NONPRECEDENTIAL DISPOSITION
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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued November 5, 2024
Decided November 6, 2024

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 24-1492

NATIONAL WILDLIFE REFUGE ASSOCIATION, et al.,
Plaintiffs-Appellees,

v.

RURAL UTILITIES SERVICE, et al.,
Defendants-Appellees.

v.

ITC MIDWEST LLC and DAIRYLAND POWER COOPERATIVE,
Intervening Defendants-Appellants.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 3:24-cv-00139-wmc

William M. Conley,
Judge.

O R D E R

This appeal is successive to *Driftless Area Land Conservancy v. Rural Utilities Service*, 74 F.4th 489 (7th Cir. 2023), which concerns the proposed construction of an electric transmission line across a federal wildlife refuge. Our opinion held that the district court erred in declaring improper the implementation of an administrative order that had been withdrawn before the district court acted. Likewise, we held, it erred in announcing that the agency lacks the power to approve a land exchange that

might permit construction by changing the boundaries of the refuge. Such an exchange had yet to be approved, and we held that judicial review must await the administrative decision.

In February 2024 the agency approved a land exchange, which the district court enjoined. An order issued on March 21, 2024, reads:

> [D]efendants are PRELIMINARILY ENJOINED from closing on any land exchange involving the Upper Mississippi River National Wildlife and Fish Refuge before the court issues its decision on the pending motion for preliminary injunction.

This order does not give any reasons and seems to be more in the nature of a temporary restraining order than a preliminary injunction, though it bears the latter label. The judge held a hearing the next day and on March 25 issued another preliminary injunction, which reads:

> IT IS ORDERED that the federal defendants and intervenor defendants are PRELIMINARILY ENJOINED from taking any action to close the land exchange agreement or begin construction on the stretch of the Cardinal-Hickory Creek Transmission Line Project running through and across the Upper Mississippi River National Wildlife and Fish Refuge until after this court has an opportunity to review and consider the relevant administrative record underlying the federal defendants' February 2024 administrative decisions and issued a decision on whether to continue plaintiffs' preliminary injunction further. Those defendants are further directed to expediate the production of that record.

An accompanying opinion set out the judge's view that nothing should change until the agency's decision had been thoroughly reviewed. The judge also relied to an extent on his earlier declaration that a land exchange would be unlawful.

The court did not find that plaintiffs were likely to prevail on the merits. Defendants appealed, and on May 2, 2024, we stayed the preliminary injunction, observing in part:

> The Supreme Court held in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the

> public interest." See also *Nken v. Holder*, 556 U.S. 418, 434 (2009). These factors are not optional. The absence of a finding that the plaintiffs are "likely to succeed on the merits" precludes the entry of a preliminary injunction.
>
> Both of the district court's orders observed that the land exchange had been blocked in 2022, but that decision was vacated as premature and improvident. It cannot be relied on to show that the plaintiffs are likely to succeed in this new suit. See *Driftless*, 74 F.4th at 496 (the district court's vacated decision "will not have any authoritative or precedential effect in any future suit, once any of the federal agencies makes a new decision"). Nor did the district court make any independent finding about the plaintiffs' probability of success.
>
> We therefore stay the effectiveness of the preliminary injunction.
>
> The district court remains free to consider whether a permanent injunction is appropriate. But a permanent injunction, if any, must be based on a conclusion that the agency's action is legally forbidden and that other equitable considerations, including those in 42 U.S.C. §4370m–6(b)(1) & (2) ("the FAST Act") have been satisfied.

After we issued this stay, the district court did not act on plaintiffs' request for a permanent injunction. The land exchange closed, and construction began. On September 26, 2024, the transmission line was placed in service.

The orders of March 21 and March 25 are moot. Both orders enjoin the closing of the land exchange, and the March 25 order also enjoins the start of construction. Neither element of relief is achievable today. The exchange closed, and construction was not only started but also finished. These orders no longer can serve any function. They are accordingly vacated as moot, to avoid any possibility of collateral consequences. See *Department of Treasury v. Galioto*, 477 U.S. 556 (1986); *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

Plaintiffs' request for a permanent injunction remains pending in the district court, which must determine whether the entire case is moot. We can imagine the possibility of relief such as an order to tear down the transmission line and restore the environment, or to swap additional (or different) land as part of an exchange, but at oral argument plaintiff's lawyer struggled to articulate any kind of relief that plaintiffs deem both desirable and feasible. Counsel suggested that plaintiffs want a decision on the

merits even if no concrete relief is possible, expressing the view that this will help them (or similar environmental litigants) in some future suit concerning a different project. Counsel also stated that a favorable decision on the merits might help when negotiating in this or some future litigation. This sounds like a proposal for an advisory opinion, which is outside the federal courts' remit. Once a controversy has become moot because damages and prospective relief are impossible, the label "declaratory judgment" does not avoid the constitutional problem.

We are therefore tempted to declare that the entire case is moot and order the complaint dismissed for lack of a case or controversy. But perhaps plaintiffs' counsel was simply unprepared to address this issue during the oral argument. It would not be appropriate to find mootness until all litigants have had a full opportunity to address the question whether any concrete relief is possible, because a case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Service Employees*, 567 U.S. 298, 307 (2012).

The two preliminary injunctions are vacated, and the case is remanded for proceedings consistent with this order.