IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

NORTHERN PLAINS RESOURCE COUNCIL, et al.,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS, et al.,

Defendants,

TC ENERGY CORPORATION, et al.,

Intervenor-Defendants,

STATE OF MONTANA, Intervenor-Defendant,

AMERICAN GAS ASSOCIATION, et al.,

Intervenor-Defendants.

CV-19-44-GF-BMM

ORDER ON MOTION TO VACATE APRIL 15, 2020 AND MAY 11, 2020 ORDER TO VACATE

INTRODUCTION

Defendants U.S. Army Corps of Engineers and Todd T. Semonite (collectively "the Corps") have filed a Motion to Vacate the Court's April 15, 2020 and May 11, 2020 decision. (Doc. 174.) The Corps bases its motion on the Ninth

Circuit's determination that Plaintiffs' claims became moot on appeal. (Doc. 175.) Plaintiffs Northern Plains Resource Council, Bold Alliance, Natural Resources Defense Council, Sierra Club, Center for Biological Diversity, and Friends of the Earth (collectively "Plaintiffs") oppose this motion. (Doc. 181.)

FACTUAL AND LEGAL BACKGROUND

Plaintiffs filed this action against the Corps to prevent them from authorizing certain discharges of dredge and fill material associated with construction of portions of the Keystone XL pipeline. (Doc. 175 at 7.) The Corps authorized discharges of dredged or fill material into jurisdictional waters as required for the construction, maintenance, repair, and removal of utility lines and associated facilities via Nationwide Permit 12 ("NWP 12"). 82 Fed. Reg. 1860, 1860, 1985-86 (January 6, 2017). The Corps reissued NWP 12—a permit that may last up to five years—in 2017. (Doc. 130 at 3.) Plaintiffs alleged in their Complaint that the Corps' reissuance of NWP 12 violated the Endangered Species Act ("ESA"), the National Environmental Policy Act ("NEPA"), and the Clean Water Act ("CWA"). (Doc. 36 at 73–77, 81–84.)

The Court granted partial summary judgment in Plaintiffs' favor on April 15, 2020. (Doc. 130.) The Court determined that the reissuance of NWP 12 in 2017 "may" affect species or critical habitat listed by the ESA, and thus the Corps should have initiated programmatic consultation before reissuing NWP 12 in 2017.

(Doc. 130 at 9, 11.) The Court subsequently remanded NWP 12 to the Corps for compliance with the ESA and vacated NWP 12 pending completion of the consultation process. (Doc. 130 at 21.) The Court further enjoined the Corps from authorizing any dredge or fill activities under NWP 12. (*Id.*) The Court declined to rule on Plaintiffs' NEPA and CWA claims, pending ESA consultation. (*Id.* at 22.)

The Corps appealed the Court's decision. Defendants moved for a partial stay pending appeal and suggested the Court should revise its remedy. (Doc. 131.) Plaintiffs supported a partial narrowing of the scope of the remedy originally ordered by the Court to limit the remedy to Keystone XL construction in particular. (Doc. 151 at 6–7.) The Court issued an order amending the vacatur and injunction, but denying Defendants' motion to stay on May 11, 2020. (Doc. 151.)

The U.S. Supreme Court later stayed, pending appeal, the Court's injunction and vacatur except as to Keystone XL. (Doc. 175 at 7.) The Corps modified and reissued NWP 12 in 2021, while the appeal of this case was pending before the Ninth Circuit. (*Id.* at 8.) President Biden also issued Executive Order 13990, which revoked a 2019 Presidential permit authorizing TC Energy to construct and operate the Keystone XL pipeline at the international border with Canada. (*Id.* at 8.)

The Ninth Circuit subsequently dismissed the appeal for lack of jurisdiction as moot and remanded to this Court with instructions to dismiss the underlying

claim and to determine whether Defendants were entitled to vacatur. (Doc. 165 at 4.)

The Corps now moves to vacate the Court's April 15, 2020 and May 11, 2020 orders. (Doc. 174.) Intervenor Defendants support the motion. (Docs. 176; 177.) Intervenor Defendants who filed separate briefs in favor of the Corps' motion include American Gas Association, American Petroleum Institute, Association of Oil Pipe Lines, Interstate Natural Gas Association of America, and National Rural Electric Cooperative Association (collectively "NWP 12 Coalition") (Doc. 176) and the State of Montana ("the State") (Doc. 176).

LEGAL STANDARDS

"The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear*, 340 U.S. 36, 39 (1950).

DISCUSSION

Courts generally treat vacatur as "automatic" whenever mootness prevents appellate review. *Dilley v. Gunn*, 64 F.3d 1365, 1369 (9th Cir. 1995). An exception to the "established practice" of automatic vacatur may apply, however, when an appellant's own actions caused the dismissal of the appeal. *Id.* When an appellant

intentionally renders his appeal moot by its own act, the district court must decide whether to vacate its judgment in light of "the consequences and attendant hardships of dismissal or refusal to dismiss" and "the competing values of finality of judgment and right to relitigation of unreviewed disputes." *Id.* at 1370–71 (9th Cir. 1995) (quoting *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982)).

The Court must determine (I) whether Defendants are entitled to automatic vacatur and, if they are not, (II) whether a balancing of the equities supports vacatur of the April 15, 2020 and May 11, 2020 orders.

I. Whether Defendants are entitled to automatic vacatur under *Munsingwear*

The Corps assert that they are entitled to automatic vacatur under *Munsingwear*. (Doc. 175 at 26.) Appellants still may be entitled to automatic vacatur on remand under *Munsingwear* when their actions mooted the appeal, but the actions were "wholly unrelated to this lawsuit and would have occurred in the absence of this litigation." *Dilley*, 64 F.3d at 1372. The Corps argues that their reissue of the NWP 12 was "happenstance" unrelated to this litigation and that other contributing factors, like President Biden's executive order, contributed to mooting the appeal. (Doc. 175 at 26.)

The Ninth Circuit's order of remand, while brief, clearly undercuts Defendants' argument. *See* (Doc. 165.) The Ninth Circuit based its mootness

determination solely upon the fact that the Corps' "issuance of a new nationwide permit supersedes the agency action that is the subject of these appeals." (Doc. 165 at 3–4.) The Ninth Circuit also had the opportunity to automatically vacate this Court's orders, but chose instead to remand for this Court to "consider whether appellants are entitled to vacatur." (Doc. 165 at 4.) If vacatur was "automatic," there would be nothing for this Court to consider. The Corps itself points out that, in circumstances when automatic vacatur applies, it "makes it unnecessary to *even decide* whether Federal Defendants were . . . entitled to vacatur." (Doc. 184 at 7 (emphasis in original).) The citation that follows the Ninth Circuit's order to remand reemphasizes that it did not contemplate automatic vacatur in this case. The Ninth Circuit cites *Dilley* and parenthetically notes that "vacatur is not automatic when an appellant's own action moots the appeal." (Doc. 165 at 4 (quoting *Dilley v. Gunn*, 64 F.3d 1365, 1370–71 (9th Cir. 1995).)

Defendants urge the Court not to "read[] too much into the Ninth Circuit's two-paragraph order." (Doc. 184 at 3.) The Court declines to ignore the Ninth Circuit simply because it made its point concisely. The Corps' early reissuance of NWP 12 rendered the appeal of this case moot, and, therefore, automatic vacatur proves inappropriate. *Dilley v. Gunn*, 64 F.3d 1365, 1369 (9th Cir. 1995).

II. Whether a balancing of the equities supports vacating the Court's prior orders.

The Court must "balance the equities" in determining whether to vacate orders when the party seeking vacatur caused mootness. *All. for the Wild Rockies v. Savage*, 897 F.3d 1025, 1032 (9th Cir. 2018). The Court must balance "the consequences and attendant hardships of dismissal or refusal to dismiss," and "the competing values of finality of judgment and right to relitigation of unreviewed disputes." *Dilley*, 64 F.3d at 1371. The Court also must consider whether vacatur serves the public interest. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 27 (1994).

a. Attendant hardships of dismissal or refusal to dismiss

Defendants demonstrate no "attendant hardships" that will result should the Court fail to vacate the April 15, 2020 and May 11, 2020 orders. *Dilley*, 64 F.3d at 1371. The Corps states only that "Plaintiffs should not continue to burden the Corps, multiply proceedings, and insist that this Court leave in place a decision in a moot lawsuit over a superseded permit that inflicts no continuing injury on them." (Doc. 184 at 10.) The Corps fails to explain how Plaintiffs could continue to burden the Corps or multiply proceedings when the parties have agreed that "the Court should enter final judgment on the claims in this case." (Doc. 171 at 2.) The Corps' description of the Court's prior orders as "a decision in a moot lawsuit over a superseded permit that inflicts no continuing injury on [Plaintiffs]" cuts both

ways as well. (Doc. 184 at 10.) The Corps admits that it no longer uses the "superseded" 2017 NWP 12 in any way, and, therefore, there can be no hardship in maintaining the Court's orders enjoining it.

b. Finality of judgment versus the right to relitigation of unreviewed disputes

Leaving the April 15, 2020 and May 11, 2020 orders in place also poses no risk to the "right to relitigation," as evidenced by the ongoing lawsuits against the 2021 version of NWP 12. *See Ctr. for Biological Diversity v. Spellmon*, No. 21-cv-00047-BMM. The Corps argues that either Plaintiffs or some other future litigant could raise the Court's April 15, 2020 and May 11, 2020 orders in lawsuits challenging the 2021 version of NWP 12. (Doc. 184 at 11.) Defendants fail to demonstrate how such an argument, if advanced by a litigant, would pose any true risk to relitigation of unreviewed disputes.

The 2017 NWP 12 and the 2021 NWP 12, in the Corps own words, represent "wholly different and distinct agency actions." (Doc. 175 at 21.) Orders interpreting the former version of NWP 12 prove persuasive, at best, but they cannot bind any court interpreting the 2021 NWP 12. The 2021 NWP 12 constitutes a "wholly different" permit to interpret. (*Id.*) Defendants still have the opportunity to appeal any decisions arising from challenges to the 2021 NWP 12. To leave the orders interpreting the 2017 NWP 12 in place presents no threat to the right to relitigation. *See Upper Missouri Waterkeeper v. United States*

Evironmental Prot. Agency, No. CV-16-52-GF-BMM, 2022 WL 1001387, at *3 (D. Mont. Apr. 4, 2022).

c. Public interests of vacatur

The Court always must consider the public interest when granting an equitable remedy like vacatur. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Id.*

The Corps argues that vacatur advances public policy, because the Corps' decision to reissue NWP 12 was only incidentally related to litigation. When an appellant takes action that moots an appeal, but that action was motivated by legitimate reasons only incidental to the mooted case, vacatur still may prove appropriate. *Am. Games, Inc. v. Trade Prod., Inc.*, 142 F.3d 1164, 1170 (9th Cir. 1998). The situation in *American Games* differs from the Corps' actions in this case. In *American Games*, the appellant company mooted the appeal by purchasing the appellee company so that their interests no longer were adverse. *Id.* at 1166. The Ninth Circuit determined that, while mergers of this nature could frequently be used by companies to bury adverse decisions, no evidence existed of that being the case in *American Games* where the "primary motive for the sale" was to avoid the

appellee company from being purchased instead by one of the appellant's competitors. *Am. Games, Inc. v. Trade Prod., Inc.*, 142 F.3d 1164, 1170 (9th Cir. 1998).

The Corps asserts that NWP 12 must be reissued every five years, and this was the Corps' "primary motive" in reissuing it in March 2021. (Doc. 184 at 9.) The Corps' argument could be compelling were it not for the fact that the 2017 NWP 12 was not set to expire until March 2022. *See* 86 Fed. Reg. 2744 (Jan. 13, 2021). Moreover, unlike in *American Games* where "none of the principals mentioned the relatively trivial pending lawsuit" during the merger, the Corps openly acknowledge that it reissued NWP 12 early "partly to address issues raised in [this Court's] decision in *Northern Plains Resource Council, et al., v. U.S. Army Corps of Engineers, et al.*" *Compare Am. Games, Inc.*, 142 F.3d at 1170 *with* 86 Fed. Reg. at 2747. These facts demonstrate that mooting this case served as more than merely "a possible bonus" motivating the Corps' desire to reissue NWP 12 nearly a year early. *Am. Games, Inc.*, 142 F.3d at 1170. The Corps' motives do not weigh in favor of vacatur in this case. *Dilley v. Gunn*, 64 F.3d 1365, 1372 n.6 (9th Cir. 1995).

CONCLUSION

Defendants fail to meet their burden of establishing that they were equitably entitled to the "extraordinary remedy of vacatur." *U.S. Bancorp Mortg. Co. v.*

Bonner Mall P'ship, 513 U.S. 18, 26 (1994). The equities in this case weigh in favor of maintaining the Court's April 15, 2020 and May 11, 2020 orders.

ORDER

Accordingly, **IT IS ORDERED** that Defendants' Motion to Vacate the Court's April 15, 2020 and May 11, 2020 Decisions and Order (Doc. 174) is **DENIED.**

Dated this 15th day of July, 2022.

Brian Morris, Chief District Judge
United States District Court