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UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

STATE OF WYOMING, et al., Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Respondents, and WYOMING OUTDOOR COUNCIL, CENTER FOR BIOLOGICAL DIVERSITY, CITIZENS FOR A HEALTHY COMMUNITY, DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, EARTHWORKS, ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL LAW AND POLICY CENTER, MONTANA ENVIRONMENTAL INFORMATION CENTER, NATIONAL WILDLIFE FEDERATION, NATURAL RESOURCES DEFENSE COUNCIL, SAN JUAN CITIZENS ALLIANCE, SIERRA CLUB, THE WILDERNESS SOCIETY, WESTERN ORGANIZATION OF RESOURCE COUNCILS, WILDERNESS WORKSHOP, AND WILDEARTH GUARDIANS, Respondent-Intervenors.	Civil Case No. 2:16-cv-00285-SWS [Lead] [Consolidated With 2:16-cv-00280-SWS] Assigned: Hon. Scott W. Skavdahl **RESPONDENT-INTERVENOR CITIZEN GROUPS' RESPONSE TO PENDING MOTIONS**

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INTRODUCTION

The States of Wyoming and Montana (State Petitioners) and Western Energy Alliance and Independent Petroleum Association of America (Industry Petitioners) have placed before this Court a litany of requests, which share one commonality: all seek the judicial equivalent of the Bureau of Land Management's (BLM) unlawful suspension of the Waste Prevention Rule. Petitioners want a specific policy outcome—to avoid complying with a fully-effective final regulation associated with modest compliance costs—and their requests are transparent attempts to achieve that outcome without regard to the legality or appropriateness of the route.

Each request is more extraordinary than the one before it. Despite the fact that merits briefing is almost complete, Industry Petitioners make their third request for a preliminary injunction. But they fail to present any new evidence or attempt to meet their high burden. State Petitioners, while conceding that the availability of a stay under 5 U.S.C. § 705 "turns on the same four factors considered under a traditional [preliminary injunction] analysis," nevertheless urge a "pragmatic approach" that would somehow permit this Court to preliminarily enjoin the Rule "regardless" of whether they meet those four factors, tacitly admitting that they cannot carry this burden. In the alternative, Industry Petitioners ask this Court to take the unprecedented step of vacating the Waste Prevention Rule at their behest, without concluding that the Rule is invalid and without even remanding it to the agency. Finally, Federal Respondents urge this Court to judicially resurrect their unlawful attempts to suspend the Rule without pointing to *any* authority to do so or arguing that Petitioners have met their burden for a preliminary injunction.

All of these requests fall far short of the legal requirements for obtaining relief. Moreover, they would all severely harm both Respondent-Intervenors and the public, through increased waste of natural gas and associated lost royalties and pollution. Ultimately, while

Petitioners complain about "chaos" and claim to seek "certainty and stability," the Administrative Procedure Act (APA) provides such certainty and stability by requiring regulated entities to comply with, and agencies to implement, final regulations unless and until they are invalidated by a court or validly revised or rescinded. Neither has happened here.

BACKGROUND

Based upon independent reports documenting rampant waste of publicly-owned natural gas, and following years of analysis and numerous public hearings, BLM finalized the Waste Prevention Rule over a year ago. 81 Fed. Reg. 83,008 (Nov. 18, 2016). Immediately thereafter, Petitioners moved this Court to preliminarily enjoin the Rule.

After full briefing and a half-day hearing, on January 16, 2017, "having considered the briefs and materials submitted in support of the motions and the oppositions thereto, having heard witness testimony and oral argument of counsel, and being otherwise fully advised," this Court denied the motions. *Wyoming v. U.S. Dep't of the Interior*, No. 2:16-CV-0285-SWS, 2017 WL 161428, at *1 (D. Wyo. Jan. 16, 2017). In a detailed opinion, this Court found that "Petitioners have failed to establish all four factors required for issuance of a preliminary injunction." *Id.* at *12. On the merits, this Court concluded that Petitioners have not "shown a clear and unequivocal right to relief." *Id.* at *9, *10. This Court also determined that Petitioners "failed to establish that irreparable injury is likely in the absence of an injunction." *Id.* at *11. Petitioners did not appeal this Court's order, and on January 17, 2017, the Waste Prevention Rule went into effect and companies were legally required to comply with its provisions.

After numerous requests for extensions to file merits briefs by both Petitioners and Federal Respondents,[1] the merits briefing in this case is almost complete. Petitioners filed their opening briefs on October 2, 2017, *see, e.g.*, Br. in Supp. of WEA & IPAA's Pet. for Review of Final Agency Action (Oct. 2, 2017), ECF No. 142, and Respondents filed their responses on December 11, *e.g.*, Fed. Resp'ts' Resp. to Pet'rs' Merits Brs. (Dec. 11, 2017), ECF No. 176 (BLM Merits Resp.); Citizen Groups' Resp. Br. (Dec. 11, 2017), ECF No. 175 (Citizens Merits Resp.). In the midst of the merits briefing, Industry Petitioners filed a second request for a preliminary injunction, predominantly premised on the same arguments that this Court had already rejected. *See* Mem. in Supp. of Mot. for Prelim. Inj. 1 (Oct. 27, 2017), ECF No. 161 (Indus. Second PI Mem.). In response, this Court noted that it "must decline Industry Petitioners' invitation to avoid the compliance and enforcement uncertainty by granting their request for a preliminary injunctive relief; Petitioners' motion for preliminary injunction must be resolved on its own merit, or lack thereof." Order Granting Mot. for an Extension of the Merits Briefing Deadlines 4 (Oct. 30, 2017), ECF No. 163 (Order Extending Briefing Sched.).

Also on December 11, Federal Respondents moved to dismiss this case, arguing that "[b]ecause the agency is in the midst of reconsidering the Waste Prevention Rule," "[j]udicial review of the merits at this stage would interfere with the integrity of the administrative process, and would be a waste of the Court's and the Parties' resources." BLM Merits Resp. 1. Federal Respondents explained that "[w]here a court finds that a matter is prudentially unripe or moot, the appropriate course is to dismiss the action." *Id*. at 5.

[1] *See*, *e.g.*, Joint Mot. of WY, MT, & Indus. Pet'rs to Extend Briefing Sched. (Mar. 3, 2017), ECF No. 97; Indus. Pet'rs' Mot. for Extension of Time (Mar. 30, 2017), ECF No. 110; Fed. Resp'ts' Mot. to Extend the Briefing Deadlines (June 20, 2017), ECF No. 129.

Ten days before the merits reply briefs and responses to Federal Respondents' motion to dismiss were due, Federal Respondents and Petitioners jointly asked this Court to stay the litigation in light of BLM's ongoing reconsideration as well as BLM's issuance of a rule to suspend many of the Waste Prevention Rule's provisions, 82 Fed. Reg. 58,050 (Dec. 8, 2017) (Suspension Rule). Joint Mot. to Stay (Dec. 26, 2017), ECF No. 186.

The States of California and New Mexico, as well as Citizen Groups, challenged BLM's hastily-developed Suspension Rule as an arbitrary and capricious attempt to change the requirements of the Waste Prevention Rule without considering BLM's statutory obligations and the lengthy administrative record documenting the waste problem. Plaintiffs moved for a preliminary injunction. *E.g.*, Conserv. & Tribal Citizen Groups' Notice of Mot. & Mot. for Prelim. Inj., *Sierra Club v. Zinke*, No. 17-cv-07187-WHO (N.D. Cal. Dec. 19, 2017), ECF No. 4. On February 22, 2018, the district court granted a preliminary injunction, concluding that "Plaintiffs have provided several reasons that the Suspension Rule is arbitrary and capricious, both for substantive reasons, as a result of the lack of a reasoned analysis, and procedural ones, due to the lack of meaningful notice and comment." *California v. BLM*, --F.3d--, No. 17-cv-7186-WHO, 2018 WL 1014644, at *17 (N.D. Cal. Feb. 22, 2018). The court further concluded that plaintiffs had established "injuries with effects statewide, to the general public, and on the personal level, any of which might be sufficient to establish likely irreparable harm," and that the balance of the equities likewise favored plaintiffs because an "expected increase in [industry] profits of only 0.17%, a marginal amount," did not outweigh these significant harms. *Id*. at *16.

The Petitioners now ask this Court to take a bevy of different steps, including preliminarily enjoining the Rule, Mem. in Supp. of Mot. for Prelim. Inj. or Vacatur 4–14 (Feb. 28, 2018), ECF No. 197 (Indus. Mem.), staying the Rule under § 705 of the APA, Mot. to Lift

Stay and Suspend Impl. Deadlines (Feb. 28, 2018), ECF No. 195 (States Mot.), and vacating the Rule without a decision on the merits while retaining jurisdiction, Industry Mem. 14–18.

ARGUMENT

Petitioners seek to rid themselves of the obligation to comply with the Waste Prevention Rule without a conclusion by this Court that the Rule is unlawful. This Court should either decide this case on the merits or dismiss it, and decline Petitioners' and BLM's latest invitation to avoid both compliance and a merits determination.

I. This Court Should Either Proceed to Adjudicate the Merits or Dismiss this Case.

Should this Court decide to proceed with this litigation, the only appropriate path is to complete its merits adjudication. *See* Citizen Groups' Resp. to N.D. & TX Joint Mot. to Lift Stay 1–2 (Mar. 2, 2018), ECF No. 198 (Citizens Resp. to N.D. & TX Mot.); *see also Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1579–80 (10th Cir. 1994) (explaining procedure for review of agency action, and rejecting alternative methods of resolving validity of such action). The merits briefing is almost complete and thus no "preliminary" relief is necessary. Nor may this Court vacate a regulation without determining that it is invalid. *See infra* pp. 22–24.

Federal Respondents urge this Court to "stay its hand," Fed. Resp'ts' Resp. to Mots. to Lift the Stay and for Other Relief 2, 6, 8, 9 (Mar. 14, 2018), ECF No. 207 (BLM Resp.), and argue that this is an "instance[] when the exercise of Article III jurisdiction is unwise," *id*. at 8 (quoting *Wyoming v. Zinke*, 871 F.3d 1133, 1141 (10th Cir. 2017)). This Court has previously recognized such concerns. *E.g.*, Order Granting Mot. to Extend Briefing Deadlines 3 (June 27, 2017), ECF No. 133 (Order Granting Extension). But if this case is prudentially unripe and this Court should not exercise its Article III jurisdiction, then the appropriate result is to *dismiss* the case, not to exercise that Article III jurisdiction to rule on substantive motions for relief. *See*

Wyoming, 871 F.3d at 1146 (upon finding a challenge to a regulation prudentially unripe due to administrative reconsideration, vacating a decision to enjoin the regulation and directing the district court to dismiss the case without prejudice); *see also* BLM Merits Resp. 5–6 (noting that "[w]here a court finds that a matter is prudentially unripe or moot, the appropriate course is to dismiss the action" and citing cases). Notably, in *all* of the cases that Federal Respondents cite where the court stayed its hand due to prudential ripeness concerns, BLM Resp. 8, the court dismissed or stayed the case without granting any other form of relief.[2] Federal Respondents ask this Court to demur only *after* affording them the substantive outcome they desire.

Moreover, the other forms of relief put forward by Petitioners do not reduce the "risk[] [of] substantial interference in the administrative process," *id*. at 6, or lessen the need for this Court to "review [the validity of the Rule] under the Administrative Procedures Act," Order Granting Extension 3. As Federal Respondents explain, "any order issued by this Court would be in response to *its evaluation of the discrete agency action before it*, namely, the 2016 Waste Prevention Rule." BLM Resp. 14 (emphasis added). A preliminary injunction or stay under § 705 requires this Court to conclude that Petitioners are likely to succeed on the *merits*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), and vacatur without a decision on the merits, even presuming that it is a valid form of relief (it is not), requires this Court to consider the "seriousness of the deficiencies" alleged in the Rule, *see* Indus. Mem. 15. Indeed, for evidence that the forms of relief Petitioners request may influence the administrative process,

[2] In *American Petroleum Institute v. EPA*, 683 F.3d 382, 390 (D.C. Cir. 2012), the court held the case in abeyance and required regular reports from the agency. In *National Park Hospitality Association v. U.S. Department of the Interior*, 538 U.S. 803, 812 (2003), the court vacated the judgment of the court of appeals and remanded with instructions to dismiss the case with respect to the issue in question. In *Utah v. U.S. Department of the Interior*, 535 F.3d 1184, 1198 (10th Cir. 2008), the court affirmed the district court's dismissal of the claims in question because they were not ripe for adjudication.

this Court need look no further than BLM's current proposed rule, which seeks comment on the concerns this Court expressed in denying earlier motions for preliminary injunction. 83 Fed. Reg. 7924, 7927 (Feb. 22, 2018) (Rescission Proposal). Moreover, Petitioners' alternative forms of relief all require a significant expenditure of resources by this Court—one that may be equal to or greater than resolving this case on the merits. Federal Respondents cannot have it both ways—telling this Court to both "stay its hand" *and* grant substantive relief.

II. Petitioners' Successive Motions for a Preliminary Injunction Are Not Appropriate.

For the third time in this litigation, Petitioners seek the extraordinary remedy of a preliminary injunction. Given the advanced stage of this litigation and this Court's previous finding that Petitioners failed to establish all four factors necessary to grant such relief, this Court should decline to consider Petitioners' successive motions, which are yet another "invitation" to "avoid the compliance and enforcement uncertainty" associated with BLM's repeated, unlawful attempts to suspend the Waste Prevention Rule. *See* Order Extending Briefing Sched. 4.

A. The extraordinary remedy of a preliminary injunction is neither necessary nor appropriate at this advanced stage of the litigation.

As Petitioners admit, "[t]he purpose of a preliminary injunction is to 'preserve the relative position of the parties *until a trial on the merits can be held*.'" Indus. Mem. 4 (emphasis added) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)); *see* Mem. in Supp. of WY & MT's Mot. for Prelim. Inj. 11 (Nov. 28, 2016), ECF No. 22 (same); *see also Keirnan v. Utah Transit Auth.*, 339 F.3d 1217, 1220 (10th Cir. 2003) ("A preliminary injunction serves to preserve the status quo pending a final determination of the case on the merits" in order to "preserve the power to render a meaningful decision on the merits." (quotation omitted)).

But instead of asking this Court to resolve the almost-fully-briefed merits, Petitioners have forced the parties and this Court to brief and consider a third preliminary injunction motion.

Given the advanced stage of the litigation—the administrative record was filed nearly a year ago, both opening and response briefs have been filed, and merits briefing can be concluded expeditiously—it would be inappropriate to grant preliminary relief "until a trial on the merits can be held." *Camenisch*, 451 U.S. at 395; *see also* Resp't-Intervenor Citizen Groups' Resp. to Indus. Pet'rs' Second Mot. for a Prelim. Inj. 8–10, ECF No. 173 (Nov. 29, 2017) (Citizens Second PI Resp.). The merits of this case can be rapidly resolved. N.D. & TX Joint Mot. to Lift Stay & Establish Expedited Sched. 9 (Feb. 26, 2018), ECF No. 194; Citizens Resp. to N.D. & TX Mot. 1–2. Accordingly, no "preliminary" relief is necessary or appropriate.

While recognizing that a stay must be "interim … pending a future adjudication of the merits," BLM Resp. 16, Federal Respondents urge this Court to grant preliminary relief, while simultaneously *avoiding* consideration of the merits until BLM finalizes its rescission rulemaking, at which point "this case will become moot," *id.* at 9, 15–16. In essence, Federal Respondents seek the stay pending administrative reconsideration that federal courts have twice found did not satisfy administrative law requirements. But, as courts have recognized in a related context, a stay of a regulation is impermissible while at the same time "block[ing] judicial review by obtaining a stay in the … litigation." *Becerra v. U.S. Dep't of the Interior*, 276 F. Supp. 3d 953, 964 (N.D. Cal. 2017).

B. This Court's denial of Petitioners' previous preliminary injunction requests precludes successive requests premised on the same legal and factual claims.

This Court has already ruled that Petitioners are not entitled to a preliminary injunction. Petitioners are "collaterally estopped from challenging the district court's earlier findings" in a subsequent preliminary injunction motion. *Adams v. City of Chicago*, 135 F.3d 1150, 1153 (7th Cir. 1998); *see* 18A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4445 (2d ed. 2017) (ruling on a preliminary injunction motion is preclusive with respect to a

subsequent preliminary injunction motion "if the same showings are made and it appears that nothing more is involved than an effort to invoke a second discretionary balancing of the same interests"). Here, Petitioners have presented no new evidence regarding either their likelihood of success on the merits or their alleged irreparable harm, instead presenting the same legal arguments and factual evidence that this Court already considered and found inadequate.[3]

In particular, Petitioners do not and cannot point to anything new with regard to their likelihood of success on the merits—no controlling judicial decision has been issued, the Waste Prevention Rule has not changed and, as discussed *infra* pp. 11–12, this Court must base its assessment of the validity of the Rule on the administrative record that supported the promulgation of the Rule. This Court should end its analysis here. Petitioners' repeated motions for preliminary injunctions are impermissible attempts to waste judicial resources by relitigating issues that have already been decided in a full and fair proceeding before this Court. *See* Citizens Second PI Resp. 5–8. Petitioners' efforts should be rejected as collaterally estopped.

III. Should this Court Reach the Merits of Petitioners' Successive Requests, It Should Again Conclude that They Are Not Entitled to this Relief.

A preliminary injunction is an "extraordinary remedy," for which "the right to relief must be clear and unequivocal." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005) (quotation omitted). To obtain a preliminary injunction, Petitioners must establish: (i) a likelihood of success on the merits; (ii) that they are likely to suffer irreparable harm in the absence of injunctive relief; (iii) that the balance of equities favors an injunction; and (iv) that an injunction is in the public interest. *Winter*, 555 U.S. at 20. "[E]ach of these elements is a prerequisite for obtaining a preliminary injunction." *Diné Citizens Against Ruining Our Env't v.*

[3] State Petitioners indicate in their recent motion that "the States' prior motion for preliminary injunction [is] renewed herein" and further note that their arguments on the appropriateness of a preliminary injunction "will not be repeated." States Mot. 4.

Jewell, 839 F.3d 1276, 1281 (10th Cir. 2016) (*Diné CARE*). Petitioners fail to meet their burden on each of these factors; indeed, they do not even try, and State Petitioners' suggestion that this Court may judicially stay the Rule upon some lesser test is a tacit admission that Petitioners cannot meet their high burden here.

For their part, Federal Respondents "do not oppose" a stay of the Waste Prevention Rule, but "take no position on the most appropriate authority under which the Court stays" the Rule and, importantly, do not contend that Petitioners have satisfied the four prerequisites for relief. BLM Resp. 12 & n.3. Rather, they ask this Court to provide "relief from a rule that may change and stability of the regulatory regime during the reconsideration process," *id.* at 7, a request that is indistinguishable from Petitioners' earlier "invitation to avoid the compliance and enforcement uncertainty" rejected by this Court, Order Extending Briefing Sched. 4 ("Petitioners' motion for preliminary injunction must be resolved on its own merit, or lack thereof.").

A. Petitioners fail to establish a likelihood of success on the merits.

As explained *supra* pp. 8–9, Petitioners are collaterally estopped from relitigating this Court's earlier determination that they failed to establish this required prerequisite for a preliminary injunction. Instead of raising new relevant evidence, Industry Petitioners merely cite to this Court's statements in its January 2017 order denying a preliminary injunction and finding that Petitioners had *not* established a likelihood of success on the merits. Indus. Mem. 9. Moreover, since that ruling, Citizen Groups have filed a lengthy defense of the Waste Prevention Rule on the merits, explaining in detail why the Rule is a valid exercise of BLM's authority, and specifically addressing the concerns raised by this Court in its denial of Petitioners' first preliminary injunction motions. Citizens Merits Resp. 9–43.

Industry Petitioners also refer to BLM's new "concerns" about the Waste Prevention Rule, as articulated in the Suspension Rule and BLM's recently-issued proposal to rescind key

provisions of the Rule, 83 Fed. Reg. at 7924. Indus. Mem. 10. But BLM has *never* concluded that the Waste Prevention Rule was unlawful, nor confessed error in this litigation, and does not do so now. *Compare* Indus. Mem. 10 (pointing only to "concerns" BLM has expressed), *with* BLM Resp. 13 (discussing BLM's "broad statutory authority" to regulate waste). The agency has also explained that the Waste Prevention Rule is not statutorily *mandated*, *see* BLM Resp. 13, while claiming "broad authority to regulate the development of federal and Indian oil and gas in a manner that the agency deems efficient and in the public interest," power that certainly encompasses the authority to promulgate the Waste Prevention Rule. Defs.' Opp. to Pls.' Mots. for a Prelim. Inj. 27–28, *California*, No. 3:17-cv-07186-WHO (N.D. Cal. Jan. 16, 2018), ECF No. 67 (Ex. 1).

Nor can BLM's Suspension Rule or Rescission Proposal affect this Court's evaluation of the lawfulness of the Waste Prevention Rule itself, as these recent actions are not part of the administrative record for the Rule before this Court. Review of a final agency action must be "based on the full administrative record that was before all decision makers … *at the time of the decision*." *Bar MK Ranches v. Yeutter*, 994 F.2d 735, 739 (10th Cir. 1993) (emphasis added); *see* 5 U.S.C. § 706 ("In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party. …"). "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). "After-the-fact rationalization by counsel in briefs or argument will not cure noncompliance by the agency with" the requirement that it "must make plain its course of inquiry, its analysis and its reasoning" in the administrative record. *Olenhouse*, 42 F.3d at 1575. This Court must evaluate the Waste

Prevention Rule based strictly on the administrative record before it and the basis articulated by the agency at the time it promulgated the Rule.[4]

There is no reason for this Court to reverse its earlier conclusion that Petitioners have failed to demonstrate a likelihood of success on the merits.

B. Petitioners fail to demonstrate they will suffer irreparable harm.

Petitioners have not put forth the necessary evidence to show that absent a preliminary injunction, they will incur imminent and "certain, great, actual and not theoretical" harm. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (quotation omitted). Instead, Industry Petitioners have once again made entirely unsupported allegations about the difficulties of compliance and the specter of production losses. None of these arguments satisfies Industry Petitioners' burden of showing certain or great harm.

First, neither compliance costs nor royalty payments are legally sufficient to constitute irreparable harm, as Citizen Groups have explained at length. *See* Citizen Groups' Resp. to Mots. for a Prelim. Inj. 33–35 (Dec. 15, 2016), ECF No. 69 (Citizens First PI Resp.); Citizens Second PI Resp. 21. Courts have broadly rejected the theory that compliance costs alone constitute irreparable harm, as this standard would be met for any regulation requiring private entities to take action. *E.g.*, *Lane v. Buckley*, 643 F. App'x 686, 688 (10th Cir. 2016) ("[E]conomic harm … generally is insufficient to constitute irreparable harm."); *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) ("[I]t is well settled that economic loss does not, in and of itself, constitute irreparable harm." (quotation omitted)); *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527 (3d Cir. 1976) ("Any time a corporation complies with a

[4] For this reason, Federal Respondents are wrong to assert that the parties would need to update their merits briefs due to changed circumstances. *See* BLM Resp. 16. The validity of the Waste Prevention Rule in no way hinges on BLM's subsequent actions.

government regulation that requires corporation action, it spends money and loses profits; yet it could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction."). This is all the more true where, as here, the compliance costs represent only a tiny fraction of the profits of small oil and gas operators. VF_0000575–76, 602. Industry Petitioners' claim that additional royalty payments constitute irreparable harm, Indus. Mem. 8, is likewise fundamentally incorrect because if Petitioners prevail on the merits and this Court sets aside the Rule's royalty requirements, any overpaid royalties can be recovered from the agency. 30 U.S.C. § 1721a; *Wyoming*, 2017 WL 161428, at * 11.

Second, Industry Petitioners fail to submit *any* new or specific information to support their allegations of heightened compliance costs or stranded production. Instead of providing the requisite factual support to show "certain, great, actual and not theoretical" harm, *Heideman*, 348 F.3d at 1189 (quotation omitted), Industry Petitioners cite only bald, generalized assertions in a declaration submitted by a representative of one industry trade group. *See* Indus. Mem. 6–7 (citing Decl. of Kathleen Sgamma (Feb. 28, 2018), ECF No. 192-3 (Sgamma Decl.)); *see also N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1253 (10th Cir. 2017) (finding "speculative assertions" in a single declaration insufficient to establish irreparable harm).[5] Even assuming these types of harms are legally sufficient (they are not), Industry Petitioners have never, and do not now, identify specific wells where production will allegedly

[5] The Sgamma Declaration is largely duplicative of earlier declarations submitted by Ms. Sgamma in this litigation, *compare* Sgamma Decl., *with* Decl. of Kathleen Sgamma (Oct. 27, 2017), ECF No. 162-1, and cites to the same October 2017 "estimates" of lost production and compliance costs cited in Industry Petitioners' second preliminary injunction request. Sgamma Decl. ¶ 10. These estimates are unreliable and speculative, consisting of unsubstantiated claims without disclosure of methodology, assumptions, or underlying data. Citizens Second PI Resp. 22–23; Decl. of Jonathan R. Camuzeaux & Dr. Kristina Mohlin ¶¶ 6–13 (Nov. 29, 2017), ECF No. 173-1.

be shut-in, nor specific unsuccessful attempts to receive an exemption. Nor do they identify particular companies that cannot comply with the standards, identify the approaches those companies have taken to try to comply, or even provide a detailed accounting of why the costs would be overly burdensome for any specific operator.

In contrast to Industry Petitioners' unsubstantiated and generalized allegations, when promulgating the Waste Prevention Rule, BLM conducted a rigorous and transparent analysis of the costs associated with the Rule, and found them reasonable, particularly because many of the costs would be offset by the capture and sale of additional gas.[6] Analyzing the impacts on small businesses in particular, BLM estimated that average annual compliance costs would range from $44,600 to $65,800 for each company, the equivalent of approximately 0.15% of a small company's profits. *See* VF_0000575–76; *see also* VF_0000602 (average "small" operator has annual revenue of $500 million). Even now, BLM concedes that suspending the "Core Provisions" of the Rule would only increase the profits of small operators by 0.17% and "will not have a significant economic impact on a substantial number of small entities." 82 Fed. Reg. at 58,058, 58,064. Furthermore, as this Court recognized, the Rule contains "several economic exemptions" in the event that compliance with its requirements would force operators to cease production and abandon reserves. *Wyoming*, 2017 WL 161428, at * 11 (citing 43 C.F.R. § 3179.102(c) (well completion requirements); § 3179.201(b)(4) (pneumatic controller requirements); § 3179.202(f) (pneumatic diaphragm pump requirements); § 3179.203(c)(3) (storage vessel requirements); § 3179.303(c) (operator may request approval of an alternate leak

[6] Though Federal Respondents now assert that compliance with the Waste Prevention Rule would be costly and difficult, they provide no support for this reversal of position from BLM's findings in the Waste Prevention Rule. *California*, 2018 WL 1014644, at *10 ("[I]t appears that BLM is simply 'casually ignoring' all of its previous findings and arbitrarily changing course.").

detection program)). Industry Petitioners have provided no evidence of difficulty obtaining these exemptions.

Third, the fact that the Waste Prevention Rule is fully in effect and all compliance dates have passed is not evidence that Petitioners are being irreparably harmed. Petitioners have had ample time to prepare to comply—the Rule was published sixteen months ago, BLM's first attempt to delay provisions was held unlawful within four months, and BLM's second attempt to suspend standards was preliminarily enjoined within five weeks of its effective date. Furthermore, while BLM, on two separate occasions, briefly and unlawfully suspended certain provisions of the Rule before their initial compliance dates, Petitioners now seek to enjoin other "Core Provisions" that have required compliance since January 17, 2017, and were not unlawfully suspended by BLM until almost a year later. *See* Indus. Mem. 1 n.1 (requesting injunction of 43 C.F.R. §§ 3162.3-1(j), 3179.101, 3179.102, 3179.204).[7]

Finally, while Petitioners have not shown evidence of *any* companies that "cannot comply" with the Waste Prevention Rule, *id.* at 8, if any such compliance challenges exist, they are largely of Industry Petitioners' own making, as other operators have already indicated they are complying with the Rule. Citizens Second PI Resp. 19–21, 23–24. Critically, Petitioners do *not* seek a stay in order to allow time to prepare for compliance with the Rule, but instead seek a stay in order to avoid compliance altogether. If Industry Petitioners' true concern were with lack

[7] Notably, both Industry and State Petitioners wrongly claim that vacating these "Core Provisions" would maintain the "status quo that has existed since January 17, 2017." Industry Mem. 14, 18; States Mot. 3. To the contrary, many of these "Core Provisions" *required compliance on January 17, 2017*, following this Court's denial of Petitioners' first preliminary injunction motions. These same provisions were not stayed by BLM's first unlawful stay, and remained in effect at least until BLM suspended them through its second unlawful stay almost a year later. It is unclear why Petitioners believe they did not need to comply with these provisions following this Court's order denying their first preliminary injunction motions, and their current motions suggest they have been entirely ignoring that order.

of ample time to comply, they would have requested a short stay targeted at providing that relief. *See Citizen Band Potawatomi Indian Tribe v. Okla. Tax Comm'n*, 969 F.2d 943, 948 (10th Cir. 1992) (discussing the "well-settled principle that an injunction must be narrowly tailored to remedy the harm shown"). Because Industry Petitioners have failed to show certain, great and imminent harm from complying with the Waste Prevention Rule, their request to enjoin the Rule must be denied.

C. The balance of the equities and the public interest weigh decisively against a preliminary injunction.

To obtain preliminary relief, Petitioners must demonstrate that the balance of equities favors an injunction, and that issuance is in the public interest. *Winter*, 555 U.S. at 20. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at 24 (quotation omitted); *see Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351, 357–58 (10th Cir. 1986) (concluding an injunction should issue after "looking beyond the 'public interest' defined in the narrow sense" to examine "the broader public interest"). Here, the clear and concrete harms to the public from enjoining the Waste Prevention Rule's requirements far outweigh the small and speculative harms alleged by Petitioners.

Industry Petitioners once again attempt to minimize harms to the Citizen Groups and the public as "speculative and generalized concerns." Indus. Mem. 13. This baseless assertion is flatly contradicted by the extensive evidence in the administrative record and detailed declarations from the Citizen Groups documenting the benefits from the Rule, both to the public and for specific members of the Citizen Groups. *See* Citizens First PI Resp. 46–49; Citizens Second PI Resp. 25. These documented, concrete public benefits stand in stark contrast to the truly "speculative and generalized" harms to Industry Petitioners alleged in a single declaration

by a trade group representative. Indeed, on essentially identical facts (given that the "Core Provisions" are the same ones unlawfully suspended by the Suspension Rule), the California district court recently determined that "the financial costs of compliance are not as significant as the increased gas emissions, public health harms, and pollution" and that "the balance of equities and public interest strongly favor" enjoining the Suspension Rule. *California*, 2018 WL 1014644, at *16–17. Federal Respondents' attempt to distinguish the inquiry "in light of the specific facts" before this Court fails. *See* BLM Resp. 15 (citing the exact same allegations of harm assessed by the California district court).[8]

The Waste Prevention Rule cuts the waste of publicly-owned natural gas, providing millions in additional royalties for taxpayers, tribes, and state and local governments. *See* VF_0000564 (Rule will result in $6 million in additional royalties in 2018); Decl. of Gwen Lachelt ¶¶ 2–4, 8 (Dec. 15, 2016), ECF No. 69-3 (Rule benefits La Plata County, Colorado by "providing additional royalties that we can use to fund key County priorities—including infrastructure, roads, and education"). When publicly-owned natural gas is released into the atmosphere, burned unused, or leaked through inadequate infrastructure, the American public loses a valuable resource that could have been used productively. 81 Fed. Reg. at 83,009. BLM has conceded that suspending the "Core Provisions" of the Rule for a year will result in the waste of 9 billion cubic feet of publicly-owned gas, 82 Fed. Reg. at 58,057, or enough to heat

[8] At most, when this Court "briefly touch[e]d upon these factors with a few observations," it concluded that "the balance of harms in this case does not tip decidedly in either side's favor." *Wyoming*, 2017 WL 161428, at * 12. Since then, Citizen Groups have presented additional detailed information regarding the benefits of the "Core Provisions" that Petitioners now seek to enjoin, both in this Court and in the California litigation. *See, e.g.* Decl. of Hillary Hull (Mar. 16, 2018) (Hull Decl.) (Ex. 2); Decl. of Dr. Elena Craft (Mar. 16, 2018) (Craft Decl.) (Ex. 3).

approximately 130,000 homes.[9] In addition to preventing waste and boosting royalties, the Rule also provides important indirect benefits in the form of health, environmental, and safety benefits for the public, and cost-saving benefits through the sale of recovered gas for operators. These indirect public benefits are particularly important because when Congress drafted the Mineral Leasing Act's waste prevention mandate, it intended to protect the interests of the American public, not those of individual operators. Citizens Merits Resp. 11–12, 11 n.2, 32–33. The Rule protects the public by increasing safety, reducing the nuisance of loud and unsightly flares, and reducing emissions of the potent greenhouse gas methane, volatile organic compounds that contribute to smog, and carcinogenic air pollutants. 81 Fed. Reg. at 83,009, 83,069, 83,077; *see All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (recognizing the "well-established public interest in preserving nature and avoiding irreparable environmental injury" (quotation omitted)).

These benefits are critical for Citizen Groups' members and communities in close proximity to oil and gas development covered by the Waste Prevention Rule. For example, Environmental Defense Fund member Don Schreiber, a New Mexican rancher, lives with over 120 BLM-managed oil and gas wells on his ranch, and worries about the "near-constant smell from leaking wells, which can be extremely strong when we are driving, riding, and walking around areas with oil and gas development on the Ranch," making "breathing uncomfortable" and leading to concerns that his family is "breathing harmful hydrocarbons, such as benzene, toluene, ethylbenzene, and xylenes." *See* Decl. of Francis Don Schreiber ¶¶ 5, 10 (Dec. 2, 2016),

[9] Calculation based on average natural gas consumption per home, using Energy Information Administration data. *See* Energy Info. Admin., Natural Gas (last visited Mar. 16, 2018), https://www.eia.gov/naturalgas/data.php#consumption (divide 2016 total residential natural gas consumption by 2016 number of residential consumers).

ECF No. 27-8 at 10–11. At a community level, approximately 6,182 wells subject to the Rule and not covered by other state or federal standards are located in counties designated as nonattainment with ozone ambient air quality standards and are therefore already suffering from unhealthy air. These wells will emit up to an additional 2,089 tons of volatile organic compounds annually if the Rule is enjoined, contributing to the formation of ground-level ozone, which impairs lung functioning and leads to hospital and emergency room visits, and serious cardiovascular and pulmonary problems such as asthma attacks, stroke, heart attacks, and death. Hull Decl. ¶ 18; Craft Decl. ¶¶ 5–13.

State Petitioners raise the "public interest in certainty and stability." States Mot. 5. Likewise, BLM complains about having to enforce a regulation that it is "actively reconsidering." BLM Resp. 1, 6. The public interest in regulatory certainty is advanced through adhering to a regulation that was the product of an extensive record, years of public engagement, and a thorough explanation at least until an agency has completed a similarly thorough process to rescind it. *See Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (rejecting argument that active reconsideration should affect that status of a regulation) (citing *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992) ("[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked.")).

Because Petitioners have once again failed to demonstrate a clear and unequivocal right to the extraordinary remedy of a preliminary injunction, their motions should be denied.

III. A Stay under APA § 705 Must Satisfy the Same Preliminary Injunction Factors and Is Likewise Inappropriate.

While conceding that a stay under the APA, 5 U.S.C. § 705, "turns on the same four factors considered under a traditional [preliminary injunction] analysis," States Mot. 3–4 (citing *Hill Dermaceuticals, Inc. v. FDA*, 524 F. Supp. 2d 5, 8 (D.D.C. 2007)), State Petitioners urge a

"pragmatic approach" that would somehow permit this Court to preliminarily enjoin the Rule "[r]egardless" of whether Petitioners have met those four factors, *id.* at 4–5. There is no different test, and for the same reason that Petitioners have not met the requirements for a preliminary injunction, they have also failed to meet the requirements for a stay under § 705.

To obtain a judicial stay under § 705, Petitioners must demonstrate their entitlement to such an extraordinary remedy using the "same [factors] considered in evaluating the granting of a preliminary injunction." *Ohio v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987). The courts have regularly relied on the same factors for granting a stay under § 705 as they do for granting a preliminary injunction. *See, e.g.*, *id.*; *Humane Soc'y of the U.S. v. Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009); *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 446 (7th Cir. 1990); *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985);[10] *cf. Schrier*, 427 F.3d at 1258 (party seeking a preliminary injunction must show that its right to relief is "clear and unequivocal" and must establish all four factors). This Court's local rule governing review of agency action similarly provides that "[r]equests for injunctive relief in proceedings under this rule shall be governed by Fed. R. Civ. P. 65 and 65.1," and does not provide for alternative means of obtaining injunctive relief. D. Wyo. Civ. R. 83.6(f).

State Petitioners' suggestion that this Court adopt a "pragmatic approach," using its "inherent equitable powers" to "maintain the status quo" by issuing a judicial stay without full

[10] *See also Affinity Heathcare Servs., Inc. v. Sebelius*, 720 F. Supp. 2d 12, 15 n.4 (D.D.C. 2010) ("The APA authorizes reviewing courts to stay agency action pending judicial review. 5 U.S.C. § 705. Motions to stay agency action pursuant to these provisions are reviewed under the same standards used to evaluate requests for interim injunctive relief."); *Branstad v. Glickman*, 118 F. Supp. 2d 925, 934 (N.D. Iowa 2000) (stating that "[c]ourts have recognized that [the 5 U.S.C. § 705] standard is the same as the standard for issuance of a preliminary injunction," and collecting cases to support that point); *Kan. ex rel. Graves v. United States*, No. 00-4153-DES, 2000 WL 1665260, at *4 (D. Kan. Sept. 29, 2000) (similar).

consideration of the preliminary injunction factors has no basis in the law. States Mot. 3–4. This Court has previously acknowledged as much in declining to grant similar requests based only on "compliance and enforcement uncertainty." *See* Order Extending Briefing Sched. 4.

For the proposition that this Court may stay a regulation without determining that the challengers have satisfied the preliminary injunction test, State Petitioners cite only to *Rochester-Genessee Regional Transportation Authority v. Hynes-Cherin*, 506 F. Supp. 2d 207 (W.D.N.Y. 2007), a district court case predating the Supreme Court's decision in *Winter*. *Rochester-Genessee* is both wrong and wholly inapposite.

It is wrong because, despite recognizing that to grant a preliminary injunction under § 705 the court must examine the four traditional factors, the district court relied on a "sliding scale" test, in which "more of one [of the four preliminary injunction factors] excuses less of the other[s]," to find that public interest concerns predominated over the other factors. *Id.* at 214. After *Winter*, however, the Tenth Circuit explicitly rejected the use of such a sliding-scale test, holding that "any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible." *Diné CARE*, 839 F.3d at 1282.

It is also inapposite because the harm inflicted and remedy sought in *Rochester-Genessee* are not at all analogous to the situation presented here. In *Rochester-Genessee*, the district court found that there would be "chaos and confusion in families of school-age children," *third parties* who would not know what bus to take to school absent a stay. 506 F. Supp. 2d at 214. In light of the "significant harm to the *public* in the absence of a stay," the court issued a brief, one-month stay of an administrative order to "enable the parties … to take the steps necessary" to comply with the agency's order. *Id.* (emphasis added). The court was not moved by the school bus operators' failure to prepare to comply with the order; indeed, it lamented the parties'

"ostrich-like mentality" and declared that "it was certainly incumbent upon all concerned to prepare" to comply with the agency's order notwithstanding the ongoing litigation. *Id*. at 210.

Here, by contrast, Petitioners focus on the alleged financial harms to parties to this litigation—Industry Petitioners—from having to comply with a rule that has been on the books for nearly a year and a half, not injuries to the public at large from the continued effectiveness of the Waste Prevention Rule. Critically, State Petitioners do not request a brief stay in order to give the industry time to come into compliance with the regulation; rather, they specifically seek a stay so that industry never has to comply.

Ultimately, there is no route to judicially stay a regulation without satisfying the four preliminary injunction factors, something the parties failed to do here, *supra* pp. 10–19.

IV. Vacatur Without a Decision on the Merits Is Unlawful.

Industry Petitioners alternatively advance a novel theory that this Court can, at their behest, vacate the "Core Provisions" of the Waste Prevention Rule without first making a determination as to the Rule's validity. Indus. Mem. 14–18. They claim that "vacatur is an equitable remedy … entrusted to the district court's discretion," by citing to the *dissenting* opinion in a case that addressed whether a district court must vacate its own decision (*not* an agency regulation) when the case becomes constitutionally moot. *Id.* at 14 (citing *Rio Grande Silvery Minnow v. Bureau of Reclam.*, 601 F.3d 1096, 1139 (10th Cir. 2010) (Henry, J., dissenting)). That case simply has no application here. Separate from courts' equitable powers to vacate their own decisions and decisions of lower courts, discussed in *Rio Grande Silvery Minnow*, the APA does grant courts the power to vacate agency regulations—but only as a *remedy* following a decision against the agency on the merits, and even then, courts apply a balancing test and do not always vacate the unlawful agency action. *See, e.g.*, *Diné Citizens*

Against Ruining Our Env't v. U.S. Office of Surface Mining Reclam. & Enf't, No. 12-CV-01275-JLK, 2015 WL 1593995, at *1–2 (D. Colo. Apr. 6, 2015). Indeed, to the Citizen Groups' knowledge, no court has ever vacated a final agency regulation at the request of a regulated industry without first determining that the regulation is invalid. What Industry Petitioners call a "pragmatic, equitable approach," Indus. Mem. 15, would be more properly characterized as "unprecedented and unlawful."

Courts have rejected such extraordinary relief, including in cases where the *agency* requested it, which BLM has pointedly not done here, BLM Resp. 7, 12 (arguing that this Court need not reach the question of vacatur). *See Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 135 (D.D.C. 2010) ("[T]his Court is not persuaded that it has the authority to order vacatur of the 2008 Critical Habitat Designation without an independent determination that the FWS's action was not in accordance with the law."); *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 4–5 (D.D.C. 2009) ("Here, the Federal defendants seek a remand and vacatur of the SBZ Rule without a determination on the merits that the SBZ Rule is legally deficient. … The Court finds no precedent to support the proposition that it should remand and vacate the SBZ Rule under the circumstances presented here."); c*f. Frito-Lay, Inc. v. U.S. Dep't of Labor*, 20 F. Supp. 3d 548, 557 (N.D. Tex. 2014) ("Without a finding that the Final Order is arbitrary and capricious, or otherwise unlawful, a ruling vacating or setting aside the Final Order is premature."). It would be all the more unprecedented for this Court to vacate the Waste Prevention Rule without a finding of invalidity at the request of the Rule's challengers, and without remanding the Rule to BLM.

While Industry Petitioners identify two cases in which courts have vacated an agency rule after deciding to remand the rule to the agency, *see* Indus. Mem. 14–15, those cases presented

very different circumstances than those here. In both of those cases, the *agency*, not the regulated entity, sought vacatur, and only after seeking a voluntary remand of the rule. More critically, in both cases, other courts had come to final decisions that rendered the challenged regulations very likely invalid. In *Center for Native Ecosystems v. Salazar*, the challenged regulation was "based entirely on" a statutory interpretation of the Endangered Species Act that two other courts had concluded was contrary to the plain language of the Act, and the District of Colorado court found the reasoning of those courts "very persuasive." 795 F. Supp. 2d 1236, 1238, 1240 (D. Colo. 2011). And in *ASSE International, Inc. v. Kerry*, which dealt with State Department-imposed sanctions, not a regulation, the district court vacated those sanctions pending their reconsideration only after the Ninth Circuit concluded that "the State Department did not provide adequate due process," and remanded the case. 182 F. Supp. 3d 1059, 1061 (C.D. Cal. 2016).[11] Industry Petitioners' attempt to analogize this Court's decision on their first motion for a preliminary injunction to the independent and final decisions in *Center for Native Ecosystems* and *ASSE International* falls flat, and this Court should decline to provide such unprecedented relief.

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Ultimately, Petitioners' and Federal Respondents' filings are transparent attempts to circumvent agency rulemaking and the judicial review processes by "return[ing] to this Court for relief" and asking this Court to resurrect the unlawful Suspension Rule. BLM Resp. 12. This is evident from Petitioners' request for a so-called "narrowly-tailored" remedy, Indus. Mem. 17,

[11] In a third case cited by Industry Petitioners, *Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. Salazar*, No. 07-cv-00876 JEC/WPL, 2009 WL 8691098, at *5 (D.N.M. May 4, 2009)), the court *declined* to vacate the agency rule. And in that case, the independent Inspector General had issued a report identifying problems with the regulation. *Id*.

which conveniently seeks a judicially-crafted replacement for the unlawful Suspension Rule. It is likewise clear from Federal Respondents' phrasing of the "question before this Court": "whether the agency should be forced to … implement" the Waste Prevention Rule, "which BLM promulgated a notice-and-comment rulemaking to suspend." BLM Resp. 1; *see id.* at 13–14 ("[A] stay [by this Court] … would be consistent with BLM's own exercise of its authority and discretion in promulgating the Suspension Rule.").

As Federal Respondents point out, "the California court expressly excluded consideration of the merits of the Waste Prevention Rule from its review of the Suspension Rule." *Id.* at 14. This Court should exercise similar comity, and not consider Petitioners and Federal Respondents' requests that it "provide relief" akin to the enjoined Suspension Rule "in light of the developments in California." *Id.* at 11.[12] While Citizen Groups do not object to proceeding to the merits, Petitioners and Federal Respondents' requests that this Court stay or vacate the Rule because the California court enjoined the Suspension Rule should be rejected.

CONCLUSION

For the foregoing reasons, Citizen Groups respectfully request that this Court deny the pending motions.

[12] Federal Respondents' citation to the California court's opinion regarding a possible stay of provisions of the Waste Prevention Rule, BLM Resp. 14–15, is misleading. That court did not in any way suggest that Petitioners here met the four factors to obtain a preliminary injunction (indeed, as discussed *supra* p. 17, it suggested the opposite), and was simply criticizing BLM for attempting to suspend the Rule based upon this Court's concerns without tethering the Suspension Rule to those concerns. *California*, 2018 WL 1014644, at *9. The California court ultimately found that "BLM has failed to provide the requisite reasoned analysis in support of the Suspension Rule, and it is therefore arbitrary and capricious. … BLM failed to consider the scope of commentary that it should have in promulgating the Suspension Rule and relied on opinions untethered to evidence." *Id.* at *13.

Respectfully submitted on March 16, 2018,

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CERTIFICATE OF SERVICE

I certify that on March 16, 2018, I filed the foregoing **RESPONDENT-INTERVENOR CITIZEN GROUPS' RESPONSE TO PENDING MOTIONS** using the United States District Court CM/ECF which caused all counsel of record to be served by electronically.

/s/ Robin Cooley
Robin Cooley