration's post-hoc Final EA satisfied NEPA, such a ruling would not impair the current administration's prerogative to provide a "reasoned explanation" for any change in policy going forward, which again would be informed by Federal Defendants' review of the Zinke Order directed by the Haaland Order. Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 966-67 (9th Cir. 2015) (en banc) (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515-16 (2009)). Thus, the Court's consideration and resolution of the present case does not impede Federal Defendants' review of coal leasing or cause any hardship to Federal Defendants.

To the extent Federal Defendants may claim hardship from having to defend a challenged action that may ultimately be reversed by the new administration on policy grounds, this is insufficient. Being required to defend a suit, without more, does not constitute a "'clear case of hardship or inequity' within the meaning of Landis." Lockyer, 398 F.3d at 1112. Further, there is nothing extraordinary or inequitable about one administration having to defend a rule issued by a prior administration that is still under administrative review, and federal courts often refuse to stay cases challenging a rule based on the mere chance that a federal agency may try to replace it at some time in the future. See, e.g., California v.

EPA, 360 F. Supp. 3d at 993 (denying a stay despite the EPA actively preparing a new rule because of "the ordinary uncertainty in the rulemaking process, which creates at least a 'fair possibility' of harm"); Ariz. Yage Assembly v. Barr, No. 3:20-CV-03098-WHO, 2020 WL 5629833, at *8 (N.D. Cal. Sept. 21, 2020) (refusing to grant a stay even after new rulemaking began because "it is impossible to predict when the regulations will be finalized"); Pasqua Yaqui Tribe v. U.S. EPA, No. CV-20-00266-TUC-RM, Order (D. Az. Apr. 12, 2021) (denying stay of litigation challenging previous administration's Clean Water Act rule under review by the current administration where "abeyance of th[e] litigation may result in damage to Plaintiffs or others and there is no indication that agency review of the challenged rule will be completed within a reasonable time") (slip op. attached as Exh. 1); Wild Virginia v. Council on Envtl. Quality, No. 3:20CV00045, Order Denying Defs.' Mot. for Stay of Case (W.D. Va. Feb. 19, 2021) (denying stay of litigation challenging previous administration's NEPA regulations under review by the current administration) (slip op. attached as Exh. 2).

The proper course of action should Federal Defendants not wish to defend the Zinke Order is to not only revoke that Order (as the Haaland Order purports to do), but also rescind the Final EA and eliminate all legal consequences flowing from the Zinke Order that continue to harm Plaintiffs. Absent such actions, this case should proceed to judicial resolution.

Because Federal Defendants cannot demonstrate any legitimate hardship from being required to litigate this case under the Court's current scheduling order, their stay motion should be denied.

III. ABEYANCE WOULD NOT PROMOTE JUDICIAL ECONOMY

Federal Defendants' motion should be denied for the additional reason that they do not demonstrate that abeyance would promote the "orderly course of justice," Lockyer, 398 F.3d at 1110, or "economy of time and effort for [the Court], for counsel, and for litigants," Landis, 299 U.S. at 254. Indeed, the requested stay could cause the unnecessary expenditure of judicial resources by giving rise to preliminary injunction proceedings that could otherwise be averted by the timely and orderly resolution of this case on summary judgment.

Federal Defendants make no effort in their motion to argue that principles of judicial economy favor a stay other than an opaque claim that "Secretarial Order 3398 may moot this case." Doc. 199 ¶ 3. However, even if this administration's review of the Zinke Order may eventually yield a policy reversal that resolves this controversy, Federal Defendants have not made any claim that such action may happen on a timeframe that could avert harm to Plaintiffs. In similar circumstances, the U.S. District Court for the District of Arizona recently denied the new administration's request to stay a challenge to a Trump-era rule where, "[d]epending upon the results of the anticipated agency review of the [Trump] rule,

it is possible that an abeyance could avoid unnecessary expenses and conserve judicial resources. However, that possibility is speculative, and Defendants have offered no timeline of when agency review of the rule will begin, much less be completed." Pasqua Yaqui Tribe, No. CV-20-00266-TUC-RM, Slip. Op. at 4 (Exh. 1) (citing Dependable Hwy. Express, Inc., 498 F.3d at 1066-67).

Not only have Federal Defendants failed to demonstrate that abeyance would conserve judicial resources, granting Federal Defendants' motion could give rise to a need for Plaintiffs to seek preliminary injunctive relief from this Court to avert harms from further coal leasing. In this regard, as discussed above, Federal Defendants have stated that they do not expect to issue coal leases for 110 days—but have made no promises thereafter. Rather than expedited review based on incomplete merits briefing, as would be necessary in the preliminary injunction context if Federal Defendants' motion were granted, denying Federal Defendants' motion and resolving this case on summary judgment would promote the "orderly course of justice." Lockyer, 398 F.3d at 1110.

Finally, to the extent that judicial economy could potentially be served by Federal Defendants' review of the Zinke Order, this factor is best evaluated after June 15, 2021, when the promised review is due under the Haaland Order. Should Federal Defendants complete that review and commit to a timely policy change that could prevent harm to Plaintiffs from the ongoing effect of Federal

Defendants' decision to rescind the former federal coal-leasing moratorium, Federal Defendants may renew their request for a stay at that time. But absent any indication that Federal Defendants intend to reverse course on federal coal leasing, the Court's resolution of this case is necessary to prevent potential harm to Plaintiffs and remedy Federal Defendants' serious violation of NEPA.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Federal Defendants' motion for a stay of these proceedings be denied.

Respectfully submitted this 1st day of June, 2021,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Pursuant to Local Rule 7.1(d)(2), I certify that this brief contains fewer than 6,500 words. I relied on my Microsoft Word word-processing tool to obtain the count.

s/ Jenny K. Harbine

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served today via the Court's CM/ECF system on all counsel of record.

/s/Jenny K. Harbine
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