Case No. 21-35262

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA ENVIRONMENTAL INFORMATION CENTER, and WILDEARTH GUARDIANS,
Plaintiffs-Appellees,

vs.

RYAN K. ZINKE, *et al.*
Defendants,

and

SPRING CREEK COAL COMPANY LLC and NAVAJO TRANSITIONAL ENERGY COMPANY,
Intervenor-Defendants-Appellants

Appeal From the U.S.District Court for the District of Montana
Case No. CV 1:17-cv-00080 – Hon. Susan P. Watters, District Judge

PLAINTIFF-APPELLEES' MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATUTES AND LEGISLATIVE MATERIALS

INTRODUCTION

Plaintiffs-Appellees Wildearth Guardians and Montana Environmental Information Center (collectively, "Conservation Groups") respectfully request that this Court dismiss Appellants' appeal. This Court lacks jurisdiction to review the appeal filed by Defendants-Intervenors-Appellants Spring Creek Coal, LLC, (Spring Creek) and Navajo Transitional Energy Company (together, "NTEC") from a judgment entered by the United States District Court for the District of Montana on February 3, 2021, adopting the findings and recommendations of the magistrate judge and granting in part Conservation Groups' motion for summary judgment and denying Defendants' and Intervenor-Defendants' respective motions for summary judgment. That judgment is not a "final decision" enabling an appeal because the judgment remanded the matter to the defendant administrative agency, United States Office of Surface Mining Reclamation and Enforcement (OSM) and deferred vacatur of OSM's Finding of No Significant Impacts (FONSI) and Environmental Assessment (EA) for the Spring Creek Mine Mining Plan Modification (mine expansion) pending remand. Defendant OSM dismissed its initial

appeal in this action and instead has opted to complete the remand and issue a revised analysis. It is settled law that an intervenor, such as NTEC here, may not pursue an appeal in this circumstance.

Counsel for Conservation Groups have contacted counsel for NTEC, who oppose this motion.

BACKGROUND

The Spring Creek Mine is a colossal coal strip-mine located in Big Horn County, Montana, approximately 30 miles north of Sheridan, Wyoming. Dist. Ct. Dkt. No. 102 at 3. The mine has been active commercially since 1979. *Id.* The facts at issue in this case and its antecedent arose out of Spring Creek's 2005 application to lease an additional 1,117.7 acres of federal coal for strip-mining. *Id.* at 3-4. After completing an EA and FONSI, the Bureau of Land Management (BLM) issued the lease to Spring Creek with an effective date of December 1, 2007. *Id.* In 2011, the Montana Department of Environmental Quality issued a state mining permit to Spring Creek for the mine expansion. *Id.* at 4. In June of 2012, OSM issued a FONSI and federal approval of the mine expansion. *Id.*

The instant case represents an appeal from the second of two challenges to OSM's approval of the mine expansion. In their first suit, Conservation Groups challenged the OSM's 2012 issuance of the EA and FONSI, and approval of the mine expansion. *Id.* at 4. The Federal District Court for the District of Montana granted Conservation Groups' motion for summary judgment, finding that OSM had violated the National Environmental Policy Act (NEPA), by failing to comply with the law's public participation and notice requirements and failing to take a "hard look" at the consequences of approving the mine expansion. *WildEarth Guardians v. OSM* (*WildEarth I*), CV 14-13-BLG-SPW, 2016 WL 259285, at *2 (D. Mont. Jan. 21, 2016).

The District Court remanded the matter to OSM, but allowed mining to continue for 240 days during the pendency of the remand. *Id.* at *3. In response to the District Court's remand, OSM prepared and issued a revised EA and FONSI in late 2016, again approving the mine expansion. Conservation Groups again sued, challenging the approval and the revised EA and FONSI for failure to take a hard look at the consequences of the expansion. In 2019, Magistrate Judge Cavan issued findings and recommendations on the Parties' cross motions for

summary judgment, recommending that Conservation Groups' motion for summary judgment be granted in part and OSM's and Spring Creek's motions be denied. Dist. Ct. Dkt. No. 71 at 42. The proceedings were then stayed pending the bankruptcy of Spring Creek. Dist. Ct. Dkt. No. 86 at 1. NTEC obtained the Spring Creek Mine in bankruptcy and subsequently moved to intervene in the present case. Dist. Ct. Dkt. Nos. 97-99.

Following NTEC's intervention, the District Court adopted Judge Cavan's findings and recommendations in their entirety on February 3, 2021. Dist. Ct. Dkt. No. 102 at 2. The District Court agreed with the findings and recommendations that, among other omissions, OSM had failed to take a hard look at the indirect effects of coal transportation, non-greenhouse gas emissions, and greenhouse gas emissions, and that its decision not to prepare an EIS was arbitrary and capricious. *Id.* at 18, 22, 28, 34. The District Court granted a deferred vacatur, as it had in *WildEarth I*, allowing Federal Defendants 240 days in which to "complete a corrective NEPA analysis and prepare an updated EA. Federal Defendants may seek leave to extend the deadline should they determine an EIS is warranted." Dist. Ct. Dkt. No. 102 at 35.

On April 5, 2021, NTEC filed a notice of appeal, pursuant to 28 U.S.C. § 1291. Dist. Ct. Dkt. No. 106 at 2. On April 19, 2021, OSM filed a notice of appeal. Dist. Ct. Dkt. No. 112. In June OSM moved to dismiss its appeal and, instead, pursue a corrective analysis on remand. Mot. to Dismiss, *Mont. Env't Info. Ctr. v. Haaland*, No. 21-35294 (9th Cir. June 23, 2021), ECF No. 8. This Court granted the motion, dismissing OSM's appeal. *Mont. Env't Info. Ctr. v. Haaland*, No. 21-35294 (9th Cir. June 23, 2021), ECF No. 9. Despite, the dismissal of OSM's appeal and OSM's preparation of a revised analysis on remand, NTEC continues to pursue its appeal.

Concurrent with its notice of appeal, NTEC moved in the District Court to stay the deadline for vacatur pending its appeal. Dist. Ct. Dkt. No. 104. At a hearing on NTEC's stay motion, OSM informed the District Court that it intended to complete an EIS on the mine expansion and seek an extension of the deadline to complete the corrective NEPA analysis in response to the District Court's February 3, 2021 Order. Dist. Ct. Dkt. No. 140 at 4. The District Court denied NTEC's motion for stay pending appeal. *Id.* at 5. Subsequently, on remand, OSM "determined it is appropriate to complete an

Environmental Impact Statement ('EIS') rather than an EA" for the mine expansion. Dist. Ct. Dkt. No. 142 at 2.

STANDARD OF REVIEW

This Court has jurisdiction to determine its own jurisdiction, and does so de novo. *Special Inv., Inc. v. Aero Air, Inc.*, 360 F.3d 989, 992 (9th Cir. 2004). Jurisdiction must be established as a threshold matter, and without it a court may not proceed. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). A court may not address the merits of a case without first determining that it has jurisdiction over the claim or claims at issue. *Potter v. Hughes*, 546 F.3d 1051, 1060 (9th Cir. 2008). If a court determines that it lacks jurisdiction, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co.* 523 U.S. at 94 (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)).

ARGUMENT

As a general matter, under 28 U.S.C. § 1291, federal appellate courts have jurisdiction only over appeals from "final decisions" of federal district courts. District court orders that vacate an administrative agency's decision in its entirety and remand the matter

back to the agency are not appealable, final decisions for purposes of § 1291. *Alsea Valley All. v. Dep't of Com.*, 358 F.3d 1181, 1184 (9th Cir. 2004) ("[R]emand orders generally are not 'final decisions' for purposes of section 1291.").

This Court has allowed immediate appeals from decisions that are not "final decisions" under § 1291 only in specific, limited circumstances, none of which apply here. A remand order may be treated as a "final decision" for purposes of appeal under § 1291 only where: (1) the "district court conclusively resolves a separable legal issue"; (2) the remand order compels the agency to "apply a potentially erroneous rule which may result in a wasted proceeding"; and (3) review would be rendered effectively unavailable if immediate appeal were foreclosed. *Id.* at 1184 (quoting *Collard v. U.S. Dep't of Interior*, 154 F.3d 933, 935 (9th Cir.1998)).

I. This Court Lacks Jurisdiction Over NTEC's Appeal Because the District Court's Remand Order Is Not a Final Decision Under 28 U.S.C. § 1291.

Beginning with the proposition that remand orders generally are not final decisions for purposes of § 1291, and in light of the District Court's remand order, it remains to determine whether the District

Court's remand constitutes a final judgment. While courts apply the *Alsea Valley* three-factor test in a practical manner, every factor of the test must nonetheless be met for a judgment to qualify as final for purposes of appellate jurisdiction. *Alsea Valley*, 358 F.3d at 1184 (finding that failure to meet one factor relieved court of obligation to consider the other two). In other words, if even one of the three factors is not present in a given situation, the order is not final and this Court lacks jurisdiction to decide the appeal.

Here, the "exceptions" outlined by *Alsea Valley* with regard to § 1291 do not apply. First, the District Court did not decide any separable legal issues. The only issue before the District Court below was Conservation Groups' challenge to the validity of OSM's approval of the expansion of the Spring Creek Mine. The court below had neither the opportunity to nor did it address any other issue. Second, the District Court's order does not compel the agency to apply a "potentially erroneous rule" or in fact any rule, which could "result in a wasted proceeding." *Id.* at 1184. Finally, NTEC retains its ability to seek review of the agency's ultimate decision. In its February 2021 Order adopting the Magistrate's findings and recommendations, the District

Court remanded the administrative action, in its entirety, to OSM for corrective NEPA review. NTEC will have the opportunity to participate in that remand process and ensure that its interests are considered when OSM revisits its analysis and renders a decision. If NTEC is dissatisfied with the ultimate decision to any degree, it may also challenge that decision in court. Because none of the factors are met, the District Court's decision is not final and subject to appeal.

A. The judgment fails the first factor of the *Alsea Valley* test because there were no separable legal issues.

When a district court remands only a part of a case, and decides other issues in a manner that leaves no uncertainty as to their future resolution, the appellate court may find the decision to be "final" for jurisdictional purposes notwithstanding the existence of a remand to the agency. In such instances, the settled issues are not subject to subsequent modification on remand, and therefore are appropriate for resolution by the appellate court. Several examples prove instructive.

In *Sierra Forest Legacy v. Sherman*, 646 F. 3d 1161, 1175 (9th Cir. 2011), the district court upheld most of the agency's decision but remanded one portion to the agency for additional review. In determining that the judgment was "final" for purposes of § 1291, this

Court observed, "[t]here is no question that the district court decided numerous legal issues distinct from those to be addressed in the agency remand." *Id.* at 1176. The Court reasoned that the agency was far more likely, on remand, to only address the matters specifically remanded, and not the ones the court upheld, than it was to reconsider the entire decision and address all issues the plaintiffs had raised in challenging the original decision, even if the latter course were theoretically possible. *Id.* at 1175 (noting that "the final judgment rule deals in practice, not theory"). As a result, the court concluded, the portions of the decision *not* remanded to the agency for additional review constituted separable legal issues that would not be addressed on remand and on which plaintiffs could not, therefore, achieve the relief they sought through the remand process. Thus, for purposes of appellate jurisdiction, the district court's judgment was final as to those issues. *Id.* at 1175-76.

The likelihood that a plaintiff might gain all of the relief it seeks through remand is telling. In *Skagit County Public Hospital District No. 2 v. Shalala*, 80 F.3d 379 (9th Cir. 1996), the government argued that a district court decision remanding, in part, a challenged decision to an

agency review board for the sole purpose of determining whether the review board had jurisdiction did not address the plaintiffs' requested relief. *Id.* at 384. The appellate court, in vacating the district court's remand order, functionally determined that the "meaningless remand" was a separable legal issue as it did not relate to any of the plaintiff's claims. *Id.* By allowing the appeal of those claims to proceed, there was no danger of the waste of judicial resources because there was no chance the remand ordered by the district court would have addressed the issues raised by the appellant. Thus, for all practical purposes, the judgment was final and the plaintiff's appeal could proceed.

The Ninth Circuit has continued to consistently apply these criteria in determining whether a challenged agency decision is "final" for purposes of appeal. In *HonoluluTraffic.com v. Federal Transit Administration*, plaintiffs challenged construction of a light rail system under NEPA, the National Historic Preservation Act, and Section 4(f) of the Department of Transportation Act. 742 F.3d 1222, 1227 (9th Cir. 2014). Plaintiffs lost on summary judgment on all but the Section 4(f) claims, such that construction of the light rail could proceed through the three initial phases of construction but was enjoined as to the last phase

until the agency addressed the remand of the Section 4(f) issues. Plaintiffs appealed the claims they had lost and no party appealed the Section 4(f) determination. The court reasoned that the decision was final as to the other claims, because:

> Defendants could have appealed the remand order but did not. Plaintiffs are not even aggrieved by it. Since no party wants us to review the remand of the Section 4(f) claims, the remand should not defeat our jurisdiction to review the unquestionably final dismissal of the remainder of the claims.

Id. at 1229. Thus, the issues for remand were entirely separable from the issues sought to be appealed, and the determination on remand would not impact the outcome of any of the appealed issues or provide plaintiffs with the relief they sought.

By contrast, in *Alsea Valley*, the basis for the appellate court's determination that the district court judgment was not "final" turned on the fact that, "[b]efore the proceedings even reach the appeal stage, it is possible that the action taken by the Service on remand will provide the Council with all the relief it seeks." 358 F.3d at 1185. There, as here, there were no outstanding issues that could not be resolved by the agency on remand. Similarly, *Sierra Forest Legacy* pointed to its own earlier determination that an agency remand for an entirely new EIS

and consultation with plaintiff tribe did not constitute a final judgment subject to appellate review, because the entire challenged decision was subject to the remand order. 646 F.3d at 1176 (citing *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1072-76 (9th Cir. 2010)).

The instant case clearly falls under the rubric of *Pit River* and *Alsea Valley* rather than that of *Sierra Forest Legacy*, *Skagit County*, or *HonoluluTraffic.com*. Here, as in the first two cases, the District Court issued an order of deferred vacatur that applied to both the EA and FONSI, and remanded the entire matter to OSM for further proceedings consistent with its opinion. Dist. Ct. Dkt. No. 102 at 35. OSM, in turn, has decided to prepare an EIS and has begun that process. Dist. Ct. Dkt. No. 142 at 2. No portion of the District Court's decision can be considered "final" for purposes of conferring jurisdiction under § 1291, and to do so would risk the waste of judicial resources through potentially duplicative or conflicting results on remand, which would themselves be subject to litigation. As the remand has the potential to address all of NTEC's concerns, the District Court's remand order is not final for purposes of appeal.

B. The District Court's remand order fails the third factor of the *Alsea Valley* test because NTEC still has ample opportunity for review.

In the present case, OSM initially appealed the District Court's decision, but subsequently moved to voluntarily dismiss its appeal. *Mont. Env't Info. Ctr. v. Haaland*, No. 21-35294 (9th Cir. June 23, 2021), ECF No. 9. As a general matter, orders remanding an agency action, especially, as here, the entire agency action, are appealable only by the agency itself. *Alsea Valley*, 358 F.3d at 1184. *Alsea Valley* explained that "only *agencies* compelled to refashion their own rules face the unique prospect of being deprived of review altogether. An agency, after all, cannot appeal the result of its own decision." *Id.* at 1184 (emphasis in original).

So too here. While procedurally divergent from *Alsea Valley* in that OSM initially did appeal the District Court's order, the practical effect is the same as *Alsea Valley*, because OSM subsequently dismissed its appeal. Thus, OSM's decision to address the issues highlighted by the District Court on remand, rather than through appeal, ensures that NTEC will not be deprived of the opportunity for review. While *Alsea Valley* did not wholly foreclose the possibility that a non-agency litigant

might be able to appeal a remand order, "we conceive of none … but we need not reach that question. Our decision reaffirms that we will not exercise our jurisdiction over a remand order unless 'a holding of nonappealability would effectively deprive the litigants of an opportunity to obtain review.'" *Id.* at 1184-1185 (citing *Stone v. Heckler*, 722 F.2d 464, 466-68 (9th Cir.1983)).

This Court is under no more compulsion to address that question than was the court in *Alsea Valley*, because NTEC will not be deprived of an opportunity for review of OSM's remanded analysis. In the absence of an appeal from the action agency, this and other courts of appeal have consistently rejected efforts by other litigants to appeal from district court orders that—like this one—remand the entire matter to the agency. *Id.* at 1184-87; *Pitt River*, 615 F.3d at 1074-77 (rejecting plaintiffs' appeal); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 987 (9th Cir. 2019) (rejecting plaintiffs' and intervenors' appeals); *Isaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751, 762 (8th Cir. 2009) (rejecting intervenor-defendants' appeal); *Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653, 658 (D.D.C. 2013) (rejecting intervenor-defendants' appeal). Intervenors in NTEC's

position do not face the possibility of losing their right to review because the remand process ensures their ability to participate both administratively and ultimately to petition for adjudicatory relief. *Alsea Valley*, 358 F.3d at 1185. In counterpoint, if the agency's review on remand results in a decision that is favorable to NTEC's interests—an entirely possible outcome of the remand process—NTEC's current appeal, if allowed to proceed, would result in a significant waste of judicial resources.

In particular, NTEC may participate in the statutorily required public participation process under NEPA, an opportunity that will only be expanded as OSM completes an EIS rather than an EA, as the agency now intends. NTEC can, through its administrative engagement, urge OSM to issue a revised decision that addresses its alleged interests. Further, the District Court's order in no way dictates or predetermines the outcome of the remand process, and, assuming that OSM's review on remand complies with that order and with NEPA's requirements, OSM is at liberty to approve the mine expansion, an outcome that would give NTEC all the relief it could hope for as a result of this appeal. Conversely, if OSM comes to a decision as a result

of the remand process that NTEC believes is adverse to its interests, there is nothing to prevent NTEC from challenging that decision and subsequently obtaining appellate review. Thus, review for NTEC is in no way foreclosed by the unavailability of immediate appeal, which is compelled by the fact that the District Court's remand order is not a final decision for purposes of § 1291.

II. Allowing the appeal would contravene the limiting language in case law construing exceptions to the final judgment rule.

When discussing the applicable exceptions allowing appeals from non-final remand orders, *Alsea Valley* stated that such exceptions were rare and should be applied very narrowly. In regards to exceptions to the "final decision" requirement, the Court stated that "[a]lthough we conceive of none, there may be circumstances that would afford a non-agency litigant the ability to appeal a remand order," demonstrating that exceptions to this requirement are rare. *Alsea Valley*, 358 F.3d at 1184.

Granting the appeal before the Court would stretch this exception beyond any prior application, contrary to case law consistently stating that the exception should be kept narrow. *Alsea Valley* stated that an

exception could conceivably apply under certain interpretations but refused to do so because of the intended nature of the exception. *Id.* at 1184. *Pit River* mirrored this narrow application and refused to allow an appeal for a case that halted construction of power plants and was dismissed. 615 F. 3d at 1076. Even if some generous interpretation of the District Court's judgment in the present case could be interpreted as a final ruling, this Court should not find it has jurisdiction. These rules are not meant to be exercises in the conceivable, but are meant to act as last resort exceptions when parties have clearly lost their ability to obtain review or are in danger of serious and permanent harm. *See*, *e.g.*, *HonoluluTraffic.com*, 742 F. 3d at 1229 (allowing immediately appeal of non-remanded claims where project construction would continue and permanently alter the environmental and historical lands). As no such circumstance exists in the present case, this Court must dismiss the appeal.

CONCLUSION

The District Court judgment is on its face a non-final remand order of the entire matter to OSM. Allowing NTEC's appeal for any part of the present case would risk wasting this Court's time while the entire

matter is on remand to OSM. Deeming the remand order a "final decision" would stretch existing case law beyond any prior application. NTEC does not face the unique risk of losing its right to review as a government agency would, no matter how the present case is settled on remand. NTEC cannot demonstrate the District Court's deferred-vacatur and remand order is an appealable final order. Therefore, well-established authority demonstrates this Court should find that it lacks jurisdiction over NTEC's appeal, grant Conservation Groups' motion, and dismiss this appeal.

Respectfully submitted this 11th day of August, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that, consistent with Fed. R. App. P. 27(d)(2)(A), the foregoing motion contains 3,752 words, excluding caption, tables, signature block, and certificate of compliance. The motion's type size and typeface comply with Fed. R. App. P. 32(a)(5)-(6).

/s/ Melissa Hornbein
Melissa Hornbein