

Nos. 15-8126, 15-8134

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING; STATE OF COLORADO; INDEPENDENT
PETROLEUM ASSOCIATION; and WESTERN ENERGY ALLIANCE,

Petitioners-Appellees

and

STATE OF NORTH DAKOTA; STATE OF UTAH; and UTE INDIAN TRIBE,

Intervenors-Appellees

v.

S.M.R. JEWELL; NEIL KORNZE; U.S. DEPARTMENT OF THE INTERIOR;
and U.S. BUREAU OF LAND MANAGEMENT,

Defendants-Appellants

and

SIERRA CLUB; EARTHWORKS; WESTERN RESOURCE ADVOCATES;
THE WILDERNESS SOCIETY; CONSERVATION COLORADO EDUCATION
FUND; and SOUTHERN UTAH WILDERNESS ALLIANCE,

Intervenors-Appellants

ON APPEAL FROM THE DISTRICT OF WYOMING, CASE NOS. 15-CV-
41/43 (HON. SCOTT W. SKAVDAHL)

NORTH DAKOTA, ET AL.’S MOTION TO DISMISS APPEAL AS MOOT

Appellee States of North Dakota, Wyoming, Colorado, and Utah (the “State Appellees”), by and through their undersigned counsel, hereby submit this Motion, pursuant to 10th Cir. R. 27.2(A)(1)(b), and respectfully request the Court enter an

Order dismissing these appeals as moot. In support thereof, the movants state as follows:

CERTIFICATE OF CONFERRAL

Undersigned counsel has consulted with counsel for Appellees Independent Petroleum Association of America and Western Energy Alliance (“Industry Appellees”), as well as Appellee Ute Indian Tribe, each of whom agrees that these appeals are moot and should be dismissed. Undersigned attempted, in good faith, to confer with counsel for Federal Appellants and Citizen Group Appellants, but did not receive a definitive response prior to the time of filing; it is anticipated that Appellants will oppose the relief requested herein.

BACKGROUND FACTS

These interlocutory appeals arise out of a preliminary injunction order entered by the United States District Court for the District of Wyoming on September 30, 2015, enjoining Appellants United States Department of the Interior and its Bureau of Land Management (the “Federal Appellants”) from implementing the March 26, 2015 final rulemaking entitled “Oil and Gas; Hydraulic Fracturing on Federal Lands; Final Rule” 80 Fed. Reg. 16128 (Mar. 26, 2015) (“BLM Rule”).

Federal Appellants and Intervenor-Appellants Sierra Club, et al. (the “Citizen Group Appellants”) each filed a Notice of Appeal seeking to overturn the District Court’s preliminary injunction Order.

Substantive briefing regarding the preliminary injunction Order was completed June 20, 2016, with the filing of Federal Appellants’ and Citizen Group Appellants’ Reply briefs. But, the parties have yet to submit their Final Briefs with citations to the deferred Joint Appendix. Pursuant to the Court’s June 17, 2016 Order, the Final Briefs are currently due July 1, 2016. Therefore, this Court has not yet issued an Opinion regarding the propriety of the preliminary injunction entered by the District Court.

Briefing in this consolidated appeal proceeded concurrently with the District Court’s adjudication of the case on the merits. After the injunction issued, the Federal Appellants completed the administrative record (which was incomplete at the time of the preliminary injunction), and then the parties submitted briefing on the underlying challenge to the BLM Rule. On June 21, 2016, the District Court issued its *Order on Petitions for Review of Final Agency Action*, a copy of which is attached hereto as Exhibit A, concluding that the Federal Appellants lacked Congressional authority to promulgate the BLM Rule and, therefore, holding that the Rule is unlawful and ordering that it be set aside.

ARGUMENT

In light of the District Court’s judgment on the merits of the underlying challenge to the BLM Rule, this case regarding the District Court’s previously entered preliminary injunction should be dismissed as moot. Overturning (or upholding) the injunction will have no practical effect, since the District Court has now decided the underlying case and set aside the BLM Rule.

The exercise of judicial power under Article III of the Constitution “depends on the existence of a case or controversy.... [A] federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them.” *Jones v. Temmer*, 57 F.3d 921, 922 (10th Cir. 1995) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)); see also *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (appeal becomes moot if the appellate court can fashion no meaningful relief).

Accordingly, even if an appellate court originally has statutory jurisdiction to review a district court’s interlocutory order granting a preliminary injunction, that jurisdiction is lost if the interlocutory appeal no longer presents a live case or controversy. *Fleming v. Gutierrez*, 785 F.3d 442, 444 (10th Cir. 2015). In those circumstances, an appeal is moot, and the appellate court is without subject matter jurisdiction to reach the merits of the appeal. *Id.* (citing *Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884, 891 (10th Cir. 2008))

(“Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction.”).

Such is the case here – the District Court’s final judgment on the merits means Appellants’ challenge to the preliminary injunction order is no longer a live case or controversy. This Court should not rule on the existing appeals because such a ruling could not result in any meaningful relief in light of the District Court’s final disposition of the underlying case. *See, e.g., Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215, 1219 (10th Cir. 2004) (when affirming or reversing a preliminary injunction would afford no relief, the case is moot); *C.f. Baker v. Bray*, 701 F.2d 119, 122 (10th Cir. 1983) (“[T]he claim upon which the request for a preliminary injunction was based ... was dismissed by the district court, and this action certainly mooted the issue raised herein.”).

The exception to the doctrine of mootness – that the problems are “capable of repetition yet evading review” – is inapposite in this case. “This exception applies when: (1) the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party ... [will] be subjected to the same action again.” *United States v. Seminole Nation of Oklahoma*, 321 F.3d 939, 942 (10th Cir.2002). Neither prong is satisfied here. Instead, the primary legal issue in these appeals – whether Federal Appellants had Congressional authority to

regulate hydraulic fracturing – is now part of the District Court’s final decision on the merits (which unlike the preliminary injunction order, was issued with the benefit of the full administrative record) and will be subject to review in any potential and separate appeal from that final judgment. *See Rio Grande Silvery Minnow*, 355 F.3d at 1220 (exception to mootness doctrine did not apply during appeal of interlocutory order because same legal issue would be subject to review in appeal of final order).

RELIEF REQUESTED

Wherefore, the State Appellees respectfully request the Court grant this Motion and enter an Order dismissing Appellants’ appeal as moot in light of the District Court’s final judgment setting aside the BLM Rule.

Dated: June 24, 2016.

Respectfully submitted,

/s/Paul M. Seby

Paul M. Seby
Special Assistant Attorney General
Greenberg Traurig, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Phone: (303) 572-6584
sebyp@gtlaw.com

Matthew A. Sagsveen
North Dakota Office of the Attorney
General
500 N. 9th Street
Bismarck, ND 58501
Phone: (701) 328-2925
ndag@nd.gov

masagsve@nd.gov
hhogan@nd.gov
Counsel for Intervenor-Appellee State of
North Dakota

/s/ Jeremy A. Gross (with permission)
Jeremy A. Gross
Assistant Attorney General
Michael J. McGrady
Senior Assistant Attorney General
Wyoming Attorney General's Office
2320 Capitol Ave.
Cheyenne, Wyoming 82002
Phone: (307) 777-6946
jeremy.gross@wyo.gov
mike.mcgrady@wyo.gov

Counsel for Petitioner-Appellee State of
Wyoming

/s/Frederick R. Yarger (with permission)
Frederick R. Yarger
Solicitor General
Colorado Attorney General's Office
1300 Broadway, 10th Floor
Denver, CO 80203
Phone: (720) 508-6168
Fred.Yarger@coag.gov

Counsel for Petitioner-Appellee State of
Colorado

/s/ John Robinson Jr. (with permission)
Steven F. Alder
John Robinson Jr.
Utah Assistant Attorneys General
Sean D. Reyes
Utah Office of the Attorney General
1594 W. North Temple, Suite 300
Salt Lake City, Utah 84116

Phone: (801) 538-7227
jrobinson@utah.gov
stevealder@utah.gov

Counsel for Intervenor-Appellee State of
Utah

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing

NORTH DAKOTA, ET AL.'S MOTION TO DISMISS APPEAL AS MOOT

- (1) all required privacy redactions have been made;
- (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 virus scanning program, McAfee VirusScan Enterprise Version 8.8, and according to the program are free of viruses..

s/ Kevin Collins

CERTIFICATE OF SERVICE

I hereby certify that on Date, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ _____