Nos. 16-8068, 16-8069

Oral Argument Requested

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING; STATE OF COLORADO; INDEPENDENT PETROLEUM ASSOCIATION; AND WESTERN ENERGY ALLIANCE,

Petitioners-Appellees

and

STATE OF NORTH DAKOTA; STATE OF UTAH; UTE INDIAN TRIBE,

Intervenors-Appellees

v.

S.M.R. JEWELL; NEIL KORNZE; U.S. DEPARTMENT OF THE INTERIOR; and U.S. BUREAU OF LAND MANAGEMENT,

Respondents-Appellants

and

SIERRA CLUB; EARTH WORKS; WESTERN RESOURCE ADVOCATES; WILDERNESS SOCIETY; CONSERVATION COLORADO EDUCATION FUND; and SOUTHERN UTAH WILDERNESS ALLIANCE,

Intervenors-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, NOS. 15-CV-41/43 (HON. SCOTT W. SKAVDAHL)

SUPPLEMENTAL BRIEF FOR THE FEDERAL APPELLANTS

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GLOSSARY

APA	Administrative Procedure Act
BLM	U.S. Bureau of Land Management
FLPMA	Federal Land Policy and Management Act
MLA	Mineral Leasing Act of 1920

INTRODUCTION

In response to this Court's order of March 17, 2017, the Federal Appellees ("BLM") submit this supplemental brief explaining why this appeal should be held in abeyance pending further agency action.

This appeal involves judicial review of BLM's 2015 "Hydraulic Fracturing Rule." *See* "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands," 80 Fed. Reg. 16,128 (March 26, 2015). The district court erroneously set aside the Hydraulic Fracturing Rule, holding that BLM's statutory authority does not extend to ensuring that federal lessees operate safely and use best practices when they extract publicly-owned resources from federal and Indian lands. As BLM's briefs in this case have explained, several statutes give it the authority to accomplish those goals, and Congress has never revoked that authority.

Although BLM had authority to promulgate the Hydraulic Fracturing Rule, it also has substantial discretion in how it carries out its statutory mission of administering federal and Indian leases. The specific provisions of the Rule may no longer reflect BLM's best judgment of how to exercise that authority. The President has directed BLM to review the Hydraulic Fracturing Rule and, "if appropriate," to "publish for notice and comment proposed rules suspending, revising, or rescinding" it. "Promoting Energy Independence and Economic Growth," Exec. Order 13,783 (March 28, 2017). BLM intends to begin this process by publishing a Notice of Proposed Rulemaking in the Federal Register by June 13, 2017.

This Court should hold this appeal in abeyance during BLM's rulemaking. The United States does not wish to abandon its appeal and potentially forfeit any arguments in defense of its statutory authority. But there may be no need for the Court to decide whether BLM had statutory authority to promulgate the 2015 Rule, because BLM may decide that no exercise of its authority is necessary and may rescind the Rule. In addition, various parties in this appeal also argue that BLM acted arbitrarily or capriciously and that it failed to follow required procedures in promulgating the particular Rule at issue here – arguments that will no longer apply if BLM changes the provisions of the Rule in a new administrative process. And reinstating the Rule now would merely force lessees to waste their resources to comply with requirements that may only be temporary. The doctrine of prudential ripeness counsels the Court temporarily to withhold review, rather than wasting the Court's and the parties' resources considering the merits of a Rule that may soon be suspended, rescinded or revised.

The most efficient means of resolving this case – for all involved parties and for the Court – is to wait until BLM has finished the process of reconsidering the Hydraulic Fracturing Rule. In the meantime, federal and Indian lessees will continue to operate under the regulations that governed their activities under the prior regulations. When BLM's process is complete, the Court can consider the issue of BLM's authority in the context of the specific rules (if any) that BLM claims authority to promulgate.

LEGAL AND FACTUAL BACKGROUND

For nearly a century, BLM and its predecessors have regulated oil and gas operations on federal and Indian lands. Those regulations, for example, required operators to obtain permits before drilling, to avoid "undue damage to surface or subsurface resources," and to "protect" usable water from contamination. *See* 43 C.F.R. §§ 3162.3, 3162.5. BLM's regulations, including its Onshore Oil and Gas Orders, establish standards to ensure the integrity of oil and gas wells and to require the safe storage and disposal of drilling fluids. *See, e.g.,*, 53 Fed. Reg. 46,798 (Nov. 18, 1988); 58 Fed. Reg. 47,354 (Sept. 8, 1993); 43 C.F.R. § 3164.1.

In March 2015, BLM updated these requirements to address the growing use of hydraulic fracturing, a well-stimulation technique that "involves the injection of fluid under high pressure to create or enlarge fractures in the reservoir rocks." *See* 80 Fed. Reg. at 16,131. Recently, the use of this technology has grown in scale, and about 90 percent of wells drilled on federal and Indian lands in 2013 were hydraulically fractured. *Id.* at 16,128, 16,131.[1] BLM's Hydraulic Fracturing Rule was promulgated to address this growing practice by imposing a permit and reporting process designed to protect wellbore integrity and groundwater, reduce interference with other wells,

[1] Most hydraulic fracturing occurs on state and private property. Federal lands are the source of about eleven percent of the natural gas and five percent of the oil produced in the United States. *See* BLM App. 749.

assure that recovered fluids are stored properly, and disclose the chemicals that were used in the process. *See generally* U.S. Opening Br. at 8-9.

BLM's action to regulate activities on federal and Indian lands in the Hydraulic Fracturing Rule was authorized by statute. BLM exercises stewardship over public lands generally under the Federal Land Policy and Management Act ("FLPMA"). FLPMA provides that BLM may "regulate. . . the use, occupancy, and development of the public lands." 43 U.S.C. § 1732(b); *see also id.* § 1740. That charge specifically includes a duty to "take any action necessary to prevent unnecessary or undue degradation of the lands." *Id.* § 1732(b). More specifically, BLM oversees the development of oil and gas resources on federal lands under the Mineral Leasing Act ("MLA"), 30 U.S.C. §§ 181-287, among other statutes. The MLA authorizes BLM to "prescribe necessary and proper rules and regulations" to ensure that operations on federal leases are conducted with "reasonable diligence, skill and care." *Id.* §§ 187, 189. BLM has a similar mission for resources on Indian lands under the Act of March 3, 1909, the Indian Mineral Leasing Act, and the Indian Mineral Development Act. *See* 25 U.S.C. §§ 396, 396d, 2107.

Several parties filed district-court challenges to the Hydraulic Fracturing Rule. Those plaintiffs generally focused on two principal themes: First, they argued that in granting BLM the general statutory authorities to manage the development of federal lands and resources, Congress intended to exclude the particular technique of

hydraulic fracturing. *See* PI Order at 8-22 (Appellee App. 3172-86).[2] Second, they argued that even if BLM had the authority to regulate hydraulic fracturing, it violated the APA by making arbitrary or capricious decisions and by failing to adhere to proper rulemaking procedures. *Id.* at 22-39 (Appellee App. 3186-3203). The district court stayed the Rule before it went into effect, and it later granted a preliminary injunction on the basis of both of these issues and ordered briefing on the merits. The parties then briefed both BLM's statutory authority to address hydraulic fracturing and the way that BLM exercised that authority in the 2015 Rule. However, the district court's final decision considered only the issue of BLM's authority. Because the court granted the petitions for review on the grounds that BLM lacked statutory authority to regulate hydraulic fracturing, it did not reach the other issue in its final order. *See* Merits Order at 26-27 (BLM App. 320-21).

The government appealed to protect its plain authority under FLPMA, the MLA, and the other relevant statutes. Because of the district court's decision, briefing in this Court generally focused on whether BLM's authority is sufficient to regulate oil and gas development on federal and Indian lands even if that development uses the technique of hydraulic fracturing. However, some of the parties here ask the Court also to consider the APA issues that were presented to the district court. *See, e.g.*,

[2] Because the district-court actions began with petitions for review under Local Rule 83.6(a)(1), rather than complaints, these arguments were first presented in the petitioners' motions for a preliminary injunction.

Intervenor States Br. at 32-39; Intervenor Ute Tribe Br. at 23-52; Chamber of Commerce Amicus Br. at 8-30. The Court scheduled oral argument for January 17, 2017, but continued that argument on its own motion.

On January 30, 2017, the President issued an Executive Order directing agencies to examine ways to streamline the regulatory process and eliminate duplicative or unnecessary regulations. *See* "Reducing Regulation and Controlling Regulatory Costs," Exec. Order 13,771 (Jan. 30, 2017). Agencies have inherent authority to reconsider their past decisions and, with a reasoned explanation, to revise, replace or repeal a decision that is within their discretion. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "The APA requires only that 'the new policy be permissible under the statute, and that there are good reasons for it." *In re FCC 11-161*, 753 F.3d 1015, 1115 (10th Cir. 2014) (quoting *Qwest Corp. v. FCC*, 689 F.3d 1214, 1225 (10th Cir. 2012), and *Fox Television*, 556 U.S. at 515). If an agency "adequately explains the reasons for a reversal of policy," then it may reconsider its prior decisions and rules as it evaluates "the wisdom of its policy on a continuing basis." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (quoting *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 863-64 (1984) (internal quotation marks and citations omitted). "A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part).

In light of that Executive Order, BLM examined both its authority to regulate hydraulic fracturing on federal and Indian lands and the way that it exercised that authority in the Hydraulic Fracturing Rule. BLM's initial review indicated that the Hydraulic Fracturing Rule does not reflect the agency's current policies and priorities, and BLM may conclude after this review that it should have exercised its statutory authority and discretion differently. However, in holding that BLM lacks authority to ensure safe operations on federal and Indian lands, the district court made a serious and consequential error about federal authority and the interpretation of statutes that BLM administers. BLM now faces a significant litigation dilemma: In order to seek review of the district court's error, the agency would have to defend a rule that it no longer considered appropriate to protect federal and Indian lands.

BLM therefore requested on March 15 that the Court hold this appeal in abeyance. BLM advised the Court that it was preparing a notice of proposed rulemaking to rescind the 2015 Rule and that it expected to issue that notice within 90 days. *See* Cardinale Decl. ¶ 5. The petitioners do not oppose BLM's motion to hold the appeal in abeyance, but citizen group-intervenors (herein, "Environmental Intervenors") do oppose. On March 17, the Court granted BLM's motion in part, continuing oral argument and directing supplemental briefing that would address the questions enumerated in the argument sections below.

Since that time, on March 28, the President issued another relevant Executive Order. That Executive Order specifically named several rules, including the Hydraulic

Fracturing Rule, and directed BLM, "if appropriate" and "as soon as practicable," to publish for notice and comment a proposed rule "suspending, revising, or rescinding" that Rule. Exec. Order 13,783, § 7(b)(i); *see also* "American Energy Independence," Secretarial Order No. 3349 (Dep't of the Interior, March 29, 2017) (directing BLM to proceed expeditiously in proposing to rescind the Hydraulic Fracturing Rule). BLM is actively engaging in this administrative process and currently expects to act within the 90-day time frame that it previously described to the Court.

RESPONSES TO THE COURT'S QUESTIONS

I. SUMMARY OF RESPONSES

A. Should the cases be held in abeyance pending the anticipated rulemaking?

This appeal should be held in abeyance. The Court has inherent power to do so, and it should be guided in the use of that power by the doctrine of prudential ripeness. That doctrine "ensures that Article III courts make decisions only when they have to, and then, only once." *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012).

BLM intends to publish notice of a new rulemaking process shortly to consider whether it should revise or rescind the Hydraulic Fracturing Rule. The 2015 Rule is not fit for judicial review at this time because it is tentative, given that pending rulemaking, and because that rulemaking may make it unnecessary for the Court ever to consider the question of BLM's statutory authority – much less whether the Rule's

particular provisions are arbitrary or capricious. *See infra* pp. 10-19. Furthermore, the Rule is not presently in effect due to the district court's order. The hardship to the regulated community of reinstating the Rule, creating a dilemma whether to comply with a Rule that may soon be changed, is greater than the hardship to BLM or the Environmental Intervenors of delaying appellate review. *See infra* pp. 19-25. In similar considerations, the D.C. Circuit has applied prudential ripeness to hold cases in abeyance pending further agency rulemaking. *See Am. Petroleum Inst.*, 683 F.3d at 389-90.

B. Are there other reasons that the Court should not decide these appeals before the new regulation issues?

BLM's anticipated rulemaking, which the agency expects to begin no later than June 13, 2017, is the only reason that BLM recommends holding this appeal in abeyance, but it is a sufficient reason. *See infra* p. 25.

C. If the government abandons its appeal, do the intervenors have standing?

The government does not intend to abandon its position that it has the statutory authority to regulate oil and gas operations, including Hydraulic Fracturing, on federal and Indian lands. If the government did so, however, any intervenor that wished to appeal the district court's judgment would have to demonstrate an independent basis for standing to invoke the Court's jurisdiction. The Environmental Intervenors cannot do so because a private party may not defend a government regulation that has been invalidated when the government chooses not to defend it.

See infra pp. 25-30. In addition, Intervenors here have not yet provided evidence to support their own standing to appeal. *See infra* pp. 30-31.

D. If these appeals are abated, what is the status of the present Rule during the new rulemaking? What is the status of the district court's order of June 21, 2016?

The district court's decision "set aside" – that is, vacated – the Hydraulic Fracturing Rule. The district court's order went beyond enjoining enforcement to declare the Rule itself void. The Rule has no legal effect as long as the district court's decision stands. This Court has jurisdiction to review the district court's order, but BLM has no control over the status of the present Rule except to the extent it seeks review here. Although BLM believes the district court's decision was in error, review of that decision is not urgent in light of the upcoming rulemaking. *See infra* pp. 32-34.

II. REASONS TO ABATE THE APPEAL

A. Should the cases be held in abeyance pending the anticipated rulemaking?

1. The court has discretion to abate an appeal to avoid making an unnecessary decision.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). The use of this power "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254-55; *see also Proctor & Gamble Co. v. Kraft Foods Global, Inc.*, 549 F.3d 842, 849(10th Cir. 2009) (quoting

Landis). This Court has held timely petitions for review in abeyance while the agency reconsiders its actions. *See Springfield Television of Utah, Inc. v. FCC*, 710 F.2d 620, 623 (10th Cir. 1983).

Although no particular doctrinal analysis is required for the Court to exercise its discretion to manage its docket efficiently, the courts have adapted the doctrine of prudential ripeness to situations similar to this one. "[T]he doctrine of prudential ripeness ensures that Article III courts make decisions only when they have to, and then, only once." *Am. Petroleum Inst.* 683 F.3d at 387. Prudential ripeness "protect[s] the expenditure of judicial resources" and "comports with [the courts'] theoretical role as the governmental branch of last resort." *Nat'l Treas. Employees Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996). The same two factors assist the Court in assessing prudential ripeness as constitutional ripeness: The Court must balance "the fitness of the issue for judicial review with the hardship to the parties from withholding review." *United States v. Bennett*, 823 F.3d 1316, 1326 (10th Cir. 2016); *see, e.g., Farrell-Cooper Min. Co. v. Dep't of Interior*, 728 F.3d 1229 (10th Cir. 2013); *Awad v. Ziriax*, 670 F.3d 1111, 1124 (10th Cir. 2012).

This Court has applied the doctrine of prudential ripeness in the context of administrative appeals. In *Farrell-Cooper*, this Court considered Farrell-Cooper's claim for an injunction against the enforcement of a Notice of Violation, even though Farrell-Cooper had simultaneously sought an administrative appeal that remained ongoing. The Court dismissed the appeal, holding that the notice of violation could

not be considered final as long as Interior continued to review them and that judicial review would "disrupt the administrative process." 728 F.3d at 1235 (quoting *Bell v. New Jersey*, 461 U.S. 773, 779 (1983)).

The situation now before this Court arises more commonly in the D.C. Circuit, which has analyzed the effect of administrative reconsideration on judicial review. That court applies prudential ripeness to the type of situation that this appeal presents, deferring judicial review of agency action that is otherwise reviewable if the agency has begun reconsideration proceedings. In *American Petroleum Institute*, the D.C. Circuit considered petitions for review of an EPA rule. After briefing was completed, EPA issued a notice of proposed rulemaking that "if made final, would significantly amend" the rule under review. 683 F.3d at 384. The court decided that review of the original petitions was unripe based on "prudential reasons for refusing to exercise jurisdiction." *Id.* at 386 (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003)). The court recognized the value in "letting the administrative process run its course before binding parties to a judicial decision." *Id.* The agency planned to amend some of the provisions that the petitioners challenged, and the Court gave EPA an opportunity to reconsider its position, apply its expertise, and potentially obviate the need for judicial review. *Id.* at 387-88. Rather than dismiss the petitions, the D.C. Circuit held them in abeyance, requesting status reports so that it could proceed with judicial review if "the rulemaking takes an unforeseen turn." *Id.* at 389-90. This is consistent with the D.C. Circuit's practice in other cases. *See, e.g.*,

Sierra Club. v. EPA, 551 F.3d 1019, 1023 (D.C. Cir. 2008); *Devia v. NRC*, 492 F.3d 421 (D.C. Cir. 2007); *Public Citizen Health Research Grp. v. Comm'r*, 740 F.2d 21 (D.C. Cir.1984).

BLM's announcement that it intends to reconsider the 2015 Hydraulic Fracturing Rule leaves this appeal in a position similar to the petitions for review in *American Petroleum Institute*, and that case provides a model for the Court to follow here. Consistent with that model, the D.C. Circuit has recently granted stays in several cases challenging major Clean Air Act regulations that are now being reconsidered pursuant to the Executive Orders described above. *See Coke v. EPA*, D.C. Cir. No. 15-1166 (Apr. 24, 2017) (postponing oral argument and holding case in abeyance); *Murray Energy Corp. v. EPA*, D.C. Cir. No. 16-1127 (Apr. 27, 2017) (same); *West Virginia v. EPA*, D.C. Cir. No. 15-1363 (Apr. 28, 2017) (Clean Power Plan) (holding case in abeyance and ordering supplemental briefing on whether to remand to the agency); *North Dakota v. EPA*, D.C. Cir. No. 15-1381 (Apr. 28, 2017) (same).

2. Review is prudentially unripe because the legal issues before the Court may soon change.

Although the Rule itself is final and reviewable, the agency's prospective change of policy leaves the specific issues raised by petitioners below unfit for judicial review. The fitness of an issue may depend on whether the issue is purely legal, whether consideration would benefit from a more concrete setting, and whether the agency's action is sufficiently final. *See Skull Valley Band of Goshute Indians v. Nielson*,

376 F.3d 1223, 1237 (10th Cir. 2004) (quoting *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998)).

The finality element is most important here. This Court will not review agency action "of a merely tentative or interlocutory nature" because the agency remains free to change its mind. *Cure Land, LLC v. U.S. Dep't of Agriculture*, 833 F.3d 1223, 1230-31 (10th Cir. 2016) (quoting *Ctr. v. Native Ecosystems v. Cables*, 509 F.3d 1310, 1329 (10th Cir. 2007), and *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). It is true that the 2015 Hydraulic Fracturing Rule is a final agency action within the meaning of the APA. But the Supreme Court "has interpreted the finality element in a pragmatic way." *Id.* An agency action that is otherwise final may still be considered "tentative" if the agency has announced proceedings to reconsider it, *see Am. Petroleum Inst.*, 683 F.3d at 387, because the concerns that counsel against review of interlocutory agency decisions are also present where an agency is actively reviewing its previous decision.

Those concerns arise here because, in two separate executive orders, the President has directed BLM to review the Hydraulic Fracturing Rule. One of those orders refers specifically to the Rule and directs BLM to publish for notice and comment a proposed rule "suspending, revising, or rescinding" that Rule. In accordance with this directive, BLM has begun a review of the Rule and has announced its intent to issue a notice of proposed rulemaking by June 13, 2017. Neither BLM nor the Court may lawfully pre-judge the outcome of that ongoing

process, which will depend on BLM's administrative record and the discretionary policy choices that it makes based on that record.

These circumstances create a very real possibility that the Court might uphold BLM's authority to promulgate the 2015 Hydraulic Fracturing Rule, only to see that Rule revised or rescinded during the litigation or shortly thereafter. "It would hardly be sound stewardship of judicial resources to decide this case now," given that BLM's anticipated rulemaking "would dispense with the need for such an opinion." *Am. Petroleum Inst.*, 683 F.3d at 388. In contrast, holding this appeal in abeyance as prudentially unripe would allow BLM "to apply its expertise and correct any errors, preserve[] the integrity of the administrative process, and prevent[] piecemeal and unnecessary judicial review." *Id.*

In addition to promoting judicial economy, holding this appeal in abeyance would avoid judicial interference with the administrative process. The anticipated rulemaking will be an opportunity for the petitioners below to convince BLM to change its mind on the subject of regulation of hydraulic fracturing. If they are successful, "this case goes away without the need for judicial review."[3] *Id.* In another context, this Court has noted that "flexibility in reconsidering and reforming of policy . . . is one of the signal attributes of the administrative process . . . and courts will not

[3] Other parties, including Environmental Intervenors here, may well seek judicial review of BLM's final decision in the rulemaking process, but any such issues would have to be raised in new litigation.

lightly interfere with it." *Wyoming v. U.S. Dep't of Interior*, 587 F.3d 1245, 1254 (10th Cir. 2009) (internal quotation marks and citations omitted).

The pragmatic considerations that favor abeyance might carry less force if the agency were trying to "stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way." *Am. Petroleum Inst.*, 683 F.3d at 388. That is not the case here. As in *American Petroleum Institute*, BLM is considering "a complete reversal of course . . . that, if adopted, would necessitate substantively different legal analysis." *Id.* And it is highly unlikely that BLM will be able to evade judicial review of its ultimate position on the regulation of hydraulic fracturing on federal and Indian lands.

The Environmental Intervenors may argue, as they did in opposing the continuance of oral argument, that BLM's authority to promulgate the Hydraulic Fracturing Rule is a "purely legal" question, and that BLM would benefit during the reconsideration process from the Court's views on the agency's authority. *See* Environmental Intervenors' filing of March 15, 2017, at 1-2, 8. It is possible that such an advisory ruling from this Court would assist BLM, but by no means certain. BLM may decide to withdraw the Rule without promulgating a new rule, for example. Even if BLM were to attempt to promulgate new regulations governing hydraulic fracturing as part of its anticipated rulemaking process, the issue of its statutory authority would turn on specifically what and how the agency intended to regulate. Consideration of that question would therefore "benefit from a more concrete

setting," *Skull Valley Band*, 376 F.3d at 1237, in a future case in which BLM attempts to exercise its authority.

Furthermore, even if this Court were to consider the abstract question of BLM's authority to regulate hydraulic fracturing generally, that is not the only question at issue in this appeal. Several parties and amici have filed briefs asking the Court to hold that regardless of BLM's authority, the 2015 Rule is invalid because BLM acted arbitrarily or capriciously or failed to follow the required procedures. *See, e.g.,* Intervenor States Br. at 32-39; Intervenor Ute Tribe Br. at 23-52; Chamber of Commerce Amicus Br. at 8-30. For example, the Ute Tribe argues that BLM failed to consider certain relevant factors in promulgating the Hydraulic Fracturing Rule, *see* Intervenor Ute Tribe Br. at 23-45; and that BLM failed to engage in appropriate consultation with the tribe, *id.* at 46-52. Resolving the question of BLM's statutory authority in the abstract, as the Environmental Intervenors may ask the Court to do, would not resolve those kinds of issues. Even if this Court remanded the case to the district court to consider these particular issues, the district court would still be burdened with deciding the validity of regulatory provisions that may soon be revoked or changed.

Separation-of-powers concerns often lead courts to prioritize judicial economy over administrative efficiency, and thus to avoid rendering a decision that might be instructive in further agency proceedings. This Court applies other rules that reflect a "preference for a single appeal" that reviews the agency's final positions, even if an

immediate appeal might guide the agency regarding a pending rulemaking. *See Miami Tribe of Okla. v. United States*, 656 F.3d 1129, 1140-41 (10th Cir. 2011); *see also Alsea Valley All. v. Dep't of Commerce*, 358 F.3d 1181, 1185 (9th Cir. 2004). The court cannot assume that a new agency proceeding, intended to supersede the action under review, will present the same issues. If BLM takes the same actions in its prospective rulemaking as petitioners here claim were unlawful in the 2015 Rule, or if petitioners believe that BLM again oversteps its authority, they can seek judicial review of BLM's new final action. The courts will then have the benefit of review in "a more concrete setting," *Skull Valley Band*, 376 F.3d at 1237, including an administrative record and regulatory provisions that reflect BLM's actual, current statutory interpretation and policy judgments. But "[u]ntil all these contingencies have played out . . . any decision by [this Court] could prove entirely unnecessary." *Alsea Valley*, 358 F.3d at 1185.

Although courts sometimes dismiss appeals on the grounds of prudential ripeness, *see, e.g.*, *Farrell-Cooper*, 728 F.3d at 1239, that is not BLM's recommendation here. BLM intends to publish a notice of proposed rulemaking to rescind the 2015 Rule, but BLM's final decision on that matter must await the results of the rulemaking process. It is possible that BLM's rulemaking will result in rescission of the 2015 Rule, in amendments to the Rule, or in no changes at all. In the event BLM decides not to change the Rule, it would rightly wish to preserve its argument that here the district court adopted an erroneously narrow interpretation of BLM's statutory authority. This case is therefore a better candidate for abeyance, so that BLM can

return to its appeal in the event that "the rulemaking takes an unforeseen turn." *Am. Petroleum Inst.*, 683 F.3d at 389.

3. Review is prudentially unripe because the balance of hardships tilts in favor of delay.

The second factor in assessing ripeness is "the hardship to the parties of withholding court consideration." *Farrell-Cooper*, 728 F.3d at 1234 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). This inquiry "may be answered by asking 'whether the challenged action creates a direct and immediate dilemma for the parties.'" *Morgan v. McCotter*, 365 F.3d 882, 891 (10th Cir. 2004) (quoting *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995)). Three different groups – BLM, the Rule's challengers, and Environmental Intervenors – have an interest in whether the Hydraulic Fracturing Rule remains vacated or is reinstated on appeal. On balance, the interest of those groups – in particular, the potential costs to the regulated community of compliance with requirements that may soon be changed – warrant a period of abeyance while BLM reconsiders the Rule.

For BLM, greater hardship would flow from immediate appellate review than from abeyance. Although BLM has sought appellate review of the district court's erroneous decision, reversal of that decision only benefits the United States to the extent that the Rule constitutes a wise use of BLM's statutory discretion. The Executive Orders require BLM to examine whether that remains the case, and BLM has already begun the review process that is necessary to make any changes to the

Rule. Proceeding with the appeal would divert administrative resources away from that process. Fairness demands that BLM not pre-determine the issues at stake in the rulemaking, on which the public has yet to comment, but proceeding with judicial review of the Hydraulic Fracturing Rule may compel the United States to represent BLM's current position on those questions. *See San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1048 (10th Cir. 2011) (observing that premature judicial review "could hinder [the agency's] efforts to refine its policies"); *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 713-14 (10th Cir. 2010) (discussing pre-determination in the context of environmental analysis). BLM's present interest is to create an opportunity, unencumbered by active litigation, to determine its position on the continuing need for the Hydraulic Fracturing Rule, while preserving its ability to seek review of the district court's error only if necessary. Actively defending the Rule in court while simultaneously reconsidering it in administrative proceedings would be a mild hardship for BLM, and one that could be avoided by holding the appeal in abeyance on grounds of prudential ripeness.

The Rule's challengers, and particularly the regulated community that would have to comply with the requirements of the Hydraulic Fracturing Rule, face a different and more serious balance of hardships. The regulated community will not suffer hardship from delayed review, as the Rule has been vacated and does not apply to operations on federal and Indian lands during this appeal. *See infra* pp. 32-34; *Farrell-Cooper*, 728 F.3d at 1237. However, if the district court decision were reversed

and the Rule were reinstated before BLM completes the reconsideration process, regulated parties will face a "direct and immediate dilemma," *Morgan*, 365 F.3d at 891, whether to comply with requirements that may be only temporary. *See also Farrell-Cooper*, 728 F.3d at 1237 (considering whether a delay in review will "lead to hardship" by confronting the plaintiff with "the choice of complying with [the challenged] requirements or facing sanctions").

The "overwhelming majority" of entities operating in the onshore oil and gas extraction industry are small businesses. Regulatory Impact Analysis at 96 (BLM App. 893). Some of the Rule's requirements are consistent with industry practice, but the Rule would require some operators to change their practice. *Id.* at 82-83 (BLM App. 879-80). BLM estimated during the rulemaking process for the 2015 Rule that up to 3,800 operations per year could be subject to the Rule and that each operation could incur compliance costs of about $11,400, so the "compliance costs might reach $45 million per year." *Id.* at 2-3 (BLM App. 799-800). Some of the litigants now before the Court allege that these estimates are far too low. *See* Chamber of Commerce Amicus Br. at 17-20; Intervenor Ute Tribe Br. at 36-42.

This Court in *Skull Valley Band* placed considerable weight on such costs in deciding whether to proceed with judicial review. The question in that case was whether Utah state statutes concerning the storage of spent nuclear fuel were preempted by federal law, or whether plaintiffs were subject to those statutes. 376 F.3d at 1227. Utah argued that the plaintiffs' preemption argument was unripe

because the Nuclear Regulatory Commission had not approved the off-site storage of spent nuclear fuel. The Court rejected this argument and held that the preemption argument was ripe for decision "in light of the substantial costs of licensing a [private] storage facility under the Utah statutory scheme." *Id.* at 1238. To delay a decision, the Court held, would impose upon plaintiffs "the uncertainty of not knowing whether they will be required to incur the substantial expenses and comply with the numerous regulatory requirements" imposed by the challenged statutes. *Id.* at 1239 (analyzing *Pacific Gas & Elec. Co. v. State Energy Res. Cons. & Dev. Com'n*, 461 U.S. 190, 201 (1983)).[4]

Here, these considerations work in favor of holding the appeal in abeyance. Operators on federal and Indian lands are already required to comply with the rules in place prior to 2015, and will continue to do so if the Court holds this appeal in abeyance. But proceeding with the appeal will require those operators to make their long-term planning and investment decisions based on the "substantial expenses" and "numerous regulatory requirements" of compliance with the Rule, despite "the

[4] Reflecting the same concerns, other courts of appeals have recognized that it may be appropriate to remand an invalid rule without vacating it, while the agency reconsiders the rule, in order to avoid "the disruptive consequences of an interim change that may itself be changed." *E.g., Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015); *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 993094 (9th Cir. 2012); each quoting *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

uncertainty of not knowing" whether those requirements will even be in effect when operations begin. *Id.*

Finally, the Court must consider whether abeyance will cause hardship to the Environmental Intervenors who support the Rule. BLM does not propose dismissal of its own appeal or the Intervenors' separate appeal on prudential ripeness grounds, but only a delay while BLM charts its new course for the regulation (if appropriate) of hydraulic fracturing on federal and Indian lands. But the procedural hardship to the Environmental Intervenors from mere delay is not enough to proceed with the appeal given the strong countervailing procedural efficiencies of awaiting the result of the administrative process.

The Environmental Intervenors may also claim hardship because, if this appeal is held in abeyance, operators on federal and Indian lands will not be subject to various requirements of the Hydraulic Fracturing Rule that Environmental Intervenors believe are important to protect the environment. BLM did not quantify the benefits of the Rule during its 2015 rulemaking, because the purpose of the Rule is not to reduce ongoing environmental effects but to impose additional safeguards to reduce the risk of accidental environmental harm, and BLM was "unable to monetize the incremental reduction in risk that the rule confers." 80 Fed. Reg. at 16,188. Indeed, an important reason for BLM to begin a new rulemaking is to assess whether the claimed public benefits of the Rule are justified by its costs. *See* Exec. Order 13,783, § 1(e).

While that assessment proceeds, existing regulations and policies provide important protections against the incremental risk of environmental harm from oil and gas operations. Applicable BLM requirements include 43 C.F.R. subpart 3160 and Onshore Oil and Gas Orders, which ensure well safety through design criteria and BLM inspections and approval. *See* 80 Fed. Reg. at 16,129. BLM's pre-existing regulations also provide for public notice of proposed wells and allow BLM to impose conditions of approval that "require, forbid, or control specified activities and disturbances." *Id.* Furthermore, to the extent the Environmental Intervenors believe that operations will be unsafe, it may challenge BLM's decisions to issue permits to drill. Even where plaintiffs seek review of BLM's leasing decisions, this Court has held that such challenges are unripe until "it becomes clear what type of oil and gas development [a lessee] will ultimately be allowed to engage in, if any," and it has held that a plaintiff "will suffer no hardship" from delaying review until that time. *S. Utah Wilderness All. v. Palma*, 707 F.3d 1142, 1160 (10th Cir. 2013). The same consideration applies here.

If BLM decides not to revise or rescind the Hydraulic Fracturing Rule through an appropriate administrative process, both BLM and Environmental Intervenors will have an opportunity to return to this Court and seek reversal of the district court's order vacating the Rule. Any hardship that Environmental Intervenors suffer from a temporary delay in that process does not outweigh the potential costs to the regulated community of compliance with regulatory mandates that may soon be changed. For

these reasons, the Court should hold the appeal in abeyance as prudentially unripe. BLM would not be opposed to providing, during that abeyance, status reports about its ongoing rulemaking process.

B. Are there other reasons that the Court should not decide these appeals before the new regulation issues?

In BLM's view, the anticipated rulemaking is both the only reason and a sufficient reason to hold this appeal in abeyance. BLM has the discretion "to prescribe necessary and proper rules and regulations . . . to carry out and accomplish the purposes" of the MLA, 30 U.S.C. § 189, and the other statutory authorities discussed in its principal briefs provide additional authority. When BLM has made a final decision on the best way to exercise its authority, it will defend that authority in court if necessary. But BLM should not be required to do so in the defense of a regulation that might no longer reflect its considered judgment about what type of regulation may be necessary and proper. BLM's anticipated rulemaking is therefore a weighty consideration that is itself sufficient to delay a decision here.

C. If the government abandons its appeal, do the intervenors have standing?

The government does not intend to abandon its appeal. For the reasons stated in BLM's briefing to this point, it has the statutory authority to promulgate the Hydraulic Fracturing Rule, and the district court's decision to the contrary was erroneous. BLM recommends abeyance not because it agrees with the petitioners' constrained view of BLM's statutory authority, but because it is reconsidering whether

the Rule is a wise use of its discretion. There would be no need for BLM's appeal here if the Rule were rescinded or revised, but BLM will not finally decide whether to rescind or revise the Rule until it completes its anticipated rulemaking process.

Assuming for purposes of argument that the government abandoned its appeal, the Environmental Intervenors would have to demonstrate their own standing to seek review of the district court's judgment. In this Court, a party seeking to intervene under Federal Rule of Civil Procedure Rule 24(a) or (b) need not establish Article III standing "'so long as another party with constitutional standing on the same side as the intervenor remains in the case.'" *San Juan Cty. v. United States*, 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc) (quoting and adopting the reasoning of *San Juan Cty. v. United States*, 420 F.3d 1197, 1205 (10th Cir. 2005)); *see Wyoming v. Dep't of Interior*, 587 F.3d 1245, 1252 (10th Cir. 2009). However, "an intervenor who lacks standing cannot pursue an appeal if the original parties choose not to." *San Juan Cty.*, 503 F.3d at 1174. This is because "[a]ny party invoking the power of the federal courts must demonstrate standing to do so." *Greenbaum v. Bailey*, 781 F.3d 1240, 1242 (10th Cir. 2015). A party that chooses to "'piggyback' on the standing of another party" must establish its "own independent standing" if the other party chooses not to appeal. *Id.* at 1243.[5]

[5] Even if the Court has jurisdiction over a case due to the standing of existing parties, an intervenor may only claim "piggyback" standing if there is a "current, active dispute among those existing parties that they have asked the court to resolve."

A party invoking the court's jurisdiction must show that it has suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent;" it must show that its injury is "fairly traceable" to the challenged action; and it must show that a favorable decision will redress its injury. *See, e.g.*, *Tennille v. Western Union Co.*, 809 F.3d 555, 559 (10th Cir. 2015) (quoting *Friends of the Earth v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 180-81 (2000)). In the context of an appeal, the party must "be aggrieved by the order from which appeal is taken." *Uselton v. Comm. Lovelace Motor Freight, Inc.*, 9 F.3d 849, 854 (10th Cir. 1993).

If it were necessary to decide it, the principal standing issue here would be whether Environmental Intervenors suffer injury from the district court's order. To establish injury-in-fact sufficient to confer standing, a party must show that it seeks "a remedy for a personal and tangible harm" and that it has a "direct stake in the outcome" of the case. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (citations and quotation marks omitted). The decision to seek appellate review cannot be "placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)). Thus, the Environmental

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City of Colorado Spring v. Climax Molybdenum Co., 587 F.3d 1071, 1080 (10th Cir. 2009). That may not be the case if the petitioners consent to BLM's request to hold this appeal in abeyance during the anticipated rulemaking. The Court need not consider this question, however, because BLM does not intend to abandon its appeal.

Intervenors would have to show that oil and gas operations (which would be covered by the Rule but for the district court's vacatur order) are likely to cause their members personal and tangible harm.[6]

1. A third-party intervenor lacks standing to defend the validity of a statute or regulation when the government chooses not to appeal.

It is doubtful whether Environmental Intervenors would be able to demonstrate standing here because in general, only the government has standing to defend the validity of its own regulations. In *Diamond v. Charles*, the Supreme Court reviewed the lower courts' injunction against the enforcement of an Illinois statute. The State of Illinois declined to defend the statute in the Supreme Court, but Diamond, an intervenor with "piggyback" standing below, continued to seek review. *See* 476 U.S. at 60-61, 64. The Supreme Court held that Diamond did not have standing because "the power to create and enforce a legal code . . . is one of the quintessential functions of a State." *Id.* at 65 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)). The defense of such legal provisions by a third-party intervenor would amount to "an effort to compel the State to enact a code in accord with [the intervenor's] interests." *Id.*; *see also Arizonans for*

[6] An organization has standing to sue on behalf of its members if its members would otherwise have standing to sue in their own right, if the interests at stake are germane to the organization's purpose, and if the litigation does not require the participation of individual members. *See, e.g.*, *Palma*, 707 F.3d at 1152. BLM does not contest that the Intervenors' filings below establish the second and third of these requirements.

Official English v. Arizona, 520 U.S. 43, 64-65 (1997) (expressing doubt, though not resolving, whether non-elected sponsors of legislation may "defend, in lieu of public officials, the constitutionality of initiatives made law of the State").

Other courts of appeals have applied *Diamond* to find that plaintiffs lacked standing to challenge various civil regulatory provisions. *See Associated Builders & Contractors v. Perry*, 16 F.3d 688, 692-93 (6th Cir. 1994); *see also Kendall-Jackson Winery, Ltd. v. Branson*, 212 F.3d 995, 997-99 (7th Cir. 2000); *Sea Shore Corp. v. Sullivan*, 158 F.3d 51, 58-59 (1st Cir. 1998) (both analyzing this problem as one of redressability rather than injury). The Ninth Circuit allows intervenors to defend a statute or regulation on appeal in the government's absence, *see, e.g.*, *Yniguez v. State of Ariz.*, 939 F.2d 727, 731-32 (9th Cir. 1991) (called into question in *Arizonans for Official English*, 520 U.S. at 64-65); although it has limited the arguments that intervenors in that situation may make. *See Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1341 (9th Cir. 1992). In *Wyoming v. U.S. Dep't of Agriculture*, 414 F.3d 1207, 1211 (10th Cir. 2005), this Court allowed a third-party defense of a regulation on appeal where the government had declined to appeal an adverse judgment, but it dismissed the intervenors' appeal on mootness grounds without considering the *Diamond* issue.

If the Court were to address the issue here, it should find that *Diamond* is controlling and that the Environmental Intervenors would lack standing to pursue their own appeal. BLM has both the duty by statute to manage the public lands and the authority to promulgate appropriate regulations to govern oil and gas operations,

and only BLM can "address violations of and enforce compliance with" the Rule. *Associated Builders & Contractors*, 16 F.3d at 693. Under *Diamond,* therefore, BLM is the *only* party with a "direct stake" in seeing the regulatory provisions of the Hydraulic Fracturing Rule remain effective as a legal code. 476 U.S. at 65.

2. The Environmental Intervenors have not yet made a sufficient showing of concrete, particularized harm.

Even assuming that Environmental Intervenors *could* show a direct stake in defending the Hydraulic Fracturing Rule without the government's participation, they have yet to make an adequate showing of injury. To demonstrate standing, a plaintiff cannot rely on "generalized harm to the . . . environment." *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009). The Supreme Court has rejected a standing affidavit, for example, that "was not tied to application of the challenged regulations . . . does not identify any particular site . . . [and] relates to past injury rather than imminent future injury." *Id.* at 495. Instead, the Supreme Court's standing doctrine requires a plaintiff seeking standing to allege "concrete plans" to visit a "particular site." *See N.M. Off-Highway Vehicle Alliance v. U.S. Forest Service*, 645 Fed. Appx. 795, 802 (10th Cir. 2016) (quoting *Summers*, 555 U.S. at 496, and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)).

Intervenors' filings below sought to establish their right to intervene, which is based on a different showing. They generally discussed how they support the interests of their members rather than the "imminent and concrete harm to the

interest of their members" that the Supreme Court requires. *Summers*, 555 U.S. at 495; *see* Decl. of Bruce Baizel (Earthworks) ¶ 4 (BLM Supp. App. 1-2); Decl. of Jon Goldin-DuBois (Western Resource Advocates) ¶ 3 (BLM Supp. App. 7); Decl. of Lois Epstein (The Wilderness Society) ¶¶ 4, 6 (BLM Supp. App. 11-13); Decl. of Carrie Curtiss (Conservation Colorado Education Fund) ¶¶ 4-5 (BLM Supp. App. 16-17); Decl. of Deborah Nardone (Sierra Club) ¶ 7 (BLM Supp. App. 29). These organizations would plainly have to make an additional, more specific showing before they could pursue an appeal of the district court's order on their own.

One of the intervenors, Southern Utah Wilderness Alliance, submitted a declaration that contains specific facts about the activities of a particular member. *See* Decl. of Virginia Norris Exton ¶¶ 7-13 (BLM Supp. App. 23-25). Even that declaration, however, is not specific enough to establish "imminent future injury" related to oil and gas operations at a "particular site." *Summers*, 555 U.S. at 495. Exton identifies only two specific areas where hydraulic fracturing is occurring, *see id.* ¶ 9, but does not establish that she has imminent, concrete plans to visit those areas as distinguished from "countless other BLM-managed lands in the West." *Id.* ¶¶ 7-8. She also does not allege facts to support the conclusion that specific oil and gas operations are engaging in practices or creating risks that the Hydraulic Fracturing Rule addresses, and therefore that reinstating the Rule would redress her claims of injury. *Summers* requires more to establish constitutional standing.

III. EFFECTS OF ABATING THE APPEAL

If these appeals are abated, what is the status of the present Rule during the new rulemaking? What is the status of the district court's order of June 21, 2016?

The district court reviewed the Hydraulic Fracturing Rule under the APA, and "set aside" – that is, vacated – the Rule as being "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706. To vacate an agency action means "to annul, to cancel or rescind . . . to make, or to render, void . . . to deprive of force; to make of no authority or validity." *Alabama Power Co. v. EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994) (quoting *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983)); *see Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1245 (10th Cir. 2008).

When a regulation is vacated, the effect is "to suspend the [regulated parties'] compliance obligation pending further rulemaking by the agency." *Alabama Power*, 40 F.3d at 456. Although vacatur under the APA is a form of equitable relief, the district court's order was not an ongoing injunction against BLM's enforcement of the Rule, but a final order that deprived the Rule of any legal effect. It maintained the status quo ante – i.e., the pre-existing federal regulations and whatever state statutes and regulations might apply to hydraulic fracturing. BLM has no control over the status of the present Hydraulic Fracturing Rule except to the extent the BLM either seeks further relief from this Court or moots this appeal by rescinding the Rule.

If the present appeal is abated, this situation will continue. This Court, of course, has jurisdiction to review the district court's order, and both this Court and the district court have the power to stay the district court's order pending further appellate review. *See* Fed. R. Civ. P. 60(b)(6); Fed. R. App. P. 8(a). But neither BLM nor any other party has sought such a stay.[7] Holding the case in abeyance would constitute a decision temporarily not to exercise this Court's jurisdiction, on prudential grounds, while BLM reconsiders the Rule.

The argument in this brief explains why that course is justified. Although BLM believes the district court's decision was erroneous, review of that decision is not urgent in light of the likelihood that the anticipated rulemaking will result in at least some changes to the Rule. If Interior ultimately chooses not to rescind or revise the

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[7] In opposing the continuance of oral argument, the Environmental Intervenors proposed that the Court request briefing on what the status of the Rule and the district court's order *should be* during any abeyance, implying that a stay of the district court's order may be appropriate. *See* Environmental Intervenors' filing of March 15, 2017, at 3, 13. The Court, however, ordered the parties only to address what the status of the Rule and the district court's order *is* during any abeyance. *See* Order of March 17, 2017. If the Environmental Intervenors were to make a separate motion under Rule 8 for a stay pending appeal, BLM would respond at that time. Many of the same factors that warrant abeyance here – particularly the potential cost and uncertainty of constant regulatory changes – would counsel against such a stay.

A separate question, which the Court may consider later, is what the status of the district court's order will be after BLM completes its rulemaking. This Court in similar situations has dismissed the appeal as moot and ordered the district court's judgment to be vacated. *See Wyoming*, 414 F.3d at 1211, 1213. Vacatur of the district court's opinion would also be appropriate here, and it would mitigate any harm to the Environmental Intervenors from a delay in hearing their appeal.

Rule, then the Court would likely proceed with the appeal and consider whether the district court's view of BLM's statutory authority was erroneous. That would delay the effectiveness of the Rule, but such a delay is tolerable here in light of the existing regulatory regimes and the possible costs of implementing a Rule that may soon be changed.

In their earlier filing opposing the continuance of oral argument, the Environmental Intervenors argued that an indefinite abeyance "would allow BLM to effectively rescind the Rule without the notice-and-comment rulemaking and reasoned decision-making required under the [APA]." Environmental Intervenors' filing of March 15, 2017, at 2; *see id.* at 10-11. That is not the case because the district court, not BLM, set aside the Rule based on a finding that it was legally invalid. Notice-and-comment rulemaking is not necessary to give effect to the district court's decision, and the Attorney General (representing BLM) plainly has the discretion not to appeal it. Rather, BLM's request here for abeyance will *support* its efforts to conduct a full notice-and-comment rulemaking, with public participation and a reasoned decision, before taking any action (if appropriate) to rescind the Rule. A delay in this appeal will facilitate that orderly administrative process. That would be far more consistent with the respective roles of the courts and the Executive Branch than for the district court to vacate the Rule by judicial fiat or for this Court to charge forward and unnecessarily review a Rule that may soon be moot.

CONCLUSION

For the foregoing reasons, BLM respectfully renews its request that the Court hold this appeal in abeyance until BLM advises the Court of the status of its reconsideration of the Hydraulic Fracturing Rule.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation established in this Court's Order of March 17, 2017, because it contains 9,070 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the word count feature of Microsoft Word.

s/ *J. David Gunter II*
J. DAVID GUNTER II

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing

BRIEF

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s/ *J. David Gunter II*
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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2017, I electronically filed the foregoing Supplemental Brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system.

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s/ *J. David Gunter II*
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