No. 22-35789

United States Court of Appeals for the Ninth Circuit

Citizens for Clean Energy, et al.,

Plaintiffs-Appellees,

vs.

United States Department of the Interior, et al.,

Defendants,

&

National Mining Association,

Intervenor-Defendants-Appellant,

&

State of Wyoming and State of Montana, et al.,

Intervenor-Defendants-Appellants.

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

Appeal from the United States District Court
for the District of Montana, Nos. 4:17-cv-00030-BMM, 4:17-cv-00042-BMM
Hon. Brian Morris, Chief District Judge

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INTRODUCTION

Plaintiffs-Appellees Northern Cheyenne Tribe and Citizens for Clean Energy et al. ("Conservation Organizations") respectfully request that this Court dismiss the appeals of Intervenor-Appellants National Mining Association, State of Wyoming, and State of Montana. This Court lacks jurisdiction to review the appeals from the rulings entered by the district court on April 19, 2019 and August 12, 2022. As to the former, the appeals are time-barred. And as to both, the district court's order remanding the matter to the Department of the Interior and Bureau of Land Management (together, "Federal Defendants") is not a "final decision" enabling an appeal under 28 U.S.C. § 1291 because the order vacated and remanded the entire matter to the federal administrative agencies. Federal Defendants chose not to appeal, but instead have begun the remand process.

Orders remanding an agency action, especially the entire agency action, are generally appealable only by the agency itself. Where, as here, an agency opts not to appeal, this Court has consistently rejected efforts by plaintiffs or intervenors to appeal the remand order. This Court should similarly dismiss Intervenor-Appellants' appeals, here, for

lack of jurisdiction. It is well settled that an intervenor, like the National Mining Association, State of Wyoming, and State of Montana here, may not pursue an appeal in this circumstance, where it may obtain all the relief it seeks on remand before the administrative agency.

Counsel for the Tribe and Conservation Organizations contacted counsel for the National Mining Association, Wyoming, and Montana, who oppose this motion, and Federal Defendants, who take no position on this motion.

BACKGROUND

This case involves the Tribe and Conservation Organizations' challenge of the Secretary of the Interior's March 29, 2017, decision to rescind a moratorium on federal coal leasing, which opened the entire federal mineral estate to new coal mining. Dist. Ct. Dkt. 239 at 15. That decision unleashed potentially significant threats to public health, water and air quality, climate, our public lands, and the Northern Cheyenne Tribe and Reservation that would have been precluded by the moratorium. *See id.* 14–16. Despite these impacts, Federal Defendants

initially failed to conduct any review of their decision to renew coal leasing under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h.

On April 19, 2019, the district court held that Federal Defendants violated NEPA by failing to evaluate the environmental consequences of their decision. Specifically, the decision to revoke the federal coal-leasing moratorium immediately ended protections from most new coal leasing for all federal public land and constituted a "major federal action" triggering NEPA; the decision had immediate legal consequences, rendering it a final agency action; and thus, "Federal Defendants' decision not to initiate the NEPA process proves arbitrary and capricious." *Citizens for Clean Energy v. U.S. Dep't of the Interior*, 384 F. Supp. 3d 1264, 1281 (D. Mont. 2019) (Dist. Ct. Dkt. No. 141). The district court further found that Plaintiffs raised "a substantial question as to whether the project may cause significant environmental impacts." *Id.* at 1279 (citation omitted). Although the Court did not direct BLM to perform any specific type of NEPA analysis, the Court recognized that "[i]f Federal Defendants determine that an EIS would not be necessary

…, Federal Defendants must supply a 'convincing statement of reasons' to explain why the Zinke Order's impacts would be insignificant." *Id.* at 1282 (citation and quotation omitted). Further, the court directed the parties to file additional briefing on the question of the appropriate remedy for Federal Defendants' NEPA violation.

On May 22, 2019, before the filing of remedy briefs, Federal Defendants commenced a NEPA review process by issuing a draft environmental assessment (EA). *See* Dist. Ct. Dkt. No. 143. While the NEPA review process was ongoing, the district court declined to issue an order on remedies. After the EA was finalized, the Tribe and Conservation Organizations urged the court to vacate the decision to lift the moratorium, arguing that the EA was invalid on its face. Rejecting this argument, the district court issued an order on May 22, 2020, finding:

> Federal Defendants have remedied the violation specified in the Court's [April 19, 2019] Order (failure to initiate NEPA analysis) and any challenge to the EA and the [Finding of No Significant Impact (FONSI)] is not appropriately before the Court. Plaintiffs remain free to file a complaint to challenge the sufficiency of the EA and FONSI and the issuance of any individual coal leases.

Dist. Ct. Dkt. No. 170 at 24. The court issued judgment on the same day and no party appealed. Dist. Ct. Dkt. No. 171.

On July 20, 2020, the Tribe and Conservation Organizations filed a motion for leave to file a supplemental complaint challenging the sufficiency of the EA under NEPA. Dist. Ct. Dkt. No. 173. The district court granted the motion on July 23, 2020. Dist. Ct. Dkt. No. 175.

Following briefing on the supplemental complaint, on August 12, 2022, the district court issued an order denying motions to dismiss and granting summary judgment for the Tribe and Conservation Organizations. Dist. Ct. Dkt. No. 239. Regarding remedy, the court vacated and remanded the EA and FONSI to Federal Defendants for "completion of sufficient NEPA review analyzing revocation of the moratorium." *Id.* at 19. Consistent with this Court's precedent, the court vacated the decision to lift the moratorium. *Id.* at 18–19 (citing *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011) and *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006)). The district court issued the final judgment on October 11, 2022. Dist. Ct. Dkt. No. 247.

On October 7, 2022, Defendant-Intervenor National Mining Association filed a notice of appeal

> from both the Order entered on August 12, 2022, granting Plaintiffs' motion for summary judgment, denying Defendants' cross-motions for summary judgment, and denying NMA's motion to dismiss for mootness (ECF No. 239); and the Order entered on April 19, 2019, granting in part Plaintiffs' motion for summary judgment and denying in part Defendants' cross-motions for summary judgment (ECF No. 141).

Dist. Ct. Dkt. No. 242.

On October 11, 2022, Defendant-Intervenors Wyoming and Montana filed a notice of appeal from "the District Court's August 12, 2022, Order granting in part and denying as moot in part, the Plaintiffs' Motion for Summary Judgment (ECF No. 239), as well as all prior orders and decisions that merge into that Order, including the Intervenor-Defendants' Motion to Dismiss." Dist. Ct. Dkt. No. 245.

Federal Defendants declined to appeal, and all appeal deadlines have passed.

STANDARD OF REVIEW

This Court has jurisdiction to determine its own jurisdiction and does so de novo. *Special Invs., 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. *Id.* 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

This Court lacks jurisdiction over the pending appeals for two reasons. First, under 28 U.S.C. § 1291, federal "appellate jurisdiction only extends over 'final decisions of the district courts.'" *Alsea Valley All. v. Dep't of Com.*, 358 F.3d 1181, 1184 (9th Cir. 2004) (quoting 28 U.S.C. § 1291). District court orders that remand an administrative agency's decision in its entirety are generally not appealable, final decisions for purposes of § 1291. *Alsea Valley*, 358 F.3d at 1184 ("[R]emand orders generally are not 'final decisions' for purposes of section 1291."). Here, the district court's order remanding the

challenged decision and environmental assessment to Federal Defendants was not a final decision as to the Intervenor-Appellants. Accordingly, this Court lacks jurisdiction to consider the appeals.

Second, the appeals are untimely as to the district court's April 19, 2019 order and May 22, 2020 judgment. Under Federal Rule of Appellate Procedure 4, such appeals were due no later than July 21, 2020. No post-judgment motions enumerated under Rule 4(a)(4) were filed that could toll the appeal deadline, and Intervenor-Appellants failed to appeal within the requisite period.

For both reasons, as discussed below, Plaintiff-Appellees Tribe and Conservation Organizations respectfully request that the appeals be dismissed.

I. THIS COURT LACKS JURISDICTION OVER INTERVENOR-APPELLANTS' APPEALS BECAUSE THE DISTRICT COURT'S REMAND ORDER IS NOT A FINAL DECISION UNDER 28 U.S.C. § 1291.

Remand orders generally are not final decisions for purposes of 28 U.S.C. § 1291, and the district court's remand order here does not constitute a final decision. 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. *Alsea Valley*, 358 F.3d at 1184 (quoting *Collord v. U.S. Dep't of Interior*, 154 F.3d 933, 935 (9th Cir.1998)). Under this standard, remand orders are typically only considered final with respect to the administrative agencies that are directly bound by the decision and compelled to act. Absent an agency itself appealing a remand order, agencies alone may be "compelled to refashion their own rules," but be "deprived of review altogether," since they cannot appeal their own determinations on remand. *Id.* By contrast, remand orders are generally not considered final decisions with respect to "non-agency litigant[s]," who can either obtain "all the relief [they] seek[]" on remand or, if unsatisfied with the decision on remand, may seek judicial review. *Id.* at 1184–85. Accordingly, for the appellate court to have jurisdiction the administrative agency must appeal the district court's remand order.

Every element of the three-part *Alsea Valley* test must be met for a judgment to qualify as final for purposes of appellate jurisdiction. *Id.* at 1184 (finding that failure to meet one element relieved court of obligation to consider the other two). In other words, if even one of the three elements is not present, the order is not final and this Court lacks jurisdiction to decide the appeal.

Here, where Federal Defendants did not appeal, none of the elements outlined in *Alsea Valley*, which render a remand order final under to § 1291, are present. First, the district court did not decide any separable legal issues. The only issue addressed by the court below was the Tribe and Conservation Organizations' challenge to the validity of Federal Defendants' compliance with NEPA in connection with the decision to end the coal leasing moratorium. The court ruled in favor of the plaintiffs on this issue and did it address any other claim. Second, the remand 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, Intervenor-Appellants retain their ability to seek review of the agency's ultimate decision following remand. The district court's ruling remanded the matter, in its entirety, to Federal Defendants for corrective NEPA review. Specifically, the court ordered "sufficient NEPA analysis before BLM resumes the Coal Leasing Program," which "considers the full scope of the Zinke Order's effect on all then-pending lease applications, and other connected, cumulative, or similar actions." Dist. Ct. Dkt. No. 239 at 17. As Federal Defendants represented below, currently "the coal leasing program is under review with the opportunity for notice and comment." Dist. Ct. Dkt. 220 at 10. And any future decisions modifying the coal leasing program will be subject to further NEPA review. *Id.* Intervenor-Appellants have the opportunity to participate in this remand process and ensure their interests are considered when Federal Defendants revisit their analysis and render a decision. Future final agency actions may be challenged in federal court.

Because none of the factors are met, the district court's decision is not final and subject to appeal.

A. The District Court's Remand Order Does Not Meet the First Element of the *Alsea Valley* Test Because There Were No Separable Legal Issues.

In *Alsea Valley*, the basis for this Court's holding that the district court's ruling on summary judgment and remand order were not a "final decision" 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, in *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1072–77 (9th Cir. 2010), an agency remand for an entirely new EIS and consultation with plaintiff tribe did not constitute a final decision subject to appellate review, because the entire challenged decision was subject to the remand order. Consistent with *Alsea Valley* and *Pit River Tribe*, courts have consistently rejected

efforts by plaintiffs and intervenors that attempt to appeal orders remanding an entire decision to an administrative agency.[1]

The instant case is governed by the rule in *Alsea Valley* and *Pit River Tribe*. Here, like in those cases, the district court granted summary judgment on a challenge to an agency action and remanded the entire matter to Federal Defendants for a corrective NEPA analysis and decision. Dist. Ct. Dkt. No. 239 at 17, 19.

Absent Federal Defendants appealing, 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

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[1] *Mont. Env't Info. Ctr. v. Haaland*, No. 21-35262, slip op. at 1–2 (9th Cir. Nov. 18, 2021) (rejecting intervenor's appeal of remand order in NEPA suit); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 987 (9th Cir. 2019) (explaining that court rejected plaintiffs' and intervenors' initial appeals as premature); *Or. Wild v. Bureau of Land Mgmt.*, 690 F. App'x 987, 988 (9th Cir. 2017) (explaining rule and dismissing appeal); *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, No. 15-35427, slip. op. at 1–2 (9th Cir. Oct. 20, 2015) (dismissing appeal in NEPA suit); *Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653, 658 (D.C. Cir. 2013) (rejecting intervenor-defendants' appeal); *Diné Citizens Against Ruining Our Env't v. Klein*, 439 F. App'x 679, 681–83 (10th Cir. 2011) (rejecting intervenor's appeal of remand order in NEPA suit); *Isaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751, 762 (8th Cir. 2009) (rejecting intervenor-defendants' appeal).

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 Intervenor-Appellants' concerns, the district court's remand order does not meet the first element of the *Alsea Valley* test and is, therefore, not final for purposes of appeal.

B. The District Court's Remand Order Does Not Meet the Second Element of the *Alsea Valley* Test Because the Order Does Not Compel Federal Defendants to Apply any Potentially Erroneous Rule.

The appeals also fail to satisfy the second element of the *Alsea Valley* test because the district court's remand order does not "force[] the agency to apply a potentially erroneous rule which may result in a wasted proceeding." 358 F.3d at 1184. While the district court found that Federal Defendants NEPA analysis was arbitrary, the court carefully avoided mandating Federal Defendants to apply any rule or conduct any specific analysis on remand. *E.g.*, Dist. Ct. Dkt. 239 at 16 (declining to order Federal Defendants to complete a programmatic environmental impact statement). Federal Defendants remain free to exercise their discretion to conduct an appropriate analysis under

NEPA provided they do so in a rational, rather than arbitrary, manner. *See Gallatin Wildlife Ass'n v. U.S. Forest Serv.*, 743 F. App'x 753, 756 (9th Cir. 2018) (district court order directing agency to "issue a supplemental EIS and conduct a review of five new issues" does not direct agency "to apply a potentially erroneous rule") (quotations omitted).

As such, the district court's remand order does not satisfy *Alsea Valley's* second prerequisite to the Court's jurisdiction under § 1291.

C. The District Court's Remand Order Does Not Meet the Third Element of the *Alsea Valley* Test Because Intervenor-Appellants Have Ample Opportunity for Review.

These appeals also fail to satisfy the third element of the *Alsea Valley* test, because Intervenor-Appellants retains ample opportunities for review if it is unsatisfied with remand.

Orders remanding an agency action, especially the entire agency action, as here, are generally 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. As in *Alsea Valley*, Federal Defendants have not appealed the remand order. Thus, when Federal Defendants address the issues on remand, Intervenor-Appellants will have every opportunity to provide input and, if necessary, seek judicial review after the culmination of the remand process. Thus, they will not be deprived of any opportunity for review of Federal Defendants' remanded analysis and ultimate decision.

In the absence of an appeal from the action agency, as noted, this Court and other courts of appeal have repeatedly rejected efforts by plaintiffs or intervenors to appeal from district court orders that—like this one—remand the entire matter to the agency. *Id.* at 1184–87; *Pit River*, 615 F.3d at 1074–77 (rejecting plaintiffs' appeal); *see also supra* note 1 (collecting cases).

In these circumstances, Intervenor-Appellants do not face the possibility of losing any right to review because the remand process ensures their ability both to participate administratively and ultimately

to seek judicial review. *Alsea Valley*, 358 F.3d at 1185. Thus, here, if Federal Defendants' review on remand results in a decision that is favorable to Intervenor-Appellants' interests—an entirely possible outcome of the remand process—the coal company's current appeal, if allowed to proceed, would result in a significant waste of judicial resources.

In particular, Intervenor-Appellants may participate in the statutorily required public participation process under NEPA, an opportunity that will only be expanded as Federal Defendants continue the pending coal-program review, including NEPA review on any substantive changes to the federal coal-leasing program. Through this process, Intervenor-Appellants may urge Federal Defendants to issue a revised decision that addresses their interests. Further, the district court's remand order in no way dictates or predetermines the outcome of the remand process, and, assuming Federal Defendants' review on remand complies with statutory requirements, Federal Defendants could resume federal coal leasing, an outcome that would give

Intervenor-Appellants all the relief they could hope for as a result of this appeal.

Conversely, if Federal Defendants take final action as a result of the remand process that Intervenor-Appellants determine is adverse to their interests, there is nothing to prevent them from challenging that decision and subsequently obtaining appellate review. Thus, review in this case 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 28 U.S.C. § 1291.

II. APPEALS OF THE DISTRICT COURT'S APRIL 2019 ORDER AND MAY 2020 JUDGMENT ARE UNTIMELY.

While the appeals should be dismissed in their entirety under this Court's standard application of the *Alsea Valley* test, the portion of the appeals purporting to address the district court's April 19, 2019 order and associated May 22, 2020 judgment should be dismissed for the additional reason that they are untimely.

Intervenor-Appellants filed these appeals, seeking review of the district court's May 22, 2020 judgment more than two years too late. Federal Rule of Appellate Procedure 4 provides that a "notice of appeal

may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is … a United States agency." Fed. R. App. P. 4(a)(1)(B). This time limit is "mandatory and jurisdictional." *Hanson v. Shubert*, 968 F.3d 1014, 1017 (9th Cir. 2020) (quoting *Melendres v. Maricopa Cnty.*, 815 F.3d 645, 649 (9th Cir. 2016)). "Failure to file a notice of appeal within the applicable time limit *must* result in dismissal for lack of jurisdiction." *Id.* (emphasis in original).

Although Rule 4 identifies certain post-judgment motions that may toll the appeal period, none applies here. *See* Fed. R. App. P. 4(a)(4)(A) (enumerating motions). While the Tribe and Conservation Organizations filed a motion to supplement their complaint on July 20, 2020, within the appeal period, the district court did not grant the motion until July 23, 2020, after the appeal period closed. Dist. Ct. Dkt. No. 175. And in any event, such motions under Federal Rule of Civil Procedure 15(d) are not among the enumerated motions that toll the jurisdictional appeal deadline. *See Allen v. Schnuckle*, 253 F.2d 195, 196

(9th Cir. 1958) (motion to amend complaint under Federal Rule of Civil Procedure 15 did not toll appeal deadline).

Because the deadline for appealing the district court's April 19, 2019 order and associated May 22, 2020 judgment passed long before the Intervenor-Appellants filed their notices of appeal, the appeals as to that order and judgment should be dismissed as untimely.

CONCLUSION

Well-established authority demonstrates that the district court's remand order is not a final decision under 28 U.S.C. § 1291. The absence of an immediate appeal does not foreclose the opportunity for Intervenor-Appellants to obtain appellate review following remand. And further, appeals from the district court's April 2019 order and May 2020 judgment are untimely. Accordingly, this Court should dismiss Intervenor-Appellants' appeals for lack of jurisdiction.

Respectfully submitted this 9th day of January, 2023.

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CERTIFICATE OF COMPLIANCE

This document complies with the Fed. R. App. P. 27(a)(2)(B) because this motion does not exceed 5,200 words, and does not exceed 20 pages, excluding caption and certificate of compliance. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using 14 point font and plain, roman style.

Dated January 9, 2023.

/s/Amanda D. Galvan
Amanda D. Galvan