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 REPLY BRIEF

ORAL ARGUMENT NOT REQUESTED

HECTOR BALDERAS
Attorney General of New Mexico
WILLIAM GRANTHAM
Assistant Attorney General
201 Third St. NW
Suite 300
Albuquerque, NM 87102
Phone: (505) 717-3520
Fax: (505) 827-5826
wgrantham@nmag.gov
Attorneys for the State of New Mexico

XAVIER BECERRA
Attorney General of California
DAVID A. ZONANA
Supervising Deputy Attorney General
MARY S. THARIN
GEORGE TORGUN
Deputy Attorneys General
1515 Clay St., 20th Floor
Oakland, CA 94612-0550
Phone: (510) 879-1002
Fax: (510) 622-2270
Mary.Tharin@doj.ca.gov
George.Torgun@doj.ca.gov
Attorneys for the State of California

ROBIN COOLEY
JOEL MINOR
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
Phone: (303) 623-9466
Fax: (303) 623-8083
rcooley@earthjustice.org
jminor@earthjustice.org
Attorneys for Wyoming Outdoor Council, et al.

Additional Counsel Listed on Signature Page

October 1, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Federal Register

Legislative History

Other Authorities

INTRODUCTION

On September 28, 2018, the Bureau of Land Management ("BLM") promulgated a final rule rescinding the Waste Prevention Rule. Under the law in this Circuit, this case is thus now constitutionally moot. The Court should apply the well-established remedy for this situation: vacate the district court's challenged Order and remand with instructions to dismiss the case. Oral argument is unnecessary to resolve this straightforward issue.

Should the Court reach the merits, it must reverse the district court's legally erroneous Order, which enjoins a federal regulation without considering the four prerequisites for such extraordinary relief. Only one of the four Appellee groups even attempts to defend the district court's decision on the merits, for good reason. There is no legal support for allowing a district court such expansive and standard-less authority to issue nationwide injunctions of federal regulations. Reversal is necessary to ensure the orderly judicial review of administrative regulations in this Circuit.

ARGUMENT

I. BLM's Rescission of the Waste Prevention Rule Renders this Case Moot and Requires Vacatur of the District Court's Order.

This Court lacks Article III jurisdiction because BLM rescinded the Waste Prevention Rule challenged in this case, and there is no longer a live controversy for the Court to decide. The Court should apply the default remedy for moot

appeals by: (1) vacating the district court's Order; and (2) remanding to the district court with instructions to dismiss the underlying cases.

A. This case is constitutionally moot.

"Under Article III of the Constitution, the power of the federal courts extends only to actual, ongoing cases or controversies." *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1211 (10th Cir. 2005) (quotation omitted) ("*Wyoming I*").[1] "The crucial question is whether granting *present* determination of the issues offered will have some effect in the real world." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 (10th Cir. 2010) (quotation omitted, emphasis in original). Because BLM has rescinded the Waste Prevention Rule, resolution of the merits of the Rule will have no effect in the real world.

When an agency replaces a prior regulation, the "adoption of the new rule . . . render[s] the appeal moot." *Wyoming I*, 414 F.3d at 1212; *see also Hayes v. Osage Minerals Council*, 699 F. App'x 799, 803 (10th Cir. 2017) (agency's replacement of challenged environmental analysis with new analysis rendered appeal moot); *Akiachak Native Cmty v. U.S. Dep't of the Interior*, 827 F.3d 100, 113–14 (D.C. Cir. 2016) ("[W]hen an agency has rescinded and replaced a

[1] Questions of constitutional mootness are reviewed de novo. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1122–23 (10th Cir. 2010).

challenged regulation, litigation over the legality of the original regulation becomes moot.").

Wyoming I, a challenge to the Forest Service's 2001 regulation prohibiting road construction in roadless areas ("Roadless Rule"), is directly on point. 414 F.3d at 1210. In that case, states and industry groups obtained a permanent injunction against the Roadless Rule in the District of Wyoming. *Id.* at 1211. Several conservation group intervenors appealed the injunction. *Id.* One day after oral argument in that appeal, the Forest Service—under a new presidential administration—finalized a new regulation replacing the Roadless Rule. *Id.* The Court held that the case was moot because "the portions of the Roadless Rule that were substantively challenged by [petitioners] no longer exist," and "the alleged procedural deficiencies of the Roadless Rule are now irrelevant because the replacement rule was promulgated in a new and separate rulemaking process." *Id.* at 1212.

This case is indistinguishable from *Wyoming I*. On September 28, 2018, while the States of California and New Mexico and the Citizen Groups' ("Appellants") appeal of the district court's preliminary injunction was pending, BLM promulgated a final regulation rescinding the Waste Prevention Rule through a new, separate rulemaking process. 83 Fed. Reg. 49,184 (Sept. 28, 2018) ("Rescission Rule"). The Rescission Rule rescinds, replaces, and revises

provisions of the Waste Prevention Rule, *id.* at 49,184, 49,190, including "remov[ing] almost all of the requirements in the [Waste Prevention] rule that [BLM] previously estimated would pose a compliance burden to operators and generate benefits of gas savings," *id.* at 49,204. BLM explains that the Rescission Rule has "superseded" the Waste Prevention Rule. Answering Br. of Fed. Resp'ts-Appellees 10 (Sept. 12, 2018) ("BLM Br."), Doc. No. 010110051889;[2] *see also* Press Release, BLM, Interior Department Finalizes *New* Waste Prevention Rule (Sept. 18, 2018), https://www.blm.gov/press-release/interior-department-finalizes-new-waste-prevention-rule-0 (emphasis added). The regulation that Petitioners challenged no longer exists and so resolving Petitioners' case will have no effect in the real world. *See Wyoming I*, 414 F.3d at 1211–12.[3] Accordingly, this case is now constitutionally moot.

[2] All appellate pleadings citations are to Case No. 18-8027 unless otherwise noted. 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] Likewise, the arguments raised by several Petitioners that the case was not prudentially moot or prudentially unripe because the district court only raised "concerns" about ripeness and mootness are now irrelevant. *See* Wyo. Br. 20; Industry's Corrected Resp. to Appellants' Joint Opening Br. 14–20 (Sept. 17, 2018), Doc. No. 010110053953 ("Industry Br."); Intervenor-Appellees State of N.D.'s & Tex.'s Joint Resp. Br. 15 (Sept. 12, 2018), Doc. No. 010110051859 ("N.D. Br."). In any event, for the reasons stated in Appellants' opening brief, if the Court concludes that this case is prudentially unripe or prudentially moot, it should likewise vacate the district court's Order and remand the case with

BLM agrees that "[w]hen the final rule is published," as it now is, "this appeal will be constitutionally moot." BLM Br. 10; *see also* State of Wyo. & State of Mont.'s Joint Resp. Br. 19 (Sept. 12, 2018), Doc. No. 010110051783 ("Wyo. Br.") ("It may be that when the replacement rule is promulgated these proceedings will be moot."). BLM likewise agrees that the proper course, "[w]hen the appeal becomes constitutionally moot," is to "remand[] [the case] to the district court with instructions to dismiss." BLM Br. 12 (citing *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 482 (1990)).

Several Petitioner-Appellees, however, argue that their case would not be mooted by the publication of a final rule. They are incorrect.

First, Petitioner-Appellees Western Energy Alliance and Independent Petroleum Association of America (collectively, "Industry Petitioners") contend that although BLM has rescinded the Waste Prevention Rule, Appellants might succeed in a lawsuit challenging the Rescission Rule, potentially causing a court to vacate the Rescission Rule and reinstate the Waste Prevention Rule. Industry Br. 18. But that outcome is "speculative" at this point. *Wyoming I*, 414 F.3d at 1212; *see also Chamber of Commerce of the U.S. v. Envtl. Prot. Agency*, 642 F.3d 192, 208 (D.C. Cir. 2011) (rejecting argument against mootness that industry was under

---

instructions to dismiss. Appellants' Joint Opening Br. 28–32 (July 30, 2018), Doc. No. 010110030065 ("Open. Br.").

a "continuing threat of injury" because "if the federal standards are invalidated in a pending court case, the [prior] standards could be reimposed," and noting that "at this point the possibility that they may be invalidated is nothing more than speculation"). Industry cites to this Court's decision in *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012), in which this Court recognized that the risk of leaving a plaintiff without a remedy if circumstances change may counsel against finding a case moot. Industry Br. 17. But that concern is remedied by dismissing this case without prejudice, as this Court did in *Wyoming I*, 414 F.3d at 1214, so that Petitioners may re-file their claims if the Waste Prevention Rule comes back into effect.[4]

Second, Industry Petitioners incorrectly rely upon the "capable of repetition but evading review" exception to the mootness doctrine, Industry Br. 17–18, which applies only in "exceptional situations . . . when: (1) the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration, *and* (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again," *Chihuahuan Grasslands All. v. Kempthorne*, 545 F.3d

[4] With respect to the Roadless Rule, a district court eventually set aside the Forest Service's revised rule and reinstated the Roadless Rule. *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 919 (N.D. Cal. 2006). The *Wyoming I* state and industry petitioners then renewed their challenge to the original Roadless Rule in the district court. *See Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1226 (10th Cir. 2011) ("*Wyoming II*"). As this Court foresaw, petitioners thus had the opportunity to challenge the rule when it was reinstated.

884, 893–94 (10th Cir. 2008) (quotations and alterations omitted, emphasis in original). An action must meet both standards to fall under the exception. *See id.* at 893. The Waste Prevention Rule, by its terms a permanent rule, does not meet the first prong. As with the Roadless Rule, if the Waste Prevention Rule "were to reappear in the future, there would be ample opportunity to challenge the rule before it ceased to exist." *Wyoming I*, 414 F.3d at 1212.

Third, Petitioner-Intervenor-Appellees North Dakota and Texas (collectively, "North Dakota") argue that a live controversy exists because BLM continues to regulate communitized areas in the Rescission Rule. *See* N.D. Br. 9, 11, 15–17. But North Dakota's quibble is now with the regulatory regime in the Rescission Rule, not that in the rescinded Waste Prevention Rule. The Rescission Rule applies a very different regulatory regime to communitized lands than the Waste Prevention Rule did. It "remove[s] almost all of the requirements in the [Waste Prevention] rule that . . . would pose a compliance burden to operators and generate benefits of gas savings" and "replaces the [Waste Prevention] rule's requirements with requirements largely similar to those that were in" BLM's prior regulatory regime, Notice To Lessees and Operators 4A ("NTL-4A"). 83 Fed. Reg. at 49,204.

To the extent North Dakota wants to challenge the Rescission Rule's control of communitized areas as beyond BLM's authority, it must do so in a new case

based upon a new administrative record—a fact North Dakota seems to concede. *See* N.D. Br. 6 (recognizing that North Dakota and Texas would have to challenge the Rescission Rule "separately in court"). As BLM explains, "[i]f the [parties] take issue with any element of the Revision Rule, they may challenge it in a new proceeding, which will present a different factual and procedural framework." BLM Br. 12 (citing *Or. Nat. Res. Council v. Grossarth*, 979 F.2d 1377, 1379 (9th Cir. 1992)).[5] North Dakota's newfound "abstract disagreement[]" over BLM's longstanding administrative policy of regulating communitized areas does not save North Dakota's challenge to the Waste Prevention Rule from mootness. *See Utah v. U.S. Dep't of the Interior*, 535 F.3d 1184, 1191–92 (10th Cir. 2008) (explaining

[5] Indeed, North Dakota did not challenge BLM's decades-long regulation of communitized areas under the Mineral Leasing Act, which specifically grants BLM authority over communitized areas. 30 U.S.C. § 226(m). Nor did North Dakota challenge NTL-4A—replaced by the Waste Prevention Rule and now largely restored by the Rescission Rule—which applied to communitized areas. NTL-4A at § I, 44 Fed. Reg. 76,600, 76,600 (Dec. 27, 1979) ("Oil production subject to royalty shall include that which (1) is produced and sold . . . for the benefit of a lease under the terms of an approved communitization . . . agreement."); *see also Plains Expl. & Prod. Co.*, 178 IBLA 327, 329, 340–41 & n.17 (2010) (explaining that NTL-4A governs communitized tracts that include private minerals). Rather, North Dakota challenged the Waste Prevention Rule as "unlawfully expand[ing] BLM's regulatory authority over non-federal property." N.D. Br. 2. In particular, North Dakota objected to the Waste Prevention Rule adopting different natural gas capture targets on operators in North Dakota than North Dakota's state regulation required. Joint Opening Br. of the States of N.D. & Tex. 19–20 (Oct. 2, 2017), ECF No. 143. The Rescission Rule, by contrast, "defer[s] to State or tribal regulations" for gas capture targets. 83 Fed. Reg. at 49,193, 49,202.

that the ripeness doctrine is intended to prevent courts from "becoming entwined in abstract disagreements over administrative policies").

B. This Court should apply the ordinary remedy by vacating the District Court's Order and remanding for dismissal.

It is "[t]he established practice of [appellate courts] in dealing with a civil case from a court in the federal system which has become moot while on [appeal] to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *Rio Grande Silvery Minnow*, 601 F.3d at 1129 ("[W]hen a case becomes moot on appeal, the ordinary course is to vacate the judgment below and remand with directions to dismiss.") (quoting *Kan. Judicial Review v. Stout*, 562 F.3d 1240, 1248 (10th Cir. 2009)); *Wyoming v. U.S. Dep't of the Interior*, 587 F.3d 1245, 1254 (10th Cir. 2009) ("When a case becomes moot while on appeal, our general practice is to vacate the district court judgment and remand with instructions to dismiss the case for lack of jurisdiction."); *McClendon v. City of Albuquerque*, 100 F.3d 863, 868 (10th Cir. 1996) (same); *see also* BLM Br. 12 (recognizing that if "the appeal becomes constitutionally moot, the case should be remanded to the district court with instructions to dismiss").

As Appellants explained in their Opening Brief, Open. Br. 29–31, in *Wyoming v. Zinke*, this Court held that a challenge to a different BLM regulation was *prudentially* unripe because BLM had proposed rescinding the regulation, and

the appropriate remedy was to vacate the district court order and remand for dismissal of the case, 871 F.3d 1133, 1145–46 (10th Cir. 2017) ("*Zinke*"). Here, where the case is *constitutionally* moot, the argument for vacatur and dismissal is even stronger.

In *Zinke*, the Court recognized that vacatur was appropriate to "prevent [the unreviewed order] from spawning any legal consequences." *Id.* at 1145 (quoting *Munsingwear*, 340 U.S. at 41); *see also U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) ("A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment."). Here, fulfilling that purpose has particular force because the district court's Order would set a dangerous precedent—radically expanding the federal judiciary's authority to enjoin federal regulations without applying the four-factor preliminary injunction test—without ever receiving appellate review. *Infra* pp. 12–19. It would be inequitable to prevent Appellants from obtaining appellate review of that incorrect decision because circumstances outside their control rendered their appeal moot.[6]

[6] It was not the actions of Appellants, but rather "it was the actions of Secretary Zinke and the BLM that rendered these appeals [moot]; namely, the issuance of Secretarial Order No. 3349" and the Rescission Rule. *Zinke*, 871 F.3d at 1145. At every stage, Appellants have sought quick review of the district court's erroneous decision. *Contra* BLM Br. 11. They filed their appeal within two days of the district court issuing the Order, *e.g.*, State Resp'ts' Notice of Appeal (Apr. 6, 2018), ECF No. 218; after first moving in the district court, they moved this Court

In *Zinke*, this Court also found that "dismissing the underlying action is appropriate . . . given that there would be nothing for the district court to do upon remand" because an agency has rescinded the regulation at issue. *Zinke*, 871 F.3d at 1146 (citing *Utah*, 535 F.3d at 1186, 1192; *Park Lake Res. Ltd. Liab. Co. v. U.S. Dep't of Agric.*, 197 F.3d 448, 454 (10th Cir. 1999)). Just as in *Zinke*, ordering the district court to dismiss the underlying suit on remand is appropriate here because BLM has rescinded the Waste Prevention Rule, and there is no regulation left for Petitioners to challenge.

Industry Petitioners argue that the Court should vacate the Waste Prevention Rule, not the district court Order. Industry Br. 18–20. This is not the law. *See Munsingwear*, 340 U.S. at 39 (explaining that default rule is to "vacate the *judgment* below)" (emphasis added). Indeed, Industry Petitioners do not cite a single case in which a court has taken the extraordinary step of vacating an agency regulation without consideration of its merits because the case challenging it became moot. *See Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 135

---

for a stay pending appeal, *e.g.*, Citizen Groups' Mot. for Stay Pending Appeal (Apr. 20, 2018), Doc. No. 01019979456; they negotiated a prompt briefing schedule, Joint Proposed Briefing Schedule (June 19, 2018), Doc. No. 010110009017; and they opposed BLM's motion to further delay briefing, *e.g.* State Appellants' Opp'n to Mot. for a 30-Day Extension of Time to File Resp. Br. (Aug. 22, 2018), Doc. No. 010110041399. In addition, although "this case was mooted by" BLM, "the agency is not 'the party seeking relief from the judgment below.'" *Wyoming I*, 414 F.3d at 1213 (citing *U.S. Bancorp Mortg. Co.*, 513 U.S. at 24).

(D.D.C. 2010) ("[T]his Court is not persuaded that it has the authority to order vacatur of the 2008 Critical Habitat Designation without an independent determination that the [agency's] action was not in accordance with the law."). Indeed, there would be nothing for the court to vacate here as BLM has rescinded and replaced the Waste Prevention Rule.

Industry Petitioners cite inapposite cases involving agency *adjudicative* orders—where the agency decision is equivalent to an appealed district court decision and therefore subject to reversal—*not* agency regulations. *See* Industry Br. 19–20 (citing *A.L. Mechling Barge Lines, Inc. v. United States*, 36 U.S. 324, 329–31 (1961) and *Bd. of Governors of Fed. Reserve Sys. v. Sec. Bancorp & Sec. Nat'l Bank*, 454 U.S. 1118, 1118 (1981), which both addressed "administrative orders"). The vacatur question presented here is the fate of the district court's Order, not the Waste Prevention Rule, which BLM has now rescinded. This Court should follow its ordinary practice and vacate the Order, and remand the case with instructions to dismiss the petitions for review.

II. If This Court Reaches the Merits of the Appeal, It Should Vacate the District Court's Illegal Stay Order.

A. The District Court erred by enjoining the Waste Prevention Rule without considering the four requisite factors or allowing for judicial review.

The district court committed legal error by enjoining a nationwide regulation without finding that the prerequisites for such extraordinary relief had been met,

and by simultaneously ending judicial review of the challenged rule. Open. Br. 16–28. Most of the Appellees in this action, including BLM, do not even attempt to defend the district court's Order. *See, e.g.*, BLM Br. 13 ("Typically, before a court formally enjoins an agency action, it must consider [the four preliminary injunction factors]"); Industry Br. 11–12 ("Because Industry Appellees did not champion the legal theory upon which the Stay Order is premised, however, and maintain their requested relief was and is appropriate, … this brief only addresses the … argument that the District Court should have dismissed this case."); N.D. Br. 8 ("North Dakota and Texas take no position on the Wyoming District Court's stay of the phase-in provisions of the Venting and Flaring Rule."). Only the joint brief from Petitioner-Appellees Wyoming and Montana (collectively "Wyoming") respond to Appellants' arguments, advocating for an expansive, standard-less interpretation of a district court's authority to issue a nationwide injunction of a federal rule. Wyo. Br. 12–18. Wyoming's arguments have no legal basis and must be rejected. If left in place, the Order creates a dangerous precedent that district court judges have unfettered discretion to preliminarily enjoin agency regulations nationwide.

Wyoming first admits that "[a] stay of agency action under Section 705 is a provisional remedy in the nature of a preliminary injunction," and that "Circuits generally agree that the four-factor analysis is the proper test." *Id.* at 12, 16.

Contrary to this admission and this Court's earlier conclusion that the "district court's 'stay' effectively enjoins enforcement," *Wyoming v. U.S. Dep't of the Interior*, No. 18-8027, 2018 WL 2727031, at *1 (10th Cir. June 4, 2018), however, Wyoming then claims that "a Section 705 stay is not a preliminary injunction" but rather an "ordinary" remedy which courts are free to grant without considering these factors, Wyo. Br. 12–14. Wyoming cites no authority for this proposition and does not even attempt to confront the uniform and overwhelming body of case law holding otherwise, including this Court's binding precedent in *Associated Securities Corporation v. Securities and Exchange Commission*, 283 F.2d 773, 774–75 (10th Cir. 1960). *See* Open. Br. 17–18.

Instead, Wyoming relies almost exclusively on a fact-specific case from the Western District of New York, which does not support the district court's Order. Wyo. Br. 14–17 (citing *Rochester-Genesee Reg'l Transp. Auth. v. Brigid Hynes-Cherin*, 506 F. Supp. 2d 207 (W.D.N.Y. 2007)). In *Rochester-Genesee*, the district court did consider the four factors, and conceded that the "standards for granting … relief [under § 705] are onerous." 506 F. Supp. 2d at 210. However, applying a "sliding scale," the court determined that the irreparable injury to third party schoolchildren justified a short stay. *Id*. at 214 (noting that "[t]he Second Circuit has "treated [the] criteria [for issuing a stay] somewhat like a sliding scale"). The Tenth Circuit has since eliminated the "sliding scale" approach following the

Supreme Court's decision in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). *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."); *see also N.M. Dep't of Game & Fish v. U. S. Dep't of the Interior*, 854 F.3d 1236, 1246 (10th Cir. 2017) ("Although we have applied this modified approach in the past, our recent decisions admonish that it is not available after the Supreme Court's ruling in *Winter*."). *Rochester-Genesee*, even if it were otherwise persuasive, which it is not, is simply not good law in the Tenth Circuit.[7]

Wyoming is therefore wrong to assert that the District of Colorado was "incorrect" when that court concluded earlier this year (a) that the four-factor analysis was the proper test when considering a stay under Section 705, and (b) that the sliding-scale approach was no longer permissible in the Tenth Circuit. *See* Wyo. Br. 16–17 (citing *Sierra Club v. Fed. Highway Admin.*, No. 17-cv-1661-WJM-MEH, 2018 WL 1610304 (D. Colo. Apr. 3, 2018)). Moreover, Wyoming's suggestion that a court "frankly has inherent equitable authority" to ignore the

[7] In addition to being founded upon use of a "sliding scale" test impermissible in this Circuit, *Rochester-Genesee* involved very different equities. There, the court granted a temporary stay to avoid harms to innocent third-party school children to allow time for the parties to come into compliance with the challenged order. 506 F. Supp. 2d at 214. Here, by contrast, the Petitioners sought a stay to avoid alleged harms to themselves in order to *avoid* coming into compliance with the challenged regulation.

four-factor analysis when taking action "to preserve rights pending review" has no basis in law. *Id.* at 18. While a district court has discretion to issue injunctive relief, such discretion is not unlimited. *See, e.g.*, *In re Grand Jury Proceedings Empanelled May 1988*, 894 F.2d 881, 887 (7th Cir. 1989) ("A modern federal equity judge does not have the limitless discretion of a medieval Lord Chancellor to grant or withhold a remedy.").

Wyoming also is wrong to assert that district courts "are free to apply a sliding scale or no scale at all when considering whether to grant a stay under Section 705." Wyo. Br. 14. The Supreme Court has mandated that a party seeking preliminary injunctive relief must establish the likelihood of four separate factors. *Winter*, 555 U.S. at 20, 33 (concluding that district court "abused its discretion" by failing to properly consider four factors); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1209 (10th Cir. 2009) ("Before we will grant such relief, we require a movant seeking such an injunction to make a heightened showing of the four factors."). Consequently, the district court's Order is contrary to law and must be overturned.

Nor does anything in Section 705's legislative history indicate that Congress intended to relax the requirements for the issuance of injunctive relief. *See* Wyo. Br. 13–14. Wyoming references several "early bills" that were never adopted by Congress and therefore "do[] not give a clear indication of Congressional intent."

Settles v. Golden Rule Ins. Co., 927 F.2d 505, 510 (10th Cir. 1991). The language quoted by Wyoming from House Report No. 1980 provides no support for its contention that courts have unfettered discretion to ignore the four prerequisites. Wyo. Br. 14. In fact, an overwhelming body of legal authority says otherwise. *See* Open. Br. 18.

The Supreme Court has explained that section 705 "was primarily intended to reflect existing law," which recognized the courts' traditional power to afford injunctive relief in challenges to agency action, "not to fashion new rules of intervention for District Courts." *Sampson v. Murray*, 415 U.S. 61, 68 n.15 (1974); *see also Peoples Gas, Light & Coke Co. v. U.S. Postal Serv.*, 658 F.2d 1182, 1191 (7th Cir. 1981) (finding that the Administrative Procedure Act ("APA") "has been widely interpreted as being merely declaratory of the common law of reviewability" and citing cases); S. Rep. No. 79-752, at 230 (1945) *reprinted in* U.S. Gov't Printing Office, Administrative Procedure Act: Legislative History, 1944–46, at 230 (1946) (attached in Addendum to Appellants' Opening Brief) (clarifying that the "second sentence" of section 705, governing judicial process, was only intended to "change existing law" with regard to a license renewal situation not relevant here). Even more recently, the Supreme Court has explained that the "four-factor test is the traditional one" for stays pending judicial review. *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quotation omitted).

Furthermore, the Attorney General's Manual on the APA ("Manual") provides no support for Wyoming's position that courts are free to ignore the four-factor test when issuing stays of agency action. *See* Wyo. Br. 17–18. To the contrary, the Manual explains that 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) (attached in Addendum to Appellants' Opening Brief). With regard to section 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.

Finally, none of the Appellees, including Wyoming, rebut the argument that the district court committed legal error by issuing its Order enjoining the Waste Prevention Rule "pending review" while simultaneously preventing judicial review of the Rule. *See* Open. Br. 26–28. Specifically, Wyoming admits that the district court decided to "stay its hand temporarily while the executive branch completes its revisions to the Waste Prevention Rule," and "[i]t may be that when the

replacement rule is promulgated these proceedings will be moot." Wyo. Br. 19.[8] Yet the plain language of Section 705 only allows a reviewing court to grant relief "pending conclusion of the review proceedings," not pending completion of a separate agency action. 5 U.S.C. § 705.

B. The proper remedy is vacatur of the stay order.

If this Court determines that the district court committed legal error in issuing the stay, the proper remedy is to vacate the Order. *See Winter*, 555 U.S. at 33 (vacating injunction based on lower court's misapplication of legal standard). Contrary to BLM and Industry's assertions, this Court need not remand to the district court "with instructions to consider the [four] factors," BLM Br. 12–15, or to "fully address the merits of Industry Appellees' renewed request for preliminary injunction," Industry Br. 20–22. Because BLM has rescinded the Waste Prevention Rule, Petitioners have no need for preliminary relief. If this Court reaches the merits of this appeal, it should vacate the district court's erroneous Order and remand for further proceedings consistent with the Court's order.

CONCLUSION

This Court should conclude that this case is now moot, vacate the challenged Order, and remand with instructions to dismiss the case. If this Court instead

[8] *See also* BLM Br. 12 (distinguishing Order from "a classic preliminary injunction, which would last until a court issues a final decision," and explaining that here "the court's order was closely tied" to the Rescission Rule).

reaches the merits, it should conclude that the challenged Order is unlawful and vacate the Order.

Respectfully submitted this 1st day of October, 2018,

/s/ Robin Cooley
Robin Cooley, CO Bar # 31168
Joel Minor, CO Bar # 47822
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
Phone: (303) 623-9466
Facsimile: (303) 623-8083
rcooley@earthjustice.org
jminor@earthjustice.org

Attorneys for Intervenor-Respondent-Appellants Natural Resources Defense Council, Sierra Club, The Wilderness Society, and Western Organization of Resource Councils

/s/ William Grantham
HECTOR BALDERAS
Attorney General of New Mexico
WILLIAM GRANTHAM
Assistant Attorney General
201 Third St. NW
Suite 300
Albuquerque, NM 87102
Phone: (505) 717-3520
Fax: (505) 827-5826
wgrantham@nmag.gov

Attorneys for Intervenor-Respondent-Appellant the State of New Mexico

/s/ Mary S. Tharin
XAVIER BECERRA
Attorney General of California
DAVID A. ZONANA
Supervising Deputy Attorney General
MARY S. THARIN
GEORGE TORGUN
Deputy Attorneys General
1515 Clay St., 20th Floor
Oakland, CA 94612-0550
Phone: (510) 879-1002
Fax: (510) 622-2270
Mary.Tharin@doj.ca.gov
George.Torgun@doj.ca.gov

Attorneys for Intervenor-Respondent-Appellant the State of California

Susannah L. Weaver, DC Bar # 1023021
Donahue, Goldberg & Weaver, LLP
1111 14th Street, NW, Suite 510A
Washington, DC 20005
Phone: (202) 569-3818
susannah@donahuegoldberg.com

Peter Zalzal, CO Bar # 42164
Rosalie Winn, CA Bar # 305616
Environmental Defense Fund
2060 Broadway, Suite 300
Boulder, CO 80302
Phone: (303) 447-7214 (Mr. Zalzal)
Phone: (303) 447-7212 (Ms. Winn)
pzalzal@edf.org
rwinn@edf.org

Attorneys for Intervenor-Respondent-Appellant Environmental Defense Fund

Laura King, MT Bar # 13574
Shiloh Hernandez, MT Bar # 9970
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
Phone: (406) 204-4852
king@westernlaw.org
hernandez@westernlaw.org

Erik Schlenker-Goodrich, NM Bar # 03-196
Western Environmental Law Center
208 Paseo del Pueblo Sur, #602
Taos, New Mexico 87571
Phone: (575) 613-4197
eriksg@westernlaw.org

Attorneys for Intervenor-Respondent-Appellants Center for Biological Diversity, Citizens for a Healthy Community, Diné Citizens Against Ruining Our Environment, Earthworks, Montana Environmental Information Center, National Wildlife Federation, San Juan Citizens Alliance, WildEarth Guardians, Wilderness Workshop, and Wyoming Outdoor Council

Darin Schroeder, KY Bar # 93282
Ann Brewster Weeks, MA Bar # 567998
Clean Air Task Force
18 Tremont, Suite 530
Boston, MA 02108
Phone: (617) 624-0234
dschroeder@catf.us
aweeks@catf.us

Attorneys for Intervenor-Respondent-Appellant National Wildlife Federation

Scott Strand, MN Bar # 0147151
Environmental Law & Policy Center
15 South Fifth Street, Suite 500
Minneapolis, MN 55402
Phone: (312) 673-6500
sstrand@elpc.org

Rachel Granneman, IL Bar # 6312936
Environmental Law & Policy Center
35 E. Wacker Drive, Suite 1600
Chicago, IL 60601
Phone: (312) 673-6500
rgranneman@elpc.org

Attorneys for Intervenor-Respondent-Appellant Environmental Law & Policy Center

CERTIFICATE OF COMPLIANCE

I certify with respect to the foregoing that:

(1) This document complies with the type-volume limitation of Fed. R. App. P. Rule 32(a)(7)(A) and (B)(i)(ii), excluding the parts of the document exempted by Fed. R. App. P. 32(f):

[X] this document contains 4842 words, or

[ ] this brief uses a monospaced typeface and contains <state the number of> lines of text.

(2) This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this document has been prepared in a proportionally spaced typeface using Word 2016 in 14 point font size and Times Roman, or

[ ] this document has been prepared in a monospaced typeface using <state name and version of word processing program> with <state number of characters per inch and name of type style>.

/s/ Robin Cooley

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2018 I electronically filed the foregoing **APPELLANTS' JOINT REPLY BRIEF** using the court's CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Robin Cooley

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Sophos Endpoint Advanced, Version 10.8.1.1, September 28, 2018 and according to the program are free of viruses.

/s/ Robin Cooley