Nos. 18-8027 and 18-8029

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, et al.,
Petitioners - Appellees,

and

WESTERN ENERGY ALLIANCE, et al.,
Consolidated Petitioners - Appellees,

and

STATE OF NORTH DAKOTA, et al.,
Intervenors - Petitioners - Appellees,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
Respondents - Appellees.

and

WYOMING OUTDOOR COUNCIL, et al.,
Intervenors - Respondents - Appellants,

and

STATE OF CALIFORNIA, et al.,
Intervenors - Respondents - Appellants.

On Appeal from the U.S. District Court for the District of Wyoming
Nos. 2:16-cv-285-SWS, 2:16-cv-280-SWS (Hon. Scott W. Skavdahl)

MOTION TO DISMISS APPEAL AS MOOT

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 27 and Tenth Circuit Rule 27.3(A), the Federal Appellees move to dismiss this appeal as moot. Counsel for the Industry Groups and States of Wyoming and Montana consent to this motion. Counsel for North Dakota consents to the motion provided that it requests a remand to the district court and nothing more. Texas concurs with North Dakota, with the same stipulation. Counsel for the Citizen Groups and States of California and New Mexico have asked the Federal Appellees to include the following statement: "Appellants do not oppose the motion to the extent it seeks vacatur of the district court order challenged on appeal and remand with instructions to dismiss the underlying petitions for review, consistent with the court's ordinary practice; to the extent it does not, Appellants oppose and intend to file a response."

The Federal Appellees have good cause to file this motion at this time because the Revision Rule issued by the Bureau of Land Management (BLM) was published in the Federal Register on September 28, 2018. 83 Fed. Reg. 49,184. The Revision Rule will take effect on November 27, 2018. *Id.* The opening brief in this appeal was filed on July 30, 2018; answering briefs were filed on September 12, 2018; and the reply brief was filed on October 1, 2018.

BACKGROUND

BLM promulgated the Waste Prevention Rule in November 2016 (2016 Rule).[1] 81 Fed. Reg. 83,008 (Nov. 18, 2016). The 2016 Rule was a new attempt to regulate the venting and flaring of natural gas released during oil and gas development on federal and Indian lands, and it replaced regulations that had been in effect for more than 30 years. *Id.* at 83,009. Industry groups and the States of Wyoming and Montana (the Petitioners) challenged the Rule in the District of Wyoming, and their respective challenges were consolidated. The Citizen Groups and States of New Mexico and California (collectively, "the Groups") intervened as Respondents.

While the consolidated challenge was pending and before the 2016 Rule went into full effect, BLM began to develop a "Revision Rule" to revise and replace the 2016 Rule. A proposed Revision Rule was published in the Federal Register on February 22, 2018. 83 Fed. Reg. 7924. The Petitioners then moved for various forms of equitable relief, including suspension of the 2016 Rule's upcoming deadlines pending publication of the final Revision Rule. *See* ECF Nos. 195, 197.[2] In April 2018, the district court issued an order staying review and full implementation of the 2016 Rule while BLM finalized the Revision Rule. ECF No. 215. The court explained that forcing "temporary compliance with [the 2016 Rule] makes little sense and provides

[1] A complete discussion of the factual background and procedural history relevant to this appeal can be found in BLM's answering brief, filed on September 12, 2018.
[2] References to district court filings refer to docket number 2:16-cv-00285-SWS.

minimal public benefit." *Id.* at 9. The Groups appealed that order, and their appeals were consolidated in the instant proceeding.

On September 28, 2018, the final Revision Rule was published in the Federal Register. 83 Fed. Reg. 49,184. The Revision Rule rescinded a number of the 2016 Rule's requirements and modified and replaced others. *Id.* at 49,190. The States of California and New Mexico and a consortium of conservation and tribal citizen groups—many of whom are parties to the instant proceeding—have challenged the new rule in the Northern District of California. N.D. Cal. No. 4:18-cv-05712 (filed Sept. 18, 2018) (states); No. 3:18-cv-05984 (filed Sept. 28, 2018) (groups).

The Groups assert in their recently filed reply brief that publication of the Revision Rule renders their appeal "constitutionally moot" because "there is no longer a live controversy for the Court to decide." Reply Br. at 1. BLM agrees and therefore moves to dismiss this appeal as moot.[3]

ARGUMENT

I. This appeal is moot because this Court can no longer grant meaningful relief to the Groups.

Article III, § 2 of the U.S. Constitution confines federal courts to the decision of "Cases" or "Controversies." "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the

[3] The Groups also argue that the Petitioners' underlying challenge to the 2016 Rule is moot and that this Court should instruct the district court to dismiss it. Reply Br. at 2, 9, 11, 19. Because only the interlocutory stay order is on appeal, however, this Court need only decide whether the challenge to the stay is moot. *See infra* p.5.

complaint is filed.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). A case is moot if "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1211 (10th Cir. 2005) (citation omitted). "The crucial question is whether granting a present determination of the issues offered will have some effect in the real world." *Id.* at 1212 (citation omitted); *see also* Reply Br. at 2-5.

Now that the final Revision Rule has been published, this appeal is moot. Even if this Court eventually holds that the stay was an abuse of discretion, vacating the stay would have no effect in the real world because the 2016 Rule has been replaced. 83 Fed. Reg. at 49,190; Reply Br. at 4, 12 (acknowledging that the 2016 Rule "no longer exists"). When an agency replaces a regulation, "adoption of the new rule . . . render[s] the appeal moot." *Wyoming*, 414 F.3d at 1212; *see also* Reply Br. at 1-5. Further review of the stay order would result in only an advisory opinion, which federal courts lack authority to issue. *See Golden v. Zwickler*, 394 U.S. 103, 108 (1969).

II. Neither exception to mootness applies.

This Court recognizes two exceptions to mootness, *see Brown v. Buhman*, 822 F.3d 1151, 1166 (10th Cir. 2016), but neither exception applies here.

The first exception applies when a defendant voluntarily ceases "challenged conduct" but remains free to resume the conduct at any time. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1115-16 (10th Cir. 2010) (citation

omitted). This exception does not apply because BLM's "challenged conduct"—that is, promulgation of the 2016 Rule—is not at issue on appeal. The only question before this Court is whether the district court's stay order was an abuse of discretion. Moreover, to the extent that order may be considered "challenged conduct," it was not voluntarily withdrawn, and it will not be revived in the future.

The second exception is for cases "capable of repetition, yet evading review." *Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884, 893 (10th Cir. 2008). That exception applies when (1) the duration of the challenged conduct is too short to be fully litigated before it expires; and (2) there is a reasonable expectation that the complaining party will be subjected to the same conduct again. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990); *Wyoming*, 414 F.3d at 1212. A case must meet both elements for the exception to apply. *Chihuahuan Grasslands*, 545 F.3d at 893. The exception does not apply here: the Groups will not be subjected to the stay again because the stayed rule has been replaced.

III. Remedy

The Groups argue that this Court not only should dismiss as moot *this appeal*, but also should order the district court to dismiss as moot *the Petitioners' underlying challenge* to the merits of the 2016 Rule. Reply Br. at 2, 9, 11, 19. The Court need not go that far. Because only the district court's interlocutory stay order is before the Court on appeal, the Court need only decide whether the appeal is moot. Determining whether the challenge to the merits of the 2016 Rule is also moot may reasonably be

left to the district court on remand. *See, e.g., Fleming v. Gutierrez*, 785 F.3d 442, 446 & n.5 (10th Cir. 2015) (dismissing interlocutory appeal as moot and stating that "it remains for the district court to determine on remand whether any claims for relief . . . remain pending").

CONCLUSION

For these reasons, this appeal should be dismissed as moot and the case should be remanded to the district court.

Respectfully submitted,

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90-1-18-14846

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. All counsel in this appeal are registered CM/ECF users who will be served by the appellate CM/ECF system.

I certify that the foregoing document contains 1,294 words in 14-point type and that it complies with the type-face and type-volume requirements of Tenth Circuit Rule 32(a) and Federal Rule of Appellate Procedure 27(d)(2)(A).

I also certify that I have scanned the foregoing document for viruses using our current version of Endpoint Protection (October 11, 2018) (v.1.277.936.0) and that the document is free of viruses.

I further certify that I have not made any privacy redactions in the attached document and that no paper copies are required.

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