No. 21-16791

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PASCUA YAQUI TRIBE, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants-Appellees,

ARIZONA ROCK PRODUCTS ASSOCIATION, et al.,
Intervenors-Defendants-Appellants,

CHANTELL SACKETT and MICHAEL SACKETT,
Intervenors-Defendants-Appellees.

On Appeal from the U.S. District Court
for the District of Arizona (No. 4:20-cv-00266-RM)

MOTION TO DISMISS APPEAL FOR LACK OF APPELLATE JURISDICTION

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INTRODUCTION

Defendants-Appellees U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, and agency officials (together, the Agencies) move to dismiss the appeal by Intervenors-Defendants-Appellants Arizona Rock Products Association, et al. (Business Intervenors), because there is no appellate jurisdiction. The district court's order vacated one of the two rules challenged by Plaintiffs and remanded to the Agencies. But the claim challenging the other rule remains pending in district court, so the order is not final and appealable under 28 U.S.C. § 1291. And the order is not final as to the Business Intervenors for a second independent reason. The order remands to the Agencies, and remand orders generally are not final as to intervenors. The Business Intervenors can instead comment on the Agencies' new proposed rule (and any future proposals) and then challenge any final rule in court if they are aggrieved. Finally, the order is not appealable by the Business Intervenors as an injunction under 28 U.S.C. § 1292(a)(1) because the order does not require Business Intervenors to take any action, nor does it prohibit them from doing anything.

BACKGROUND

A. The Clean Water Act and the Agencies' "Waters of the United States" Rules

The Clean Water Act (CWA) seeks "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. Among

other things, the Act prohibits "the discharge of any pollutant by any person" without a permit or other authorization, 33 U.S.C. § 1311(a), to "navigable waters," defined as "the waters of the United States," *id.* at 1362(7).

In 1973, EPA published regulations defining "navigable waters" broadly to include traditional navigable waters; tributaries of traditional navigable waters; interstate waters; and intrastate lakes, rivers, and streams used in interstate commerce. 38 Fed. Reg. 13,528, 13,528-29 (May 22, 1973). The Army Corps of Engineers first promulgated regulations defining "waters of the United States" in the 1970s. Covered waters included only those waters subject to the ebb and flow of the tide or used "for purposes of interstate or foreign commerce." 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974). Thereafter, the Corps broadened its interpretation of the phrase. *See, e.g.*, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977). In the 1980s, the Agencies adopted regulatory definitions substantially similar to the 1977 definition; those regulations remained in effect until 2015. *See* 33 C.F.R. § 328.3(a) (1987) (Corps); 40 C.F.R. § 232.2(q) (1988) (EPA). Over time, the Agencies refined their application of the 1980s regulations as informed by three Supreme Court decisions. *See, e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

In 2015, the Agencies revised the regulations defining "waters of the United States." 80 Fed. Reg. 37,054 (June 29, 2015). Then in 2019, the Agencies repealed

the 2015 rule and reinstated the prior regulatory framework. 84 Fed. Reg. 56,626 (Oct. 22, 2019) (2019 Rule). In 2020, the Agencies again revised the definition of "waters of the United States" with the Navigable Waters Protection Rule, 85 Fed. Reg. 22,250 (Apr. 21, 2020) (NWPR).

The NWPR narrows the definition of "waters of the United States." It establishes four categories of jurisdictional waters: "(1) The territorial seas and traditional navigable waters; (2) tributaries of such waters; (3) certain lakes, ponds, and impoundments of jurisdictional waters; and (4) wetlands adjacent to other jurisdictional waters (other than waters that are themselves wetlands)." 85 Fed. Reg. at 22,273. The NWPR also establishes exclusions and defines the operative terms used in the regulatory text. 85 Fed. Reg. at 22,270, 22,340-41. The NWPR includes as jurisdictional "perennial" tributaries that "flow[] continuously year-round" and certain "intermittent" tributaries that "flow[] continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts)." *Id.* at 22,338. Ephemeral waters (waters that flow in direct response to precipitation) are categorically excluded from jurisdiction under the NWPR. *Id.* at 22,340.

The NWPR includes "adjacent wetlands" as subject to CWA jurisdiction if they directly abut a jurisdictional water, are "inundated by flooding" from a jurisdictional water during "a typical year," are separated from a jurisdictional water "only by a natural berm, bank, dune, or similar natural feature," or are separated from a

jurisdictional water "only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection" between the wetlands and the jurisdictional water in a "typical year." *Id.* at 22,338. The NWPR also maintains certain exclusions from jurisdiction (e.g., waste treatment systems) and adds others (e.g., certain ditches). *Id.* at 22,317-25.

On June 9, 2021, the Agencies announced their intent to revise the definition of "waters of the United States." *See* 86 Fed. Reg. 41,911 (Aug. 4, 2021). They also announced their intent to undertake two rulemakings. They first planned to propose "[a] foundational rule to restore longstanding protections" and anticipate undertaking "a second rulemaking process that builds on that regulatory foundation." *Id.*

As explained below, the district court here vacated the NWPR, Appendix 11, so it is not in effect. 86 Fed. Reg. 69,732, 69,733 (Dec. 7, 2021). Another district court has also vacated the NWPR. *Navajo Nation v. Regan*, __ F. Supp. 3d __, No. 20-CV-602-MV/GJF, 2021 WL 4430466 (D.N.M. Sept. 27, 2021).

On December 7, 2021, the Agencies published a proposed first rule. 86 Fed. Reg. 69,372. The rule proposes to restore the regulations defining "waters of the United States" in place for decades before 2015 with amendments to reflect the Agencies' interpretation of the statutory limits on the scope of the "waters of the United States" as informed by Supreme Court case law. *Id.* at 69,372-74 (executive summary of proposed rule).

B. Procedural History

In their complaint, Plaintiffs challenged both the NWPR and the 2019 Rule. Appendix 12-49. They alleged that the Agencies exceeded their authority and acted contrary to the CWA by adopting certain provisions in the NWPR (Count I, Appendix 42-43); that promulgating the NWPR was arbitrary and capricious, an abuse of discretion, and contrary to law for a variety of reasons (Counts II and III, Appendix 43-46); that the Agencies promulgated the NWPR's waste-treatment-system exclusion in violation of notice-and-comment requirements (Count IV, Appendix 46-47); and that the 2019 Rule is arbitrary and capricious, an abuse of discretion, and contrary to the CWA (Count V, Appendix 47-48). The Agencies filed an answer to Plaintiffs' complaint on September 8, 2020. ECF No. 17.

The Business Intervenors moved to intervene as defendants in April 2021, and the district court granted their motion on May 5, 2021. ECF No. 43. Chantell and Michael Sackett (the Sackett Intervenors) moved to intervene as defendants, and the court granted their motion on May 14, 2021. ECF No. 70.

Plaintiffs filed a motion for summary judgment. ECF Nos. 47-68. The Business Intervenors filed an opposition and cross-motion for summary judgment, ECF Nos. 79-81, as did the Sackett Intervenors, ECF Nos. 77, 78.

The Agencies then moved for voluntary remand of the NWPR without vacatur in July 2021. ECF No. 72. The Agencies expressed significant concerns with the NWPR, "including whether the NWPR adequately considered the CWA's statutory objective

in determining the scope of 'waters of the United States,'" but they did not concede legal error with regard to the NWPR. *Id.* at 11.

Plaintiffs filed an opposition to the remand motion, stating that any remand must be accompanied by vacatur of the NWPR or, in the alternative, that the parties should be directed to complete summary judgment briefing. ECF No. 74 at 1. The Business Intervenors stated in their response that they "[did] not oppose the relief sought in the Agencies' Motion," but disagreed with many of the Agencies' statements in the remand motion and argued that any remand should be without vacatur. ECF No. 85 at 2. The Sackett Intervenors opposed remand in part and opposed vacatur if the NWPR were remanded. ECF No. 84 at 1.

The district court vacated the NWPR and remanded the rule to the Agencies. Appendix 1-11. After noting that neither Plaintiffs nor Business Intervenors opposed a remand of the NWPR and rejecting the Sackett Intervenors' opposition, the Court granted the Agencies' request for a voluntary remand of the NWPR. Appendix 5-6, 11. The district court also vacated the NWPR, after identifying serious errors concerning the rule and determining that vacatur would not have disruptive consequences but that remanding without vacatur would "risk serious environmental harm." Appendix 8-9.

The district court then denied all pending summary judgment motions without prejudice and required the parties to submit proposals for litigating Plaintiffs' challenge to the 2019 Rule. Appendix 11. The parties submitted a joint report to the

district court, in which they proposed "that the most efficient course for this case is to hold Plaintiffs' remaining claims regarding the 2019 Rule in abeyance pending publication in the Federal Register of a final rule regarding the Proposed Rule or a decision by the Agencies not to proceed with the rulemaking." Appendix 57. While the report noted Business Intervenors' position that the claim challenging the 2019 Rule should be dismissed, it further stated that "[n]otwithstanding this belief, Business-Intervenors have conferred with the other parties on the most efficient course for this case in light of Plaintiffs' refusal to dismiss Claim V and agree with the proposal set forth" in the report. Appendix 57.

The district court then issued an order adopting the parties' joint proposal and ordering that "[f]urther proceedings regarding Plaintiffs' remaining claim in this action are held in abeyance pending the earlier of (A) publication of a final rule regarding the Proposed Rule or (B) a determination by the Agencies to terminate the rulemaking regarding the Proposed Rule." Appendix 63.

Business Intervenors appealed the remand-vacatur order and filed a motion in district court for a stay pending appeal on October 25, 2021. ECF Nos. 104-06. The Agencies did not appeal, and they opposed the stay motion in district court, arguing that the district court's order was not appealable by Business Intervenors. ECF No. 112. Plaintiffs also opposed the stay. ECF No. 111. The district court has not ruled on the Business Intervenors' stay motion.

After docketing the appeal, this Court issued an order directing the parties to address appellate jurisdiction in their briefs:

> In addition to all other issues the parties wish to raise in their briefs, the parties are directed to address the basis for this court's jurisdiction over this appeal. *See* 28 U.S.C. § 1291; Fed. R. Civ. P. 54(b); *Chacon v. Babcock*, 640 F.2d 221, 222 (9th Cir. 1981) (order is not appealable under § 1291 unless it disposes of all claims as to all parties or judgment is entered in compliance with Rule 54(b)); *see also Alsea Valley All. v. Dep't of Com.*, 358 F.3d 1181, 1184-85 (9th Cir. 2004) ("[W]e 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.'") (citation omitted).

Ct. App. ECF No. 12, Order (Nov. 18, 2021).

Plaintiffs then filed a motion to dismiss the appeal for lack of jurisdiction on December 7, 2021. Ct. App. ECF No. 13. After an extension of time, Business Intervenors' response to that motion is due on January 10, 2022. Ct. App. ECF No. 16.

ARGUMENT

The Business Intervenors' appeal should be dismissed because this Court does not have appellate jurisdiction over it. First, because the district court's order does not resolve all of the claims, it is not final and appealable now unless the district court has directed final judgment as to the resolved claims, *see* Fed. R. Civ. P. 54(b); the district court has not done so. Second, even if the order had resolved all of the claims, remand orders such as this one are ordinarily not appealable as "final decisions" pursuant to 28 U.S.C. § 1291 by non-government parties, and the Agencies

have not appealed here. Third, the order is not an appealable interlocutory order pursuant to 28 U.S.C. § 1292(a)(1) because it is not injunctive in nature as to the Business Intervenors.

I. Because the Order does not dispose of all of the claims, it is not appealable as a final order.

Because the Court has not resolved all of the claims in this case—the claim challenging the 2019 Rule is still pending, Appendix 11, 47-48, 61-63—the order is not final and thus not appealable pursuant to 28 U.S.C. § 1291. Federal Rule of Civil Procedure 54(b) addresses this exact situation and provides a route to an interlocutory appeal, but the Business Intervenors have not followed it. The rule states that:

> When an action presents more than one claim for relief . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties . . . .

A district court order is thus not appealable unless it "disposes of all claims as to all parties or unless judgment is entered in compliance with" Rule 54(b). *United States v. Gila Valley Irr. Dist.*, 859 F.3d 789, 797 (9th Cir. 2017) (quoting rule); *see also*, *e.g.*, *Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC*, 548 F.3d 738, 747 (9th Cir. 2008) (same); *Chacon v. Babcock*, 640 F.2d 221, 222 (9th Cir. 1981) (same).

There is no question here that the order does not "dispose[] of all claims." Plaintiffs' claim concerning the 2019 Rule is still pending in district court, which is

holding the claim in abeyance as jointly requested by the parties, including the Business Intervenors. Appendix 61-63; *supra* pp. 6-7.

Rule 54(b) provides a process for seeking an immediate appeal from an order that does not resolve all claims. To make such an order appealable, a district court "must make an express determination that there is no just reason for delay and it also must make an express direction for the entry of judgment." *Gila Valley Irr. Dist.*, 859 F.3d at 797 (internal quotation marks omitted, quoting 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters § 3914.7 (2d ed. 1991)). The district court has not done so here, and Business Intervenors have not filed a motion asking for this relief. They did ask for a Rule 54(b) determination in a footnote in their reply in support of their motion for a stay. ECF No. 113 at 4 n.1. But asking for a substantive ruling in a footnote in a reply does not provide an opportunity to respond; they should have filed a motion instead. And Business Intervenors joined in the request to hold the remaining 2019 Rule claim in abeyance. Appendix 57; *supra* pp. 6-7.

In sum, because the district court's order does not resolve all of the claims, it is not final and appealable pursuant to 28 U.S.C. § 1291 and Federal Rule of Civil Procedure 54(b).

II. The Order is not appealable by Business Intervenors as a final order because it remands to the Agencies for further proceedings.

The order is not appealable under 28 U.S.C. § 1291 for a second independent reason. It is a settled rule in this Circuit that an order remanding a matter to an agency for further proceedings is ordinarily not a final appealable decision pursuant to 28 U.S.C. § 1291: "remand orders generally are not 'final decisions' for purposes of section 1291." *Alsea Valley All. v. Dep't of Comm.*, 358 F.3d 1181, 1184-85 (9th Cir. 2004); *see also, e.g.*, *Crow Indian Tribe v. United States*, 965 F.3d 662, 676 (9th Cir. 2020); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1174 (9th Cir. 2011); *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1075-77 (9th Cir. 2010).

There are a "few exceptions" to this general rule, *Alsea Valley*, 358 F.3d at 1184, but none applies here. When deciding whether a remand order is appealable, this Court considers three factors:

> A remand order will be considered final where (1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable.

Id. (internal quotation marks omitted); *see also, e.g.*, *Crow Indian Tribe*, 965 F.3d at 676. Because this Court "appl[ies] a practical construction to the finality requirement . . . , these are considerations, rather than strict prerequisites." *Sierra Forest Legacy*, 646 F.3d at 1175. But the Court has not hesitated to dismiss appeals where the third factor is

not met—i.e., where review would be available *after* the remand. *Alsea Valley*, 358 F.3d at 1184 (citing additional cases).

When applying this third factor, ordinarily only the agency involved may appeal a remand order; intervenors cannot do so alone. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 816 (9th Cir. 2018). A remand "may have left the [agency] without an avenue for review," but "[t]his alone, however, does not entitle the [intervenor] to appeal." *Alsea Valley*, 358 F.3d at 1185. If the agency could not appeal a remand order, it would be required to apply the court's potentially erroneous directions on remand but would be unable to appeal its own revised action. *Id.* at 1184. The same is not true for private parties; they can challenge the new agency action after the remand if they are dissatisfied with it.

Business Intervenors will have that exact opportunity here. As explained above, the Agencies have already published a proposed rule and solicited public comment on it. Business Intervenors may comment on the proposal, and this case is thus unlike *Crow Indian Tribe*, where "[a]n appeal is the only way the Intervenors' objections can be considered." 965 F.3d at 676. And when the Agencies finalize a rule, the Business Intervenors may seek judicial review of it. This alone defeats the Business Intervenors' attempt to appeal, as it did in *Alsea Valley*. *Id.* at 1184 ("We need not decide whether the Remand Order meets the first two criteria because we conclude that the third prerequisite is lacking.").

In any event, neither of the other two factors establishes that the Order is final as to the Business Intervenors. First, the Court did not conclusively resolve a separable legal issue. *See id.* at 1184; *Crow Indian Tribe*, 965 F.3d at 676. The matter came to the district court on the Agencies' motion for voluntary remand, in which they did not admit error. The court's discussion of problems with the NWPR in the context of the propriety of vacatur focused on Plaintiffs' allegations in the Complaint and summary judgment pleadings and on the Agencies' expressed concerns regarding the NWPR, without directing the Agencies to follow any particular path in the then-contemplated rulemaking. Appendix 5-11; *see also* 86 Fed. Reg. 69,732 (Dec. 7, 2021) (proposed rule). Second, because the Order does not direct the Agencies to take any particular action on remand, it does not "force[] the agency to apply a potentially erroneous rule which may result in a wasted proceeding." *Alsea Valley*, 358 F.3d at 1184 (internal quotation marks omitted).

In sum, because the district court's order remands to the Agencies, it is not final and appealable by Business Intervenors pursuant to 28 U.S.C. § 1291.

III. The Order is not appealable as an injunction pursuant to 28 U.S.C. § 1292(a)(1).

Section 1292(a)(1) authorizes appeals from "interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1). As an initial

matter, the district court's Order does not directly issue an injunction; Plaintiffs had not moved for one, and the court did not say it was issuing one. Appendix 1-11.

While some orders are appealable if the "substantial effect" is that of an injunction, *see United States v. Orr Water Ditch Co.*, 391 F.3d 1077, 1081 (9th Cir. 2004), this Order is plainly not injunctive in nature as to the intervenors. *See Sierra Club v. Dep't of Agric.*, 716 F.3d 653, 659-60 (D.C. Cir. 2013) (holding that order was not appealable by intervenors because injunction was entered against agency and injunction did not have any purpose beyond remanding). The order is not directed at the Business Intervenors and does not mandate or prohibit any action by them during the remand. While the order has the indirect effect of changing the law that might apply to some of their activities, that does not make the order an injunction that is enforceable against the Business Intervenors.

CONCLUSION

The district court's Order is not appealable as a "final decision[]" pursuant to 28 U.S.C. § 1291 both because it does not dispose of all claims by all parties and because it is a remand to an agency that is not immediately appealable by the private intervenors under this Court's case law. Nor is the district court's order appealable as an injunction pursuant to 28 U.S.C. § 1292(a)(1). The appeal should be dismissed because there is no appellate jurisdiction. Alternatively, the Court has already directed the parties to address appellate jurisdiction in their briefs, and the Court could wait and consider these issues after briefing.

Respectfully submitted,

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90-5-1-4-21739

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the requirements of Fed. R. App. P. 27(d) and 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 3,614 words.

s/ Robert J. Lundman
ROBERT J. LUNDMAN