

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

July 10, 2015

FOR THE TENTH CIRCUIT

**Elisabeth A. Shumaker
Clerk of Court**

WILDEARTH GUARDIANS,

Plaintiff - Appellee,

v.

UNITED STATES OFFICE OF
SURFACE MINING RECLAMATION
AND ENFORCEMENT, et al.,

Defendants,

v.

COLOWYO COAL CO, L.P.,

Intervenor Defendant - Appellant,

and

TRAPPER MINING, INC.,

Intervenor Defendant.

No. 15-1186
(D.C. No. 1:13-CV-00518-RBJ)
(D. Colo.)

WILDEARTH GUARDIANS,

Plaintiff - Appellee,

v.

UNITED STATES OFFICE OF
SURFACE MINING RECLAMATION
AND ENFORCEMENT, et al.,

Defendants,

No. 15-1236
(D.C. No. 1:13-CV-00518-RBJ)
(D. Colo.)

and
TRAPPER MINING INC.,
Intervenor Defendant - Appellant,
and
COLOWYO COAL COMPANY, L.P.,
Intervenor Defendant.

ORDER

These matters are before the court on the parties' *Joint Motion to Consolidate Appeals and Extension of Time to File Response Briefs* filed in case numbers 15-1186 and 15-1236. Upon consideration, the motions are granted, and case numbers 15-1186 and 15-1236 are consolidated for all procedural purposes. The parties shall place both appeal numbers on any pleadings filed.

On June 29, 2015, the court issued an order directing the parties in case number 15-1186 to show cause as to the basis for the court's exercise of appellate jurisdiction at this time over the district court's May 8, 2015 Order and Final Judgment. Review of case number 15-1236 reveals similar potential jurisdictional defects. Accordingly, the court is considering both appeals for summary disposition. *See* 10th Cir. R. 27.2(B).

As noted in the June 29, 2015 order, it appears that the district court's May 8, 2015 judgment is not yet final. Except in certain circumstances that do not appear to be present here, this court's appellate jurisdiction is limited to review of final judgments. *U.S. v. Nixon*, 418 U.S. 683, 690-92 (1974); *Albright v. Unum Life Ins. Co.*, 59 F.3d

1089, 1092 (10th Cir. 1995). A decision is “not final, ordinarily, unless it ends the litigation on the merits and leaves nothing for the court to do but execute judgment.”

Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 204 (1999) (internal quotations omitted).

The district court’s May 8, 2015 Final Judgment states:

[T]he Court will not, at this time, enter an order of vacatur as to the approval of the mining plan revision for the Colowyo Coal Co., L.P. mine. However, the Court will enter an order of vacatur, vacating the Secretary of the Interior’s approval of the Colowyo mining plan revision, in 120 days unless the Office of Surface Mining, Reclamation and Enforcement has fully completed its obligations under the National Environmental Policy Act, absent further court order based upon very good cause shown.

May 8, 2015 Final Judgment, pp. 2-3.

Upon further review, it also appears that the May 8, 2015 Final Judgment could be a remand by a district court to an administrative agency for further proceedings, which is also ordinarily not appealable because such a decision is not a final decision. *See Western Energy Alliance v. Salazar*, 709 F.3d 1040, 1047 (10th Cir. 2013).

Additionally, on July 1, 2015, Appellant Trapper Mining Inc. (Trapper) filed a “Notice of Correction of Statement of Law” in the district court, stating that the district court’s May 8, 2015 Order relied on Trapper’s misunderstanding that the affirmative defense of mootness applies. The district court has not yet issued an order regarding that pleading.

On or before July 17, 2015, the parties are directed to file written responses discussing the basis for this court’s exercise of appellate jurisdiction at this time over the district court’s May 8, 2015 Order and Final Judgment. The responses shall include, but

are not limited to, a discussion of the finality of the May 8, 2015 Order and Judgment, the administrative-remand rule, and Trapper's July 1, 2015 pleading. Appellants may, but are not required to, file a consolidated response.

If Appellants choose to file nothing or fail to file a timely response, the appeals may be dismissed pursuant to Tenth Circuit Rule 42.1.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk



by: Lindy Lucero Schaible
Counsel to the Clerk