No.15-1126

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Diné Citizens Against Ruining Our Environment, San Juan Citizens Alliance, Sierra Club, Center for Biological Diversity, and Amigos Bravos,

Petitioners-Appellees,

vs.

United States Office of Surface Mining, Reclamation, and Enforcement, Sally Jewell, Al Klein, Bob Postle, Rick Williamson, Mychael Yellowman,

Respondents,

and

Navajo Transitional Energy Company, LLC

Intervenor-Respondent-Appellant.

APPELLEES' MOTION TO DISMISS NAVAJO TRANSITIONAL ENERGY COMPANY, LLC'S APPEAL FOR LACK OF JURISDICTION

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INTRODUCTION

Appellees, Diné Citizens Against Ruining Our Environment et al. (collectively, "Diné CARE"), hereby move pursuant to Fed. R. App. P. 27 and Tenth Circuit Rule 27.2(A)(1)(a) to dismiss this appeal by Intervenor-Respondent-Appellant Navajo Transitional Energy Company, LLC (NTEC), for lack of jurisdiction.[1] NTEC opposes this motion.

In the underlying case, the district court held that the U.S. Office of Surface Mining (OSM) violated the National Environmental Policy Act (NEPA) in approving an application by NTEC's predecessor in interest to revise the mining plan at the Navajo Mine. The district court then remanded the case to OSM for further proceedings consistent with the court's analysis. Pursuant to binding Tenth Circuit precedent, a remand order is not a "final decision[]" under 28 U.S.C. § 1291 that may be appealed by a private intervenor such as NTEC. Because this Court lacks jurisdiction, it must dismiss NTEC's appeal as premature.

[1] Tenth Circuit Rule 27.2(A)(3)(a) requires a showing of good cause to support the filing of dispositive motions at any time later than 14 days after the filing of a notice of appeal. Good cause exists here because Diné CARE's motion is based on the recent decision by the Federal Defendants not to appeal. After initially filing a notice of appeal, the Federal Defendants subsequently moved to voluntarily dismiss their appeal on August 18, 2015. Consequently, Diné CARE could not have filed this motion before August 18, 2015.

BACKGROUND

The Navajo Mine is a large open-pit coal mine located on the Navajo Nation in northwestern New Mexico. The Navajo Mine supplies coal exclusively to the Four Corners Power Plant (FCPP); it is infeasible for the mine to supply coal to other customers. Dist. Ct. Dkt. 79 at 13. FCPP only purchases coal from the Navajo Mine; it is infeasible for FCPP to obtain coal from any other source. *Id.*

In 2011 NTEC's predecessor in interest applied to OSM to revise its mining plan for the Navajo Mine to expand operations southward into a portion of the area administratively designated as "Area IV North." OSM prepared an environmental assessment (EA) and in March 2012 issued a finding of no significant impact (FONSI) and approved the application. *See id.* at 3-4.

In May 2012 Diné CARE filed the instant case challenging OSM's approval of the mining plan revision and naming OSM and various federal officials as defendants. Dist. Ct. Dkt. 1. NTEC's predecessor in interest intervened. Dist. Ct. Dkts. 15, 18. In March 2015 the district court ruled that OSM violated NEPA by failing to consider the reasonably foreseeable impacts of coal combustion at FCPP. Dist. Ct. Dkt. 79 at 23. In a separate order, the court vacated OSM's EA, FONSI, and approval of the mining plan revision and remanded the matter to OSM for further proceedings consistent with its ruling on the merits. Dist. Ct. Dkt. 83 at 7.

NTEC filed a notice of appeal on April 8, 2015. Dist. Ct. Dkt. 84. NTEC subsequently moved for an emergency stay of the district court's rulings. Mot. for Emergency Stay (Apr. 9, 2015). In its motion, NTEC acknowledged that the district court's ruling would not cause any reduction in coal production or employment at the mine and would cause no interruption of operations at FCPP. *Id.* at 6, 21. This Court subsequently denied NTEC's motion. Or. (Apr. 16, 2014).

OSM filed a notice of appeal on June 5, 2015. Dist. Ct. Dkt. 95. On August 18, 2015, OSM moved to voluntarily dismiss its appeal. Mot. for Voluntary Dismissal (Aug. 18, 2015). The same day this Court issued an order dismissing OSM's appeal. Or. (Aug. 18, 2015). It appears that OSM is now in the process of re-analyzing NTEC's application, consistent with the district court's remand order.

ARGUMENT

"It is black letter law that a district court's remand order is not normally 'final' for purposes of appeal under 28 U.S.C. § 1291." *W. Energy Alliance v. Salazar*, 709 F.3d 1040, 1047 (10th Cir. 2013) (quoting *N.C. Fisheries Ass'n v. Gutierrez*, 550 F.3d 16, 19 (D.C. Cir. 2008)). Accordingly, "[u]nder § 1291, remand by a district court to an administrative agency for further proceedings is ordinarily not appealable because it is not a final decision." *Trout Unlimited v. DOA*, 441 F.3d 1214, 1218 (10th Cir. 2006) (internal quotation omitted) (quoting *Bender v. Clark*, 744 F.2d 1424, 1426-27 (10th Cir. 1984)). "This general principal

has been called the 'administrative-remand rule.'" *W. Energy Alliance*, 709 F.3d at 1047 (quoting *Trout Unlimited*, 441 F.3d at 1218).

The administrative remand rule "promotes judicial economy and efficiency by avoiding the inconvenience and cost of two appeals: one from the remand order and one from the later district court decision reviewing the proceedings on remand." *Sierra Club v. DOA*, 716 F.3d 653, 656 (D.C. Cir. 2013); *accord W. Energy Alliance*, 709 F.3d at 1047, 1050. Appellate review by a private party, like NTEC here, is particularly unwarranted because "[i]f the [agency's] decision on remand is not satisfactory, [the private party] can pursue administrative remedies and, if necessary, seek review in district and appellate courts at a later stage in the proceedings." *Trout Unlimited*, 441 F.3d at 1219; *see W. Energy Alliance*, 709 F.3d at 1050 (drawing distinction between appeals by agencies and appeals by private parties). Further, letting remand take its course "leaves open the possibility that an appeal may prove unnecessary if the remand proceedings satisfy all parties." *Sierra Club*, 716 F.3d at 656. In addition to the Tenth Circuit, the Eighth Circuit, the Ninth Circuit, and the D.C. Circuit have specifically held that "a district court order remanding for [additional NEPA review] does not constitute a 'final decision' appealable *by a private party* under . . . 28 U.S.C. § 1291." *Id.* at 658 (emphasis added); *Diné CARE v. Klein*, 439 F. App'x 679, 681-83 (10th Cir. 2011) (unpublished); *S. Utah Wilderness Alliance v. Kempthorne*, 525 F.3d 966,

969-71 (10th Cir. 2008) (holding that administrative remand rule precluded immediate appeal by private leaseholders where district court remanded matter to agency to conduct further NEPA analysis).

Diné CARE v. Klein is directly on point and counsels dismissal of NTEC's appeal. In *Klein*, as here, the district court vacated OSM's approval of a similar permit revision at the Navajo Mine for violation of NEPA and remanded the matter to the agency to correct legal deficiencies and reassess its FONSI. 439 F. App'x at 681. There, the mine operator and OSM appealed the district court's ruling, but the agency subsequently dismissed its appeal, as here. *Id.* This Court held that, in light of the agency's determination not to pursue an appeal, there was "no final, appealable order under 28 U.S.C. § 1291 because the district court remanded the case to OSM for further proceedings." *Id.* So too here: the district court remanded the case to OSM to correct its legal deficiencies and OSM has not pursued its appeal. OSM Mot. for Voluntary Dismissal (Aug. 18, 2015). Accordingly, as in *Klein*, jurisdiction is not proper and NTEC's appeal should be dismissed.

In its motion for an emergency stay, NTEC argued that jurisdiction was proper under the "practical finality" exception to the administrative remand rule. Mot. for Emergency Stay at 8-11 (Apr. 9, 2015). This exception applies to cases that present issues that are "important" and "urgent." *W. Energy Alliance*, 709 F.3d at 1049-50. If this test is met, the court then makes the jurisdictional determination

under § 1291 assessing "whether the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review." *Bender*, 744 F.2d at 1427. The Tenth Circuit "ha[s] warned [that] this exception to the administrative-remand rule must be narrowly construed and pragmatic finality invoked only in truly unique circumstances if [the court is] to preserve the vitality of § 1291." *W. Energy Alliance*, 709 F.3d at 1049 (internal quotation omitted) (quoting *Boughton v. Cotter Corp.*, 10 F.3d 746, 752 (10th Cir. 1993)).

The central concern of the practical finality exception is assuring that *federal agencies* not be foreclosed from seeking appellate review. *Id.* at 1050. By contrast, this Court "rarely take[s] jurisdiction over appeals involving *private* litigants seeking immediate appeal of remand orders." *Id.* (internal quotation omitted) (quoting *Miami Tribe of Okla. v. United States*, 656 F.3d 1129, 1140 n.14 (10th Cir. 2011)); 15B Charles Alan Wright et al., Federal Practice and Procedure: Jurisdiction § 3914.32 (2d Ed. 2014) ("[P]rivate party appeals are frequently dismissed, in keeping with the general rule that remand orders are not final."); *see also* 19 Moore's Federal Practice § 202.08 at 202-63 to -64 (3d ed. 2013) ("An important concern in this balancing test is whether *the agency* likely would be foreclosed from future appellate review."); *Sierra Club*, 716 F.3d at 656-57 (explaining "asymmetry" between appeals from remand orders by federal agencies and private parties).

Here, the practical finality exception is inapplicable. As in *Klein*, there is no urgency to warrant piecemeal review. NTEC

> is not foreclosed from re-raising (if necessary) its current issues in later proceedings or attacking any adverse decision resulting from remand. Although postponed review in this case might result in added costs, delay and uncertainty, such "inconveniences . . . do not create appellate jurisdiction where it does not otherwise exist."

439 F. App'x at 682 (quoting *Trout Unlimited*, 441 F.3d at 1219 n.2); *accord S. Utah Wilderness Alliance*, 525 F.3d at 970 (holding that temporary delay in lease development during remand while "BLM complies with NEPA does not constitute the sort of irreparable harm that might persuade us to consider the matter urgent and overlook the administrative remand rule"); *Trout Unlimited*, 441 F.3d at 1219 (rejecting practical-finality argument on basis that if "decision on remand is not satisfactory, Defendant-Intervenors can pursue administrative remedies and, if necessary, seek review in district and appellate courts at a later stage in the proceedings"). Further, NTEC has admitted that the delay in mining in Area IV North pending remand will not cause any reduction in coal production or employment at the mine and will cause no interruption of operations at FCPP. Mot. for Emergency Stay at 6, 21 (Apr. 9, 2015). NTEC will simply mine coal in existing permitted areas of the Navajo Mine and deliver that coal to FCPP. *Id.*

In its motion to stay, NTEC argued that the appeal was urgent due to potential mootness from the then-looming approval of a permit renewal application

and environmental impact statement (EIS) that included the portion of the mine, Area IV North, at issue in the instant case. *Id.* at 10-11. NTEC's argument must fail. For if OSM's actions eventually moot Diné CARE's case, NTEC will obtain exactly what it seeks: leave to expand mining operations into Area IV North. Thus, mootness would serve the policies of "judicial economy and efficiency" that animate the administrative remand rule. *See Sierra Club*, 716 F.3d at 656; *W. Energy Alliance*, 709 F.3d at 1050. Indeed, that NTEC may shortly obtain what it desires is an additional reason for the court to stay its hand, not a basis for the court to expand the "narrowly construed" exception to the administrative remand rule. *See W. Energy Alliance*, 709 F.3d at 1049 (quoting *Boughton*, 10 F.3d at 752); *Sierra Club*, 716 F.3d at 656 (noting salutary outcome where "remanded proceedings satisfy all parties"); *accord Trout Unlimited*, 441 F.3d at 1219.

In sum, pursuant to binding Tenth Circuit precedent, the district court's remand order was not a "final decision[]" under 28 U.S.C. § 1291 that may be appealed by NTEC. Accordingly, this Court lacks jurisdiction and must dismiss NTEC's appeal as premature.

CONCLUSION

For the foregoing reasons, NTEC's appeal should be dismissed for lack of jurisdiction.

Respectfully submitted this 20th day of August 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2015, I filed the foregoing document using this Court's CM/ECF system, which will send notification to all parties of record.

s/ Shiloh Hernandez
Shiloh Hernandez

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify with respect to the foregoing:

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

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

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Semantec Endpoint Protection Small Business Edition Version 12.1.5 (12.1.RUS), last updated August 20, 2015, and according to the program are free of viruses.

s/ Shiloh Hernandez
Shiloh Hernandez