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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.*,	)	**RESPONSE IN OPPOSITION TO RESPONDENT-INTERVENORS' MOTION FOR A STAY PENDING APPEAL**
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 in opposition to Respondent-Intervenors' Motion for a Stay Pending Appeal:

1. On April 4, 2018, this Court stayed implementation of the phase-in provisions of the BLM's Waste Prevention Rule and this litigation pending promulgation of a rule revising the Waste Prevention Rule. In the Order, the Court ably recounted the tortured history of this litigation, and these States will not repeat that history here. While all of the original parties to this litigation are satisfied with the Order, Intervenor-Respondents appealed and ask this Court to stay the stay pending the outcome of that appeal. The Court should deny this request.

2. "A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (citations and quotations omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34.

3. A party seeking a stay pending appeal must demonstrate: (i) a likelihood of success on appeal; (ii) the threat of irreparable harm if the stay is not granted; (iii) the absence of harm to opposing parties if the stay is granted; and (iv) any risk of harm to the public interest. *See* 10th Cir. R. 8.1. The four requirements of a stay pending appeal are "arguably even more rigorous[] than they are for a motion for a preliminary injunction." *Dine Citizens Against Ruining Our Env't v. Jewell*, No. CIV 15-0209 JB/SCY, 2015 U.S. Dist. LEXIS 143519, at *3 (D.N.M. Sep. 16, 2015). "Because the [movants] are, in essence, requesting that the Court grant it the relief, pending appeal, that the Court recently decided

they were not entitled to receive, 'the burden of meeting the standard is a heavy one.'" *Id.* Thus, a party seeking a stay must show a likelihood of reversal, not just a possibility of success on the merits. *Pueblo of Pojoaque v. New Mexico*, 233 F. Supp. 3d 1021, 1116 (D.N.M. 2017).

4. The first two factors are the most critical, and simply showing the possibility of irreparable injury fails to satisfy the second factor. *Nken*, 556 U.S. at 344-35. "Once an applicant satisfies the first two factors, the traditional inquiry call for assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party." *Id.* at 435.

5. The Intervenor-Respondents are not likely to succeed in their appeal. First, the Tenth Circuit is not likely to hear the merits of the appeal, because this Court's stay order is not an appealable order under either 28 U.S.C. § 1291 or 28 U.S.C. § 1292(a)(1). Concurrently with the filing of this opposition, these States have filed a motion to dismiss Intervenor-Respondents appeal on this ground. A copy of that motion is attached hereto for the Court's convenience. Understanding that this Court may not wish to comment on a question within the purview of the Tenth Circuit, these States will not repeat the contents of their motion to dismiss.

6. Even if the Tenth Circuit does hear the merits, it is unlikely to reverse this Court's decision. Respondent-Intervenors will bear the burden of proving that this Court abused its discretion in granting the stay. *See Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1080 (10th Cir. 2009). That bar is far higher than the bar at issue when this Court entered the stay. The Tenth Circuit has characterized an abuse of discretion as "an

arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Attorney General of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009) (citation and quotation omitted).

7. The determination to enter the stay was not arbitrary, capricious, whimsical or unreasonable. It was an eminently reasonable response to the circumstances of the case. The merits of the rule under review could be substantially affected by an imminent action by the BLM. The Court reasonably concluded that because of the evident irreparable harm caused to the industry Petitioners in particular, it would be in the interests of justice and judicial economy to allow a short delay that maintained the status quo thereby permitting the Court to assess the merits fully and finally.

8. Moreover, the Court did not employ the wrong standard or analysis in granting the stay. Respondent-Intervenors contend that the Court failed to apply the traditional four factors court's review when deciding whether to grant stays and preliminary injunctions. But the Court did not write its order in a vacuum. That order was written after the Court had delved deeply in the substance of the Waste Prevention Rule in prior proceedings and had considered the arguments of the parties about the likelihood of success and their respective harms on multiple occasions. The Court need not reiterate everything it has ever said or heard about the case when it decides a motion, and because the Tenth Circuit can affirm on any basis appearing in the record, the presumption that the order includes all necessary findings runs in favor of the District Court's decision. With all that it knew about the case already, the Court rightly focused on the equities and irreparable injuries that tipped the balance in favor of a stay.

9. Similarly, the Court did not err in applying 5 U.S.C. § 705. As the Court found there is nothing in the language of § 705 or its legislative history suggesting that "it is limited to those situations where preliminary injunctive relief would be available." (Doc. 210 at 9). And the Court rightly noted that it was not the first court to come to this conclusion. *Id.* (citing *California v. BLM*, 277 F. Supp. 3d 1106, 1124-25 (N.D. Cal. 2017)).

10. Turning to the second factor, the Court properly concluded that the industry Petitioners in particular would be irreparably harmed in the absence of a stay. (Doc. 210 at 9-10). The industry Petitioners submitted substantial materials demonstrating their harm. And while the Intervenor-Respondents trivialize those harms, those harms are more than sufficient to support a stay. *See, e.g., Portland Cement Ass'n v. EPA*, 665 F.3d 177, 189 (D.C. Cir. 2011) (granting a stay after finding industry should not have to build expensive new containment structures until the standard is finally determined). In contrast, Intervenor-Respondents are no more harmed by the stay than they have been under the status quo for the last forty years. If their harms were so irreparable and imminent, one wonders why they did not seek to remedy them sooner.

11. Finally, the same harms that justified the imposition of the stay in the first place preclude the imposition of a stay pending appeal. Where the Court found irreparable harm in the absence of a stay, it cannot logically conclude that staying the stay will not cause harm to the opposing parties. Similarly, where the Court concludes, as it did, that a stay is in the public interest, it logically cannot conclude that reversing course will be in the public interest.

12. Accordingly, if the Tenth Circuit reaches the merits of this interlocutory appeal, the Intervenor-Respondents are unlikely to succeed and there is no good reason to grant them a stay pending their appeal. The Court just weighed the same arguments and equities and in its considered judgment entered a stay that set a reasonable path forward to the ultimate resolution of this case. The Court should not veer from that path.

WHEREFORE the States of Wyoming and Montana request that the Court deny Respondent-Intervenors' Motion for a Stay Pending Appeal.

DATED this 16th day of April 2018.

FOR THE STATE OF WYOMING

/s James Kaste

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 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