Nos. 18-8027 & 18-8029

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATE OF WYOMING, ET AL.,
Petitioner-Appellees,

&

STATE OF NORTH DAKOTA, ET AL.,
Petitioner-Intervenor-Appellees,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Respondent-Appellees,

&

STATE OF NEW MEXICO, ET AL.,
Intervenor-Respondent-Appellants,

&

WYOMING OUTDOOR COUNCIL, ET AL.,
Intervenor-Respondent-Appellants.

On Appeal from the United States District Court for the District of Wyoming
Civil Action No. 2:16-cv-00285-SWS & 2:16-cv-00280-SWS
Hon. Scott W. Skavdahl

APPELLANTS' JOINT RESPONSE TO MOTION TO DISMISS

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October 25, 2018

All parties to this case agree that it is moot due to the Bureau of Land Management's ("BLM") final decision to replace the challenged Waste Prevention Rule with the Rescission Rule. *See* Mot. to Dismiss Appeal as Moot 1 (Oct. 11, 2018), Doc. No. 010110066954 ("Motion to Dismiss") (providing party positions).[1] The parties only disagree about whether this Court should follow its usual practice with regard to the appropriate remedy. As this Court has held, "[w]hen a case becomes moot pending appeal, the general practice is to vacate the judgment below and remand with directions to dismiss." *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1213 (10th Cir. 2005) ("*Wyoming v. USDA*").

There is no reason to depart from the Court's ordinary remedy in this case. The challenged district court Order radically expands the federal judiciary's authority to enjoin federal regulations without applying the necessary four-factor preliminary injunction test. Vacatur is necessary to prevent this flawed Order "from spawning any legal consequences" where review was prevented by "happenstance." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40–41 (1950). Moreover, as is typical when a regulation is replaced, the replacement moots both the appeal and underlying suit. Accordingly, this Court should remand the case with instructions to dismiss the underlying petitions for review.

[1] All appellate pleadings citations are to Case No. 18-8027 unless otherwise noted.

I. Vacatur Is the Ordinary Remedy for Mootness and Is Warranted Here.

As Appellants explained at length in their reply brief on the merits, the ordinary remedy of vacatur is appropriate in this case. Appellants' Joint Reply Br. 9–12 (Oct. 1, 2018), Doc. No. 010110062387 ("Reply Br.").

Nearly seventy years ago, the Supreme Court explained that the "established practice" when a case becomes moot on appeal is to "reverse or vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39. This Court faithfully applies *Munsingwear* and vacates the underlying district court order in cases it finds to be moot on appeal. *E.g.*, *Hayes v. Osage Minerals Council*, 699 F. App'x 799, 804 (10th Cir. 2017); *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enf't*, 652 F. App'x 717, 718–19 (10th Cir. 2016); *Diné Citizens Against Ruining Our Env't v. U.S. Office of Surface Mining, Reclamation & Enf't*, 643 F. App'x 799, 800 (10th Cir. 2016); *WildEarth Guardians v. Pub. Serv. Co. of Colo.*, 690 F.3d 1174, 1191 (10th Cir. 2012) ("*WildEarth Guardians v. PSCo*"); *McKeen v. U.S. Forest Serv.*, 615 F.3d 1244, 1260 (10th Cir. 2010); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1133 (10th Cir. 2010); *Kan. Judicial Review v. Stout*, 562 F.3d 1240, 1249 (10th Cir. 2009); *Chihuahuan Grasslands All. v. Kempthorne*, 545 F.3d 884, 894 (10th Cir. 2008); *McMurtry v. Aetna Life Ins. Co.*, 273 F. App'x 758, 761 (10th Cir. 2008); *Lane v. Simon*, 495 F.3d 1182, 1187 (10th Cir. 2007); *Bank of*

Nova Scotia v. Suitt Constr. Co., 209 F. App'x 860, 862 (10th Cir. 2006); *S. Utah Wilderness All. v. Norton*, 116 F. App'x 200, 203 (10th Cir. 2004); *McClendon v. City of Albuquerque*, 100 F.3d 863, 868 (10th Cir. 1996).

In particular, where an agency has replaced a challenged regulation while it was subject to an appeal, this Court has repeatedly held that the case was moot, vacated the underlying district court order, and remanded with instructions to dismiss the case. *Wyoming v. USDA*, 414 F.3d at 1210, 1213–14 (case mooted where the Forest Service replaced the Roadless Rule with a new regulation; challenged order vacated and case remanded with instructions to dismiss); *Wyoming v. U.S. Dep't of the Interior*, 587 F.3d 1245, 1249–50 (10th Cir. 2009) ("*Wyoming v. DOI*") (case mooted where National Park Service replaced regulation governing snowmobile use in Yellowstone with a new regulation; challenged order vacated and case remanded with instructions to dismiss). Just a year ago, this Court held that a challenge to a different BLM regulation was prudentially unripe because BLM proposed to rescind the regulation. *Wyoming v. Zinke*, 871 F.3d 1133, 1143 (10th Cir. 2017) ("*Zinke*"). "[G]uided by [its] cases discussing mootness," the court vacated the district court decision and remanded with instructions to dismiss. *Id.* at 1145–46.

Vacatur also is the appropriate remedy here. BLM has mooted this case by replacing the regulation at issue—the Waste Prevention Rule—with the Rescission

Rule, 83 Fed. Reg. 49,184 (Sept. 28, 2018). Motion to Dismiss at 2–3. There is thus no relevant distinction between this case and *Wyoming v. USDA* or *Wyoming v. DOI*. Just as in those cases, this Court should apply the default remedy of vacatur. And vacatur is even more appropriate in this case than in *Zinke* because BLM has finalized its rescission of most of the regulation at issue, rendering the case constitutionally (instead of prudentially) moot.

Vacatur is particularly appropriate because it will "prevent [the unreviewed order] from spawning any legal consequences." *Zinke*, 871 F.3d at 1145 (quoting *Munsingwear*, 340 U.S. at 41); *see also U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) ("A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment."). Fulfilling the purpose behind vacatur is especially important in this case because the district court's unprecedented Order expands the federal judiciary's authority to enjoin federal regulations without applying the four-factor preliminary injunction test. *See* Reply Br. 12–19. It would be inequitable to prevent Appellants from obtaining appellate review of that incorrect decision because circumstances outside their control—BLM's actions—mooted the case before appellate review could be completed.[2]

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[2] Appellants have acted to expedite this appeal in order to obtain a decision prior to BLM's rescission of the Waste Prevention Rule. Appellants filed their appeals within two days of the district court issuing the Order. Joint Deferred App. 216–

The lone exception to the vacatur rule applies when "the party seeking appellate relief is . . . responsible for mooting the case" in an "attempt[] to manipulate the courts to obtain the relief it was not able to win in the judicial system." *Wyoming v. USDA*, 414 F.3d at 1213; *see also Zinke*, 871 F.3d at 1145 ("[I]f the party seeking vacatur has caused mootness, generally we do not order vacatur.") (quoting *Rio Grande Silvery Minnow*, 601 F.3d at 1129); *Wyoming v. DOI*, 587 F.3d at 1254 ("Vacatur can be an inappropriate remedy . . . when the actions of a nonprevailing party are responsible for rendering the dispute moot."). But where, as here, an agency that was either not an appellant, or does not itself seek vacatur, causes a case to become moot by promulgating a new regulation, this exception to the normal rule requiring vacatur does not apply. *Zinke*, 871 F.3d at 1145; *Wyoming v. DOI*, 587 F.3d at 1254; *Wyoming v. USDA*, 414 F.3d at 1213.[3]

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21. Appellants swiftly sought a stay pending appeal. *See, e.g.*, Citizen Groups' Mot. for Stay Pending Appeal (Apr. 20, 2018), Doc. No. 01019979456; State Appellants' Mot. for Stay Pending Appeal, Case No. 18-8029 (Apr. 20, 2018), Doc. No. 01019979472. Appellants negotiated a prompt briefing schedule. Joint Proposed Briefing Schedule (June 19, 2018), Doc. No. 010110009017. When BLM sought to delay that briefing schedule, Appellants opposed BLM's motion. State Appellants' Opp'n to Mot. for a 30-Day Extension of Time to File Resp. Br. (Aug. 22, 2018), Doc. No. 010110041399; Appellants' Opp'n to Mot. for a 30-Day Extension of Time to File Resp. Br. (Aug. 22, 2018), Doc. No. 010110041351.

[3] In analogous cases where an agency moots a case during an appeal, but the agency does not seek vacatur, other circuits have repeatedly reached the same conclusion. *See, e.g.*, *All. for the Wild Rockies v. Savage*, 897 F.3d 1025, 1032 (9th Cir. 2018); *Ozinga v. Price*, 855 F.3d 730, 736 (7th Cir. 2017); *Akiachak Native Cmty. v. U.S. Dep't of the Interior*, 827 F.3d 100, 115 (D.C. Cir. 2016); *Humane Soc'y of the U.S. v. Kempthorne*, 527 F.3d 181, 188 (D.C. Cir. 2008).

New Mexico, California, and the Citizen Group Appellants—the intervenors seeking appellate relief and vacatur—did not moot this case. BLM, which was the prevailing party below, mooted the case by promulgating the Rescission Rule. Accordingly, the exception to vacatur does not apply in this case, and this Court should follow its usual practice and vacate the challenged Order.

II. Because No Live Case or Controversy Remains, the Court Must Remand with Instructions to Dismiss the Case.

In addition to vacating the underlying district court order, in circumstances where a case becomes moot on appeal, this Court routinely remands the case to the district court with instructions to dismiss the underlying action. *E.g.*, *WildEarth Guardians v. PSCo*, 690 F.3d at 1191; *McKeen*, 615 F.3d at 1260; *Rio Grande Silvery Minnow*, 601 F.3d at 1133; *Wyoming v. DOI*, 587 F.3d at 1254; *Kan. Judicial Review*, 562 F.3d at 1249; *Chihuahuan Grasslands All.*, 545 F.3d at 894; *McMurtry*, 273 F. App'x at 761; *Lane*, 495 F.3d at 1187; *Bank of Nova Scotia*, 209 F. App'x at 862; *S. Utah Wilderness All.*, 116 F. App'x at 203; *Wyoming v. USDA*, 414 F.3d at 1214; *McClendon*, 100 F.3d at 868; *accord N.M. Off-Highway Vehicle All. v. U.S. Forest Serv.*, 645 F. App'x 795, 807 (10th Cir. 2016) (vacating district court order and remanding with instructions to dismiss underlying case due to lack of subject matter jurisdiction).

In *Zinke*, this Court explained that "dismissing the underlying action is appropriate . . . given that there would be nothing for the district court to do upon

remand" because BLM had proposed rescinding the challenged regulation. *Zinke*, 871 F.3d at 1146 (citing *Utah v. U.S. Dep't of the Interior*, 535 F.3d 1184, 1186, 1192 (10th Cir. 2008)); *Park Lake Res. Ltd. Liab. Co. v. U.S. Dep't of Agric.*, 197 F.3d 448, 454 (10th Cir. 1999)). Just as in *Zinke*, ordering the district court to dismiss the underlying suit on remand is appropriate here because BLM has rescinded the Waste Prevention Rule, and replaced it with the Rescission Rule through a new rulemaking with a distinct rationale, substantive scope, and administrative record.

In its merits response brief filed just last month, BLM explained that if "the appeal becomes constitutionally moot, the case should be remanded to the district court with instructions to dismiss." Answering Br. of Fed. Resp'ts-Appellees 12 (Sept. 12, 2018), Doc. No. 010110051889 ("BLM Resp. Br."). BLM has apparently reversed its position and now attempts to distinguish the question of whether this *appeal* is moot from the question of whether this *case* is moot, contending that this Court need not decide whether Petitioners' challenge to the Waste Prevention Rule is moot in order to dismiss this appeal. Motion to Dismiss at 3 n.3, 5–6. But BLM points to no rationale for why the underlying challenge has not been mooted by the Rescission Rule. Indeed, BLM explains that the appeal "would have no effect in the real world because the [Waste Prevention] Rule has been replaced," and that "[w]hen an agency replaces a regulation, adoption of the

new rule renders the appeal moot." *Id.* at 4 (quotations and alterations omitted). These are the exact same reasons why the underlying challenge is moot. There is simply no live case or controversy for the district court to adjudicate. *See Akiachak*, 827 F.3d at 113-14 ("[W]hen an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot.").

The only case BLM cites to support its position is inapposite. In that case, the court found that an appeal of a preliminary injunction against a county's election procedures was moot because the preliminary injunction expired by its own terms on election day 2014. *Fleming v. Gutierrez*, 785 F.3d 442, 444–45 (10th Cir. 2015). But the county's election procedures at issue remained on the books—and there was still a live controversy to be resolved about whether those procedures would apply in future elections. *Id.* at 446. Accordingly, the court dismissed the appeal, but not the entire case, because there was still a merits issue for the district court to decide. *Id.* at 449. That is not the case here, where the regulation at issue—the Waste Prevention Rule—has been replaced by the Rescission Rule. The Waste Prevention Rule is no longer on the books and there is no live controversy regarding whether its requirements may apply in the future.

Petitioner-Intervenor-Appellees North Dakota and Texas (collectively, "North Dakota") apparently agree that this case is moot, but "request[] a remand to

the district court and nothing more." Motion to Dismiss at 1.[4] In its merits response brief, North Dakota argued that a live controversy continues to exist because the Rescission Rule (like the Waste Prevention Rule, and the regulatory regime that predated the Waste Prevention Rule) applies to communitized areas, and North Dakota disputes BLM's regulatory jurisdiction over such areas. *See* Intervenor-Appellees State of N.D.'s and Tex.'s Joint Resp. Br. 9, 11, 15–17 (Sept. 12, 2018), Doc. No. 010110051859 ("N.D. Br."); *contra* Reply Br. 7–9 (rebutting North Dakota's arguments).

The district court cannot issue an advisory opinion about the legality of BLM's legal position in a case challenging a regulation that no longer exists. *See Wyoming v. USDA*, 414 F.3d at 1212 ("[T]he portions of the [Roadless Rule] that were substantively challenged by [petitioners] no longer exist," and "the alleged procedural deficiencies of the [Roadless Rule] are now irrelevant because the replacement rule was promulgated in a new and separate rulemaking process"); *Akiachak*, 827 F.3d at 113–14 ("[W]hen an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation

[4] If, concurrently with this opposition, Petitioner-Appellees file responses *in support* of BLM's motion to dismiss without vacatur of the district court order and dismissal of the underlying case, Appellants will have no opportunity to reply to additional arguments made therein. If that occurs, Appellants respectfully request that the Court entertain a motion for leave for Appellants to file replies to respond to any such arguments.

becomes moot."). As North Dakota recognizes, if it wants to challenge the Rescission Rule's application to communitized areas, it must do so in a new case, based upon the administrative record and reasoning BLM presented in the Rescission Rule. *See* N.D. Br. 6; *see also* BLM Resp. Br. 12 ("If the [parties] take issue with any element of the [Rescission] Rule, they may challenge it in a new proceeding, which will present a different factual and procedural framework." (citing *Or. Nat. Res. Council v. Grossarth*, 979 F.2d 1377, 1379 (9th Cir. 1992))). To date, North Dakota has not done so.[5]

In their response brief, Petitioner-Appellees Western Energy Alliance and Independent Petroleum Association of America (collectively, "Industry Petitioners") argued that Appellants might successfully challenge the Rescission Rule, potentially causing a court to vacate it and reinstate the Waste Prevention Rule. Industry's Corrected Resp. to Appellants' Joint Opening Br. 18 (Sept. 17, 2018), Doc. No. 010110053953 ("Industry Br."). But that outcome is "speculative." *Wyoming v. USDA*, 414 F.3d at 1212; *see also Chamber of*

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[5] It is unclear what exactly North Dakota's dispute with the Rescission Rule would be because the Rescission Rule largely restores BLM's 1979 Notice to Lessees 4A ("NTL-4A"), which applied to communitized areas. 44 Fed. Reg. 76,600, 76,600 (Dec. 27, 1979). North Dakota never challenged NTL-4A's application to communitized areas during the 37 years it was in effect. Moreover, North Dakota's primary objection to the now-replaced Waste Prevention Rule is that it required operators to follow federal, rather than state, natural gas capture targets on communitized lands. Joint Deferred App. 120–21. But the Rescission Rule "defer[s] to State or tribal" gas capture targets. 83 Fed. Reg. at 49,193, 49,202.

Commerce of the U.S. v. Envtl. Prot. Agency, 642 F.3d 192, 208 (D.C. Cir. 2011) (rejecting argument that new standards could be "invalidated in a pending court case" because "at this point the possibility that they may be invalidated is nothing more than speculation"). Moreover, contrary to Industry Petitioners' suggestion, they will not be without a remedy if a court does eventually overturn the Rescission Rule. *See* Industry Br. 17 (citing *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012)). This Court should follow the ordinary course of dismissing this case without prejudice, *see Wyoming v. USDA*, 414 F.3d at 1214, allowing Industry Petitioners to re-file their claims if the Waste Prevention Rule comes back into effect.[6]

CONCLUSION

This Court should follow the ordinary course and vacate the district court's order and remand with instructions to dismiss.

Respectfully submitted October 25, 2018,

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[6] Indeed, after this Court dismissed the *Wyoming v. USDA* case, a district court eventually set aside the Forest Service's replacement rule and reinstated the Roadless Rule. *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 919 (N.D. Cal. 2006). The *Wyoming v. USDA* petitioners were then free to renew their challenge to the Roadless Rule. *See Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1226 (10th Cir. 2011).

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2018 I electronically filed the foregoing **APPELLANTS' JOINT RESPONSE TO MOTION TO DISMISS** using the court's CM/ECF system which will send notification of such filing to all counsel of record.

Date: October 25, 2018

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5; and

(2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Sophos Endpoint Advanced, Version 10.8.2.344, last updated October 25, 2018 and according to the program are free of viruses.

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CERTIFICATE OF COMPLIANCE

I certify with respect to the foregoing that:

(1) This document complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because it contains 2,858 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

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