Nos. 18-8027 & 18-8029

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATE OF WYOMING, ET AL.,
Petitioner-Appellees,

&

STATE OF NORTH DAKOTA, ET AL.,
Petitioner-Intervenor-Appellees,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Respondent-Appellees,

&

STATE OF NEW MEXICO, ET AL.,
Intervenor-Respondent-Appellants,

&

WYOMING OUTDOOR COUNCIL, ET AL.,
Intervenor-Respondent-Appellants.

On Appeal from the United States District Court for the District of Wyoming
Civil Action No. 2:16-cv-00285-SWS & 2:16-cv-00280-SWS
Hon. Scott W. Skavdahl

APPELLANTS' JOINT OPENING BRIEF

ORAL ARGUMENT REQUESTED

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July 30, 2018

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record for Intervenor-Respondent-Appellants Wyoming Outdoor Council, et al., certify that no Intervenor-Respondent-Appellant has any parent companies, subsidiaries, or affiliates that have issued shares to the public.

/s/ Robin Cooley
Counsel for Intervenor Respondent-Appellants Wyoming Outdoor Council, et al.

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STATEMENT OF RELATED CASES

This case is a consolidation of two appeals. Case No. 18-8027 is an appeal by Respondent-Intervenor-Appellants Wyoming Outdoor Council, et al. ("Citizen Groups"). Case No. 18-8029 is an appeal by Respondent-Intervenor-Appellants the State of New Mexico and the State of California ("Respondent States"). This Court consolidated the cases on April 23, 2018. Order at 2 (Apr. 23, 2018), Doc. No. 01019980237.[1] Pursuant to this Court's request, the Citizen Groups and Respondent States (collectively, "Appellants") file this brief jointly to avoid unnecessarily repeating or duplicating arguments. *See* Order at 3 (June 19, 2018), Doc. No. 010110009238; *see also* Fed. R. App. P. 28(i).

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction, 28 U.S.C. § 1331, because this case challenges a Bureau of Land Management ("BLM") regulation, the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule, 81 Fed. Reg. 83,008 (Nov. 18, 2016) ("Waste Prevention Rule" or "Rule"), under federal law.

As this Court has already held, it has jurisdiction over these appeals under 28 U.S.C. § 1292(a)(1). Order at 5 (June 4, 2018), Doc. No. 010110002174 ("June

[1] All Tenth Circuit docket citations are to Case No. 18-8027, unless otherwise noted.

4 Order"). On April 4, 2018, the district court issued an order enjoining implementation of the Waste Prevention Rule. Order Staying Implementation of Rule Provisions and Staying Action Pending Finalization of Revision Rule (Apr. 4, 2018), ECF No. 215 ("Stay Order"). The Citizen Groups and the Respondent States quickly filed interlocutory appeals of the Stay Order. Respondent-Intervenors' Notice of Appeal (Apr. 5, 2018), ECF No. 216; State Respondents' Notice of Appeal (Apr. 6, 2018), ECF No. 218.[2] In denying Appellees' motions to dismiss, this Court explained that the Stay Order "is an injunction in substance, if not in form" and therefore jurisdiction is appropriate under § 1292(a)(1). June 4 Order at 5.

STATEMENT OF THE ISSUES

(1) Did the district court err by failing to determine whether the prerequisites for issuing injunctive relief were met prior to exercising its authority under the Administrative Procedure Act ("APA"), 5 U.S.C. § 705, to enjoin a final, effective federal agency regulation?

(2) Did the district court err by granting "relief pending review" pursuant to 5 U.S.C. § 705 despite simultaneously staying that review?

[2] All district court docket citations are to Case No. 16-cv-285-SWS unless otherwise noted. All district court docket citations will be replaced with references to the Deferred Joint Appendix when the Deferred Joint Appendix is filed. *See* Fed. R. App. P. 30(c)(2)(B).

(3) Did the district court err by failing to dismiss this case despite finding it to be prudentially unripe and prudentially moot?

STATEMENT OF THE CASE

The district court committed an unprecedented legal error when it enjoined the Waste Prevention Rule pursuant to 5 U.S.C. § 705, without concluding that the regulation's challengers had demonstrated the four prerequisites for this extraordinary remedy. Indeed, the district court had previously concluded that the four prerequisites were not met. The district court further erred when it invoked its § 705 authority to enjoin the Waste Prevention Rule "pending review," but then effectively ended that review by staying the litigation. Moreover, although the district court found that it would not be wise to exercise Article III jurisdiction to review the merits of the Rule due to prudential ripeness and prudential mootness concerns, the court nevertheless exercised that very jurisdiction to enjoin the Rule. Taking such action is directly contrary to this Court's recent ruling in *Wyoming v. Zinke*, 871 F.3d 1133, 1143 (10th Cir. 2017) ("*Zinke*"), and the basic principle that where a case is prudentially unripe or moot a court should stay its hand. This Court must vacate the district court's unlawful Stay Order.

I. The Waste Prevention Rule Updates Nearly 40-Year-Old Standards that Allowed Unnecessary and Environmentally Harmful Waste of Public Resources.

The district court stayed implementation of BLM's final and effective Waste Prevention Rule. The Rule requires oil and gas companies who lease public and tribal lands to utilize cost-effective measures to capture, rather than waste, publicly owned natural gas. Companies waste gas by either intentionally venting it into the air, allowing it to leak from their equipment, or burning it in noisy and unsightly flares. Under the Mineral Leasing Act ("MLA"), BLM must ensure that federal oil and gas lessees "use all reasonable precautions to prevent waste." 30 U.S.C. § 225. Pursuant to this statutory mandate, the Interior Department has regulated waste of public and Indian natural gas for nearly 40 years. *See* Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases (NTL-4A), 44 Fed. Reg. 76,600 (Dec. 27, 1979) (BLM's prior waste regulation).

BLM's four-decade-old regulations, however, failed to keep pace with "significant technological developments" that led to a dramatic increase in oil and gas production on federal lands, and a corresponding increase in waste of these resources. 81 Fed. Reg. at 83,009. In 2008 and 2010 reports, the Government Accountability Office identified a pervasive problem of preventable natural gas waste and associated air pollution on public and tribal lands. VF_0002605–48;

VF_0002649–705.[3] An Interior Department study found that between 2009 and 2015, operators wasted 462 billion cubic feet of publicly owned gas—enough to serve about 6.2 million households for a year. 81 Fed. Reg. at 83,015. As BLM itself concluded, "the American public has not benefited from the full potential of . . . increased production, due to venting, flaring, and leaks of significant quantities of gas during the production process." *Id.* at 83,009.

To address this problem, BLM initiated a rulemaking in 2014. BLM published a proposed rule, accepted over 330,000 public comments, held multiple public hearings and tribal outreach sessions, and met with state regulators and other stakeholders. *Id.* at 83,010.

Following more than three years of study and public engagement, BLM promulgated the final Waste Prevention Rule on November 18, 2016. The Rule prohibits venting of natural gas except in limited situations. *Id.* at 83,011. It limits flaring through a system—modeled after North Dakota's program—that requires operators to capture, rather than burn, a certain percentage of the gas they produce each month. *Id.* at 83,023. The Rule also requires lessees to measure and report vented or flared gas, institute leak detection and repair programs, and update outdated and inefficient equipment. *Id.* at 83,011–13. Some provisions required

[3] All Record citations to VF_xxxxxxx will be replaced with references to the Deferred Joint Appendix when the Deferred Joint Appendix is filed. *See* Fed. R. App. P. 30(c)(2)(B).

compliance on the Rule's effective date of January 17, 2017, while others required compliance on January 17, 2018. *Id.* at 83,008, 83,024, 83,033, 83,082.

Based on the extensive record before the agency, BLM determined that the Rule's carefully crafted requirements are "economical, cost-effective, and reasonable measures . . . to minimize gas waste." *Id.* at 83,009. BLM estimated that the Rule would reduce wasteful venting of natural gas by 35% and wasteful flaring by 49%. *Id.* at 83,014. Because operators pay royalties only on gas that is captured, the Rule's waste prevention provisions will increase payments to federal, state, and tribal taxpayers by up to $14 million each year. *Id.* Moreover, because the Rule requires operators to capture natural gas—a marketable product—it is highly cost-effective. The Rule's estimated compliance costs of $44,600–$65,800 per operator amount to just a fraction of a percent (approximately 0.15%) of even a small company's annual profits. *See* VF_0000575–76; *see also* VF_0000602 (average "small" operator has annual revenue of $521 million). BLM also included several exceptions in the Rule to ensure that compliance would not cause any operator to cease production on a well or abandon any reserves. *See, e.g.*, 81 Fed. Reg. at 83,084.

The Waste Prevention Rule also has environmental benefits. The principal component of natural gas is methane, a greenhouse gas "with climate impacts roughly 25 times those of carbon dioxide . . . over a 100-year period, or 86 times

those of carbon dioxide . . . if measured over a 20-year period." *Id.* at 83,009. BLM estimated that the Waste Prevention Rule would reduce methane emissions by up to 180,000 tons per year, reduce smog-forming volatile organic compounds by up to 267,300 tons per year, and reduce carcinogenic hazardous air pollutants by up to 2,031 tons per year. *Id.* at 83,014; VF_0000678. And it would improve quality of life for residents who live near noisy and unsightly flares. VF_0000644–45.

II. The Courts and Congress Reject the New Administration's and Other Rule Opponents' Attempts to Sideline the Rule.

As soon as BLM finalized the Waste Prevention Rule, Western Energy Alliance and the Independent Petroleum Association of America ("Industry Petitioners"), as well as the states of Wyoming, Montana, and North Dakota ("State Petitioners") (collectively, "Petitioners"), filed legal challenges to the Rule. Pet'n for Review of Final Agency Action (Nov. 18, 2016), ECF No. 1; State of N.D.'s [Proposed] Pet'n for Review (Nov. 23, 2016), ECF No. 19-3; Pet'n for Review of Final Agency Action, *W. Energy All. v. Jewell*, No. 16-cv-280-SWS (Nov. 15, 2016), ECF No. 1.[4] The cases were consolidated. Civil Minute Sheet Status Conference (Nov. 30, 2016), ECF No. 23. Petitioners sought preliminary

[4] The State of Texas later intervened as a Petitioner. Tex.'s Unopposed Mot. to Intervene as Pet'r for Review of Final Agency Action (Mar. 21, 2017), ECF No. 104.

injunctions pursuant to 5 U.S.C. § 705 and Federal Rule of Civil Procedure 65. Wyo. & Mont.'s Mot. for Prelim. Inj. 2 (Nov. 28, 2016), ECF No. 21; N.D.'s Mot. for Prelim. Inj. 2 (Dec. 5, 2016), ECF No. 39; Mot. for Prelim. Inj. 1–2, *W. Energy All. v. Jewell*, No. 16-cv-280-SWS (Nov. 23, 2016), ECF No. 12.[5]

After extensive briefing and a half-day hearing, the district court denied the motions, finding "Petitioners ha[d] failed to establish all four factors required for issuance of a preliminary injunction." *Wyoming v. U.S. Dep't of the Interior*, No. 2:16-cv-0285-SWS, 2017 WL 161428, at *1, *12 (D. Wyo. Jan. 16, 2017) ("*Wyoming*"). On the merits, the district court concluded that "Petitioners have not shown a clear and unequivocal right to relief." *Id.* at *9. Petitioners did not appeal. As a result, the Waste Prevention Rule went into effect as scheduled on January 17, 2017.

Three days later, the new presidential administration was inaugurated. Thereafter, Industry Petitioners and the newly appointed Secretary of the Interior, Ryan Zinke, initiated multiple attempts to render the Waste Prevention Rule inoperative. Industry Petitioners lobbied Congress to repeal the Rule using the

[5] The Respondent States and Citizen Groups intervened to defend the Rule. Citizen Groups' Mot. to Intervene as Resp'ts (Dec. 2, 2016), ECF No. 27; Intervenor-Applicants Cal. & N.M.'s Mot. to Intervene as Resp'ts (Dec. 15, 2016), ECF No. 62.

Congressional Review Act, but the Senate voted down this initiative. 163 Cong. Rec. S2851, S2858 (May 10, 2017).

On June 15, 2017, without providing public notice or comment, BLM attempted to "postpone the compliance dates" of the Waste Prevention Rule's provisions that did not require compliance until January 2018, purportedly pursuant to 5 U.S.C. § 705. *See* 82 Fed. Reg. 27,430, 27,431 (June 15, 2017). The Northern District of California held that the "postponement" violated the APA and vacated the rule. *California v. BLM*, 277 F. Supp. 3d 1106, 1120–23, 1127 (N.D. Cal. 2017) ("*California I*").

Shortly thereafter, BLM adopted a new rule, suspending for one year all the Waste Prevention Rule's provisions that "generate benefits of gas savings or reductions in methane emissions." 82 Fed. Reg. 58,050, 58,051 (Dec. 8, 2017) ("Suspension Rule"). Finding the Suspension Rule "untethered to evidence," and recognizing the serious risks of irreparable harm it created, the Northern District of California preliminarily enjoined the Suspension Rule and reinstated the Waste Prevention Rule on February 22, 2018. *California v. BLM*, 286 F. Supp. 3d 1054, 1058 (N.D. Cal. 2018) ("*California II*").

The same day the *California II* court issued its injunction, BLM initiated another rulemaking, proposing largely to rescind the Waste Prevention Rule. 83 Fed. Reg. 7924 (Feb. 22, 2018) ("Proposed Rescission Rule"). The public

comment period on the Proposed Rescission Rule ended on April 23, 2018. *Id.* at 7924. BLM has yet to issue a final rule.

III. The District of Wyoming Enjoins the Waste Prevention Rule.

Meanwhile, proceedings in the underlying District of Wyoming case continued, and the parties had filed opening and response briefs. *See* Citizen Groups' Resp. Br. (Dec. 11, 2017), ECF No. 175; State Resp'ts' Opp'n to Pet'rs' Brs. in Supp. of Pet'ns for Review of Final Agency Action (Dec. 11, 2017), ECF No. 174. On December 11, 2017, however, BLM filed a motion to dismiss or stay the case on prudential ripeness grounds because BLM had issued the Suspension Rule and was in the process of developing the Rescission Rule. Fed. Resp'ts' Resp. to Pet'rs' Merits Brs. & Mot. to Dismiss, or, in the Alt., for a Stay of Proceedings (Dec. 11, 2017), ECF No. 176 ("BLM Mot. to Dismiss"). The District of Wyoming stayed the case based on these prudential ripeness concerns. Order Granting Jt. Mot. to Stay 4–5 (Dec. 29, 2017), ECF No. 189.

In response to the *California II* injunction and the reinstatement of the Rule, Petitioners filed a litany of motions asking the Wyoming district court to lift the litigation stay and provide various forms of relief. These included requests for: (1) a preliminary injunction, (2) a stay of the Rule pursuant to § 705, (3) vacatur of the rule without reaching the merits, and/or (4) prompt resolution of the merits of the case. Mot. to Lift Litig. Stay & for Prelim. Inj. or Vacatur of Certain

Provisions of the Rule Pending Admin. Rev. (Feb. 28, 2018), ECF No. 196; Mot. to Lift Stay & Suspend Implementation Deadlines (Feb. 28, 2018), ECF No. 195; Jt. Mot. by the States of N.D. & Tex. to Lift the Stay (Feb. 26, 2018), ECF No. 194. For its part, BLM continued to argue that the case was prudentially unripe, and that the "exercise of Article III jurisdiction [would be] unwise." Fed. Resp'ts' Resp. to Pet'rs' & Intervenor-Pet'rs' Mots. to Lift the Stay & for Other Relief 8 (Mar. 14, 2018), ECF No. 207 (quoting *Zinke*, 871 F.3d at 1141). BLM nevertheless also urged the district court to stay the Waste Prevention Rule. *Id.* at 11–15.

On April 4, 2018, the District of Wyoming enjoined implementation of all of the Waste Prevention Rule's provisions with January 2018 compliance dates, purportedly pursuant to its authority under the APA, 5 U.S.C. § 705. Stay Order at 9, 11. The court did not analyze whether Petitioners had satisfied the four prerequisites for an injunction. *Id.* at 9–11. Instead, the district court justified the decision by asserting, without citing evidence, that Industry Petitioners would be "irreparably harmed" because "the costs and difficulties of immediate compliance . . . are undoubtedly substantial and unrecoverable." *Id.* at 2, 9. The court did not address Petitioners' likelihood of success on the merits, despite its earlier conclusion that they had *not* satisfied that factor. *See Wyoming*, 2017 WL 161428,

at *4–10. The court also did not address the harms to taxpayers from lost royalty revenue or to the public from losing the Rule's environmental benefits.

In addition to enjoining key provisions of the Rule, the district court stayed the litigation "pending finalization or withdrawal of the proposed Revision Rule." Stay Order at 11. The district court explained its concerns that the case was both prudentially unripe and prudentially moot, and opined that these considerations "counsel the court to stay its hand, and to withhold relief it has the power to grant." *Id.* at 7–8 (quotation omitted).

The Respondent States and Citizen Groups immediately filed notices of appeal and jointly moved in the district court for a stay pending appeal. Resp't-Intervenor Citizen Groups' & States' Jt. Mot. for a Stay Pending Appeal (Apr. 6, 2018), ECF No. 222. The district court denied the stay pending appeal on April 30, 2018, reaffirming its decision to enjoin the Waste Prevention Rule, and once again explicitly refusing to perform the four-factor analysis necessary to grant injunctive relief. *See* Order Denying Mot. for Stay Pending Appeal (Apr. 30, 2018), ECF No. 234 ("District Court Stay Pending Appeal Denial").

IV. This Court Rejects Motions to Dismiss and Motions for a Stay Pending Appeal.

The Respondent States and Citizen Groups also sought stays pending appeal in this Court. Citizen Groups' Mot. for Stay Pending Appeal (Apr. 20, 2018), Doc. No. 01019979456; State Appellants' Mot. for Stay Pending Appeal, Case No. 18-

8029 (Apr. 20, 2018), Doc. No. 01019979472. Meanwhile, Petitioners moved to dismiss the appeals, contending this Court lacked interlocutory jurisdiction over appeals from stays granted under 5 U.S.C. § 705. WEA & IPAA's Mot. to Dismiss for Lack of Appellate Jurisdiction (Apr. 19, 2018), Doc. No. 01019978713; State of Wyo. & State of Mont.'s Mot. to Dismiss for Lack of Appellate Jurisdiction (Apr. 16, 2018), Doc. No. 01019976239.

On June 4, 2018, this Court denied the motions. June 4 Order at 4. In denying the motions to dismiss, the Court explained that the district court's Stay Order "is an injunction in substance, if not in form" because "[t]he district court's 'stay' effectively enjoins enforcement of the [Waste Prevention] Rule." *Id.* at 5. This Court further concluded that the Stay Order "has the practical effect of granting an injunction; it results in serious, perhaps irreparable, consequence in that the environmental benefits of the Rule will not be realized; and it can be challenged only by immediate appeal." *Id.*

Two members of the panel exercised their discretion to deny a stay pending appeal. *Id.* at 6. Judge Matheson dissented in part, reasoning that remand was appropriate because "[u]nder this court's precedent, the district court should have analyzed the traditional four factors in deciding whether to stay the Waste Prevention Rule." *Id.* at 7 (Matheson, J., concurring in part and dissenting in part).

He further reasoned that the district court's "brief recounting of the factors" in its order denying a stay pending appeal did not "cure[]" this error. *Id.*

STANDARD OF REVIEW

This Court reviews a district court's decision to enjoin agency action for an abuse of discretion. *Citizens United v. Gessler*, 773 F.3d 200, 209 (10th Cir. 2014). A district court abuses its discretion when its decision is based upon an error of law, such as application of the wrong legal standard, or when there is clear error in its factual findings. *Id.*; *Winnebago Tribe v. Stovall*, 341 F.3d 1202, 1205 (10th Cir. 2003). Therefore, this Court reviews the district court's legal determinations de novo, and its factual findings for clear error. *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1255 (10th Cir. 2003). A district court's failure to weigh the equitable factors when granting a preliminary injunction is "an error of law and, hence, an abuse of discretion." *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009).

SUMMARY OF ARGUMENT

The district court committed a serious legal error by enjoining implementation of a nationwide regulation without concluding that the four prerequisites for granting this extraordinary relief had been met. Indeed, the district court previously reached the opposite conclusion, finding that the prerequisites, including likelihood of success on the merits, had *not* been met. The

district court now claims that the APA, 5 U.S.C. § 705, grants it the authority to ignore the four factor-analysis mandated by the Supreme Court. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). It does not. Indeed, if allowed to stand, the Stay Order would create a new, lower standard for enjoining agency actions—a standard that directly conflicts with this Court's longstanding precedent, *Assoc. Sec. Corp v. SEC*, 283 F.2d 773, 774–75 (10th Cir. 1960), as well as the uniform interpretation of § 705 by circuit and district courts around the country.

The district court further exceeded its authority by enjoining the Waste Prevention Rule *not* to allow for judicial review on the merits, as required by § 705, but instead to enable BLM to complete a separate rulemaking process to rescind the Rule. Because the district court exceeded its authority under § 705, this Court must vacate the stay.

Finally, and relatedly, the district court also erred by exercising its jurisdiction to grant an injunction while simultaneously concluding that it would be unwise to exercise jurisdiction to review the merits of the case due to prudential mootness and ripeness concerns. This exercise of jurisdiction to grant substantive relief directly conflicts with this Court's recent precedent in *Zinke*, 871 F.3d at 1145–46, which requires dismissal of a prudentially unripe case. Following *Zinke*, if this Court agrees that this case is prudentially unripe, it should not only vacate

the district court's erroneous decision, but also remand with instructions to dismiss Petitioners' suits.

ARGUMENT

I. The District Court Erred by Enjoining the Waste Prevention Rule Without Determining that the Prerequisites for Such Relief Were Satisfied.

The district court took the unprecedented step of enjoining a final regulation pursuant to its authority under 5 U.S.C. § 705 without determining that the four prerequisites for injunctive relief were satisfied.[6] This was error. The district court's failure to apply the relevant factors, if allowed to stand, would create an entirely novel, lower standard for enjoining agency actions. Such a standard would be inconsistent with this Court's recognition—in cases challenging agency actions—that relief prior to a ruling on the merits is an "extraordinary remedy" and therefore all four factors must be met. *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016) (*"Diné CARE"*) (quotation omitted).

[6] Federal Rule of Civil Procedure 52(a) requires a district court to clearly state the findings of fact and conclusions of law that support its grant of an interlocutory injunction. *See U.S. ex rel. Citizen Band Potawatomi Indian Tribe v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 889 (10th Cir. 1989). To the extent the district court considered any of the four factors, it did not meet this requirement. *See id.* at 889–90 (vacating injunction where order made a "single bare reference" to irreparable harm as the basis for granting relief, but "contain[ed] no fact findings or legal conclusions supporting [that] assertion" and did "not address the balance of hardship, or [the] likelihood of success on the merits").

The APA provides that "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to . . . preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. But § 705 does not expand judicial authority to issue a stay. Rather, as this Court and every court to consider the question (except the court below) has concluded, to obtain a judicial stay under § 705, a party must demonstrate its entitlement to such an extraordinary remedy by applying the ordinary four-part test for injunctive relief.

This Court has long been clear that the "four conditions which must be met before a stay may be granted of an order of an administrative agency" are: "(1) A likelihood that the petitioner will prevail on the merits of the appeal; (2) Irreparable injury to the petitioner unless the stay is granted; (3) No substantial harm to other interested persons; and (4) No harm to the public interest." *Assoc. Sec. Corp.*, 283 F.2d at 774–75 (interpreting APA section 10(d), the predecessor to 5 U.S.C. § 705). Judge Matheson recognized this requirement in his partial dissent from the June 4 Order, explaining: "Under this court's precedent, the district court should have analyzed the traditional four factors in deciding whether to stay the Waste Prevention Rule . . . under Administrative Procedure Act § 705." June 4 Order at 7 (Matheson, J., concurring in part and dissenting in part).

Federal district and appellate courts in other jurisdictions have universally interpreted § 705 in the same way. *See, e.g.*, *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987) (explaining that § 705 requires courts to consider the "same [factors] considered in evaluating the granting of a preliminary injunction"); *Texas v. EPA*, 829 F.3d 405, 424–35 (5th Cir. 2016) (granting stay pursuant to § 705 only after considering the four factors); *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 446 (7th Cir. 1990) (explaining that preliminary injunction standard is appropriate standard for granting § 705 stay); *Zeppelin v. Fed. Highway Admin.*, 305 F. Supp. 3d 1189, 1200 (D. Colo. 2018) (stating that the "availability" of a § 705 stay "turns on the same four factors considered under a traditional [preliminary injunction] analysis").[7]

[7] *See also, e.g.*, *E. Air Lines v. Civil Aeronautics Bd.*, 261 F.2d 830, 830 (2d Cir. 1958); *Guam Contractors Ass'n v. Sessions*, No. CV 16-00075, 2017 WL 3447797, at *4–5 (D. Guam Aug. 11, 2017); *Labnet, Inc. v. U.S. Dep't of Labor*, 197 F. Supp. 3d 1159, 1167 n.3 (D. Minn. 2016); *N.H. Hosp. Ass'n v. Burwell*, No. 15-CV-460-LM, 2016 WL 1048023, at *5 n.6 (D.N.H. Mar. 11, 2016); *Native Angels Home Health, Inc. v. Burwell*, No. 5:15-cv-234-FL, 2015 WL 12910710, at *1–2 (E.D.N.C. June 4, 2015); *Texas v. United States*, 95 F. Supp. 3d 965, 973 (N.D. Tex. 2015); *B.A. Wackerli, Co. v. Volkswagen of Am., Inc.*, No. 4:12-CV-00373-BLW, 2012 WL 3308678, at *7 (D. Idaho Aug. 13, 2012); *First Premier Bank v. U.S. Consumer Fin. Prot. Bureau*, 819 F. Supp. 2d 906, 912 (D.S.D. 2011); *Affinity Healthcare Servs., Inc. v. Sebelius*, 720 F. Supp. 2d 12, 15 n.4 (D.D.C. 2010); *Kan. ex rel. Graves v. United States*, No. 00-4153-DES, 2000 WL 1665260, at *4 (D. Kan. Sept. 29, 2000); *Branstad v. Glickman*, 118 F. Supp. 2d 925, 934 (N.D. Iowa 2000); *Charter Twp. of Van Buren v. Adamkus*, 965 F. Supp. 959, 963 (E.D. Mich. 1997); *Corning Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 562 F. Supp. 279, 280 (E.D. Ark. 1983).

Indeed, the Order challenged here came to the exact opposite conclusion of an order issued by the District of Colorado just one day prior. The District of Colorado held that "[a] stay of agency action under APA § 705 is a provisional remedy in the nature of a preliminary injunction," whose "availability turns on the same four factors considered under a traditional Federal Rule of Civil Procedure 65(a) analysis." *Sierra Club v. Fed. Highway Admin.*, No. 1:17-cv-01661-WJM-MEH, 2018 WL 1610304, at *5 (D. Colo. Apr. 3, 2018) (citing *Winkler v. Andrus*, 614 F.2d 707, 709 (10th Cir. 1980)).[8] That court emphasized that "any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible." *Id*. (quoting *Diné CARE*, 839 F.3d at 1282).

Here, though the district court "acknowledge[d] that some courts have employed the four-factor preliminary injunction test in determining whether to grant relief under § 705," the court failed to recognize that the test is *required*. Stay Order at 9 n.10. Neither the district court nor any party have cited a single

[8] In that case, the federal defendants cited the four-factor preliminary injunction test, then explained that "[t]he same standard applies for motions to stay under 5 U.S.C. § 705." Fed. Defs.' Resp. in Opp'n to Sierra Club Pls.' Mot. for Stay 6 n.4, *Sierra Club v. Fed. Highway Admin.*, No. 17-cv-01661-WJM-MEH (D. Colo. Dec. 6, 2017), ECF No. 94.

instance in which a court has enjoined a final agency action without considering the four prerequisites for such relief.[9]

Petitioner States have previously cited *Rochester-Genesee Regional Transportation Authority v. Hynes-Cherin*, 506 F. Supp. 2d 207 (W.D.N.Y. 2007), as an example of a district court granting a § 705 stay based on "pragmatic" considerations, without finding the four factors were met. State of Wyo. & State of Mont.'s Resp. to Appellants' Mots. for Stay Pending Appeal 11–12 (Apr. 30, 2018), Doc No. 01019983902. But that court conceded that the "standards for granting . . . relief [under § 705] are onerous." 506 F. Supp. 2d at 210. Applying a "sliding scale," that court determined that the irreparable injury to third party schoolchildren justified a short stay. *Id.* at 214. Following the Supreme Court's decision in *Winter*, 555 U.S. at 20, this Court has explicitly deemed such a sliding-scale-test "impermissible." *Diné CARE*, 839 F.3d at 1282.

The district court previously applied the four factors in response to requests to enjoin the rule and concluded they were not met. *Wyoming*, 2017 WL 161428,

[9] The district court cited only the recent decision by the Northern District of California setting aside BLM's first attempt to stay the Waste Prevention Rule, Stay Order at 9 n.10, which considered only the first sentence of § 705 regarding an *agency's* authority to "postpone the effective date" of its own regulation pending review, not the *courts'* authority to stay a rule pursuant to the second sentence of § 705. *California I*, 277 F. Supp. 3d at 1124–25. The court said nothing to suggest that a court could enjoin an already effective agency rule without determining that the four prerequisites had been met, as the district court did here.

at *12. But now, without citing any supporting precedent, the district court claims that such analysis is not required because "nothing in the language of the statute itself, or its legislative history, suggests [relief under § 705] is limited to those situations where preliminary injunctive relief would be available." Stay Order at 9 n.10. That is incorrect. There is ample evidence that Congress' intent in enacting § 705 was to confirm the courts' traditional stay authority in cases challenging agency actions, *not* to substantially broaden their authority in such cases.

"The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *United States v. Noland*, 517 U.S. 535, 539 (1996) (quotation marks omitted). "The four-factor test is the traditional one," and there is thus a "presumption favoring the retention of [this] long-established and familiar principle[], except when a statutory purpose to the contrary is evident." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotation marks and citations omitted). Moreover, Congress is "presumed to be aware of . . . [a] judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Because Congress has twice substantively amended the judicial review provisions of the APA without changing § 705, it has adopted the courts' uniform and longstanding interpretation of the

provision. *See* Pub. L. No. 94-574, 90 Stat. 2721, 2721 (1976); Pub. L. No. 89-554, 80 Stat. 378, 392–93 (1966); *see also supra* pp. 17–18 & n.7.

Moreover, nothing in § 705 or its legislative history indicates an intent to disrupt the long-established requirement to meet the four-factor test. Congress adopted § 705 against the backdrop of the Supreme Court's decision in *Scripps-Howard Radio v. Fed. Commc'ns Comm'n*, 316 U.S. 4, 16–17 (1942). In *Scripps-Howard*, the Supreme Court recognized that courts had the power to stay an agency action pending review even without express statutory authority, but that such stays are "not a matter of right" because they directly implicate the separation of powers between the Executive and Judicial branches. *Id.* at 9–10. When Congress codified this right in the APA, there is no evidence that it intended to expand this authority greatly by allowing courts to enjoin agency action *without* application of the traditional factors. In fact, the Supreme Court long ago concluded that "[t]he relevant legislative history of [§ 705] . . . indicates that it was primarily intended to reflect existing law under the *Scripps-Howard* doctrine . . . and *not* to fashion new rules of intervention for District Courts." *Sampson v. Murray*, 415 U.S. 61, 68 n.15 (1974) (emphasis added); *see also Peoples Gas, Light & Coke Co. v. U.S. Postal Serv.*, 658 F.2d 1182, 1191 (7th Cir. 1981) (noting that the APA "has been widely interpreted as being merely declaratory of the

common law of reviewability and standing existing at the time of [its] enactment" and collecting cases on that point).

The Senate Report prepared in advance of the APA's enactment explains that the "first sentence" of § 705—relating to an agency's authority to postpone the effective date of a rule—simply "states existing law," while the "second sentence"—the one at issue here related to a court's authority—"may be said to change existing law *only* to the extent" of a situation not relevant here. S. Rep. No. 79-752, at 44 (1945), *reprinted in* U.S. Gov't Printing Office ("GPO"), Administrative Procedure Act: Legislative History, 1944–46, at 230 (1946), *available at* www.justice.gov/sites/default/files/jmd/legacy/2014/03/20/senaterept-752-1945.pdf (attached in Addendum) (emphasis added).[10] The House Report also noted that relief under § 705 requires a "proper showing" and contains specific discussion of the traditional prerequisites for relief, including the importance of finding "a substantial question for review," and "tak[ing] into account that persons other than parties may be adversely affected." H.R. Rep. No. 79-1980, at 43–44

[10] The Senate Report clarifies that the second sentence changes existing law "only to the extent that the language of the opinion in *Scripps-Howard* . . . may be interpreted to deny to reviewing courts the power to permit an applicant for a renewal of a license to continue to operate as if the original license had not expired, pending conclusion of the judicial review proceedings." S. Rep. No. 79-752, at 44 (1945), *reprinted in* GPO, Administrative Procedure Act: Legislative History, 1944–46, at 230 (1946).

(1946), *reprinted in* GPO, Administrative Procedure Act: Legislative History, 1944–46, at 277–78 (1946), *available at* www.justice.gov/sites/default/files/jmd/legacy/2014/03/20/senaterept-752-1945.pdf (attached in Addendum).[11]

BLM has previously argued that the district court issued the stay pursuant to its general "equitable discretion." Fed. Resp't-Appellee's Opp'n to Mots. for Stay Pending Appeal 21 (Apr. 30, 2018), Doc. No. 1019984155 ("BLM Opp'n to Mots. for Stay Pending Appeal"). However, the district court was clear that it issued a stay of the Waste Prevention Rule pursuant to its § 705 authority. Stay Order at 9–10; *see also* District Court Stay Pending Appeal Denial at 2–5 ("The circumstances of these cases warrant a stay pursuant to § 705."). A § 705 judicial stay requires consideration of the four factors, as set forth above. But even if the court sought to exercise its equitable discretion, application of the four-factor test is required to enjoin agency action regardless of the source of the court's authority. *See Winter*,

[11] The Attorney General's Manual on the APA—to which the Supreme Court has accorded deference because it was issued contemporaneously with passage of the APA and because of the "role played by the Department of Justice in drafting the legislation," *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978)—provides additional support. The Manual explains that "[t]he provisions of section 10 [(the APA's judicial review provisions)] constitute a general restatement of the principles of judicial review embodied in many statutes and judicial decisions," and "generally leave[] the mechanics of judicial review to be governed by other statutes and by judicial rules." U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 93 (1946) ("AG Manual"). Referring to § 705, the Manual emphasizes that the "general procedural provisions governing the issuance of preliminary injunctions . . . appear to be applicable to the exercise of the power conferred by that subsection." *Id.* at 107.

555 U.S. at 20 (describing the four factors that a "plaintiff seeking a preliminary injunction must establish" in case challenging agency action); *see also Nken*, 556 U.S. at 434 (recognizing the "substantial overlap" between the four factors governing preliminary injunctions and stays of agency action pending appeal pursuant to the court's discretion because "similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined"); *Diné CARE*, 839 F.3d at 1281 (holding, in challenge to agency action, that injunctive relief prior to a ruling on the merits is an "extraordinary remedy" and therefore *all four* factors must be met).

The Stay Order, if allowed to stand, would radically change the law, allowing district courts to enjoin agency regulations (and other agency actions) without any consideration of the impacts to the public or of whether plaintiffs are likely to succeed on the merits. The district court abused its discretion in issuing the Stay Order, and this Court must vacate this flawed decision.[12]

[12] There is no need for this Court to order a remand for the district court to analyze the four factors, as contemplated by Judge Matheson. *See* June 4 Order at 7 (Matheson, J., concurring in part and dissenting in part). The district court has already analyzed these factors, and concluded they were not met. *Wyoming*, 2017 WL 161428, at *12. In particular, the district court concluded that "on the merits" "Petitioners have not shown a clear and unequivocal right to relief." *Id.* at *9, *12. Petitioners cannot prevail in their motion for preliminary relief without demonstrating a likelihood of success on the merits, *see Diné CARE*, 839 F.3d at 1281, and nothing relevant to the assessment of the legal validity of the Waste Prevention Rule has changed since the district court's prior order denying preliminary relief.

II. The District Court Erred by Granting "Relief Pending Review" and then Effectively Ending that Review.

The district court further erred by enjoining key provisions of the Waste Prevention Rule pursuant to its authority to grant "[r]elief pending review," 5 U.S.C. § 705, while simultaneously effectively ending that review. The district court stated that it was enjoining the Rule until BLM completes a separate rulemaking to reconsider the Rule, claiming that "[t]here is simply nothing to be gained by litigating the merits of a rule for which a substantive revision has been proposed and is expected to be completed within a period of months." Stay Order at 10. The district court then stayed the litigation "pending finalization or withdrawal of the proposed Revision Rule." *Id*. at 11. In doing so, the district court exceeded its authority under § 705 by granting relief, *not* pending judicial review, but instead pending completion of a separate agency action.

Under the plain language of § 705, a "reviewing court" is authorized to grant relief only "pending conclusion of the review proceedings." The legislative history of § 705 makes clear that the provision was intended to "provide[] intermediate judicial relief . . . in order to make *judicial* review effective," and to "afford parties an adequate *judicial* remedy." S. Rep. No. 79-752 at 27, *reprinted in* GPO, Administrative Procedure Act: Legislative History, 1944–46, at 213 (1946) (emphasis added); *see also* AG Manual at 107 (explaining that the language "'pending conclusion of the review proceedings' . . . is conclusive that the stay

power conferred by the subsection is only ancillary to review proceedings—proceedings in which the court is reviewing final agency action within the meaning of [the APA]"). This statutory purpose aligns with 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 Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

In interpreting § 705 in the context of agency-imposed stays, courts have held that a stay of agency action "pending review" is improper if at the same time judicial review is "blocked" though "a stay in the . . . litigation." *Becerra v. U.S. Dep't of the Interior*, 276 F. Supp. 3d 953, 964 (N.D. Cal. 2017) (finding that Secretary Zinke's attempt to stay a different regulation "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"); *see also Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 33 (D.D.C. 2012) (vacating EPA notice under § 705 where the "purpose and effect . . . plainly [was] to stay the rules pending reconsideration, not litigation"). As Judge Wilkins of the D.C. Circuit recently explained, a court's ability to "stay a rule . . . derives from the Court's inherent equitable power to 'preserv[e] rights' and 'to save the public interest from injury or destruction while an appeal is being heard.'" Order at 3, *West Virginia v. EPA*, Case No. 15-1363 (D.C. Cir. June 26, 2018), ECF No. 1737735 (Wilkins, J. concurring) (alteration in original) (quoting *Scripps-Howard*, 316 U.S. at 15).

Section 705 "codifies this in the rulemaking context by enabling courts . . . 'to postpone the effective date of an agency action or to preserve status or rights *pending conclusion of the review proceedings*' . . . . Thus, the Court's equitable power to maintain the status quo is inextricably tied to the Court's authority to resolve disputes." *Id.* (quoting 5 U.S.C. § 705 and citing *Nken*, 556 U.S. at 421).

Here, the district court's stay is untethered to its merits review. After granting a stay under § 705's "pending judicial review" authority, the district court stayed the litigation over the Rule "pending finalization or withdrawal of the proposed Revision Rule," Stay Order at 11, which is a separate agency rulemaking that may result in a new final regulation. The district court exceeded its authority under § 705 by granting relief not to preserve the possibility of an adequate remedy through judicial review, but to allow an agency to undertake a separate rulemaking while effectively ending judicial review of the existing Waste Prevention Rule. The district court's Stay Order controverts both the language and purpose of § 705 of the APA, and is therefore contrary to law and must be vacated.

III. The District Court Erred by Finding This Case Prudentially Unripe and Prudentially Moot While Simultaneously Exercising Jurisdiction to Grant Substantive Relief.

The district court effectively ended its review because it concluded that due to the Proposed Rescission Rule, Petitioners' lawsuit challenging the Waste Prevention Rule is both prudentially unripe and prudentially moot and the court

should therefore "stay its hand." Stay Order at 7–8. Rather than staying its hand, however, the district court granted substantive relief. Indeed, the Stay Order provided Petitioners exactly what their lawsuits seek: relief from obligations to comply with the Waste Prevention Rule. This outcome is contrary to this Court's recent decision in *Zinke*, 871 F.3d at 1145–46, in which this Court held that where a challenge to a regulation is prudentially unripe because the agency proposes to rescind the regulation at issue, the appropriate remedy is to vacate the underlying decision and dismiss the lawsuit. *Id.*

Zinke involved a directly analogous appeal from the same district court judge regarding this administration's efforts to rescind another challenged BLM oil and gas regulation, the Hydraulic Fracturing Rule. *Id.* at 1139–40. In *Zinke*, this Court recognized "the prudential ripeness doctrine contemplates that there will be instances when the exercise of Article III jurisdiction is unwise." *Id.* at 1141. This Court explained that because the agency had proposed to rescind the Hydraulic Fracturing Rule, the "disputed matter that forms the basis for [the court's] jurisdiction" had become "a moving target." *Id.* at 1142. After determining that the case was prudentially unripe, the *Zinke* Court recognized that prudential ripeness concerns required dismissal of the appeal, vacatur of the district court's order, and dismissal of the underlying lawsuit. *Id.* at 1143–46.

Although the district court recognized that this case presents the same scenario as in *Zinke* where the exercise of Article III jurisdiction would be unwise, Stay Order at 7, it failed to reach the result mandated by this Court's decision. Here, as in *Zinke*, the district court concluded that "going forward on the merits at this point remains a waste of judicial resources and disregards prudential ripeness concerns." *Id.* The district court explained that in light of BLM's "publication of the proposed Revision Rule, the court should allow the administrative process to run its course and restrain from prematurely conducting a merits analysis." *Id.* at 8 (citing *Zinke*, 871 F.3d at 1141). It further recognized that the "related doctrine of prudential mootness" was "[a]lso implicated." *Id.* (citing *Fletcher v. United States*, 116 F.3d 1315, 1321 (10th Cir. 1997)).[13]

But instead of dismissing Petitioners' case, as instructed by *Zinke*, the district court granted their request and retained jurisdiction over the case to eliminate obligations to comply with the Waste Prevention Rule. In contrast to the

[13] This Court has previously applied prudential mootness where an agency plans to reconsider the regulation or decision being challenged: "We may decline to grant relief when the 'government . . . has already changed or is in the process of changing its policies.'" *Citizen Ctr. v. Gessler*, 770 F.3d 900, 909 (10th Cir. 2014) (omission in original) (quoting *Bldg. & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1492 (10th Cir. 1993)); *see also Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012) (prudential mootness can apply where a case challenges "a regulation [that] the relevant agency later offers to withdraw on its own").

many cases cited in *Zinke* in which this Court dismissed unripe cases, 871 F.3d at 1145, the district court did not cite a single case to support its position that a court may enjoin a regulation after deciding that it should not exercise its jurisdiction because a case is prudentially unripe or moot.[14] Indeed, the district court's approach is contrary to the separation of powers rationale that underlies the prudential ripeness and mootness doctrines—that respect for Executive Branch authority sometimes counsels in favor of courts declining to exercise their powers. *See id.* at 1141; *Winzler*, 681 F.3d at 1210 (explaining that prudential mootness applies when "a coordinate branch of government steps in to promise [a plaintiff] the relief she seeks" or when an agency "offers to withdraw on its own" a challenged regulation). Here, rather than declining to exercise its powers, the district court granted "extraordinary relief," halting a final regulation in its tracks without any consideration of its legality.[15]

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[14] BLM itself recognized that, under *Zinke*, dismissal is appropriate, and moved to dismiss this case in the district court after it decided to reconsider the Waste Prevention Rule. BLM Mot. to Dismiss at 5 ("Where a court finds that a matter is prudentially unripe or moot, the appropriate course is to dismiss the action.").

[15] During briefing over the Motions for Stay Pending Appeal, BLM did not even attempt to defend the district court's erroneous application of *Zinke*. Instead, BLM merely contended in a footnote that *Zinke* left open the possibility that, even if a case is prudentially unripe, a court could fashion "some narrower form of injunctive relief." BLM Opp'n to Mots. for Stay Pending Appeal at 22 n.7. But that quote is not from *Zinke*. It is from *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1240 (10th Cir. 2017), addressing the appropriate remedy after the court

In light of *Zinke*, the district court's decision to grant an injunction after determining the case is prudentially unripe and prudentially moot is reversible error. *See United States v. Spedalieri*, 910 F.2d 707, 709 & n.2 (10th Cir. 1990) ("A district court must follow the precedent of this circuit."). As discussed above, *see supra* pp. 16–28, this Court should conclude that the district court exceeded its authority under § 705 and vacate the Stay Order. However, if this Court agrees that this matter is prudentially unripe or moot, then the appropriate remedy—consistent with *Zinke*—is to dismiss the appeal, vacate the Order, and order the district court to dismiss the underlying action.[16]

CONCLUSION

Because the Stay Order violates fundamental legal principles and exceeds the authority granted by 5 U.S.C. § 705, this Court must vacate the Order. Alternatively, if this Court concludes that this case is prudentially unripe, it must vacate the Stay Order and remand with instructions to dismiss Petitioners' lawsuits.

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determined that an agency acted arbitrarily and capriciously in violation of the APA. It has no relevance in this case.

[16] Likewise, if this case becomes *constitutionally* moot before this Court can reach a decision, it *must* vacate the Stay Order and remand the case with instructions to dismiss. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40–41 (1950).

STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument because this case involves important issues concerning a court's authority to stay a final agency regulation, and oral argument will assist the Court in its review.

Respectfully submitted this 30th day of July, 2018,

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I hereby certify that on July 30, 2018, I electronically filed the foregoing **APPELLANTS' JOINT OPENING BRIEF** using the court's CM/ECF system which will send notification of such filing to all counsel of record.

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