James Kaste, Wyo. Bar No. 6-3244
Deputy Attorney General
Erik Petersen, Wyo. Bar No. 7-5608
Senior Assistant Attorney General
Wyoming Attorney General's Office
2320 Capitol Ave.
Cheyenne, Wyoming 82002
(307) 777-6946
james.kaste@wyo.gov
erik.petersen@wyo.gov

Timothy C. Fox, Montana Attorney General
Melissa Schlichting, Deputy Attorney General
Montana Dept. of Justice
215 North Sanders
Post Office Box 201401
Helena, Montana 59620-1401
(406) 444-0662 Telephone
timothyfox@mt.gov
mschlichting@mt.gov

Brandon L. Jensen (Wyo. Bar No. 6-3464)
Budd-Falen Law Offices, LLC
300 East 18th Street
Post Office Box 346
Cheyenne, Wyoming 82003-0346
(307) 632-5105 Telephone
(307) 637-3891 Facsimile
brandon@buddfalen.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING and STATE OF MONTANA, *et al.*,	)	
Petitioners,	)	Civil No. 16-285-S (Lead Case)
v.	)	
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,	)	**REPLY IN SUPPORT OF MOTION TO LIFT STAY AND SUSPEND IMPLEMENTATION DEADLINES**
Respondents,	)	

WESTERN ENERGY ALLIANCE, *et al.*	)	
Petitioners,	)	
v.	)	Civil No. 16-280-S
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,	)	
Respondents.	)	

The States of Wyoming and Montana offer the following reply in support of their request that the Court immediately suspend the implementation deadlines in the Waste Prevention Rule until either the Bureau of Land Management promulgates the replacement rule or the Court rules on the merits of the Petitions for Review:

1. All of the original parties to these proceedings agree that the core provisions of the Waste Prevention Rule should be stayed or enjoined until the Bureau promulgates a replacement rule. The Intervenor-Respondents disagree and instead assert that it is in the public interest to force temporary compliance with a rule of dubious legality and public benefit[1] and to briefly change the status quo that has persisted since 1979. It is not. The public interest is best served by maintaining the status quo and allowing the Bureau to complete its work on the new rule without interference from this litigation.

2. The Intervenor-Respondents' oppositions to the States' motion merit little response as they fail to appreciate the difference between a preliminary injunction and the stay requested by the States. Intervenor-Respondents argue that the relief afforded by 5 U.S.C. § 705 is identical to preliminary injunctive relief and only available under the same circumstances. While courts typically apply the same four factors when considering a request for a stay as they do when considering whether to grant a preliminary injunction, there is nothing in § 705 that suggests it is limited to those situations where preliminary injunctive relief would be available. The statute does not say that, and the statute would

[1] The deficiencies in the Waste Prevention Rule are well established in the pleadings before the Court and have been acknowledged by the Bureau. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 7924 (Feb. 22, 2018).

serve little purpose, if it merely restated the existing authority of the courts to issue preliminary injunctions.

3. In fact, two of the bills Congress considered when it was developing the Administrative Procedure Act authorized preliminary injunctive relief among an array of actions. *See* Administrative Procedure, Hearings on H.R. 184, H.R. 339, H.R. 1117, H.R. 1203, H.R. 1206, and H.R. 2602, Before the House Judiciary Committee, 79th Cong., at 146 and 179 (1945).[2] Those bills authorized the courts to "issue all necessary and appropriate writs, restraining or stay orders, or preliminary or temporary injunctions, mandatory or otherwise, required in the judgment of such court to preserve the status or rights of the parties pending full review ... ." *Id.* These early bills sought to arm the courts with every available method to prevent injustice pending review. The final bill more elegantly conveys this same intention in the words "all necessary and appropriate process." 5 U.S.C. § 705. Congress was obviously familiar with preliminary injunctions in 1946, and had it desired to limit § 705 to provide only traditional preliminary injunctive relief, it could have easily said so. Instead, it gave the courts the broadest possible discretion to prevent irreparable injury through "all necessary and appropriate process."

4. Congress did not limit § 705, because while a "preliminary injunction is an extraordinary remedy never awarded as of right," *Winter v. NRDC*, 555 U.S. 7, 24 (2008),

[2] The legislative history of the Administrative Procedure Act is available online from the U.S. Department of Justice at https://www.justice.gov/jmd/ls/administrative-procedure-act-pl-79-404.

a § 705 stay was not intended to be extraordinary. The House Report on the Administrative Procedure Act explained § 705 as follows:

> This section permits either agencies or courts, if the proper showing be made, to maintain the status quo. The section is in effect a statutory extension of rights pending judicial review, although the reviewing court must order the extension; or, to put the situation another way, statutes authorizing agency action **are to be construed to extend rights pending judicial review** and the exclusiveness of the administrative remedy is diminished so far as this section operates. While the section would not permit a court to grant an initial license, **it provides intermediate judicial relief for every other situation in order to make judicial review effective**. The authority granted is equitable and should be used by both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy.

H.R. Rep. No. 1980, at 277 (1946). Thus, Congress intended the intermediate relief provided by § 705 to be an ordinary, rather than an extraordinary, remedy. And while courts generally are not free to relax one of the prongs for traditional preliminary relief, *Dine Citizens Against Ruining our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016), they are free to apply a sliding scale or no scale at all when considering whether to grant a stay under § 705.

5. Given this substantial discretion, in considering whether to grant a stay, the Court may consider an equitable resolution that takes into account many factors, including the impending mootness of these proceedings. While dismissal might be the typical result when a Court considers a matter prudentially moot, it does not have to be the invariable result. The Court may choose to stay its hand when faced with prudential mootness, but it does not lose jurisdiction over a matter until it is actually moot. Until that time, the Court retains the equitable discretion under § 705 to stay the challenged rule, if it finds that action

necessary to prevent irreparable harm. And irreparable harm can come from the rule itself, the flip-flopping regulatory burdens or, as here, from both.

6. The Court is well within its authority to grant a stay under § 705, but if it chooses instead to consider the renewed motions for preliminary injunction, these States assert that they are entitled to that relief as well. First, the Court is free to reconsider the pending requests for a preliminary injunction, because the circumstances have changed significantly since the Court denied the original motions. The Bureau's decision to rescind and revise the Waste Prevention Rule provides ample justification to reconsider the propriety of preliminary relief. Second, because of the Bureau's change in course, the outcome of the renewed motions must necessarily be different. The Bureau's view that the Waste Prevention Rule suffers from legal, factual, and methodological infirmities necessarily affects the likelihood of success on the merits. And the balance of equities and public interest now tip decidedly in favor of the Petitioners as the Bureau itself has concluded that the rule in its present form is not in the public interest.

7. A final word is warranted in response to the Intervenor-Respondents' assertions that the Petitioners brought any compliance difficulties upon themselves. The States, industry, the public, and the courts have a right to rely on the federal government. *See, e.g.*, *Granados v. Lynch*, 633 Fed. Appx. 497, 499 (Courts presume agency actions are valid, and the party challenging the agency action bears the burden of proving otherwise.). Where the federal government takes various actions to delay, suspend, and rescind a rule, there is a presumption that the government has acted lawfully. No reasonable person would rush to comply with a rule that was stayed, suspended, and will soon be rescinded. For the

same reason, the possibility that there may be litigation that ultimately upends the rule replacing the Waste Prevention Rule does not counsel against the stay requested here. The Court and all parties to this proceeding must presume that the new rule will survive judicial review. Were it otherwise, no challenge to a superseded rule would ever be moot.

8. These States continue to believe that staying the core provisions of the Waste Prevention Rule until the Bureau promulgates a new rule represents the most sensible path forward. There is no impediment preventing the Court from taking this path, and all the original parties to this litigation agree that the Court should take it.

WHEREFORE the States of Wyoming and Montana request that the Court suspend the implementation of the specific provisions of the Waste Prevention Rule set forth in the States motion until the rule is replaced or the Court decides the merits of the Petitions for Review.

DATED this 23rd day of March 2018.

FOR THE STATE OF WYOMING

/s James Kaste

James Kaste, Wyo. Bar No. 6-3244
Deputy Attorney General
Erik Petersen, Wyo. Bar No. 7-5608
Senior Assistant Attorney General
Wyoming Attorney General's Office
2320 Capitol Ave.
Cheyenne, Wyoming 82002
(307) 777-6946
james.kaste@wyo.gov
erik.petersen@wyo.gov

Attorneys for Petitioner State of Wyoming

FOR THE STATE OF MONTANA

/s Brandon L. Jensen
Brandon L. Jensen (Wyo. Bar No. 6-3464)
Budd-Falen Law Offices, LLC
300 East 18th Street
Post Office Box 346
Cheyenne, Wyoming 82003-0346
(307) 632-5105 Telephone
(307) 637-3891 Facsimile
brandon@buddfalen.com

Timothy C. Fox, Montana Attorney General
Melissa Schlichting, Deputy Attorney General
Montana Dept. of Justice
215 North Sanders
Post Office Box 201401
Helena, Montana 59620-1401
(406) 444-0662 Telephone
timothyfox@mt.gov
mschlichting@mt.gov

Attorneys for Petitioner State of Montana

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2018, the foregoing was filed electronically with the Court, using the CM/ECF system, which caused the foregoing to be served electronically upon counsel of record.

/s James Kaste
Deputy Attorney General
Wyoming Attorney General's Office