IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STATE OF WYOMING, et al., Petitioners/Appellees, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Respondents/Appellees, and WYOMING OUTDOOR COUNCIL, et al., Intervenors/Appellants.	)	No. 18-8027
STATE OF WYOMING, et al., Petitioners/Appellees, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Respondents/Appellees and STATE OF CALIFORNIA, et al., Intervenors/Appellants.	)	No. 18-8029

STATE OF WYOMING AND STATE OF MONTANA'S MOTION TO DISMISS FOR LACK OF APPELLATE JURISDICTION

The States of Wyoming and Montana, pursuant to Federal Rule of Appellate Procedure 27 and 10th Cir. R. 27.3(A)(1)(a), hereby move to dismiss these appeals on the grounds that the interlocutory *Order Staying Implementation of the Rule Provisions and Staying Action Pending Finalization of Revision Rule* that is the subject of this appeal is not a final appealable order under either 28 U.S.C. §§ 1291 or 1292(a)(1).[1] In support of this motion, the States assert as follows:

BACKGROUND

This case arises from the Bureau of Land Management's (BLM) promulgation of a rule purporting to reduce the waste of methane from oil and natural gas production activities on federal and Indian land, and regulate air quality by controlling emissions from existing oil and gas sources. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83008 (Nov. 18, 2016) (Waste Prevention Rule). The States of Wyoming and Montana and two industry groups immediately challenged the rule in the District of Wyoming. The States of North Dakota and Texas intervened as Petitioners, while the States of California and New Mexico intervened as Respondents along with about a dozen private environmental groups. "On January 16, 2017, the day before the rule became effective, [the District] Court denied the Petitioners request for preliminary injunctive relief, in part because significant portions of the Rule would not become effective until January 17,

[1] A copy of the District Court's order, Doc. 210 in Docket 16-CV-280, is attached hereto pursuant to Federal Rule of Appellate Procedure 27(a)(2)(B)(iii). References to pleadings filed in the District Court are to documents filed in 16-CV-280.

2018 ('phase-in provisions')." (Doc. 210 at 2). The District Court then set an expedited briefing schedule to ensure that the matter would be decided before these phase-in provisions became effective. But events transpired to thwart this schedule.

First, on February 3, 2017, the U.S. House of Representatives passed a Congressional Review Act resolution to disapprove of the Waste Prevention Rule. H.R.J. Res. 36, 115th Cong. (2017-2018). The U.S. Senate considered but failed to pass a similar resolution on May 10, 2017. Then on June 15, 2017, the BLM, consistent with the policies of the new administration, postponed the compliance dates for the phase-in provisions pursuant to 5 U.S.C. § 705. 82 Fed. Reg. 27430 (June 15, 2017). The BLM also announced its intention to promulgate a rule suspending or extending the compliance dates for the phase-in provisions. *Id.* As a result, the BLM requested and received and an extension of the briefing deadlines. (Doc. 133). At that time, the District Court concluded, "To move forward on the present schedule would be inefficient and a waste of both the judiciary's and the parties resources in light of the shifting sand surrounding the Rule and certain of its provisions, making it impossible to set a foundation upon which the Court can base its review under the Administrative Procedure Act." *Id.* at 3.

On July 5, 2017, some of the Intervenors, including the States of California and New Mexico, challenged the BLM's decision to postpone the phase-in provisions in the Northern District of California. *See California and New Mexico v. BLM*, No. 3:17-CV-03804-EDL (N.D. Cal.); *Sierra Club v. Zinke*, No. 3:17-CV-03885-EDL (N.D. Cal.). That court held that

the BLM's postponement of the phase-in provisions was unlawful and vacated the action. That reinstated the phase-in provisions, but only temporarily.

On December 8, 2017, the BLM followed through on its intent to promulgate a rule suspending or delaying the majority of the provisions in the Waste Prevention Rule. *See* 82 Fed. Reg. 58050 (Dec. 8, 2017) (Suspension Rule). This rule postponed the implementation of the compliance requirements for certain provisions of the Waste Prevention Rule for one year. *Id.* As grounds for the suspension, BLM explained it, "has concerns regarding the statutory authority, cost, complexity, feasibility, and other implications of the 2016 final rule, and therefore intends to avoid imposing likely considerable and immediate compliance costs on operators for requirements that may be rescinded or significantly revised in the near future." *Id.* BLM also announced that it intended to replace portions of the Waste Prevention Rule through notice and comment rulemaking. In light of this development, BLM, along with the States of Wyoming and Montana and the industry Petitioners, requested that the District Court stay the litigation. Because the ongoing rulemaking process would "materially impact the merits of the [] challenges to the Waste Prevention Rule," (Doc. 210 at 5), the District Court stayed the proceedings pending promulgation of a replacement rule or while the Suspension Rule remained in effect. (Doc. 189).

The Intervenors immediately challenged the Suspension Rule in the Northern District of California. *See State of California v. BLM*, No. 3:17-CV-07186-WHO (N.D. Cal.); *Sierra Club. v. Zinke*, No. 3:17-CV-07187-MMC (N.D. Cal.). On February 22, 2018, the California court preliminarily enjoined enforcement of the Suspension Rule, which arguably made the

phase-in provisions effective immediately, as the original compliance deadline of January 17, 2018 had passed. On the same day, the BLM published a proposed Revision Rule to replace the Waste Prevention Rule, which initiated a sixty-day public comment period. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 7924 (Feb. 22, 2018).

Because the California court's preliminary injunction abruptly changed the status quo, the States of Wyoming and Montana promptly moved the District Court to lift the litigation stay and then stay the core provisions of the Waste Prevention Rule pursuant to its authority under 5 U.S.C. § 705 pending promulgation of the Revision Rule. (Doc. No. 195). For their part, the industry Petitioners moved the District Court to issue a preliminary injunction enjoining the Waste Prevention Rule until the BLM promulgated the Revision Rule. (Doc. 196). The States of North Dakota and Texas took a different tack and asked the District Court to proceed immediately to the merits of the original challenges to the Waste Prevention Rule. (Doc. 194). The BLM agreed that Wyoming and Montana offered the best interim resolution and urged the District Court to stay both the litigation and "the Waste Prevention Rule's implementation deadlines to preserve the status and rights of the regulated parties and avoid entanglement with the administrative process." (Doc. 210 at 7). The States of California and New Mexico and the environmental groups opposed either a stay or a preliminary injunction.

Faced with a wealth of options, the District Court agreed that the stay proposed by Wyoming and Montana and unopposed by the BLM offered the best course for the interim. The District Court noted that 5 U.S.C. § 705 authorizes a court reviewing an agency decision

"[o]n such conditions as may be required and to the extent necessary to prevent irreparable harm ... [to] issue all necessary and appropriate process to ... preserve status or rights pending conclusion of review proceedings." (Doc. 210 at 9). The District Court found that, "particularly Industry Petitioners, will be irreparably harmed by full and immediate implementation of the 2016 Waste Prevention Rule, magnified by temporary implementation of significant provisions meant to be phased-in over time that will be eliminated in as few as four months." (Doc. 210 at 9-10). It further found that the BLM anticipates completing the Revision Rule in August 2018 and that this imminent development will likely affect the determination of the merits of the case.

> Accordingly, in order to preserve the status quo, and in consideration of judicial economy and prudential ripeness and mootness concerns, the Court [found] the most appropriate and sensible approach is to exercise its equitable discretion to stay implementation of the Waste Prevention Rule's phase-in provisions and further stay these cases until the BLM finalizes the Revision Rule, so that this court can meaningfully and finally engage in a merits analysis of the issues raised by the parties.

(Doc. 210 at 10). The District Court expressly denied the industry Petitioners' request for a preliminary injunction.

The States of California and New Mexico and the environmental groups immediately filed the present appeals from the District Court's stay order. In their Notices of Appeal, both groups of Appellants assert that this Court has appellate jurisdiction pursuant to 28 U.S.C. §1292(a)(1), and both mischaracterize the District Court's order as an injunction rather than a stay.

ARGUMENT

I. Legal Standard

28 U.S.C. § 1291 provides that the Courts of Appeals have jurisdiction of appeals "from all final decisions of the district courts." Accordingly, parties may appeal from a district court decision that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Parties may also appeal from "a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as final." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (citation and quotation omitted). "Stay orders are ordinarily not final orders for purposes of appeal because the plaintiff is not 'effectively out of [federal] court.'" *Anderson v. Stewart*, 82 Fed. Appx. 666, 668 (10th Cir. 2003) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983)).

The finality requirement of § 1291 is applied practically rather than technically. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The practical application of § 1291 is accomplished through the collateral order doctrine. Under the collateral order doctrine, a decision is found to be final if it: (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. *United States v. Section 17 Township 23 N.*, 40 F.3d 320, 322 (10th Cir. 1994). "These requirements are stringent and apply to only certain classes of cases." *Id.* "[A]ppealability under the collateral order doctrine

'cannot be answered without a judgment about the value of the interest that would be lost through rigorous application of [the] final judgment requirement.'" *Id.* (quoting *Digital Equipment*, 511 U.S. at 878-79) "[A]bsent a constitutional or statutory provision securing the right at stake, it will be difficult for a party to demonstrate review is necessary." *Id.*

If a stay order amounts to a refusal to adjudicate the merits it plainly presents an important issue separate from the merits. *In re Kozeny*, 236 F.3d 615, 619 (10th Cir. 2000). However, "[i]f the stay merely delays the federal litigation, courts have generally held the stay orders not to be appealable." *Id.* at 619-20. "[I]f the stay reflects merely the district court's imposition of a finite period of delay before the court completes its adjudication, the importance prong of the *Cohen* test is not satisfied." *Michelson v. Citicorp Nat'l Servs.*, 138 F.3d 508, 517 (3rd Cir. 1998).

An exception to the finality rule is set forth in 28 U.S.C. § 1292(a)(1), which authorizes interlocutory review of injunctions. But a stay is not an injunction. S*ee Nken v. Holder*, 556 U.S. 418, 428-31 (2009). An injunction operates on a person, while a stay operates on the proceedings. *Id.* at 428. While a stay may act to bar executive branch officials from taking some action, where it does so by returning to the status quo before the challenged governmental action and it relates only to the conduct or progress of the litigation before the court, it is ordinarily not considered an injunction. *Id.* at 429-30.

Where an order is not explicitly labeled an injunction, it may still be immediately appealable under 28 U.S.C. § 1292(a)(1). *See Carson v. American Brands, Inc.*, 450 U.S. 79 (1981). But to be appealable under section 1292(a)(1), a district court ruling must (1) have

the practical effect of entering an injunction, (2) have serious, perhaps irreparable, consequences, and (3) be such that an immediate appeal is the only effective way to challenge it. *Id.* at 84. "*Carson* applies only to interlocutory orders that have 'the practical effect of refusing an injunction.'" *Hutchinson v. Pfeil*, 105 F.3d 566, 569 (10th Cir. 1997) (quoting *Tri-State Generation & Trans. V. Shoshone R. Power*, 874 F.2d 1346, 1351 (10th Cir. 1989)). If the order does not have serious consequences, "the general congressional policy against piecemeal review will preclude interlocutory appeal." *Id.*

II. The District Court's order is not appealable under either § 1291 or § 1292(a)(1).

The District Court's stay order is not a final order, as it does not end this litigation on the merits. Nor is it fit for review under the collateral order doctrine, because it does not conclusively decide anything and particularly not an important question separate from the merits. Finally, the stay order does not have the practical effect of refusing an injunction and the consequences of the stay order are not sufficiently serious to warrant piecemeal review. Accordingly, this Court lacks appellate jurisdiction over this matter.

The District Court's stay order is a prototypical litigation and APA stay. It merely postpones the phase-in provisions of the Waste Prevention Rule and the litigation while maintaining the status quo as it generally existed before the phase-in compliance date for a finite period until the Revision Rule is promulgated. That imminent action by the BLM could have a substantial effect on the outcome of the merits, and the District Court wisely chose to stay its hand in the meantime. The Revision Rule could make these proceedings moot, or not.

Nutraceutical Corp. v. Von Eschenbach, 477 F. Supp. 2d 1161, 1168 (D. Utah 2007) (it is not unusual for an agency's final rule to differ from its proposed rule). Alternatively, the Revision Rule may be challenged in the Northern District of California by the same parties who have opted to file two prior challenges there, or not. That litigation, if filed, could also have a significant effect on the merits of this case. Either way, the merits remain to be decided, and no party is effectively out of federal court.

Similarly, the stay order does not have the practical effect of refusing an injunction. First, the Appellants are intervenor-respondents in the District Court proceedings not petitioners. They have never asked for injunctive relief or its equivalent either explicitly or implicitly. *See, e.g., Forest Guardians v. Babbitt*, 174 F.3d 1178, 1185 (10th Cir. 1998) (practical effect of denial of plaintiffs' "Motion for Review of Agency Decision" was to deny injunctive relief, because if it had been granted an injunction would have issued). Second, the stay order relates only to the progress of the litigation, acts only on the proceedings, and merely maintains the status quo ante in relation to those proceedings. That kind of stay is not considered an injunction and for good reason. *Nken*, 556 U.S. at 429-30. Were it otherwise, every effort by the District Court to manage its docket, maintain its ability to decide the merits before completion of the challenged action renders the merits moot, or to take account of ancillary events that might affect the merits would be subject to immediate appeal.

Moreover, the stay did not resolve an important issue separate from the merits or have serious consequences. The order does not interfere with any constitutional or statutory right of the Appellants. As the District Court explained, "Wish as they might, neither the States,

industry members, nor environmental groups are granted authority to dictate oil and gas policy on federal public lands." (Doc. 210 at 8). Appellants' "rights" are not at issue in this litigation. Appellants will allege that they are injured because the stay postpones implementation of parts of the Waste Prevention Rule. But those alleged injuries are not the result of an invasion of any constitutional or statutory right caused by the stay order. And those alleged injuries are no greater than the injuries they may have sustained every day during the preceding forty years before BLM voluntarily chose to promulgate the Waste Prevention Rule.

Appellants have no "right" to the immediate implementation of the Waste Prevention Rule that would justify deviating from the final judgment rule under the collateral order doctrine. For the same reasons, the stay order does not have serious consequences. If the Appellants have no constitutional or statutory right to dictate oil and gas policy on federal lands, then the District Court's prevention of their preference is not serious enough to warrant disruption of the orderly progress of the litigation in the District Court.

Thus, the District Court's stay order is not final even under the collateral order doctrine and it is not effectively the refusal of an injunction. Instead, it is a run-of-the-mill interlocutory order that is not subject to appeal.

CONCLUSION

At the outset of its stay order, the District Court surveyed the procedural morass of this case and lamented the sad and frustrating dysfunction of the current state of administrative law. (Doc 210 at 2). This appeal is more of the same. This Court should

conclude that it does not have jurisdiction over the District Court's stay order and dismiss these proceedings. It will not cure all that ails this case, but it would be step in the right direction.[2]

SUBMITTED this 16th day of April, 2018.

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[2] The federal and industry Appellees do not oppose this motion. Appellees, North Dakota and Texas, take no position and reserve the right to file a response. Appellants oppose this motion.

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CERTIFICATE OF WORD COUNT

I hereby certify that this response complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 27(d)(2)(A) applicable to dispositive motions because this brief contains 2,816 words, excluding parts of the brief exempted by Rule 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2018, the foregoing was served by the Clerk of Court through the Court's CM/ECF system on all attorneys of record.

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