

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION**

WESTERN ENERGY ALLIANCE)	
)	
Plaintiff,)	
)	
v.)	Case No. 16-cv-00050-DLH-CSM
)	
UNITED STATES DEPARTMENT OF THE)	
INTERIOR, SALLY JEWELL, in her official)	
Capacity as Secretary of the United States)	
Department of the Interior; BUREAU OF)	
INDIAN AFFAIRS, and MICHAEL S. BLACK,)	
in his official Capacity as Director of the Bureau)	
of Indian Affairs)	
)	
Defendants.)	

**EMERGENCY MOTION FOR STAY
(Forthwith Ruling Requested)**

Plaintiff Western Energy Alliance (“Alliance”), by and through its undersigned counsel, respectfully submits this *Emergency Motion for Stay* and respectfully requests the Court issue an Order staying the effective date of the final rule entitled *Rights-of-Way on Indian Land*, 80 Fed. Reg. 72492-72549 (Nov. 19, 2015) (the “Final Rule”) so as to provide the Court with sufficient time to rule on the merits of the Alliance’s pending motion for preliminary injunction. In support thereof, the Alliance states as follows:

BACKGROUND

1. On March 11, 2016, the Alliance initiated this action maintaining that Defendants had improperly promulgated the Final Rule for a variety of reasons.

2. Because the Final Rule’s effective date was set for March 21, 2016 (ten days after the Alliance’s Complaint was filed), the relief requested by the Alliance included both a temporary restraining order and preliminary injunction to prevent implementation of the Final Rule. *See* Dkt. Nos. 3, 9.

3. Shortly after the Alliance’s filing, the parties conferred and agreed to a stipulation. The purpose of the resulting *Joint Stipulation Regarding Briefing Schedule and Preliminary Injunction Hearing on April 11, 2016* [Dkt. No. 12] (“Stipulation”) was to remove the exigency associated with the pending effective date and provide the parties and the Court with sufficient time to adjudicate the Alliance’s request for a preliminary injunction *prior to* the Final Rule taking effect.

4. To that end, Defendants, the United States Department of the Interior and Bureau of Indian Affairs (the “Agencies”), agreed to postpone the effective date until April 21, 2016; and the parties jointly agreed on a briefing schedule for the Alliance’s motion for preliminary injunction.

5. That agreed-upon schedule culminated in a preliminary injunction hearing on April 11, 2016 – ten days before the Final Rule was scheduled to take effect.

6. It was the Alliance’s contemplation that the ten day period following the hearing would be sufficient for the Court to rule on the motion for preliminary injunction. Upon information and belief, the Agencies also contemplated that the ten day period following the hearing would be sufficient for the Court to rule on the Alliance’s motion for a preliminary injunction.

7. At the April 11, 2016 hearing, however, the Court indicated that due to its heavy caseload and crowded docket, a ruling within 10 days was not feasible. The Court requested that the parties agree to a further extension of the Final Rule's effective date to provide the Court additional time to issue a decision on the merits. The Agencies flatly refused.

8. On April 13, 2016, the undersigned counsel contacted the Agencies' counsel and again requested the Agencies voluntarily postpone the effective date for a period of 30 days to provide the Court with additional time to rule on the merits as originally requested by the Court. The Agencies again refused. *See* Emails between J. Lippa and B. Bridgewater attached hereto as Exhibit 1.

ARGUMENT

9. The Alliance, the Agencies, and the Court are faced with a timing problem. The Alliance timely moved to enjoin implementation of the Final Rule, and has cooperated with opposing counsel in establishing a briefing and hearing schedule that would make its request ripe in advance of the April 21, 2016 effective date. But, the parties' best laid plans failed to take into account the Court's busy calendar.

10. The Alliance makes this Motion and respectfully requests the Court exercise its inherent power, and the power authorized by the Administrative Procedures Act ("APA"), to stay the Final Rule's effective date in order to provide the Court with sufficient time to consider and rule upon the merits of the pending motion for preliminary injunction. *See, e.g., Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 9 (1942) (noting that because "[n]o court can make time stand still," the power to grant a stay pending review is part of a court's "traditional equipment for the administration of justice"); *see also* 5 U.S.C. § 705 (reviewing court "may issue all necessary and

appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings”).

11. Two recent cases confirm this Court’s authority to postpone the effective date until the Court has an opportunity to rule on the merits of the motion for preliminary injunction. In *State of Wyoming v. United States Department of Interior*, pending in the United States District Court for the District of Wyoming (Case No. 2:15-CV-043-SWS), the court was faced with a similar timing problem. In that case, the court held a preliminary injunction hearing one day before new Bureau of Land Management (“BLM”) regulations concerning hydraulic fracturing were set to take effect. During the preliminary injunction hearing, counsel for the Department of the Interior conceded that Section 705 of the APA provided the District Court with the ability to “postpone the effective date of an agency action in order to preserve the status quo, pending review on the merits...” See Exhibit 2, *Order Postponing Effective Date of Agency Action* and portions of *Transcript of Preliminary Injunction Proceedings* (“Wyoming Order”) at 203:3-12. That is exactly what the District Court elected to do – it postponed the effective date of the regulations until “BLM’s lodging of the Administrative Record and the Court’s ruling on the motions for preliminary injunction.” *Id.* at p. 2. The Court made clear that it was issuing a stay – not a preliminary injunction – for the sole purpose of providing the Court sufficient time to “make a meaningful review and determination, given the serious and difficult questions as to the merits...” *Id.* at 264:7-16.

12. The same rationale applies here. Quite understandably, the Court is unable to issue a determination on the merits in the narrow window provided by the parties. Rather than

rush to judgment or simply allow the Final Rule to take effect,¹ the Court can and should stay the Final Rule's effective date, pursuant to 5 U.S.C. § 705.

13. In *State of Ohio v. United States Environmental Protection Agency* (Case No. 15-3799), the Sixth Circuit Court of Appeals was faced with a similar timing problem. In that case, the petitioners moved for a stay of the Environmental Protection Agency's new "Clean Water Rule," which, among other things, purports to clarify the definition of "waters of the United States." The court observed that the motion for stay was addressed to the court's discretion, "early in the case based on incomplete factual development and legal research, for the purpose of preserving the status quo." Exhibit 3, *Order of Stay* dated October 9, 2015 (the "WOTUS Order") at p. 3. Reasoning that the new Clean Water Rule would significantly disrupt the status quo, the Sixth Circuit utilized its discretion and issued a nationwide stay to permit sufficient time for "a more deliberate determination" regarding the merits of the challenges to the rule. *Id.* ("A stay temporarily silences the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing.").

14. A similar exercise of discretion is warranted to avoid irreparable injury to existing rights-of-way grantees in this case.² For example, the Final Rule alters existing right-of-way grantees' property rights, and subjects right-of-way grantees to new and yet to be defined "applicable" tribal law. The Final Rule would also require existing grantees to immediately conform their behavior to new "procedural" requirements not currently part of the existing

¹ The Stipulation reflects the parties' agreement that Final Rule should not take effect until this Court reached the merits of the Alliance's motion for preliminary injunction. The Agencies steadfast refusal to voluntarily extend the effective date is, therefore, inexplicable.

² Section 705 and the Wyoming Order indicate that a stay should be issued "to the extent necessary to prevent irreparable injury" which the Alliance believes it has clearly demonstrated. It is noteworthy, however, that the WOTUS Order grants a stay even after concluding that there had not yet been a compelling showing that petitioners would suffer immediate irreparable harm absent a stay. Ex. 3, WOTUS Order at p. 5.

regulations governing Indian land rights-of-way. Some of these new procedural requirements, the Alliance argues, strip existing grantees of real property rights. Therefore, maintaining the status quo pending a determination on the merits would also maintain grantees' property rights, and guarantee that existing grantees are not subject to potentially inapplicable tribal law or tribal jurisdiction.

15. Moreover, if the Final Rule were to take effect, only to be subsequently enjoined, it would create far more questions than it would resolve. Would, for example, any rights-of-way issued during this interim period be required to abide by the subsequently enjoined Final Rule, whereas all other rights-of-way would be regulated by the current regulations? Would existing grantees be subject to tribal law via federal regulation for only the interim period, or beyond? What if an Indian landowner pursued remedies under tribal law to terminate an existing right-of-way during the interim period?

16. As the Court noted during the April 11, 2016 hearing, the current regulations governing Indian land right-of-way have been in place for over half a century. The Agencies will suffer no harm, therefore, if those regulations remain applicable while the Court determines the merits of the Alliance's motion for a preliminary injunction.

17. As the Sixth Circuit concluded, "[a] stay allows for a more deliberate determination of whether" a federal agencies final rule is proper under federal law. Ex. 3, WOTUS Order at p. 3. This is all the Alliance requests – that, consistent with the purpose and spirit of the Stipulation, the Court provide itself with sufficient time to rule on the merits of the motion for preliminary injunction prior to the Final Rule becoming effective.

CONCLUSION

WHEREFORE, in light of the foregoing, the Alliance respectfully requests the Court issue an Order postponing, on a nationwide basis, the effective date of the Final Rule pending a determination of the Alliance's pending motion for preliminary injunction.

Dated this 14th day of April, 2016.

Respectfully submitted,

s/ Jeffrey M. Lippa

Robert Thompson III (*admitted pro hac vice*)

Jeffrey M. Lippa

GREENBERG TRAURIG, LLP

1200 17th Street, Suite 2400

Denver, CO 80202

Telephone: 303-572-6500

Facsimile: 303-572-6540

Email: thompsonIII@gtlaw.com

lippaj@gtlaw.com

**ATTORNEYS FOR PLAINTIFF WESTERN
ENERGY ALLIANCE**

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2016, a true and accurate copy of the foregoing **EMERGENCY MOTION FOR STAY** was filed and served with the Clerk of the Court via the ECF system which will send notification to the following:

Bradley S. Bridgewater
U.S. Department of Justice
South Terrace, Suite 370
999 18th Street
Denver, CO 80202

Rebecca M. Ross
Indian Resources Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

s/ Julie Eaton
Julie Eaton

*(Original on file at offices of Greenberg Traurig,
LLP, pursuant to C.R.C.P. 121, § 1-26)*