Nos. 18-8027, 18-8029

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING; STATE OF MONTANA; WESTERN ENERGY ALLIANCE; and INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA;
Petitioners-Appellees,

STATE OF NORTH DAKOTA and STATE OF TEXAS,
Intervenors-Appellees,

v.

U.S. DEPARTMENT OF THE INTERIOR; *et al*.,
Respondents-Appellees,

WYOMING OUTDOOR COUNCIL, *et al*.,
Intervenors-Appellants,

and

STATE OF CALIFORNIA, BY AND THROUGH THE CALIFORNIA AIR RESOURCES BOARD, and STATE OF NEW MEXICO,
Intervenors-Appellants.

On Appeal from the United States District Court for the
District of Wyoming, Nos. 16-CV-080, 16-CV-085 (Hon. Scott W. Skavdahl)

STATE APPELLANTS' MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 8(a)(2), Appellants States of California, by and through the California Air Resources Board, and the State of New Mexico (collectively, "State Appellants"), move for a stay pending appeal of the district court's Order Staying Implementation of Rule Provisions and Staying Action Pending Finalization of Revision Rule. ECF No. 215 ("Order") (attached hereto as Exhibit 1). The Order enjoined several key requirements of the "Waste Prevention, Production Subject to Royalties, and Resource Conservation; Final Rule," 81 Fed. Reg. 83,008 (Nov. 18, 2016) (the "Waste Prevention Rule" or "Rule"). In doing so, the district court effectively rescinded a duly-promulgated final rule that was designed to boost our nation's natural gas supplies, increase the royalties paid to American taxpayers, and reduce environmental damage from venting, flaring, and leaks of gas.

The Court should stay the Order because State Appellants can show a high probability of success on the merits and that harm to the public outweighs harm to the Appellees. The district court erred in issuing the Order in three respects. First, the district court failed to apply the four-factor analysis mandated by the Supreme Court and this Court for granting injunctive relief. Second, the district court improperly exercised its

jurisdiction to issue an injunction even while concluding that the case was moot and unripe for review. Third, the district court relied on Section 705 of the Administrative Procedure Act ("APA") to enjoin the Rule pending its reconsideration by the U.S. Bureau of Land Management ("BLM"), when that section only addresses postponement during judicial review. The only harm to the Appellees is the cost of compliance with the Rule, which does not constitute irreparable harm. By contrast, given the increased air pollution and climate harms that will result from the Order, as well as the public interest in preventing the waste of natural resources, this Court should grant the requested stay while this Court considers this appeal.

STANDARD OF REVIEW

Under Federal Rule of Appellate Procedure 8(a)(2) and Tenth Circuit Rule 8.1, State Appellants must address: (a) the basis for jurisdiction in the district court and court of appeals; (b) the likelihood of success on appeal; (c) the threat of irreparable harm if the stay or injunction is not granted; (d) the absence of harm to opposing parties if the stay or injunction is granted; and (e) any risk of harm to the public interest. This Court considers, "based on a preliminary record, whether the district court abused its discretion and whether the movant has demonstrated a clear and unequivocal right to relief." *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir.

2001). This Court reviews the district court's legal determinations *de novo* and its underlying factual findings for clear error. *Citizens United v. Gessler,* 773 F.3d 200, 209 (10th Cir. 2014).

FACTUAL BACKGROUND

Though oil and gas production in the United States has increased dramatically over the past decade due to technological advancements, the American public has not fully benefitted from these developments due to "significant and growing quantities of wasted natural gas" from equipment leaks and operators' venting and flaring of gas. 81 Fed. Reg. at 83,014. In 2014, recognizing that this wasted gas not only squanders a valuable public resource but also harms air quality and exacerbates climate change, BLM began developing a replacement to its existing regulatory scheme, which had not been updated in over three decades. *Id.* at 83,008.

On November 18, 2016, BLM finalized the Waste Prevention Rule after soliciting and reviewing input from stakeholders and the public, including approximately 330,000 public comments. *Id*. at 83,021. The Rule applies common-sense, best-practice requirements designed to prevent venting, flaring, and equipment leaks and save up to 41 billion cubic feet of gas per year. *Id*. at 83,014. As BLM stated, the Rule established "economical, cost-effective, and reasonable measures" that "will enhance

our nation's natural gas supplies, boost royalty receipts for American taxpayers, tribes, and States, reduce environmental damage from venting, flaring, and leaks of gas, and ensure the safe and responsible development of oil and gas resources." *Id*. at 83,009. The Rule went into effect on January 17, 2017. *Id.* at 83,008.

Soon after the Rule was finalized, two industry groups and the States of Wyoming and Montana (later joined by North Dakota and Texas) (collectively, "Appellees") challenged the Rule in the district court, alleging that BLM did not have statutory authority to regulate air pollution and that the Rule was arbitrary and capricious. *Western Energy Alliance v. Jewell*, No. 2:16-cv-00280-SWS (D. Wyo. petition filed Nov. 16, 2016); *State of Wyoming v. Jewell*, No. 2:16-cv-00285-SWS (D. Wyo. petition filed Nov. 18, 2016). State Appellants intervened on the side of BLM in defense of the Rule. On January 16, 2017, the district court denied the Appellees' motions for a preliminary injunction, finding that Appellees had failed to establish a likelihood of success on the merits or irreparable harm in the absence of an injunction. ECF No. 92 (attached hereto as Exhibit 2).

On June 15, 2017, BLM published a notice in the Federal Register purporting to postpone the effectiveness of certain provisions of the Rule under APA Section 705. 82 Fed. Reg. 27,430; *see* 5 U.S.C. § 705 ("When

an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review."). State Appellants challenged this action, which was overturned by the Northern District of California on October 4, 2017, causing the postponed requirements to go back into effect. *See California v. U.S. BLM*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017).

On December 8, 2017, BLM published a final rule which suspended largely the same key requirements of the Rule. 82 Fed. Reg. 58,050 ("Suspension Rule"). On December 27, 2017, BLM and several Appellees moved to stay this litigation based upon BLM's issuance of the Suspension Rule and because the agency was in the process of issuing a proposed revision rule "that would rescind certain provisions of the Waste Prevention Rule and substantially revise others." ECF No. 188 (attached hereto as Exhibit 3). The district court granted the requested stay of the litigation on December 29, 2017. ECF No. 189 (attached hereto as Exhibit 4).

State Appellants filed a second lawsuit in California and moved for a preliminary injunction of the Suspension Rule, which was granted on February 22, 2018, restoring the Rule's requirements a second time. *California v. BLM,* 286 F. Supp. 3d 1054 (N.D. Cal. 2018). Also on February 22, 2018, BLM issued a proposal to rescind or revise key provisions of the Rule. 83 Fed. Reg. 7,924. That rulemaking is ongoing.

After the Rule's second judicial restoration, Appellees filed a grab bag of different motions in this lawsuit requesting various forms of relief. *See* Joint Motion by the States of North Dakota and Texas to Lift the Stay Entered December 29, 2017 and to Establish Expedited Schedule for Further Proceedings (ECF No. 194) (attached hereto as Exhibit 5); Motion to Lift Stay and Suspend Implementation Deadlines filed by Petitioner States of Wyoming and Montana (ECF No. 195) (attached hereto as Exhibit 6); Industry Petitioners' Motion to Lift Litigation Stay and for Preliminary Injunction or Vacatur of Certain Provisions of the Rule Pending Administrative Review (ECF No. 196) (attached hereto as Exhibit 7).

In its Order, the district court denied the motions filed by North Dakota and Texas and Industry Appellees, but granted in part and denied in part the motion filed by Wyoming and Montana. Relying on Section 705 of the APA, the district court "stayed" various key provisions of the Waste Prevention Rule that were in effect and had implementation deadlines of January 17, 2018. ECF No. 215 at 9 & n.10, 11. Specifically, the district court "ORDERED that implementation of the Waste Prevention Rule's phase-in provisions (43 C.F.R. 3179.7, 3179.9, 3179.201, 3179.202, 3179.203, and 3179.301-3179.305) is STAYED." *Id*. at 11. The district court also stayed litigation of the merits "pending finalization or withdrawal

of the proposed Revision Rule." *Id.* State Appellants appealed the district court's Order on April 6, 2018.

JURISDICTION

The district court had jurisdiction over Appellees' challenges to the Waste Prevention Rule pursuant to 28 U.S.C. § 1331.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1), because the district court's Order grants preliminary injunctive relief by "staying" several provisions of the Waste Prevention Rule. *See* ECF No. 215 at 11. As this Court has stated, "in deciding whether a district court order 'granting' an injunction is appealable under § 1292(a)(1), we consider the substance rather than the form of the motion and caption of the order." *Pimentel & Sons Guitar Makers, Inc. v. Pimentel*, 477 F.3d 1151, 1153 (10th Cir. 2007). "A stay of agency action under APA § 705 is a provisional remedy in the nature of a preliminary injunction." *Zeppelin v. Federal Highway Admin.*, 2018 WL 496840, *7 (D. Colo. Jan. 22, 2018) (citing *Winkler v. Andrus*, 614 F.2d 707, 709 (10th Cir. 1980)).

In accordance with Federal Rule of Appellate Procedure 8(a)(1), State Appellants requested a stay pending appeal from the district court on April

6, 2018. ECF No. 222 (attached hereto as Exhibit 8).[1] State Appellants requested an expedited ruling on the motion given the irreparable harm that is occurring every day as a result of the Order. *Id*. at 2-3. Briefing on the stay request was completed on April 17, 2018, but the district court has yet to issue a ruling. Given that two weeks have now passed since the filing of the motion for a stay pending appeal, and that State Appellants are subject to ongoing harms each day that the Order remains in effect, the district court has "failed to afford the relief requested." *See* Fed. R. App. P. 8(a)(2)(A)(ii); *Tape Head Co. v. RCA Corp*., 452 F.2d 816, 818 (10th Cir. 1971) (granting motion for stay pending appeal despite district court's failure to rule on such motion); *Diné Citizens Against Ruining Our Env't v. Jewell,* 2015 WL 6393843, *1 (D.N.M. Sept. 16, 2015) ("[L]ogic dictates that a court will seldom [issue an order or judgment and] then turn around and grant [a stay] pending appeal, finding, in part, that the party seeking [the stay] is likely to prevail on appeal") (citations omitted), *aff'd*, 839 F.3d 1276 (10th Cir. 2016).

[1] On April 6, 2018, State Appellants informed all parties of their intent to seek a stay in this Court. *See* Fed. R. App. P. 8(a)(2)(C). Intervenor-Appellees North Dakota and Texas take no position on this motion. The remaining Appellees oppose this motion.

ARGUMENT

I. STATE APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR APPEAL.

Stating that "the circumstances presented here do not fall nicely into any particular legal doctrine," the district court fashioned its remedy as a "stay of implementation." *See* ECF No. 215 at 10-11. But because the substantive effect of the Order is to enjoin already-effective regulations, the district court was required to undertake the analysis necessary for preliminary injunctive relief. However, it failed to do so. Further, although the district court did briefly consider harm to the Appellees, it erred by failing to recognize well-established precedent holding that compliance costs do not constitute irreparable harm. Moreover, to the extent the district court found that Appellees' claims were moot and unripe, the appropriate course of action under this Court's precedent would have been to dismiss the case, rather than to grant the requested relief. Finally, the district court's injunction failed to maintain the status quo pending a decision on the merits.

A. The District Court Did Not Consider the Preliminary Injunction Factors.

The district court enjoined already-effective regulatory requirements but failed to apply the four-factor preliminary injunction test articulated in *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "A plaintiff

seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id*. Courts must analyze all four factors, and a movant's failure to prove any one factor is fatal to a request for injunctive relief. *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016) ("Under *Winter's* rationale, any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible.").

The district court explicitly declined to analyze the Appellees' likelihood of success on the merits, finding that their legal claims were prudentially unripe and moot in light of the anticipated revised rule.[2] ECF No. 215 at 10. The Order further assumed, without explanation, that Industry Appellees will be subject to "costs and difficulties of immediate compliance" with the already-effective provisions of the Rule, even though these harms are not irreparable, as explained below. *Id*. at 9. Finally, the district court did not attempt to balance these alleged harms with the benefits

[2] In ruling on Appellees' first set of motions for a preliminary injunction, the district court found that Appellees were unlikely to prevail on the merits of any of their legal claims. ECF No. 92 at 20-22.

of the Rule, but instead summarily concluded that "temporary compliance with those provisions makes little sense and provides minimal public benefit." *Id*.

The district court relied on Section 705 of the APA as a basis for granting this injunctive relief without applying the *Winter* factors. ECF No. 215 at 9; *see* 5 U.S.C. § 705 ("[T]o the extent necessary to prevent irreparable injury [a court may] issue all necessary and appropriate process … to preserve status or rights pending conclusion of the review proceedings."). However, the standard for a judicial stay of regulatory requirements under section 705 *is* the four-factor *Winter* standard. *Assoc. Sec. Corp. v. Sec. & Exchange Comm'n*, 283 F.2d 773, 774–75 (10th Cir. 1960) (describing the "four conditions which must be met before a stay may be granted of an order of an administrative agency"); *see also Zeppelin v. Fed. Highway Admin.*, 2018 WL 496840 at *7 (finding that a stay of agency action under Section 705 "turns on the same four factors considered under a traditional Federal Rule of Civil Procedure 65(a) analysis"); *Sierra Club v. Federal Highway Admin*., 2018 WL 1610304, *5 (D. Colo. Apr. 3, 2018) (same); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30 (D.D.C. 2012) ("In considering motions to stay agency action under 5 U.S.C. § 705, courts in

this Circuit and beyond have applied the four-part test 'used to evaluate requests for interim injunctive relief.'") (citation omitted).

The district court did not cite any case in which a court granted relief under section 705 without considering the appropriate factors. Instead, the court opined in a footnote that Section 705 is not "limited to those situations where preliminary injunctive relief would be available," citing a recent case from the Northern District of California involving the same Rule. ECF No. 215 at 9 n.10 (citing *California v. U.S. BLM*, 277 F. Supp. 3d at 1124-25). But that case contradicts the district court's conclusion. *California v. U.S. BLM* considered whether an *agency* must balance the *Winter* factors when postponing a rule's effective date under a different part of Section 705. *Id*. The part of Section 705 that governs judicial process, on the other hand, is limited to those situations where injunctive relief would otherwise be available. *See* S. Rep. No. 79-752, at 230 (1945) (clarifying that the "second sentence" of section 705, governing judicial process, was not intended to "change existing law"). Thus, the district court committed a legal error by failing to engage in the requisite multifactor analysis.

Although the district court did consider one *Winter* factor—harm to the Appellees—it erred by finding that Industry Appellees would be "irreparably harmed" by spending money to comply with the Waste Prevention Rule.

ECF No. 215 at 9-11. It is well established that ordinary compliance costs do not constitute irreparable harm for purposes of a preliminary injunction. *See, e.g., Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) ("ordinary compliance costs are typically insufficient to constitute irreparable harm"); *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) ("[I]njury resulting from attempted compliance with government regulation ordinarily is not irreparable harm."); *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527–28 (3d Cir. 1976) ("Any time a corporation complies with a 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.").

As this Court has recognized, "[t]o constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). As BLM found in promulgating the Waste Prevention Rule, compliance costs will be minor and insignificant for even the smallest operators. 81 Fed. Reg. at 83,013-14 (estimating an average profit reduction for small businesses of 0.15 percent). The district court made no determination contrary to this estimate. Thus, there was no basis for the district court's finding that "irreparable harm" would result from compliance with the Waste Prevention Rule.

A preliminary injunction is an "extraordinary remedy," and, as such, the "right to relief must be clear and unequivocal." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1261 (10th Cir. 2004) (internal quotations and citation omitted). Before granting preliminary relief, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter,* 555 U.S. at 24. Because the district court did not consider these factors, Appellants are likely to succeed on the merits of this appeal.

B. The District Court Improperly Granted Relief for Claims It Deemed to be Unreviewable.

This Court has ruled that "the prudential ripeness doctrine contemplates that there will be instances when the exercise of Article III jurisdiction is unwise." *Wyoming v. Zinke*, 871 F.3d 1133, 1145 (10th Cir. 2017). The district court's Order states multiple times that the legal challenges to the Rule were not fit for review given the anticipated revisions to the Rule. The court opined that "going forward on the merits at this point remains a waste of judicial resources and disregards prudential ripeness concerns," and that the challenge also implicated the "related doctrine of prudential mootness."

ECF No. 215 at 7-8. Nevertheless, the district court exercised its jurisdiction to enjoin many of the Rule's challenged provisions.

Prudentially unripe claims are subject to dismissal under this Court's precedent. *See Wyoming*, 871 F.3d at 1145 ("Given the [regulation's] uncertain future, we conclude dismissal of the present appeals is appropriate here."). Instead, by effectively granting the relief Appellees sought, the district court did what the ripeness doctrine is designed to avoid: it "bec[ame] entwined in 'abstract disagreements over administrative policies'" which have not been formalized. *Utah v. U.S. Dep't of Interior*, 535 F.3d 1184, 1191–92 (10th Cir. 2008) (citation omitted). The district court's speculation that the Rule "will be eliminated" in a few months is not a proper basis for granting substantive relief. ECF No. 215 at 10; *see Ctr. for Food Safety v. Burwell*, 126 F. Supp. 3d 114, 124 (D.D.C. 2015) ("Because agencies often substantially revise proposed rules in their final form, they do not represent a consummation of the agency's decisionmaking process") (internal quotations and citation omitted). Because the district court found the challenge to the Rule to be prudentially unripe and moot, it was obligated to decline to exercise its jurisdiction rather than granting injunctive relief.

C. Section 705 Is an Improper Basis for Relief.

The district court enjoined key provisions of the Waste Prevention Rule while simultaneously ruling that it would *not* resolve the pending legal challenges to that Rule. Rather, the district court stayed litigation of the merits "until BLM finalizes the Revision Rule." ECF No. 215 at 10-11. However, section 705 does not give the court authority to stay regulatory provisions pending reconsideration by the agency. That section merely grants courts authority to issue injunctive relief pending resolution of the legal challenges before the court. 5 U.S.C. § 705 (an agency may postpone regulation "pending judicial review," and "the reviewing court" may take action to "preserve status or rights *pending conclusion of the review proceedings*") (emphasis added).

Multiple courts have acknowledged that section 705 is limited to stays pending judicial review. *See Becerra v. United States Dep't of Interior*, 276 F. Supp. 3d 953, 964 (N.D. Cal. 2017) (finding the agency "improperly invoked section 705 to suspend the effective date of the Rule pending its ultimate repeal rather than pending judicial review as required by section 705"); *Sierra Club*, 833 F. Supp. 2d at 33 (section 705 is not applicable where "[t]he purpose and effect of the [Postponement] Notice plainly are to stay the rules pending reconsideration, not litigation"). More broadly, the

court's action contravenes the purpose of a preliminary injunction, which is to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Thus, for this additional reason, the district court did not have authority to enjoin significant portions of the Rule while declining to resolve the merits.

II. STATE APPELLANTS WILL SUFFER IRREPARABLE HARM ABSENT A STAY PENDING APPEAL.

As the U.S. Supreme Court has stated, "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987); *see Catron Cnty. Bd. of Comm'rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1440 (10th Cir. 1996) ("An environmental injury usually is of an enduring or permanent nature, seldom remedied by money damages and generally considered irreparable."). Increased air pollution from fossil fuel extraction or combustion constitutes irreparable harm, as once the pollution is in the air the damage cannot be reversed. *See, e.g., Sierra Club v. U.S. Dep't of Agric.*, 841 F. Supp. 2d 349, 358 (D.D.C. 2012) (finding that coal plant

expansion would "emit substantial quantities of air pollutants that endanger human health and the environment and thereby cause irreparable harm") (quotation omitted). Moreover, injuries where "sovereign interests and public policies [are] at stake" are irreparable. *Kansas v. United States*, 249 F.3d 1213, 1228 (10th Cir. 2001).

Here, the record demonstrates that absent a stay pending appeal, the district court's Order will cause irreparable harm to State Appellants by increasing air pollution and related health impacts, exacerbating climate harms, and causing other environmental injury such as noise and light pollution. In particular, the Order will directly threaten the health and well-being of State Appellants' residents by resulting in increased emissions volatile organic compounds ("VOCs") and other hazardous air pollutants, as well as emissions of methane, a precursor to ground-level ozone and a potent greenhouse gas.[3]

A significant percentage of these emissions occur in New Mexico, negatively impacting air quality in the state. ECF No. 208-2 (Declaration of Sandra Ely) (attached hereto as Exhibit 9), ¶¶ 16-17. New Mexico's San

[3] According to BLM, implementation of the Waste Prevention Rule will reduce annual emissions of VOCs by 250,000–267,000 tons, and methane emissions by 175,000-180,000 tons. 81 Fed. Reg. at 83,014.

Juan Basin already has one of the highest rates of natural gas emissions in the country, accounting for nearly 17 percent of national methane losses, which are largely attributable to oil and gas development. *Id*. at ¶¶ 6, 8. In addition, VOC emissions from oil and gas development contribute to high ozone levels in San Juan County, leading to an "F" grade by the American Lung Association in 2016. *Id*. at ¶ 12.

In California, the Order will result in the emission of additional VOCs and toxic air contaminants in close proximity to areas designated as Disadvantaged Communities by the California Environmental Protection Agency, including Kern County. ECF No. 208-1 (Declaration of Elizabeth Scheehle) (attached hereto as Exhibit 10), ¶¶ 14, 16-24. The San Joaquin Valley portion of Kern County is in extreme nonattainment with the federal 2008 eight-hour ozone standard, in nonattainment with federal fine particulate matter standards, and in nonattainment with multiple state ambient air quality standards. *Id*. at ¶ 14. Excess air pollution in this region, including emissions of VOCs, particulate matter, and hazardous air pollutants from oil and gas operations, contribute to increased rates of heart disease, lung disease, asthma and other respiratory problems, and elevated cancer risk. *Id*. at ¶¶ 10-12, 14.

Further, the increased methane emissions that will result from the Order will exacerbate climate change impacts within Appellant States. *Id*. at ¶ 25. Methane is a powerful heat-trapping greenhouse gas with more than 80 times the global warming potential of carbon dioxide within the first twenty years after it is emitted. *Id*. at ¶ 13. Once in the atmosphere, these emissions contribute to climate harms that cannot be undone, including a reduction in the average annual snowpack that provides approximately 35 percent of California's water supply, increased erosion and flooding from rising sea levels, and extreme weather events. *Id*. at ¶ 15.

New Mexico, an already water-scarce state, is especially vulnerable to the water supply disruptions which are likely to accompany climate change. ECF No. 208-2, ¶ 10. Average temperatures in New Mexico have been increasing 50 percent faster than the global average over the last century. *Id*. New Mexico is facing warming-caused drought and insect outbreak leading to more wildfires, increased public health threats from amplified heat in urban areas, and disruption to water and electricity supplies. *Id*. The increased methane emissions from the Order will exacerbate these climate effects in New Mexico.

The district court failed to evaluate or even mention these irreparable harms in its Order. However, another district court recently evaluated

similar allegations of irreparable harm resulting from suspension of the Rule's key requirements and found that State Appellants had "easily [met] their burden" to demonstrate irreparable harm. *California v. BLM*, 286 F. Supp. 3d at 1075. In particular, that district court agreed that the resulting increase in air pollution and related health impacts, as well as the "serious and irreparable harms that are directly linked to methane emissions," constituted irreparable harm. *Id*. at 1073-74.

III. APPELLEES WILL NOT SUFFER IRREPARABLE HARM IF THE STAY IS GRANTED.

As discussed above, there is no basis for Appellees to claim irreparable harm from implementation of the Waste Prevention Rule. *See supra* Part I.A. Appellees Wyoming and Montana make no showing of irreparable harm in their stay request. *See* ECF No. 195. In their third motion for a preliminary injunction (which was denied by the district court), Industry Appellees speculate that compliance costs would reduce the number of potential new wells and result in several million barrels of oil that would not be produced from BLM leaseholds. As this Court has stated, "purely speculative harm" is insufficient to demonstrate irreparable harm for purposes of an injunction. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). Other than generalized statements in an affidavit,

Industry Appellees provide no evidence to support their contentions. Further, this assertion contradicts BLM's findings in the record, which Industry Appellees do not challenge, that the Waste Prevention Rule will only reduce crude oil production by 0.0 – 3.2 million barrels per year (0 – 0.07% of the total U.S. production), and will *increase* natural gas production by up to 41 billion cubic feet per year by reducing the amount of gas flared, leaked, or vented to the atmosphere. 81 Fed. Reg. at 83,014.

Furthermore, Appellees fail to acknowledge the numerous exemptions from the Rule's requirements that are available where compliance "would impose such costs as to cause the operator to cease production and abandon significant recoverable oil reserves under the lease." *See* 81 Fed. Reg. at 83,011-13. Nor do they address the fact that operators could resume such production activities if they ultimately prevail in challenges to the Waste Prevention Rule. *See Heideman*, 348 F.3d at 1189 ("Plaintiffs presented no evidence that enforcement of the Ordinance during the time it will take to litigate this case in district court will have an irreparable effect in the sense of making it difficult or impossible to resume their activities or restore the status quo ante in the event they prevail.").

Consequently, Appellees will not suffer irreparable harm if the requested stay is granted.

IV. A STAY PENDING APPEAL WOULD SERVE THE PUBLIC INTEREST.

A stay of the district court's Order would also be in the public interest. The Waste Prevention Rule prevents the waste of a public resource, increases royalty revenues to federal, state, and tribal governments, and ensures that BLM is fulfilling its trust responsibilities on tribal lands. *See* 81 Fed. Reg. at 83,009. Appellees' contentions regarding compliance costs and potential slight decreases in revenue from oil production do not represent or outweigh the public interest in the effective regulation of oil and gas operations on public lands. *See, e.g., Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1086 (10th Cir. 2004) ("financial concerns alone generally do not outweigh environmental harm").

BLM has a crucial role to play in ensuring the responsible development of oil and gas resources on federal and Indian lands, and it is in the public interest to prevent the waste of such resources and level the playing field for oil and gas development across states. *See F.T.C. v. Alliant Techsystems Inc.*, 808 F. Supp. 9, 22-24 (D.D.C. 1992) (discussing the "public's clear and fundamental interest in promoting competition"); *United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1430 (W.D. Mich. 1989) ("private, financial harm must, however, yield to the public interest in maintaining effective competition"). Because the Waste Prevention Rule is likely to result in the

stronger protection of federal lands, increased royalty payments, reduced air pollution, and greater prevention of the waste of public resources, the public interest strongly favors a stay. *See California v. BLM*, 286 F. Supp. 3d at 1076 (in enjoining Suspension Rule, concluding that the "balance of equities and public interest strongly favor issuing the preliminary injunction").

CONCLUSION

For these reasons, State Appellants respectfully request this Court grant their request for a stay pending appeal.

Dated: April 20, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2018, I electronically filed the foregoing STATE APPELLANTS' MOTION FOR STAY PENDING APPEAL with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ George Torgun
George Torgun

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