Nos. 16-8068, 16-8069

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, *et al.*,
Petitioner-Appellees,
v.

RYAN ZINKE, Secretary, United States Department of the Interior, *et al.*,
Respondent-Appellants,

SIERRA CLUB, *et al.*,
Intervenor-Respondent-Appellants.

On Appeal from the United States District Court for the District of Wyoming
Civil Action No. 2:15-CV-00043-SWS
The Honorable Scott W. Skavdahl

INTERVENOR-RESPONDENT-APPELLANTS' PRELIMINARY RESPONSE IN OPPOSITION TO FEDERAL APPELLANTS' MOTION TO CONTINUE ARGUMENT AND HOLD CASE IN ABEYANCE

After seven years of rulemaking and litigation, Respondents-Appellants Ryan Zinke et al. (collectively, BLM) have now moved to continue the March 22 oral argument, and to hold this appeal in abeyance indefinitely while the agency begins the process of rescinding its hydraulic fracturing rule, 80 Fed. Reg. 16,128 (Mar. 26, 2015) (the Rule). The Court should deny BLM's request because the issue in this appeal – whether BLM lacks legal authority to regulate hydraulic fracturing on public lands – will be just as central to BLM's new process as it is to evaluating the 2015 Rule. Any decision by BLM to rescind the Rule will

necessarily be informed by whether it has legal authority to manage oil and gas development on public lands. The agency's reversal of position does not eliminate the need for appellate review here.

Moreover, the abeyance requested by BLM would unfairly prejudice Intervenor-Respondent-Appellants the Sierra Club, et al. (collectively, the Citizen Groups), by indefinitely shielding from appellate review the district court's far-reaching ruling stripping the agency of its well-established authority. An indefinite abeyance also would allow BLM to effectively rescind the Rule without the notice-and-comment rulemaking and reasoned decision-making required under the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq.

In addition, the requested abeyance will harm the public interest by allowing thousands of new oil and gas wells to be drilled indefinitely under outdated 30-year-old standards that fail to adequately protect public health and the environment.

Alternatively, if the Court does vacate the March 22 oral argument, any postponement in this appeal should be strictly limited to minimize the prejudice to the Citizen Groups and public interest. Oral argument should be continued only until the May 2017 calendar, and the parties directed in the meantime to submit supplemental memoranda fully addressing the issues presented by BLM's motion. These include not only: (a) whether this appeal should be held in abeyance, but

also, (b) if this appeal is stayed, what the status of the Rule should be during BLM's new rulemaking effort, and (c) what the status of the district court's order should be during that process.

BACKGROUND

Every year, thousands of oil and gas wells are drilled and completed on federal and Indian lands. 80 Fed. Reg. at 16,130. Today, approximately 90% of those wells are hydraulically fractured. Id. at 16,131. BLM, however, manages oil and gas production under regulations that were last updated more than thirty years ago. Id. The agency's current regulations were issued in the early 1980s, "long before the latest hydraulic fracturing technologies were developed or became widely used." Id.

BLM recognized that updated regulations and "additional regulatory effort and oversight" were needed to address these technological developments, prevent groundwater contamination from faulty well construction, and protect the public. See id. at 16,128, 16,131. The agency undertook an extensive, nearly five-year-long rulemaking effort in which it heard from industry, states, tribes, experts, other federal agencies and more than one million public commenters. Citizen Groups' Op. Br. 5 (Aug. 12, 2016). This input extensively documented the need for updated well construction standards, better waste management requirements, and improved BLM oversight. Id. at 5–9.

On March 26, 2015, BLM published the Rule. It was immediately challenged by the Petitioner-Appellees, who moved for a preliminary injunction preventing it from taking effect. Appellants' App. 30–32. On June 24, 2015, the district court issued an order "postponing" the effective date of the Rule, which it later followed on September 30, 2015 with a nationwide preliminary injunction. Appellees' App. 3217–18, 3350–51. This injunction made the unprecedented legal ruling that BLM lacks the legal authority to regulate hydraulic fracturing on public lands. Id. at 3214–17. The injunction effectively denied BLM the tools it determined were necessary to adequately manage the 90% of oil and gas wells on public lands that are hydraulically fractured.

Even prior to BLM's motion today, the industry trade associations and states challenging the Rule (collectively, Petitioner-Appellees) had gone to great lengths to delay appellate review of the district court's ruling. BLM and the Citizen Groups appealed the 2015 preliminary injunction order, see Citizen Groups' Op. Br. 10 (Aug. 12, 2016), but Petitioner-Appellees slowed those appellate proceedings by filing a meritless motion to dismiss the preliminary injunction

appeal, and by opposing a request to expedite the appeal.[1] These efforts prevented the injunction appeal from being heard during this Court's May 2016 calendar.[2]

At the same time, Petitioner-Appellees successfully opposed the Citizen Groups' request to stay district court proceedings pending the injunction appeal, and similar requests by BLM to expedite appellate review of the central issues in the case. Ex. B at 12–13. Remarkably, Petitioner-Appellees even opposed a request for the district court to enter judgment in Petitioner-Appellees' favor, which would have quickly moved the entire case to this court. Ex. A at 3; Ex. B at 11–13. As a result, merits briefing proceeded simultaneously in the district court and in the preliminary injunction appeal.

Briefing in the injunction appeal was completed on June 20, 2016.[3] On the very next day, June 21, 2016, the district court entered a final merits decision setting aside the Rule on the ground that it was outside of BLM's legal authority.

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[1] See Intervenor-Resp't-Appellants' Reply in Supp. of Appellants' Joint Mot. to Expedite Argument at 1–4, Wyoming v. Sierra Club, Nos. 15-8126 & 15-8134 (10th Cir. Feb. 24, 2016) (Attached as Exhibit A); Intervenor-Resp't-Appellants' Resp. in Opp'n to Mot. to Dismiss at 2–3, Wyoming v. Sierra Club, Nos. 15-8126 & 15-8134 (10th Cir. Feb. 19, 2016) (Attached as Exhibit B).

[2] See Order at 2, Wyoming v. Sierra Club, Nos. 15-8126 & 15-8134 (10th Cir. Feb. 24, 2016) (denying Appellants' motion to expedite appeal, and Petitioner-Appellees' motion to dismiss); Order at 1–2, Wyoming v. Sierra Club, Nos. 15-8126 & 15-8134 (10th Cir. Mar. 10, 2016) (resetting opening brief deadline from February 16, 2016 to March 21, 2016).

[3] See Intervenor-Resp't-Appellants' Reply Br., Wyoming v. Sierra Club, Nos. 15-8126 & 15-8134 (10th Cir. June 20, 2016).

Appellants' App. 320–21. This Court subsequently dismissed the preliminary injunction appeals as moot and ordered the district court to vacate the preliminary injunction.[4]

Within a week after it was issued, both BLM and the Citizen Groups appealed the district court's final order on June 24, and June 27, 2016, respectively. Appellants' App. 324–27. Briefing in this appeal was completed in October 2016, and oral argument scheduled on the January 2017 calendar. However, this Court sua sponte vacated the January argument and rescheduled it for the March 2017 calendar. That postponement gave the new presidential administration two months after taking office to evaluate its position in this appeal.

Prior to the March 9 direction from this Court, BLM gave absolutely no indication that it was unprepared to defend its Rule at the March 22 argument. But now, after defending the Rule for two years in the district and appeals courts, BLM has informed the Court that it plans to rescind the Rule. The agency, however, offers no date for when that rescission might be completed.

ARGUMENT

This Court's rules strongly disfavor postponing oral argument. "Only in extraordinary circumstances will an argument be postponed." 10th Cir. R.

[4] Order at 3–4, Wyoming v. Sierra Club, Nos. 15-8126 & 15-8134 (10th Cir. July 13, 2016), 2016 WL 3853806, at *1.

34.1(A)(3). "Where a movant seeks relief that would delay court proceedings by other litigants he must make a strong showing of necessity." Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc., 713 F.2d 1477, 1484 (10th Cir. 1983) (Chilcott).

Moreover, when a party seeks an order staying a proceeding the Court should consider whether the stay "will substantially injure the other parties interested in the proceeding; and . . . where the public interest lies." Nken v. Holder, 556 U.S. 418, 428, 434 (2009) (quotation omitted); see also Am. Petroleum Inst. v. Envtl. Prot. Agency, 683 F.3d 382, 387 (D.C. Cir. 2012) (considering "hardship to the parties" in deciding whether to hold case in abeyance). The party seeking a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." Chilcott, 713 F.2d at 1484 (quotation omitted).

BLM's request falls well short of meeting the heavy burden for delaying oral argument and holding this appeal in abeyance.

I. BLM Has Not Met The Requirements For Postponing Oral Argument.

BLM does not even suggest that a postponement of the March 22 argument is necessary. To the contrary, the agency apparently was prepared to go ahead

with the argument as scheduled: BLM only filed its motion after the Court asked for confirmation of the agency's position in this appeal.[5]

Moreover, proceeding with oral argument and resolution of this appeal is important even in light of BLM's decision to launch a process to repeal the Rule. The issue before the Court—BLM's authority to regulate oil and gas development on public lands—is just as relevant for that new effort as it is in defending the Rule. Whether BLM has this authority is a purely legal question that will inevitably affect whatever new decision the agency makes. The Court should proceed with oral argument and this appeal in order to resolve the uncertainty created by the district court's unprecedented decision.

II. The Requested Abeyance Will Prejudice The Citizens Groups And Is Contrary To The Public Interest.

BLM's request for abeyance will prejudice the Citizen Groups and harm the public interest. It will shield from appellate review the district court's far-reaching ruling that BLM lacks legal authority to regulate well construction, waste management, and other activities on 90% of the oil and gas wells drilled on public lands—a decision that has impacts reaching well beyond the Rule itself. At the

[5] Moreover, BLM's request is untimely under this Court's rules. "Except in an emergency, a motion to postpone must be made more than 20 days before the scheduled argument date." 10th Cir. R. 34.1(A)(3); accord Fed. R. App. P. 34(b) ("A motion to postpone the argument . . . must be filed reasonably in advance of the hearing date."). BLM seeks postponement only seven days before the scheduled argument—without claiming that any emergency exists.

same time, an abeyance would allow BLM to achieve what the APA prohibits: an indefinite stay of the Rule without notice-and-comment rulemaking or a reasoned explanation.

First, the abeyance will unfairly prejudice the Citizen Groups by preventing them from pursuing their appeal of the district court's ruling. Independent of BLM, the Citizen Groups filed their own appeal in June 2016. While that appeal has been consolidated with the federal government's appeal, the Citizen Groups' right to proceed should not be held captive to BLM's new position. "An intervenor, whether by right or by permission, normally has the right to appeal an adverse final judgment by a trial court." Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 375–76 (1987); see also Barnes v. Harris, 783 F.3d 1185, 1191 (10th Cir. 2015) ("[W]hen a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party." (quoting Alvarado v. J.C. Penney Co., 997 F.2d 803, 805 (10th Cir. 1993)); Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. Dep't of Interior, 100 F.3d 837, 844 (10th Cir. 1996) (an "intervenor becomes no less a party than others").

BLM apparently proposes to leave the district court's decision setting aside the Rule in effect while the agency undertakes a new rulemaking effort. But it is hardly unprecedented for an intervenor to continue defending a law on appeal even when a federal agency no longer chooses to do so. See, e.g., United States v.

Windsor, 133 S. Ct. 2675, 2689 (2013) (Defense of Marriage Act); Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207, 1211 (10th Cir. 2005) (Forest Service Roadless Rule); Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1107 (9th Cir. 2002) (same), abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011).

Moreover, shielding the district court's ruling from appellate review could have far-reaching impacts to the Citizen Groups and public interest that extend well beyond just this Rule. For example, much of the court's reasoning—such as its view that BLM lacks authority under the Mineral Leasing Act to issue rules protecting groundwater on public lands—would invalidate BLM's existing regulations. Citizen Groups' Op. Br. 23, 28 (Aug. 12, 2016). Similarly, the district court's view that the Federal Land Policy and Management Act, 43 U.S.C. § 1701 et seq., is just a "planning statute" that does not allow the agency to adopt comprehensive rules and regulations, may have far-reaching impacts that extend to numerous other activities on public lands such as grazing, wildlife management and surface water protections. Citizen Groups' Op. Br. 43–45 (Aug. 12, 2016).

Second, BLM cannot make the Rule disappear merely by deciding that it wants to rescind it. Notice-and-comment rulemaking will be required before rescinding the regulation, a point the agency acknowledges. Mexichem Specialty Resins, Inc. v. Envtl. Prot. Agency, 787 F.3d 544, 557 (D.C. Cir. 2015); Nat'l

Parks Conservation Ass'n v. Salazar, 660 F. Supp. 2d 3, 5 (D.D.C. 2009). That process takes time. Nearly five years elapsed between November 2010, when BLM began work on the Rule and March 2015, when the Rule was finalized. 80 Fed. Reg. at 16,128.

Because it shields the district court's ruling from appellate review and potential reversal, BLM's requested abeyance would effect an indefinite stay of the Rule despite the fact that no notice-and-comment rulemaking process has been completed to rescind it. Notably, BLM offers no date by which it expects to finalize a decision rescinding the Rule, and its notice-and-comment process is likely to take multiple years. BLM's motion asks for three months just to publish a notice of the proposed rulemaking. This is not a case where the agency has been at work on a new rule for years at the time oral argument is scheduled. See Wyoming, 414 F.3d at 1211 (appeal mooted when Forest Service finalized new rule four years after new administration took office).

Third, the requested abeyance will harm the public interest by allowing numerous oil and gas wells to be drilled under outdated and inadequate standards while BLM reconsiders its new Rule. If the notice-and-comment process takes two more years, BLM's own estimate indicates that 5,600–7,600 new wells will be completed during that time. See 80 Fed. Reg. at 16,130 (2,800–3,800 wells hydraulically fractured per year). And if BLM rescinds the Rule without replacing

it with new standards, see Cardinale Decl. ¶ 5 (Mar. 15, 2017) (BLM preparing notice of proposed rulemaking "to rescind the 2015 Rule" with no mention of replacement), many thousands of additional wells would continue to be drilled based on the same inadequate 1980s regulations.

Those thousands of wells will pose an unnecessary risk to federal lands and to members of the public who live, work, or recreate nearby. And when they do cause groundwater contamination or other accidents, those wells will result in substantial unnecessary costs to remediate—if they can be cleaned up at all. BLM must undertake a reasoned process, and allow notice-and-comment, before abandoning its updated standards.

The prejudice to Citizen Groups and the public interest would be especially inequitable given the lengthy delays that have already occurred in this case. It has now been nearly two years since the district court blocked the Rule from taking effect. During that time, the parties have fully briefed two separate appeals seeking review of the district court's holding that BLM lacks legal authority to promulgate the Rule. And thousands of wells have been drilled and completed under outdated standards. The Court should not postpone appellate review yet again. See Chilcott, 713 F.2d at 1484 ("The right to proceed in court should not be denied except under the most extreme circumstances" (quotation omitted)).

III. Any Delay In This Appeal Should Be Limited And For The Purposes Of Fully Briefing BLM's Abeyance Motion.

Alternatively, if the Court does vacate the March 22 oral argument, any postponement in this appeal should be strictly limited to minimize the prejudice to the Citizen Groups and public interest. Oral argument should be continued only until the May 2017 calendar, and the parties directed in the meantime to submit supplemental memoranda fully addressing the issues presented by BLM's motion. These include not only: (a) whether this appeal should be held in abeyance, but also, (b) if this appeal is stayed, what the status of the Rule should be during BLM's new rulemaking effort, and (c) what the status of the district court's order should be during that process.

CONCLUSION

The Citizen Groups respectfully request that the Court deny BLM's motion to continue oral argument and hold this appeal in abeyance. The appeal should be argued on March 22 as scheduled.

Alternatively, if the Court does vacate the March 22 oral argument, any postponement in this appeal should be strictly limited to minimize the prejudice to the Citizen Groups and public interest. Oral argument should be continued only until the May 2017 calendar, and the parties directed in the meantime to submit supplemental memoranda fully addressing the issues presented by BLM's motion.

Dated: March 15, 2017

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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, Kaspersky Endpoint Security 10, Version 10.2.5.3201 (mr2.mr3), dated March 15, 2017, and according to the program are free of viruses.

s/Michael S. Freeman

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2017 I electronically filed the foregoing **INTERVENOR-RESPONDENT-APPELLANTS' PRELIMINARY RESPONSE IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO CONTINUE ARGUMENT AND HOLD CASE IN ABEYANCE** using the court's CM/ECF system which will send notification of such filing to the following:

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