Nos. 18-8027 & 18-8029

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATE OF WYOMING, ET AL.,
Petitioners/Appellees,
&
WESTERN ENERGY ALLIANCE, ET AL.,
Petitioner/Appellees,
v.
UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Respondents/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

STATE OF WYOMING AND STATE OF MONTANA'S JOINT RESPONSE BRIEF

ORAL ARGUMENT REQUESTED

James Kaste
Deputy Attorney General
Erik Petersen
Sen. Asst. Atty General
2320 Capitol Ave.
Cheyenne, WY 82002
(307) 777-6946 Phone
307-777-3542 Fax
james.kaste@wyo.gov

Dale Schowengerdt
Solicitor General
Montana Dept. of Justice
215 North Sanders
P.O. Box 201401
Helena, MT 59620
(406) 444-0662 Phone
dales@mt.gov

Brandon L. Jensen
Budd-Falen Law Offices, LLC
300 East 18th Street
P.O. Box 346
Cheyenne, WY 82003
(307) 632-5105 Phone
(307) 637-3891 Fax
brandon@buddfalen.com

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

"To the extent necessary to prevent irreparable injury" the Administrative Procedure Act authorizes courts to "issue all necessary and appropriate process … to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. The imminent revision or replacement of the Waste Prevention Rule will affect the outcome of these proceedings. Did the district court abuse its discretion when, to permit efficient and final review of the Waste Prevention Rule, it stayed this litigation and certain provisions of the Waste Prevention Rule which were not yet effective to prevent irreparable injury to the regulated community and preserve the status quo until the replacement rule is promulgated or that effort abandoned?

INTRODUCTION

The present appeal arises from the district court's exercise of its considerable discretion to issue a stay under the Administrative Procedure Act (APA). 5 U.S.C. § 705. The underlying litigation arose from the Bureau of Land Management's (BLM) promulgation of a rule purporting to reduce the waste of methane from oil and natural gas production activities on federal and Indian land and to regulate air quality by controlling emissions from existing oil and gas sources. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 81 Fed. Reg. 83008 (Nov. 18, 2016) (Waste Prevention Rule). After the 2016 presidential election the BLM reconsidered the rule in light of the new administration's priorities. That process is nearing completion, and the replacement of the Waste Prevention Rule is imminent.[1]

All the original parties to the litigation challenging the Waste Prevention Rule agreed that the proceedings should be stayed until the replacement rule is promulgated. The district court also agreed. To avoid harm from wholesale changes in the governing regulatory regime twice in a matter of months and the loss of unrecoverable capital needlessly invested to meet standards that will likely disappear, the district court also stayed certain provisions of the Waste Prevention Rule until the BLM promulgates the replacement rule. Appellants, intervenor-respondents in the proceedings below, opposed

[1] The replacement rule is currently being reviewed by the Office of Management and Budget and could be published in the Federal Register any day. *See* https://www.reginfo.gov/public/do/eoDetails?rrid=128175

the stay and now ask that the stay be set aside even though the replacement rule is only days away from final promulgation.

The present appeal is fundamentally a request for this Court to interfere with an ongoing agency rulemaking because the Appellants disagree with the economic, social, and political choices of the executive branch. The district court wisely chose to stay its hand until the ongoing rulemaking is completed, at which time it can render a full and final decision on the merits of the Waste Prevention Rule. This Court should affirm that decision.

STATEMENT OF THE CASE

The BLM promulgated the Waste Prevention Rule on November 18, 2016. The States of Wyoming and Montana and two industry groups immediately challenged the rule in the District of Wyoming. (Doc. 1).[2] The States of North Dakota and Texas intervened as Petitioners, while the States of California and New Mexico intervened as Respondents along with about a dozen private environmental groups.[3] (Docs. 17, 27, 62, 104). "On January 16, 2017, the day before the rule became effective, [the district] [c]ourt denied the Petitioners request for preliminary injunctive relief, in part because significant portions of the Rule would not become effective until January 17, 2018 ('phase-in provisions')." (Doc.

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[2] References to pleadings filed in the district court are to documents filed in 16-CV-285 and identified by their ECF document number as "Doc." All district court docket citations will be replaced with references to the Deferred Joint Appendix.

[3] This brief will collectively refer to the Appellant States of California and New Mexico and the Appellant environmental groups as "California."

215 at 2). The district court then set an expedited briefing schedule to ensure that the matter would be decided before these phase-in provisions became effective. But events transpired to thwart this schedule.

First, on February 3, 2017, the United States House of Representatives passed a Congressional Review Act Resolution to disapprove of the Waste Prevention Rule. H.R.J. Res. 36, 115th Cong. (2017-2018). The United States Senate considered, but did not pass, a similar resolution on May 10, 2017. Then on June 15, 2017, the BLM, consistent with the policies of the new administration, postponed the compliance dates for the phase-in provisions under 5 U.S.C. § 705. Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27430 (June 15, 2017). The BLM also announced its intention to promulgate a rule suspending or extending the compliance dates for the phase-in provisions. *Id.* As a result, the BLM requested and received an extension of the briefing deadlines. (Doc. 133). At that time, the district court concluded, "To move forward on the present schedule would be inefficient and a waste of both the judiciary's and the parties' resources in light of the shifting sand surrounding the Rule and certain of its provisions, making it impossible to set a foundation upon which the Court can base its review under the Administrative Procedure Act." (*Id.* at 3).

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

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

On December 8, 2017, the BLM followed through on its intent to promulgate a rule suspending or delaying the majority of the provisions in the Waste Prevention Rule. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58050 (Dec. 8, 2017) (Suspension Rule). This rule postponed the implementation of the compliance requirements for certain provisions of the Waste Prevention Rule for one year. *Id.* As grounds for the suspension, BLM explained that it "has concerns regarding the statutory authority, cost, complexity, feasibility, and other implications of the 2016 final rule, and therefore intends to avoid imposing likely considerable and immediate compliance costs on operators for requirements that may be rescinded or significantly revised in the near future." *Id.* BLM also announced that it intended to replace portions of the Waste Prevention Rule through notice and comment rulemaking. In light of this development, BLM, along with the States of Wyoming and Montana and the industry Petitioners, requested that the district court stay the litigation. Because the ongoing rulemaking process would "materially impact the merits of the [] challenges to the Waste Prevention Rule," (Doc. 215 at 5), the district court stayed the proceedings pending promulgation of a replacement rule or while the Suspension Rule remained in effect. (Doc. 189).

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

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

Because the California court's preliminary injunction abruptly changed the status quo, the States of Wyoming and Montana promptly moved the district court to lift the litigation stay and then to stay the phase-in provisions of the Waste Prevention Rule under 5 U.S.C. § 705 pending promulgation of the Revision Rule. (Doc. No. 195). For their part, the industry Petitioners moved the district court to issue a preliminary injunction enjoining the Waste Prevention Rule until the BLM promulgated the Revision Rule. (Doc. 196). The States of North Dakota and Texas took a different tack and asked the district court to proceed immediately to the merits of the original challenges to the Waste Prevention Rule. (Doc. 194). The BLM agreed that Wyoming and Montana offered the best interim resolution and urged the district court to stay both the litigation and "the Waste Prevention Rule's implementation deadlines to preserve the status and rights of the regulated parties and avoid entanglement with the administrative process." (Doc. 215 at 7). California opposed either a stay or a preliminary injunction.

Faced with a wealth of options, the district court agreed that the stay proposed by Wyoming and Montana and unopposed by the BLM offered the best course for the interim. It noted that 5 U.S.C. § 705 authorizes a court reviewing an agency decision "[o]n such

conditions as may be required and to the extent necessary to prevent irreparable harm ... [to] issue all necessary and appropriate process to ... preserve status or rights pending conclusion of review proceedings." (Doc. 215 at 9). The district court found that, "particularly Industry Petitioners, will be irreparably harmed by full and immediate implementation of the 2016 Waste Prevention Rule, magnified by temporary implementation of significant provisions meant to be phased-in over time that will be eliminated in as few as four months." (Doc. 215 at 9-10). It further found that the BLM anticipates completing the Revision Rule in August 2018 and that this imminent development will likely affect the determination of the merits of the case.

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

(Doc. 215 at 10). Additionally, while the district court explained that the doctrine of prudential mootness was "implicated here," it did not find that the case was prudentially moot. (Doc. 215 at 8).

California immediately filed the present appeals from the district court's stay order. The States of Wyoming and Montana promptly moved to dismiss these appeals for lack of appellate jurisdiction and the industry Appellees filed a similar motion shortly thereafter. *State of Wyoming and State of Montana's Mot. to Dismiss for Lack of Appellate Jurisdiction,* Case Nos. 18-8027 and 18-8029 (April 16, 2018) (Doc. No. 01019976239); *WEA and IPAA's Mot. to Dismiss for Lack of Appellate Jurisdiction*, Case Nos. 18-8027

and 18-8029 (April 19, 2018) (Doc. No. 01019978713). California then filed motions with the district court for a stay pending appeal. (Doc. 222). Shortly thereafter, these parties also filed motions for stay pending appeal in this Court. *Citizen Groups' Mot. for Stay Pending Appeal*, Case No. 18-8027 (April 20, 2018) (Doc. No. 01019979456); *State Appellants' Mot. for Stay Pending Appeal*, Case No. 18-8029 (April 20, 2018) (Doc. No. 01019979472).

The district court ruled on the motion for a stay pending appeal first. (Doc. 234). California argued that the district court erred when it stayed the proceedings and the phase-in provisions of the rule without assessing the four factors which must be shown for preliminary injunctive relief. (*Id.* at 2). The district court disagreed. "While recognizing courts often utilize the four-factor preliminary injunction test in determining whether to grant relief under § 705, particularly where the stay would operate 'in all material respects' as a preliminary injunction" the district court noted "'nothing in the language of the statute itself, or its legislative history, suggests it is limited to those situations where preliminary injunctive relief would be available.'" (*Id.* at 2 (quoting Doc. 215 at 9 n.10)). Contrary to California's cramped view of Section 705, the district court found that, "The plain language of § 705 confers broad discretionary authority upon a reviewing court to preserve the status quo where irreparable injury would otherwise result." (*Id.* at 5). "To accept [California's] argument that § 705 relief is only available in those situations where preliminary injunctive relief is appropriate would render § 705 meaningless." (*Id.*).

The district court also noted that, "Applying the preliminary injunction factors, particularly the likelihood of success prong, to the existing Waste Prevention Rule is

problematic—the Court would be forced to assess the legal merits of a Rule presently being revised because of concerns about its validity expressed by the very agency that drafted the Rule." (*Id.* at 3). In this regard the district court aptly noted that it "cannot meaningfully assess the merits of a 'moving target.'" (*Id.* at 7 (quoting Doc. 189) (citing *Wyoming v. Zinke*, 871 F.3d 1133, 1142 (10th Cir. 2017))).

With the proper scope of judicial discretion in mind, the district court further concluded that, "The circumstances of these cases warrant a stay pursuant to § 705." (*Id.* at 5). It found that the concrete harm to the regulated community absent a stay of the phase-in provisions outweighed the generalized harm alleged by [California], and that they were no more harmed by the "stay than they have been under the status quo for the last several decades." (*Id.* at 5-7). The district court then concluded that the stay was narrowly tailored to prevent irreparable injury under the circumstances, because the stay was limited and applied only to the phase-in provisions, "which, in reality, never became effective." (*Id.* at 5). Thus, the stay avoided "rendering judicial review of Petitioners' challenges an 'idle ceremony.'" (*Id.* (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 10 (1942)).

Subsequently, on June 4, 2018, this Court denied the motions to dismiss and denied the motions for stay pending review without significant discussion. *Order,* Case Nos. 18-8027 and 18-8029 (June 4, 2018) (Doc. No. 010110002174). One member of the panel that considered those motions would have ordered "a limited remand for the district court to explicitly analyze the traditional four factors as to whether the Rule should be stayed before this court decides the motions for stay pending appeal." (*Id.* at 7).

SUMMARY OF THE ARGUMENT

Using its broad discretionary power under Section 705, the district court charted a sensible path for resolving the chaos and uncertainty resulting from the BLM's decision to revise the Waste Prevention Rule. Section 705 empowers reviewing courts to balance the equities of unique circumstances to prevent irreparable injury and maintain the status quo. When exercising this power, courts are not constrained to provide necessary equitable relief in only those circumstances when a preliminary injunction would be warranted. The plain text of Section 705 does not so provide, and were it so, the statute would have no independent significance. Thus, reviewing courts may balance the competing injuries and public interest in the manner best calculated to provide equitable interim relief, and they are not bound to strictly apply the standards governing preliminary injunctions.

The district court's decision to stay not just the litigation, but also the phase-in provisions of the rule, was necessary to avoid irreparable harm and consistent with the authority granted by Section 705.

Finally, because the district court did not conclude that this case was prudentially unripe or prudentially moot, it had no duty to dismiss the case.

Accordingly, the order of the district court staying these proceedings and staying the phase-in provisions of the Waste Prevention Rule should be affirmed.

STANDARD OF REVIEW

This Court reviews a district court's decision to grant or deny a motion to stay proceedings for abuse of discretion. *See Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1080 (10th Cir. 2009). This Court has characterized an abuse of discretion as "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009) (citation and quotation omitted).

ARGUMENT

I. The district court enjoys considerable discretion to issue a stay under Section 705 and is not bound by the traditional four-factor analysis governing preliminary injunctions.

Rather than argue with the obvious wisdom of the district court's course of action, California asserts that the district court employed the wrong standard in granting the stay. California contends that the district court erred when it failed to apply the traditional four factors courts review when deciding whether to grant preliminary injunctions. This contention is incorrect.

It is important to recall that the district court rejected the request for a preliminary injunction and instead granted a stay under Section 705. Under Section 705, a court reviewing an agency decision "[o]n such conditions as may be required and to the extent necessary to prevent irreparable harm ... may issue all necessary and appropriate process to ... preserve status or rights pending conclusion of review proceedings." A stay of agency action under Section 705 is a provisional remedy in the nature of a preliminary injunction. *See Winkler v. Andrus*, 614 F.2d 707, 709 (10th Cir. 1980). But a Section 705 stay is not a

preliminary injunction. While courts typically recite that the availability of a Section 705 stay turns on the same four factors considered in a traditional analysis under Rule 65(a) of the Federal Rules of Civil Procedure, nothing in the language of Section 705 or its legislative history suggests that "it is limited to those situations where preliminary injunctive relief would be available." (Doc. 215 at 9, n.10 (citing *California v. BLM*, 277 F. Supp. 3d 1106, 1124-25 (N.D. Cal. 2017))). The statute does not say that, and the statute would serve little purpose, if it merely restated the existing authority of the courts to issue preliminary injunctions.

In fact, two of the bills Congress considered when it was developing the Administrative Procedure Act authorized preliminary injunctive relief among an array of actions. *See* Administrative Procedure, Hearings on H.R. 184, H.R. 339, H.R. 1117, H.R. 1203, H.R. 1206, and H.R. 2602 Before the House Judiciary Comm., 79th Cong. at 146 and 179 (1945).[4] Those bills authorized the courts to "issue all necessary and appropriate writs, restraining or stay orders, or preliminary or temporary injunctions, mandatory or otherwise, required in the judgment of such court to preserve the status or rights of the parties pending full review ... ." *Id.* These early bills sought to arm the courts with every available method to prevent injustice pending review. The final bill more elegantly conveys this same intention in the words "all necessary and appropriate process." 5 U.S.C. § 705. Congress was obviously familiar with preliminary injunctions in 1946 and had it desired

[4] The legislative history of the Administrative Procedure Act is available online from the United States Department of Justice at https://www.justice.gov/jmd/ls/administrative-procedure-act-pl-79-404.

to limit Section 705 to provide only traditional preliminary injunctive relief, it could have easily said so. Instead, it gave the courts the broadest possible discretion to prevent irreparable injury through "all necessary and appropriate process."

Congress did not limit Section 705 because, while a "preliminary injunction is an extraordinary remedy never awarded as of right," *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 24 (2008), a stay under Section 705 was not intended to be extraordinary. The House Report on the Administrative Procedure Act explained Section 705 as follows:

> This section permits either agencies or courts, if the proper showing be made, to maintain the status quo. The section is in effect a statutory extension of rights pending judicial review, although the reviewing court must order the extension; or, to put the situation another way, statutes authorizing agency action **are to be construed to extend rights pending judicial review** and the exclusiveness of the administrative remedy is diminished so far as this section operates. While the section would not permit a court to grant an initial license, **it provides intermediate judicial relief for every other situation in order to make judicial review effective**. The authority granted is equitable and should be used by both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy.

H.R. Rep. No. 1980, at 277 (1946) (emphasis added). Thus, Congress intended the intermediate relief provided by Section 705 to be an ordinary, rather than an extraordinary, remedy. And while courts generally are not free to relax one of the prongs for traditional preliminary relief, *Dine Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016), they are free to apply a sliding scale or no scale at all when considering whether to grant a stay under Section 705.

In fact, the pragmatic approach employed by the district court in this case is exactly what occurred in *Rochester-Genessee Regional Transportation Authority v. Hynes-Cherin*,

506 F. Supp. 2d 207 (W.D.N.Y. 2007). There, the Federal Transit Administration (FTA) issued a cease and desist order to the plaintiff regional transportation authority barring it from providing school bus services on certain routes in the City of Rochester shortly before the school year began. 506 F. Supp. 2d at 209. The plaintiff appealed the administrative decision and asked for a stay under Section 705. *Id.* While not convinced that the plaintiff was entitled to a permanent stay during the appeal, the court found a brief stay was warranted "to avoid the potential chaos and disruption in the transportation of students that could ensue should the FTA's decision be given immediate effect." *Id.* The court found "the most important concern ... is the effective and orderly transportation of students to and from school. Thousands of students utilize bus service, and they and their families need to know *immediately* all of the details of the bus service." *Id.* (emphasis in original).

In granting the stay, the court explicitly found that, but for the harm to students and families, plaintiff would not be entitled to a stay. *Id.* at 215. In fact, the court found that the plaintiff was not likely to prevail on the merits such that a permanent stay would be warranted. *Id.* at 213. Moreover, the court concluded the plaintiff had not demonstrated irreparable harm to itself in the absence of a stay. *Id.* Even so, the court found that the public interest compelled a temporary stay. *Id.* The Court found "that these circumstances present precisely the kind of 'irreparable injury' that [Section] 705 of the APA was intended to give courts the power to prevent." *Id.* at 214.

The current morass similarly presented the district court precisely the kind of irreparable injury Section 705 was designed to prevent. Regardless of the relative merits of the parties' arguments on the likelihood of success on the merits of their challenge to the

Waste Prevention Rule, the fact remains that the rule will be replaced in the very near future. Switching back and forth between competing regulatory regimes for a period of months presents exactly the kind of chaos and disruption that a court can and should act to prevent. Under these circumstances, strict adherence to the outcome that might result from application of the traditional four-factor analysis is less important than avoiding the significant harm and uncertainty that will be borne by all parties by immediate and dramatic flip-flops in the regulatory regime. The public interest in certainty and stability simply outweighs all other considerations for the brief period before the Waste Prevention Rule is replaced.

California argues that the Tenth Circuit, and frankly all circuits, require reviewing courts to apply the four-factor analysis when considering a stay under Section 705. (Cal. Br. at 17-18). It is true that the Circuits generally agree that the four-factor analysis is the proper test. *See id.* But as *Rochester-Genessee* shows, how those factors are balanced in any given set of circumstances can vary to meet the interests of justice. To the extent that the District of Colorado court recently concluded otherwise, it was incorrect. *See Sierra Club v. FHA*, No. 17-cv-1661-WJM-MEH, 2018 WL 1610304, at *18 (D. Colo. April 3, 2018).

In *Sierra Club*, the District of Colorado court concluded, without analysis, that because the Tenth Circuit had recently abrogated the sliding scale standard for preliminary injunctions, the sliding scale standard was no longer permissible when considering stays. *Id.* (citing *Dine*, 839 F.3d at 1282). Of course, *Dine* did not address the proper application of the standard when considering a stay. And there is no reason to conclude that the holding

of *Dine* would apply equally in a different setting. In fact, doing so would run counter to the plain language of Section 705 which does not require a party to show a likelihood of success on the merits at all. Instead the governing statute broadly empowers courts to "issue all necessary and appropriate process … to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

California further argues that Section 705 was adopted against the backdrop of *Scripps-Howard*, which indicated that Section 705 was intended to reflect existing law "and not to fashion new rules of intervention for District Courts." (Cal. Br. at 22 (citing *Sampson v. Murray*, 415 U.S. 61, 68 n.15 (1974))). But as the district court recognized, "The *Scripps-Howard* Court did not address the criteria which should govern the exercise of judicial discretion." (Doc. 234 at 4). Instead, like the court in *Rochester-Genessee*, the *Scripps-Howard* court stated that the propriety of issuing a stay of administrative action "is dependent upon the circumstances of the particular case." 316 U.S. at 10-11.

The Attorney General's Manual on the APA similarly emphasizes the reviewing court's broad and flexible power to issue stays where equity requires:

> **This power to stay agency action is an equitable power, to be exercised "upon such conditions as may be required."** Section 10(d) does not require the issuance of stay orders automatically upon a showing of irreparable damage. As in the past, reviewing courts may "balance the equities" in determining whether to postpone the effective date of agency action. Thus, "In determining whether agency action should be postponed, the court should take into account that persons other than parties may be adversely affected by such postponement and in such cases the party seeking postponement may be required to furnish security to protect such other persons from loss resulting from postponement." H.R. Rep. p. 43 (Sen. Doc. p. 277). **More broadly, it is clear that a reviewing court in exercising this power may do so under such conditions as the equities of the situation may require**.

U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 106 (1946) (emphasis added). The Manual goes on to state that, "Section [705] prescribes no procedure for the exercise of the power which it confers upon reviewing courts to postpone the effective date of agency action." *Id.* at 107. Put simply, the act does not dictate how courts should exercise their equitable discretion.

Reviewing courts can, and in many cases should, consider a request for a stay by resorting to the traditional four-factor preliminary injunction analysis, but they do not have to do so in every circumstance. And even when they apply those factors to a novel set of circumstances, they are authorized by Section 705 to balance the competing injuries and the public interest in the manner best suited to promote the interests of justice. Accordingly, because the district court is empowered by Section 705, and frankly has the same inherent equitable authority, to take all necessary action to preserve rights pending review, it did not abuse its discretion by focusing on the public interest when it granted the stay in this case. Absent an abuse of discretion, California cannot prevail in this appeal.

II. The district court's order enables meaningful review of the Waste Prevention Rule.

California argues that the district court abused its discretion by not only staying the litigation but also staying the phase-in provisions of the Waste Prevention Rule until a separate agency action—promulgation of the replacement rule—occurs. (Cal. Br. at 26). According to California, the district court's stay is "untethered to its merits review." (*Id.* at 28). Not so.

As an initial matter, a litigation stay by itself would do nothing to prevent the irreparable harm to the regulated community that the district court sought to prevent during its review. Nor would it preserve the status quo. Thus, the concurrent stay of the phase-in provisions was necessary to meet the purposes of Section 705.

At its root, California argues that tying the length of the stay to the promulgation or abandonment of the replacement rule does not permit judicial review, but rather ensures that judicial review of the Waste Prevention Rule will not occur. Of course, California did not seek judicial review of the Waste Prevention Rule, Wyoming and Montana did, and these states consented to the stay. But, more importantly, that argument supports the propriety of the district court's order. An impending future event may well affect the district court's review of the Waste Prevention Rule. Under the circumstances, the district court rightly concluded that it "cannot meaningfully assess the merits of a 'moving target.'" (Doc. 215 at 7). It may be that when the replacement rule is promulgated these proceedings will be moot, but until that occurs, it would be improvident for the court to "assess the legal merits of a Rule presently being revised because of concerns about its validity expressed by the very agency that drafted the Rule." (*Id.* at 3). Were it to do so, the BLM would be placed in the untenable position of defending the rule after determining that it "has concerns regarding the statutory authority, cost, complexity, feasibility, and other implications of the 2016 final rule." 82 Fed. Reg. 58050.

Accordingly, the district court's decision to stay its hand temporarily while the executive branch completes its revisions to the Waste Prevention Rule was not only within its discretion and consistent with the purposes of Section 705, but also ultimately permits

full and final review of the Waste Prevention Rule once it becomes clear whether that rule stands.

III. The district court did not conclude that this case was prudentially unripe or prudentially moot and, therefore, had no duty to dismiss it.

Finally, California argues that the district court found this case to be prudentially unripe and prudentially moot and, therefore, should have dismissed the case. (Cal. Br. at 28-29 (citing *Zinke*, 871 F.3d at 1145-46)). But the district court did not conclude that the case was either prudentially unripe or prudentially moot. Instead, it noted that the doctrines may be implicated by the "somewhat unique, procedural circumstances" of the case. (Doc. 133 at 7-8). Thus, while the district court was not blind to the possibility that this case may become moot at some point in the future, its order rests on the application of Section 705. And given its broad authority to issue all necessary and appropriate process to prevent irreparable injury under that statute, there is nothing improper about the court's consideration of future executive branch action as it balanced the equities in these "unique, procedural circumstances." Accordingly, the district court had no duty to dismiss the case.

CONCLUSION

The order of the district court staying the litigation and the phase-in provisions of the Waste Prevention Rule until the replacement rule is promulgated or that effort abandoned should be affirmed.

SUBMITTED this 12th day of September 2018.

FOR THE STATE OF WYOMING

/s/ James Kaste
James Kaste (Wyo. Bar No. 6-3244)
Erik E. Petersen (Wyo. Bar No. 7-5608)
Wyoming Attorney General's Office
2320 Capitol Avenue
Cheyenne, WY 82002
307-777-6946
307-777-3542 (fax)
james.kaste@wyo.gov
erik.petersen@wyo.gov

FOR THE STATE OF MONTANA

/s Brandon L. Jensen
Brandon L. Jensen (Wyo. Bar No. 6-3464)
Budd-Falen Law Offices, LLC
300 East 18th Street
Post Office Box 346
Cheyenne, Wyoming 82003-0346
(307) 632-5105 Telephone
(307) 637-3891 Facsimile
brandon@buddfalen.com

Dale Schowengerdt, Solicitor General
Montana Dept. of Justice
215 North Sanders
Post Office Box 201401
Helena, Montana 59620-1401
(406) 444-0662 Telephone
dales@mt.gov

ORAL ARGUMENT IS REQUESTED

Appellants have requested oral argument. Wyoming and Montana agree that the factual and legal issues presented in this appeal are both novel and complex and that oral argument would benefit the Court.

CERTIFICATES OF VIRUS SCANNING AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing has been scanned for viruses with the Symantec™ Endpoint Protection, version 12.1.6608.6300, Virus Definition File dated September 12, 2018, r5 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

s/ James Kaste________________
James Kaste
Deputy Attorney General

CERTIFICATE OF WORD COUNT

I hereby certify that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7) because this brief contains 5086 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

s/ James Kaste________________
James Kaste
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 2018, the foregoing was served by the Clerk of Court through the Court's CM/ECF system on all attorneys of record.

s/ James Kaste________________
James Kaste
Wyoming Attorney General's Office
2320 Capitol Avenue
Cheyenne, WY 82002
307-777-6946
307-777-3542 (fax)
james.kaste@wyo.gov