UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STATE OF WYOMING, et al;

Petitioners - Appellees,

and

STATE OR NORTH DAKOTA, et al;

Intervenors Petitioners - Appellees,

v.

SIERRA CLUB, et al.

Intervenors Respondents - Appellants,

and

UNITED STATES DEPARTMENT OF THE INTERIOR, et al;

Respondents.

No. 15-8126
(D.C. No. 2:15-CV-00043-SWS)
(D. Wyo.)

STATE OF WYOMING, et al;

Petitioners - Appellees,

v.

SALLY JEWELL, et al;

Respondents - Appellants.

No. 15-8134
(D.C. No. 2:15-CV-00043-SWS)
(D. Wyo.)

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STATE OF NORTH DAKOTA, et al;

Intervenors Petitioners - Appellees,

and

SIERRA CLUB, et al;

Intervenors Respondents.

INDUSTRY APPELLEES' MOTION TO DISMISS APPEALS FOR MOOTNESS OR, IN THE ALTERNATIVE, MOTION FOR A STAY (NOS. 15-8126 & 15-8134)

CORPORATE DISCLOSURE STATEMENT

Appellees Independent Petroleum Association of America and Western Energy Alliance (collectively, "Industry Petitioners") state under Federal Rule of Appellate Procedure 26.1 that neither trade association has a parent company and that no publicly held corporation owns 10% or more of either trade association's stock.

NOTICE OF CONFERRAL

On February 5, 2016, counsel for Industry Petitioners contacted counsel for the federal Respondents-Appellants and counsel for the Intervenors Respondents-Appellants by telephone regarding the relief requested in this motion. Counsel for both groups of appellants advised that each group of appellants opposes the relief requested in this motion.

INTRODUCTION

Industry Petitioners submit respectfully this Motion to Dismiss for Mootness, or in the Alternative, Motion for a Stay under this Court's Local Rule 27.3(A)(1)(b) and inherent power to manage its docket. The failure of Respondent-Appellant the Bureau of Land Management ("BLM")[1] to timely submit a legally sufficient administrative record in the district court proceedings places this Court in peril of considering the appeal of a preliminary injunction that has been rendered moot. The only task remaining in the district court is final briefing on the merits of this administrative appeal. The parties have a briefing schedule in place that should have the merits fully briefed and submitted to the district court before this preliminary injunction appeal will be fully briefed and submitted to this Court.

This Court cannot adjudicate a case when there is no actual controversy. And regardless of the result the district court reaches on the merits, resolving the merits will moot any controversy between the parties regarding the propriety of the preliminary injunction. Under that scenario, any opinion this Court subsequently issues on the preliminary injunction will represent an improper advisory opinion. This Court should dismiss the appeals to avoid that result.

[1] For ease of reference, Industry Petitioners will refer collectively to all federal and Intervenor entities named as respondents in the district court as "BLM."

In the alternative, this Court should enter a stay in these appeals until the district court enters its final decision to prevent the waste of resources. A stay is well tailored to conserve the limited resources of the Court and the parties and will protect this Court from issuing a decision on an imminently moot appeal.

RELEVANT PROCEDURAL HISTORY

On March 20, 2015, BLM issued the final version of its hydraulic fracturing rule at issue here.[2] *See* 80 Fed. Reg. 16,128 (Mar. 26, 2015). On the same day, Industry Petitioners filed the first of these consolidated lawsuits challenging the legality of the rule.[3] *See* Pet. for Review of Final Agency Action, No. 2:15-CV-00041, filed Mar. 20, 2015 (D. Wyo.) (ECF No. 1). BLM understood that the deadline to lodge the administrative record was June 24, 2015. *See* Resp'ts' Mot. for an Enlargement of Time to Lodge the Admin. R., No. 2:15-CV-00043, filed June 12, 2015 (D. Wyo.) (ECF No. 62). Under the district court's local rules, had BLM lodged a timely and legally sufficient administrative record on June 24,

[2]Although announced on March 20, the final rule was published in the Federal Register on March 26, 2015.

[3] On March 26, 2015, the State of Wyoming initiated the second lawsuit. *See* Pet. for Review of Final Agency Action, No. 2:15-CV-00043, filed Mar. 26, 2015 (D. Wyo.) (ECF No. 1). On June 4, 2015, the district court granted the parties' joint motion to consolidate the two cases. *See* Order Granting Joint Mot. to Consolidate, No. 2:15-CV-00043-SWS, filed June 4, 2015 (D. Wyo.) (ECF No. 44).

2015, briefing on the merits would have been complete and the entire case submitted to the district court on or about September 23, 2015.[4]

On June 12, 2015, having concluded that BLM "did not have adequate in-house staff resources to compile and index the administrative record by June 24, 2015," BLM requested an extension of the deadline for filing the administrative record to July 31, 2015. *See* ECF No. 62 at 4. On June 17, 2015, the district court partially granted BLM an extension, ordering BLM to lodge the administrative record no later than July 22, 2015. *See* Order Granting in Part Resp'ts' Mot. for an Enlargement of Time to Lodge the Admin. R., No. 2:15-CV-00043-SWS, filed June 17, 2015 (D. Wyo.) (ECF No. 76). Had BLM lodged a legally sufficient administrative record on July 22, 2015, briefing on the merits would have been complete and the entire case submitted to the district court on or about October 22, 2015.

On June 23, 2015, meanwhile, the district court heard argument on Industry Petitioners' motions for a preliminary injunction. *See* Order Postponing Effective Date of Agency Action, No. 2:15-CV-00043-SWS, filed June 24, 2015 (D. Wyo.) (ECF No. 89). The next day, the district court entered a stay of BLM's rule and

[4] The filing of the administrative record triggers additional deadlines: (i) motions to supplement the record or add extra-record evidence are due fourteen days from the filing of the administrative record, *see* D. Wyo. L.R. 83.6(b)(3); and (ii) absent proceedings related to the content of the administrative record, Petitioners' opening merits briefs are due forty-five days after the administrative record is filed, *see id.* at 83.6(c).

ordered the parties to submit citations from the to-be-filed administrative record in support of their arguments for a preliminary injunction before the court would rule on the motions. *Id.*

On July 15, 2015, BLM moved for a second extension of the administrative record deadline to August 28, 2015, explaining that "BLM is not presently able to confirm that the collection of documents [the agency had collected] constitutes the complete record." Resp'ts' (Second) Mot. for an Enlargement of Time to Lodge the Admin. R. & Req. for Expedited Consideration at 5, No. 2:15-CV-00043-SWS, filed July 15, 2015 (D. Wyo.) (ECF No. 105). The district court granted BLM a second extension and, on August 28, 2015, BLM served the administrative record on Petitioners. *See* Resp'ts' Notice of Lodging of Admin. R., No. 2:15-CV-00043-SWS, filed Aug. 28, 2015 (D. Wyo.) (ECF No. 113).

On September 18, 2015, the parties submitted citations in support of their respective arguments related to the preliminary injunction motions. *See, e.g.*, R. Citations in Supp. of Mot. for Prelim. Inj., No. 2:15-CV-00043-SWS, filed Sept. 18, 2015 (D. Wyo.) (ECF No. 127). Just twelve days later, on September 30, 2015, the district court entered its preliminary injunction order. *See* Order on Mots. for Prelim. Inj., No. 2:15-CV-0043-SWS, filed Sept. 30, 2015 (D. Wyo.) (ECF No. 119).

Despite the ninety days allowed by local rule and more than sixty days of extensions to prepare the record, BLM did not contest that the administrative record the agency lodged on August 28 was not the complete administrative record. After both the State and Industry Petitioners challenged the legal adequacy of the administrative record as lodged, BLM advised the district court and Petitioners that BLM had voluntarily undertaken a review of the as-lodged administrative record and that BLM intended to lodge a corrected or supplemental record at the conclusion of that process. *See* Mot. to Enlarge Time for Resps. to Mots. to Complete & Modify Admin. R. & Req. for Expedited Briefing & Consideration at 2, No. 2:15-CV-00043-SWS, filed Nov. 12, 2015 (D. Wyo.) (ECF No. 140). Not until January 19, 2016 did BLM lodge what the agency purports to be a corrected record. *See* Fed. Resp'ts' Notice of Lodging of the Corrected Admin. R., No. 15-CV-00043-SWS, filed Jan. 19, 2016 (D. Wyo.) (ECF No. 184).

Had BLM lodged a legally sufficient administrative record on August 28, 2015, briefing on the merits would have been complete and the entire case submitted to the district court on or about November 25, 2015. The Industry Petitioners were instead forced to wait as BLM completed a second review of the administrative record. But now that the corrected administrative record has been filed, the parties have moved on to briefing the final merits of Petitioners' administrative appeals. Under the briefing schedule provided for in the district

court's local rules, the merits will be fully briefed and submitted to the district court on or about April 18, 2016.

Before this Court, BLM waited the full seventy-four days to file its notice of appeal. *See* Fed. R. App. P. 4(a)(1)(B), 4(a)(3); Resp'ts-Intervenors' Notice of Appeal, No. 2:15-CV-00043-SWS, filed on Nov. 27, 2015 (D. Wyo.) (ECF No. 148); Fed. Resp'ts' Notice of Appeal, No. 2:15-CV-00043-SWS, filed on Dec. 10, 2015 (D. Wyo.) (ECF No. 162). BLM did not request expedited or emergency treatment when BLM initiated its appeal. Two months later, BLM has now requested expedited consideration. *See* Appellants' Joint Mot. to Expedite Argument & Consideration of Prelim.-Inj. Appeal, Nos. 15-8126, 15-8134, filed on Feb. 8, 2016 (10th Cir.) (Docket No. 10341463). Under the present briefing schedule, this appeal of the preliminary injunction will be fully briefed and before this Court on March 30, 2016. And should the Court grant BLM's motion to expedite, the case will be placed on the May argument calendar—at least two weeks after the case will be fully briefed before the district court.

MOTION TO DISMISS FOR MOOTNESS

BLM has created procedural circumstances that undermine the legitimacy of the agency's appeal. BLM's appeal presents only one question to this Court: whether the district court properly entered a preliminary injunction to preserve the status quo until the district court could resolve the merits of the Petitioners'

administrative appeals. That preliminary injunction has been especially valuable because BLM has repeatedly delayed the parties' ability to reach the merits of this lawsuit in the district court. But now the merits are finally to be presented to the district court two weeks before the propriety of the preliminary injunction is presented to this Court. No matter how the district court resolves the merits, this appeal will become moot. Rather than adjudicate a controversy, this Court will be left with nothing more to do in this appeal than offer an inappropriate advisory opinion.

Federal courts may only adjudicate actual controversies. *See Disability Law Ctr. v. Millcreek Health Ctr.*, 428 F.3d 992, 996 (10th Cir. 2005). And the controversy must exist during all stages of an appellate court's review. *Id.* If the controversy ceases to exist, "'the action is moot and this court lacks jurisdiction to adjudicate the matter.'" *Id.* (quoting *United States v. Seminole Nation of Okla.*, 321 F.3d 939, 943 (10th Cir. 2002)). "A federal court has no power to give opinions upon moot questions or declare principles of law which cannot affect the matter in issue in the case before it." *Millcreek Health Ctr.*, 428 F.3d at 996 (quoting *S. Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997)). "'An abstract, conjectural, or hypothetical injury is not enough to support jurisdiction.'" *Millcreek Health Ctr.*, 428 F.3d at 996.

The crucial question in deciding whether an issue is moot "is whether granting a present determination of the issues offered will have some effect in the real world." *Kan. Judicial Rev. v. Stout*, 562 F.3d 1240, 1246 (10th Cir. 2009). "When it becomes impossible for a court to grant effective relief, a live controversy ceases to exist, and the case becomes moot." *Id.* "In the case of an interlocutory appeal taken from the grant of a preliminary injunction, the appeal is moot where the effective time period of the injunction has passed." *Fleming v. Gutierrez*, 785 F.3d 442, 444-45 (10th Cir. 2015) (internal quotation marks and citation omitted); *see United States v. Sec'y Fla. Dep't of Corr.*, 778 F.3d 1223, 1228-29 (11th Cir. 2015) ("If the preliminary injunction has expired, it no longer has legal effect on the parties, and a decision by this court affirming or vacating the defunct injunction cannot affect the rights of the litigants."). If the appeal becomes moot, this Court "must dismiss the case, rather than issue an advisory opinion." *Flemming*, 785 F.3d at 445 (internal quotation marks omitted).

In the instant case, this Court faces the imminent likelihood that it will issue an opinion and judgment on a preliminary injunction that has already expired because the district court will have decided the merits of the case. BLM has moved the Court to add this case to the Court's May oral argument calendar, conceding that expedited treatment is necessary to have the case heard even that soon. But BLM's motion disregards the fact that, applying the district court's local rules, the

merits will be fully briefed and submitted to the district court no later than April 18 – two weeks before the first day of this Court's May argument schedule.

To date, the district court has timely addressed all aspects of this nationally important case. The district court issued its preliminary injunction order just twelve days after receiving voluminous citations to an administrative record that originally consisted of over 500,000 pages. And the district court has reiterated its commitment to hearing the merits as quickly as possible by preemptively denying any further extensions to the briefing schedule and administrative record. *See* Order Granting Joint Mot. to Modify Briefing Schedule for Mots. to Complete and Modify Admin. R., No. 2:15-CV-00043-SWS, filed Jan. 11, 2016 (D. Wyo.) (ECF No. 182). Extrapolating from the district court's past practice, it is reasonable to expect that the court will issue a merits opinion promptly after the merits are submitted.

In contrast, the instant case will not be fully briefed before this Court until March 30, 2016. Such a schedule will not allow this case to be heard during the March 7 to March 11 court session and will leave only thirty-three days for the case to be assigned to a panel and for bench memos to be written for the May 2 to May 6 court session. *See 2016 Court Sessions, Principal Holidays, and Other Days*

of Significance, U.S. Court of Appeals—Tenth Circuit.[5] The timing of BLM's appeal makes hearing the case during the May session improbable and leaves the September session or a special session during the summer months as the most likely time for the Court to hear this case. *See id.*

But even were the Court to adopt the schedule BLM contemplates, that adoption would not accelerate this appeal ahead of proceedings in the district court. In the end, the overlapping schedules of the district court's consideration of the merits and this Court's review of the preliminary-injunction appeal place this Court in peril of issuing an opinion on an expired preliminary injunction.[6] *See Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215, 1219-20 (10th Cir. 2004) (holding

[5] Available at: https://www.ca10.uscourts.gov/sites/default/files/clerk/2016-Calendar_0.pdf.

[6] Industry Petitioners filed this motion at the earliest possible time. Industry Petitioners could not bring this issue before the Court until the briefing schedule was set at the district court. *See* Notice of Withdrawal of Mot. & Intent to File Opening Mem. on the Merits, No. 2:15-CV-00043-SWS, filed Feb. 9, 2016 (D. Wyo.) (ECF No. 186). BLM's actions related to the administrative record alone have delayed the district court's schedule by 210 days. Until BLM produced the corrected administrative record – purporting to produce ninety-five percent of the documents the agency withheld when BLM originally lodged the administrative record – and Industry Petitioners reviewed the same, it was unknown whether the pending motions to complete or supplement the administrative record would be fully briefed or whether the district court would need to decide the motions to complete the record. Now that the corrected record has been filed and the parties have reviewed the same, the district court's briefing schedule has been determined. That briefing schedule ensures the likelihood that this Court's opinion will come after the district court's final decision. Industry Petitioners now have good cause to file the instant motion.

an appeal moot where the preliminary injunction had expired and no longer provided a controversy for review).

Nor does the instant motion pose any prejudice to BLM's case. It is BLM that has created the circumstances that necessitate this motion. The overlapping schedule is a product of the BLM's making. BLM delayed the resolution of the district court case, failing to submit a legally sufficient administrative record for at least 210 days. BLM also delayed this Court, waiting the full seventy-four days to file all the notices of appeal. *See* Fed. R. App. P. 4(a)(1)(B), 4(a)(3). Despite the inevitable overlap of the district and appellate courts' schedules, BLM did not ask this Court for emergency or even expedited consideration until February 8, 2016.

Neither dismissing nor staying these appeals will deny BLM the opportunity to challenge the district court's merits decision in this case. Granting the Industry Petitioners' motion will allow the parties to resolve the merits without the distraction of an appeal designed to produce a decision that will have no legal force. Continuing with this appeal will only compel the Court and the parties to expend resources on an appeal that the district court's imminent decision will render moot.

MOTION FOR STAY

Federal courts have the inherent power to manage their docket. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). *See also Clinton v. Jones*, 520 U.S. 681, 706

(1997) (recognizing federal district courts' ability to stay proceedings under their power to control their docket). For the same reasons this Court should dismiss these appeals, this Court should grant a stay to avoid the risk of wasting the resources of the Court and the parties on briefing and deciding an appeal to a preliminary injunction that will almost assuredly expire before this Court can issue an opinion and judgment. A stay of this appeal until the district court grants a merits decision would also save BLM the costs of refiling an appeal. If this Court decides that a summary dismissal for mootness is inappropriate, this Court should stay the appellate proceedings until the district court issues its final decision on the merits of this case.

CONCLUSION

Proceeding with this appeal at this time will waste the resources of the Court and the parties and can produce nothing more than an inappropriate advisory opinion. Because the district court's resolution of the merits in this lawsuit will render challenges to the preliminary injunction moot, and because the full case will be submitted to the district court before these appeals are submitted to this Court, this Court should dismiss – or at least stay – the appeals pending the district court's decision on the merits.

Submitted this 10th day of February, 2016,

/s/ Mark S. Barron

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial scanning program, TREND MICRO™ Office Scan™, Version 10.6.5372 Service Pack 3, last updated February 10, 2016, and according to the program are free of viruses.

Date: February 10, 2016.

/s/ Mark S. Barron
Mark S. Barron

CERTIFICATE OF SERVICE

I hereby certify that a copy of this **Industry Appellees' Motion To Dismiss Appeals For Mootness Or, In The Alternative, Motion For A Stay (Nos. 15-8126 & 15-8134)** was served on the 10th day of February 2016, via the Court's CM/ECF system, to counsel for all parties of record.

/s/ Mark S. Baron

(*See* Fed. R. App. P. 25(b)) (Signature)