FILED
United States Court of Appeals
Tenth Circuit

June 4, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STATE OF WYOMING; STATE OF MONTANA,

Petitioners - Appellees,

and

WESTERN ENERGY ALLIANCE; INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA,

Consolidated Petitioners - Appellees,

and

STATE OF NORTH DAKOTA; STATE OF TEXAS,

Intervenors Petitioners - Appellees,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; RYAN ZINKE, in his official capacity as United States Department of Interior Secretary; UNITED STATES BUREAU OF LAND MANAGEMENT; MICHAEL D. NEDD, in his official capacity as Acting Director of the Bureau of Land Management,

Respondents - Appellees.

and

WYOMING OUTDOOR COUNCIL; CENTER FOR BIOLOGICAL DIVERSITY; CITIZENS FOR A

No. 18-8027
(D.C. Nos. 2:16-CV-00285-SWS & 2:16-CV-00280-SWS)
(D. Wyo.)

HEALTHY COMMUNITY; DINE CITIZENS AGAINST RUINING OUR ENVIRONMENT; EARTHWORKS; ENVIRONMENTAL DEFENSE FUND; ENVIRONMENTAL LAW AND POLICY CENTER; MONTANA ENVIRONMENTAL INFORMATION CENTER; NATIONAL WILDLIFE FEDERATION; NATURAL RESOURCES DEFENSE COUNCIL; SAN JUAN CITIZENS ALLIANCE; SIERRA CLUB; WILDERNESS SOCIETY; WESTERN ORGANIZATION OF RESOURCE COUNCILS; WILDERNESS WORKSHOP; WILDEARTH GUARDIANS,

Intervenors Respondents - Appellants,

and

STATE OF CALIFORNIA; STATE OF NEW MEXICO,

Intervenors Respondents.

STATE OF WYOMING; STATE OF MONTANA;

Petitioners - Appellees,

WESTERN ENERGY ALLIANCE; INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA,

Consolidated Petitioners - Appellees,

and

STATE OF NORTH DAKOTA; STATE OF TEXAS,

Intervenors Petitioners - Appellees,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; RYAN ZINKE, in his official capacity as United States Department of Interior Secretary; UNITED STATES BUREAU OF LAND MANAGEMENT; MICHAEL D. NEDD, in his official capacity as Acting Director of the Bureau of Land Management,

Respondents - Appellees.

and

WYOMING OUTDOOR COUNCIL; CENTER FOR BIOLOGICAL DIVERSITY; CITIZENS FOR A HEALTHY COMMUNITY; DINE CITIZENS AGAINST RUINING OUR ENVIRONMENT; EARTHWORKS; ENVIRONMENTAL DEFENSE FUND; ENVIRONMENTAL LAW AND POLICY CENTER; MONTANA ENVIRONMENTAL INFORMATION CENTER; NATIONAL WILDLIFE FEDERATION; NATURAL RESOURCES DEFENSE COUNCIL; SAN JUAN CITIZENS ALLIANCE; SIERRA CLUB; WILDERNESS SOCIETY; WESTERN ORGANIZATION OF RESOURCE COUNCILS; WILDERNESS WORKSHOP; WILDEARTH GUARDIANS,

Intervenors Respondents,

and

No. 18-8029
(D.C. Nos. 2:16-CV-00285-SWS & 1:16-CV-00280-SWS)
(D. Wyo.)

STATE OF CALIFORNIA; STATE OF NEW MEXICO,

Intervenors Respondents - Appellants.

ORDER

Before **TYMKOVICH**, Chief Judge, **HOLMES** and **MATHESON**, Circuit Judges.

These appeals concern the district court's April 4, 2018, order (the April 4 Order) staying the Bureau of Land Management's Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule, 81 Fed. Reg. 83,008 (Nov. 18, 2016) (the Rule). Currently before the court are two motions to dismiss these appeals and two motions for a stay pending appeal of the April 4 Order. For the following reasons, we deny both the motions to dismiss and the motions for stay.

Motions to Dismiss

The states of Wyoming and Montana (the Appellee States) and industry groups Western Energy Alliance and Independent Petroleum Association of America (the Industry Groups) have each moved to dismiss these appeals for lack of appellate jurisdiction. It is undisputed that the April 4 Order is an interlocutory order. The Appellee States and the Industry Groups argue that the April 4 Order does not qualify for review under 28 U.S.C. § 1292(a)(1) because the appellants challenge neither an express denial or grant of an injunction nor an order with the practical effect of denying or granting an injunction. The appellants—the states of California and New Mexico (the

Appellant States) and numerous conservation and citizen groups (the Conservation Groups)—have responded in opposition to dismissal, and the Appellee States and the Industry Groups have replied.

Section 1292(a)(1) allows review of interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions." Pointing to common definitions of "injunction," the appellants contend that the April 4 Order is an injunction in substance, if not in form. *See New Mexico v. Trujillo*, 813 F.3d 1308, 1318 (10th Cir. 2016) (defining injunction "broadly as an equitable decree compelling obedience under the threat of contempt" (internal quotation marks omitted)); *Black's Law Dictionary* (10th ed. 2014) (defining injunction as "[a] court order commanding or preventing an action"). On this point, we agree with the appellants. The district court's "stay" effectively enjoins enforcement of the Rule. Moreover, the April 4 Order satisfies the "practical effect" test set forth in *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981). The April 4 Order has the practical effect of granting an injunction; it results in a serious, perhaps irreparable, consequence in that the environmental benefits of the Rule will not be realized; and it can be challenged only by immediate appeal. *See id.*

Because this court has jurisdiction over these appeals under § 1292(a)(1), we deny the motions to dismiss for lack of jurisdiction.

Motions for Stay Pending Appeal

The Appellant States and the Conservation Groups have each moved for a stay of the April 4 Order pending their appeals. The Opposing States, the Industry Groups, and

federal agencies and officials have responded in opposition to a stay, and the appellants have replied.

In considering a motion for a stay pending appeal, this court considers the movant's likelihood of success on the merits; the threat of irreparable harm if relief is not granted; the absence of harm to opposing parties if relief is granted; and the risk of harm to the public interest. *See* 10th Cir. R. 8.1; *Nken v. Holder*, 556 U.S. 418, 434 (2009). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken*, 556 U.S. at 433 (internal quotation marks omitted). The court must be convinced that the circumstances justify an exercise of the court's discretion. *See id.* at 433-34.

The appellants have failed to demonstrate that the stay factors weigh in their favor, and we are not convinced that the circumstances justify an exercise of this court's discretion. We therefore deny the motions for stay pending appeal.

Conclusion

The motions to dismiss and the motions for stay pending appeal are denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

Nos. 18-8027 & 18-8029, *Wyoming v. U.S. Dep't of the Interior*

MATHESON, J., concurring in part and dissenting in part.

I agree with the majority that this court has jurisdiction under 28 U.S.C. § 1292(a)(1) to consider these appeals and that we should deny the motions to dismiss. I do not agree, however, that the motions for stay pending appeal should be denied outright. Under this court's precedent, the district court should have analyzed the traditional four factors in deciding whether to stay the Waste Prevention Rule (effective January 17, 2017) under Administrative Procedure Act § 705, 5 U.S.C. § 705. *See Associated Sec. Corp. v. SEC*, 283 F.2d 773, 774-75 (10th Cir. 1960) (applying the traditional four factors under § 705's predecessor statute); *see also United States v. Moore*, 427 F.2d 1020, 1027 (10th Cir. 1970) (stating that the four factors "should be met before a court enjoins administrative action"). In turn, the district court's failure to analyze the four factors in the April 4, 2018, order makes it more difficult for this court to undertake the weighing required for a stay pending appeal. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). This difficulty is not cured by the brief recounting of the factors in the district court's April 30, 2018, order denying a stay pending appeal. Accordingly, I would order 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.