
Consolidated Case Nos. 20-35412, 20-35414, 20-35415, and 20-35432

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NORTHERN PLAINS RESOURCE COUNCIL, ET AL.,
Plaintiffs/Appellees,

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.,
Defendants/Appellants,

TC ENERGY CORPORATION, ET AL.,

STATE OF MONTANA, and

AMERICAN GAS ASSOCIATION, ET AL.,
Intervenors-Defendants/Appellants.

On Appeal from the United States District Court for the District of Montana
No. 4:19-cv-00044-BMM (Hon. Brian Morris)

**RESPONSE OF APPELLANTS AMERICAN GAS ASSOCIATION,
AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF OIL PIPE
LINES, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
and NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION IN
SUPPORT OF FEDERAL APPELLANTS' MOTION TO VACATE
DECISIONS BELOW**

Elbert Lin
Deidre G. Duncan
Karma B. Brown
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500
elin@HuntonAK.com
dduncan@HuntonAK.com
kbbrown@HuntonAK.com
*Counsel for Appellants American Gas
Association, et al.*

Dated: May 28, 2021

Pursuant to “established practice,” this Court should vacate the lower court’s decisions and orders and remand with instructions to dismiss the case, if it determines the appeals are moot.¹ *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997); Dkt. 150-1. Vacatur is warranted to “clear[] the path for future relitigation of the issues between the parties and eliminate[] a judgment, review of which was prevented through happenstance.” *Munsingwear*, 340 U.S. at 40. And it will ensure “the rights of all parties are preserved.” *Id.* In this circuit, vacatur is generally “automatic” when a case becomes moot on appeal. *Pub. Utils. Comm’n v. FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996).

No “exception” to the ordinary rule applies here, *id.*, as the appeals, if moot, will have been mooted through no action of the NWP 12 Coalition. The Federal Appellants have proffered numerous reasons for why this action is now moot. Dkt. 150-1. Chief among those is that the U.S. Army Corps of Engineers reissued Nationwide Permit (“NWP”) 12 on January 13, 2021, and the permit became effective on March 17, 2021, which also replaced the 2017 version of NWP 12 under review here. *See* 86 Fed. Reg. 2744 (Jan. 13, 2021). Neither the reissuance

¹ The NWP 12 Coalition takes no position on whether these appeals are moot.

of NWP 12, nor any of the other reasons proffered by the government, are the result of actions by the NWP 12 Coalition.

A party like the NWP 12 Coalition (and other Intervenor-Appellants) that “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.” *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18, 25 (1994). Vacatur in such a situation “eliminat[es] a judgment the loser was stopped from opposing on direct review.” *Arizonans for Official English*, 520 U.S. at 71.

Indeed, courts have repeatedly held that when a case is mooted by the actions of the government, vacatur must be granted to protect the rights of intervenors—like the NWP 12 Coalition—that did not cause that mootness. *See, e.g., Wyoming v. Zinke*, 871 F.3d 1133, 1145 (10th Cir. 2017) (vacating judgment to preserve rights of intervenors where agency rescission of a permanently enjoined regulation mooted a lawsuit challenging that regulation); *Akiachak Native Cmty. v. U.S. Dep’t of Interior*, 827 F.3d 100, 115 (D.C. Cir. 2016) (granting intervenor’s request for vacatur where the agency rescinded the challenged rule, mooting the appeal); *Humane Soc’y v. Kempthorne*, 527 F.3d 181, 187 (D.C. Cir. 2008) (vacating judgment and injunction to preserve rights of intervenor where challenge became moot due to subsequent agency action); *Wyoming v. U.S. Dep’t of Agric.*, 414 F.3d 1207, 1213, 1213 n.6 (10th Cir. 2005) (vacating judgment to

preserve rights of intervenors where challenge to agency regulation became moot when agency promulgated a new regulation). *See also Indigenous Env'tl. Network v. U.S. Dep't of State*, No. 18-36068, 2019 WL 2542756, at *1 (9th Cir. June 6, 2019) (granting intervenors' motion to vacate the district court's judgments when appeals were mooted by issuance of new permit).

Under these circumstances, if this Court finds the appeals to be moot, it should also grant the Federal Appellants' motion to vacate the District Court's orders of April 15, 2020 and May 11, 2020, to preserve the rights of the NWP 12 Coalition.

Date: May 28, 2021

Respectfully submitted,

/s/ Elbert Lin

Elbert Lin
Deidre G. Duncan
Karma B. Brown
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500
elin@HuntonAK.com
dduncan@HuntonAK.com
kbbrown@HuntonAK.com

Counsel for Appellants American Gas Association, American Petroleum Institute, Association of Oil Pipe Lines, Interstate Natural Gas Association of America, and National Rural Electric Cooperative Association

CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s): 20-35412, 20-35414, 20-35415, and 20-35432

I am the attorney or self-represented party.

This response contains 587 words, excluding the items exempted by Fed.

R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

[X] complies with the word limit of Cir. R. 32-1.

[] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[] complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):

[] it is a joint brief submitted by separately represented parties;

[] a party or parties are filing a single brief in response to multiple briefs; or

[] a party or parties are filing a single brief in response to a longer joint brief.

[] complies with the length limit designated by court order dated _____.

[] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Elbert Lin

Date May 28, 2021