



EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

The Honorable Yvonne Gonzalez Rogers
United States District Court for the Northern District of California
1301 Clay Street
Oakland, CA 94612

January 24, 2019

Re: No. 4:18-cv-05712-YGR, *State of California, et al. v. Bernhardt, et al.*,¹ Plaintiffs
Conservation and Tribal Citizen Groups Letter Brief Regarding Motion for Summary Judgment

Your Honor:

Plaintiffs Conservation and Tribal Citizen Groups (“Citizen Groups”) appreciate the opportunity to submit this letter brief containing an executive summary identifying the issues we wish to address in our motion for summary judgment and specifying which of those issues can be briefed jointly, versus those that need independent briefing. *See* Order Re: Parties’ Joint Case Management Statement (Jan. 16, 2019), ECF No. 81. This letter brief identifies four sets of issues that Citizen Groups currently intend to address. The final issues addressed in summary judgment briefing, however, may be affected by review of the administrative record as well as the number of pages allocated to the briefs.

This action challenges the Bureau of Land Management’s (“BLM”) final rule, *Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements*, 83 Fed. Reg. 49,184 (Sept. 28, 2018) (“Rescission”). The Rescission repeals almost all of the provisions of a final rule promulgated two years earlier, *Waste Prevention, Production Subject to Royalties, and Resource Conservation*, 81 Fed. Reg. 83,008 (Nov. 18, 2016) (“Waste Prevention Rule”). BLM adopted the Waste Prevention Rule in response to numerous reports by independent federal agencies and its own findings identifying rampant waste of publicly and tribally owned natural gas. To fulfill Congress’ mandate to require use of “all reasonable precautions to prevent waste,” 30 U.S.C. § 225, the Waste Prevention Rule required operators to control venting, flaring, and leaks, and bring more gas to market using proven, widely-available technologies that some (but not all) states already require, and that many companies use voluntarily. In addition to reducing waste, the Waste Prevention Rule would have resulted in millions of dollars of increased royalty payments to states, tribes, and local governments for schools, healthcare, and infrastructure, and reduced air and climate pollution that results when natural gas is wasted.

In 2018, BLM reversed its position, and rescinded all of the waste-reducing measures in the Waste Prevention Rule.² In doing so, BLM disregarded its previous findings about the need for the Rule, and its conclusions that the Rule was “economical, cost-effective, and reasonable.”

¹ Pursuant to Fed. R. Civ. P. 25(d), Acting Secretary of the Interior David Bernhardt is substituted as a defendant for Ryan Zinke, who resigned on January 2, 2019.

² BLM’s Rescission rulemaking followed two earlier attempts to suspend the provisions of the Waste Prevention Rule. The first was vacated by this Court as unlawful. *California v. BLM*, 277 F. Supp. 3d 1106, 1127 (N.D. Cal. 2017). The second was preliminarily enjoined by this Court. *California v. BLM*, 286 F. Supp. 3d 1054, 1076 (N.D. Cal. 2018).

81 Fed. Reg. at 83,009. BLM's change in position in the Rescission violates the Mineral Leasing Act ("MLA"), Federal Land Policy and Management Act ("FLPMA"), National Environmental Policy Act ("NEPA"), and Administrative Procedure Act ("APA"). Citizen Groups ask this Court to vacate the Rescission and reinstate the Waste Prevention Rule in its entirety.

Citizen Groups include eighteen national, regional, local, and tribal citizen groups that have different memberships, and distinct interests and focuses—both geographically and substantively. Citizen Groups include six separately represented plaintiff groupings. Notwithstanding these differences, Citizen Groups uniformly oppose the Rescission and believe joint briefing among all eighteen of the Citizen Groups is appropriate and will reduce duplication.

Citizen Groups believe, however, that it would be most efficient to brief independently from the State Plaintiffs, which are uniquely situated as sovereign States, and are represented by State Attorney Generals' offices with their own set of review and approval processes. Further, although the States' Complaint indicates that the States plan to argue that the Rescission broadly suffers many of the same legal deficiencies that the Citizen Groups plan to raise, the overlap in legal issues is not complete. *See infra*. The complaints also suggest that the Citizen Groups and States are likely to emphasize different arguments and harms based on their unique interests as citizen organizations versus sovereigns. Should the court order separate briefs, Citizen Groups would coordinate with the State Plaintiffs to minimize duplication in their arguments.

Whether the Court orders joint or separate briefing, Citizen Groups respectfully urge the Court to consider the number and complexity of issues, in addition to the lengthy factual history of this case, in determining appropriate page allocations. In the interest of fairness, Citizen Groups also ask the Court to assign roughly even page allocations to the Rescission's challengers and defenders. Doing so would be consistent with this Court's standing order, the Local Civil Rules, and general federal court practice, all of which assign equal pages per side as a default. *See, e.g.*, Standing Order in Civil Cases of Judge Yvonne Gonzales Rogers ¶ 9b (updated Feb. 24, 2017); Civ. L.R. 7-2(b), 7-3(a), & 7-4(b).

In their motion for summary judgment, Citizen Groups currently intend to make the following arguments:

(1) The Rescission fails to take all reasonable precautions to prevent waste in violation of the Mineral Leasing Act.

Under the MLA, BLM has a duty to ensure that companies developing publicly owned oil and gas "use *all* reasonable precautions to prevent waste of oil or gas." 30 U.S.C. § 225 (emphasis added). Likewise, the MLA requires that each federal lease "shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property ... and for the prevention of undue waste." *Id.* § 187. BLM adopted the Waste Prevention Rule to fulfill these and other legal mandates. Based on an extensive record, BLM required reasonable, protective measures that are similar to measures some oil and gas operators have used for years and that some, but not all, states require through regulations.

The Rescission eliminates these reasonable protections. To the extent BLM provides any explanation for why these measures are no longer reasonable, it does so by redefining "waste" to include only those measures "where compliance costs are not greater than the monetary value of

the resources they are expected to conserve.” 83 Fed. Reg. at 49,212 (new 43 C.F.R. § 3179.3). This definition of waste unlawfully reads the duty to prevent waste out of the MLA and focuses exclusively on private interests to the exclusion of “the interests of the United States” and the “public welfare” that BLM is charged to protect. 30 U.S.C. § 187. BLM also violates the APA by failing to explain how this new definition of waste is permissible under its governing statutes or to explain its change in position. *Fed. Comm’n v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–16 (2009).

Moreover, BLM has rescinded measures that, by its own analysis, meet its new (and unlawful) definition of waste because, in BLM’s view, operators will likely implement them anyway. *E.g.*, 83 Fed. Reg. at 49,195 (rescinding requirements for pneumatic controllers even though the requirements “are expected to generate revenue for operators” because “BLM expects many operators to adopt [them] even in the absence of ... requirements”). BLM’s interpretation of the MLA unlawfully reads the agency’s duty to minimize waste out of the statute.

Citizen Groups believe this legal issue largely overlaps with the State Plaintiffs’ issues.

(2) The Rescission unlawfully delegates the Bureau of Land Management’s legal obligations to the states.

BLM’s Rescission unlawfully abdicates its duties under the MLA and FLPMA by deferring to a patchwork of state regulations to minimize waste from flaring. Under the MLA, BLM is required to ensure that lessees “use *all* reasonable precautions to prevent waste of oil or gas developed in the land.” 30 U.S.C. § 225 (emphasis added). FLPMA additionally requires BLM to prevent “unnecessary or undue degradation” of the land it manages. 43 U.S.C. § 1732(b). Neither the MLA nor FLPMA authorize BLM to delegate authority to state governments to prevent the waste of federally owned oil and gas or to protect public lands and resources. Indeed, in finalizing the Waste Prevention Rule, BLM recognized that “neither ... State [nor] tribal requirements obviate the need for this rule [because] the BLM has an independent legal responsibility and a proprietary interest as a land and resource manager to oversee and minimize waste from oil and gas production activities ... on Federal and Indian ... leases.” 81 Fed. Reg. at 83,010.

Despite recognizing its independent legal duty, BLM’s Rescission permits oil and gas wells on BLM-managed lands to vent or flare, without paying royalties on the lost gas, “if it is vented or flared pursuant to applicable rules, regulations, or orders of the appropriate State regulatory agency or tribe.” 83 Fed. Reg. at 49,213 (new 43 C.F.R. § 3179.201(a)). BLM is unambiguous that it is in fact delegating its duty, stating that this provision “establishes State or tribal rules, regulations, and orders as the prevailing regulations for the venting and flaring of oil-well gas on BLM-administered leases.” *Id.* at 49,202. Yet nowhere does BLM provide any authority for such delegation. *See Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of Mont.*, 792 F.2d 782, 796 (9th Cir. 1986) (explaining that courts will not “read broad authority to subdelegate into [mineral leasing] statutes, absent clear proof of legislative intent to relieve the Secretary of a portion of his duties”). Nor does BLM explain how a patchwork of state and tribal regulations that significantly vary in their stringency and requirements (and themselves operate without regard to BLM’s new, and flawed, definition of “waste”) nonetheless ensure that “*all* reasonable precautions” are used to minimize waste on

the lease as required by the MLA. Moreover, BLM fails to provide the “good reasons” required for an agency’s change in a prior policy position. *See Fox Television*, 556 U.S. at 515.

The State Plaintiffs’ Complaint does not raise this legal issue.

(3) The Rescission is an unexplained reversal of the agency’s earlier position and is arbitrary and capricious.

In promulgating the Rescission, BLM relied on largely the same analyses (with only minor modifications) that the agency had previously relied on to support its adoption of the Waste Prevention Rule, but made completely contrary findings and conclusions. In doing so, BLM violated the APA by failing to show there are “good reasons” for rescinding or modifying key provisions of the Waste Prevention Rule, and failing to provide a “reasoned explanation” for its changed position. *Fox Television*, 556 U.S. at 514–16. Indeed, BLM has failed to provide the “more detailed justification” required when a “new policy rests upon factual findings that contradict those which underlay [the agency’s] prior policy.” *Id.* at 515; *see also Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 966–67 (9th Cir. 2015) (en banc) (similar). BLM further violated the APA by omitting consideration of relevant factors and data, relying on factors which Congress did not intend the agency to consider, and offering rationales that are unsupported or run counter to the evidence in the administrative record, lack a rational basis, represent unexplained and unsupported changes in position, and are otherwise arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Fundamentally, the Rescission disregards BLM’s prior findings and the extensive record evidence demonstrating that the waste of natural gas on federal and tribal lands is widespread and substantial, and that solutions are urgently needed to minimize this waste. Based on extensive analysis and record support, BLM previously concluded that the Waste Prevention Rule’s requirements were “economical, cost-effective, and reasonable” means to address this problem. 81 Fed. Reg. at 83,009. However, BLM issued the Rescission based on a claim that the Waste Prevention Rule’s provisions “add[] regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.” 83 Fed. Reg. at 49,184. BLM’s new conclusion is not “justified by the rulemaking record.” *Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 66 (D.C. Cir. 2017); *California v. BLM*, 286 F. Supp. 3d 1054, 1065 (N.D. Cal. 2018) (preliminarily enjoining BLM’s earlier attempt to suspend the Waste Prevention Rule, and concluding that BLM “provide[d] no basis for” reconsidering its earlier conclusion that the Waste Prevention Rule was economical and cost-effective “and point[ed] to no facts casting doubt on this assumption”). For example, BLM’s own evidence shows that the Rescission will lead to a *decrease* in natural gas production of 299 billion cubic feet. BLM, *Regulatory Impact Analysis for the Final Rule to Rescind or Revise Certain Requirements of the 2016 Waste Prevention Rule 57* (Aug. 31, 2018) (“RIA”).³ BLM also analyzed the economic impact of the Rescission on small businesses and estimates that the per-entity reduction in compliance costs would result in an average increase in profit margin of only 0.20%, an amount that BLM does not claim will constrain economic growth or prevent job creation. RIA at 66. In fact, BLM

³ Available at <https://www.regulations.gov/document?D=BLM-2018-0001-223607>.

admits that the Rescission will not affect the price, supply or distribution of energy and will not alter investment and employment decisions. RIA at 57, 65.

Citizen Groups similarly intend to argue that BLM’s conclusions with respect to (a) the impact on marginal wells, (b) the need for uniform federal standards, (c) the costs and benefits of the Rescission (including BLM’s use of a deeply-flawed “interim” value for the costs imposed by climate change), and (d) other technical conclusions represent unexplained reversals of agency position and are arbitrary and capricious. As with BLM’s claims of regulatory burden, these conclusions are unsupported by the factual record and represent unexplained departures from the agency’s prior findings. Each of these arguments will require a thorough explanation of the prior and current factual records.

Citizen Groups believe that some parts of this issue (*e.g.*, the change of position regarding burden and the use of an “interim” social cost of methane) overlap with the State Plaintiffs’ issues, but other parts (*e.g.*, the impact on marginal wells and the need for uniform federal standards) do not.

(4) The Rescission violates the National Environmental Policy Act.

BLM relies on a 26-page environmental assessment (“EA”) that fails to take the required “hard look” at the environmental impacts of the Rescission. *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 361 F.3d 1108, 1124 (9th Cir. 2004). The EA’s assessment of air pollution impacts is a single cursory sentence: “These air pollutants [methane, VOCs, and hazardous air pollutants] affect the health and welfare of humans, as well as the health of plant and wildlife species.” BLM, *Environmental Assessment: Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements Final Rule 19* (Sept. 28, 2018) (“2018 EA”).⁴ The 2018 EA fails to take a hard look at—or even acknowledge—the significant impacts of the hundreds of thousands of tons of dangerous air pollutants that will be emitted due to the Rescission. These include the public health impacts of these emissions on tribal and other communities living in the midst of extensive oil and gas development and on communities with ozone levels already exceeding federal health-based standards. They also include climate impacts, which the 2018 EA fails to disclose, monetize, or consider in the context of the global carbon budget, among other failings. *See Ctr. for Bio. Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008); *Mont. Env’tl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1095-99 (D. Mont. 2017). Further, the EA also fails to consider the Rescission’s cumulative impacts in combination with other current federal efforts to rescind important health and climate protections. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895-96 (9th Cir. 2002).

BLM’s failure to take a hard look at the Rescission’s air pollution and climate change impacts leads the agency to erroneously conclude in its Finding of No Significant Impact (“FONSI”) that rescinding the protective provisions of the Waste Prevention Rule nationwide “will not have a significant effect on the quality of the human environment, individually or cumulatively with other actions” and therefore an Environmental Impact Statement (“EIS”) is not required. BLM, *Finding of No Significant Impact, Waste Prevention, Production Subject to*

⁴ Available at <https://www.regulations.gov/contentStreamer?documentId=BLM-2018-0001-223606&contentType=pdf>.

Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements Final Rule 2 (Sept. 14, 2018).⁵ In fact, extensive record evidence shows that the Rescission will have significant negative public health and climate impacts. Accordingly, BLM failed to justify its FONSI and was compelled to prepare a comprehensive EIS.

BLM further violated NEPA by refusing to investigate reasonable alternatives to the Rescission. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999). BLM considered only three alternatives: no action (continued implementation of the Waste Prevention Rule); the Rescission; and retaining the gas capture requirements of the Waste Prevention Rule. 2018 EA at 6. Notably, BLM refused to consider in detail several reasonable alternatives, including BLM's own suggested alternatives, that would have addressed its newfound concerns about the Waste Prevention Rule, such as applying key requirements of the Waste Prevention Rule only to wells that sell gas to market, wells that would receive positive returns from compliance, and wells that are not marginal. 2018 EA at 8–9.

Citizen Groups believe there is some, but not extensive, overlap with the State Plaintiffs in how they will address the Rescission's NEPA violations. For example, the State Plaintiffs' Complaint does not allege that BLM failed to investigate reasonable alternatives. Further, in arguing that BLM was required to take a "hard look," develop an EIS, and investigate alternatives, Citizen Groups intend to specifically address the harms to their members, including their members who live on tribal lands, which differ from the States' harms.

In addition to these arguments regarding the illegality of the Rescission, Citizen Groups anticipate that their summary judgment motion will demonstrate their Article III standing to bring this action. This issue would not overlap with State Plaintiffs because Citizen Groups' standing is based on different legal standards and evidence than State Plaintiffs' standing.

In conclusion, Citizen Groups anticipate that in their motion for summary judgment—in addition to explaining the lengthy history of the Waste Prevention Rule and Rescission rulemakings and demonstrating their standing—they will address four sets of reasons for why the Rescission is unlawful. Each argument will require explaining the legal background and then detailing the evidence, from both the Waste Prevention rulemaking and the Rescission rulemaking, in support. As explained herein, some of these issues overlap with those State Plaintiffs' are likely to raise, while some do not. Citizen Groups respectfully request that, regardless of whether it orders joint or independent briefing, the Court allocate adequate pages to make all of these arguments, and allocate roughly equivalent numbers of pages to the Rescission's challengers and defenders.

Respectfully submitted,

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⁵ Available at <https://www.regulations.gov/contentStreamer?documentId=BLM-2018-0001-223604&contentType=pdf>.

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