FILED
United States Court of Appeals
Tenth Circuit

December 11, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROCKY MOUNTAIN WILD; SAN LUIS VALLEY ECOSYSTEM COUNCIL; SAN JUAN CITIZENS ALLIANCE; WILDERNESS WORKSHOP,

Plaintiffs - Appellees/Cross - Appellants,

v.

DAN DALLAS, in his official capacity as Forest Supervisor; MARIBETH GUSTAFSON, in her official capacity as Deputy Regional Forester; UNITED STATES FOREST SERVICE, a Federal Agency within the U.S. Department of Agriculture; UNITED STATES FISH AND WILDLIFE SERVICE, a Federal Agency within the Department of the Interior,

Defendants/Cross - Appellees.

LEAVELL-McCOMBS JOINT VENTURE,

Intervenor - Appellant/Cross - Appellee.

Nos. 17-1366
and 17-1413
(D.C. No. 1:15-CV-01342-RPM)
(D. Colorado)

ORDER[*]

[*] This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and 10th Circuit Rule 32.1.

Before **BRISCOE**, **MURPHY**, and **McHUGH**, Circuit Judges.

The Leavell-McCombs Joint Venture ("LMJV") owns a 300-acre parcel completely surrounded by national forest land in Colorado. LMJV plans to develop its parcel into a ski resort. It filed an access application under the Alaska National Interest Lands Conservation Act ("ANILCA") with the United States Forest Service ("USFS"), invoking USFS's obligation under ANILCA to provide owners of such isolated parcels with adequate access to their land. USFS agreed to and approved a land exchange to meet that statutory obligation. Rocky Mountain Wild ("RMW") and other conservation groups sued under the Administrative Procedure Act ("APA"), claiming that USFS's decisionmaking process in approving the land exchange did not comply with, among other statutes and regulations, the National Environmental Policy Act ("NEPA"). The district court ruled in RMW's favor, setting aside the land exchange.

LMJV and the government filed an appeal and RMW filed a conditional cross-appeal. The government subsequently moved to voluntarily dismiss its appeal but LMJV did not. After the government's voluntary dismissal, RMW moved to dismiss LMJV's appeal under the administrative-remand rule, conditioning the voluntary dismissal of its own cross-appeal on that motion being granted. Because we conclude that LMJV's appeal is subject to the administrative-remand rule and that we

therefore lack jurisdiction to hear LMJV's appeal, we grant RMW's motion and dismiss both LMJV's appeal and RMW's conditional cross-appeal.

I. BACKGROUND

In 1987, LMJV's predecessor and USFS proposed a land exchange: LMJV would trade 1,631 acres of land elsewhere in Colorado for 420 acres of USFS land adjacent to Wolf Creek Ski Area and overlaying Highway 160. *Rocky Mountain Wild v. Dallas*, No. 15-cv-01342-RPM, 2017 WL 6350384, at *1–3 (D. Colo. May 19, 2017). LMJV sought the land to develop a resort to service the ski area. *Id.* at *1. "[B]ased on the results of final appraisals of the exchanged parcels," USFS "reduce[d] the federal parcel conveyed to LMJV from 420 acres to 300 acres." *See id.* at *1, 3. This reduced parcel no longer had direct access to Highway 160 and could only be reached via Forest Service Road 391—a dirt road closed to "motorized traffic" when it becomes a ski trail in the winter. *Id.* at *3.

When LMJV began developing its newly acquired land, litigation ensued. *See generally Wolf Creek Ski Corp. v. Bd. of Cty. Comm'rs of Mineral Cty.*, 170 P.3d 821 (Colo. App. 2007) (affirming the trial court's order voiding the approval of LMJV's resort development plans). Relevant here, the Colorado Court of Appeals determined that Colorado law "require[d] at a minimum year-[]round wheeled[-]vehicle access between State Highway 160" and the planned development. *Id.* at 830. Because Forest Service Road 391 "is not usable by wheeled vehicles during the winter," the development plan did not satisfy state law. *Id.*

Under ANILCA, USFS "shall provide such access to nonfederally owned land within the boundaries of the National Forest System as [it] deems adequate to secure to the owner the reasonable use and enjoyment thereof." 16 U.S.C. § 3210(a). These nonfederal parcels within the national forests are called inholdings. In 2010, LMJV invoked ANILCA in an access application, claiming that, after the ruling in *Wolf Creek*, LMJV's "reasonable use and enjoyment" of its inholding required year-round access to Highway 160. *See* LMJV's App., Vol. 12 at 2720; LMJV's Opening Br. at 6–7 ("The Access Proposal reiterated that, under ANILCA, the USFS was statutorily obligated to provide LMJV adequate access to its inholding."). In its application, LMJV proposed two possible alternative means of satisfying USFS's statutory obligation. The first was another land exchange: LMJV would trade approximately 177 acres of the upland portion of its inholding for 205 acres of USFS's low-lying land that abutted Highway 160. The second alternative was an access road across USFS land.

In an effort to comply with NEPA, USFS prepared and, in August 2012, issued a Draft Environmental Impact Statement for public comment. *See* 42 U.S.C. § 4332(C) (requiring federal agencies to prepare environmental impact statements for "major Federal actions"). In November 2014, USFS issued its Final Environmental Impact Statement ("FEIS"). The FEIS considered three possible alternative approaches to meet its statutory obligation to LMJV: the proposed land exchange, the new access road proposal, and no action. In the "Purpose and Need for Action"

section, the FEIS acknowledged that LMJV has a "legal entitlement" to access its property under ANILCA. *See* LMJV's App., Vol. 12 at 2720, 2722.

USFS issued its final Record of Decision (the "ROD") in May 2015. The ROD concluded that "access adequate to the reasonable use and enjoyment of the LMJV property" required "automobile access on a snowplowed road." LMJV's App., Vol. 15 at 3646. The ROD therefore rejected the no-action alternative because it did not meet USFS's statutory obligation to provide access. But the ROD did "conclude that selection of either action alternative would meet" that obligation. *Id.* After reviewing the FEIS and "all resource areas" the ROD decided to proceed with and approve the land exchange alternative because it "provide[d] the greatest opportunity for [USFS] to improve [its resource] management abilities while meeting [its] legal obligations [under] ANILCA." *See id.* at 3624, 3649.

This litigation then followed. RMW, along with other conservation groups, sued in Colorado district court. *See Rocky Mountain Wild*, 2017 WL 6350384, at *1. They sought review of the ROD under the APA, claiming that USFS had violated NEPA and other statutes. *Id.* In May 2017, the district court set aside the ROD on multiple grounds. *See id.* at *18. First, it found USFS's attempt to comply with NEPA violated the APA. *Id.* at *11. Second, the district court determined USFS's interpretation of ANILCA was contrary to law—the court did not question USFS's obligation to provide access but disagreed with USFS's "categorical refusal *to consider* restrictions on the federal exchange parcel based on ANILCA" rather than apply its own land exchange regulations. *Id.* at *11–12 (emphasis added). Finally, the

district court concluded the "conservation measures" imposed "in this case do not meet [statutory] requirements." *See id.* at *15–17. LMJV filed a motion for reconsideration, which the district court denied.

After the ruling below was final, both the government and LMJV sought an appeal in October 2017. In response, RMW filed a conditional cross-appeal. In January 2018, LMJV filed a new "Application for Access," encouraging USFS to proceed with the access road alternative while this appeal was pending. *See* LMJV's Opp'n to RMW's Mot. ("LMJV's Opp'n") at 18. The government subsequently moved to voluntarily dismiss its appeal, and we granted its motion on May 14, 2018. On May 30, RMW learned of LMJV's new access application and, on June 1, it moved to dismiss both LMJV's appeal and its conditional cross-appeal in favor of a remand for further agency consideration. LMJV opposed RMW's motion on the merits and also claimed that it was untimely. "On July 19, 2018, the Forest Service published a new draft record of decision that would give LMJV reasonable access to its property (as required by ANILCA) by allowing the construction of a new road across Forest Service land to LMJV's parcel." Federal Defs.-Appellees' Br. ("Gov't's Br.") at 15. The Forest Service expects to make a final decision in early 2019.

II. DISCUSSION

"[J]urisdiction is a threshold question which an appellate court must resolve before addressing the merits of the matter before it." *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1201 (10th Cir. 2002). "Absent a specific statutory grant of jurisdiction over a particular type of dispute, we exercise jurisdiction over final

decisions of the federal district courts pursuant to 28 U.S.C. § 1291." *W. Energy Alliance v. Salazar*, 709 F.3d 1040, 1047 (10th Cir. 2013). "The remand by a district court to an administrative agency for further proceedings is ordinarily not appealable because it is not a final decision." *Bender v. Clark*, 744 F.2d 1424, 1426–27 (10th Cir. 1984); *see also N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 550 F.3d 16, 19 (D.C. Cir. 2008). ("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."). "A final decision is one 'that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *W. Energy Alliance*, 709 F.3d at 1047 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978)). "The purpose of the finality requirement is to avoid piecemeal review." *Bender*, 744 F.2d at 1426. This general principle that appellate courts do not address issues pending before an agency is called the administrative-remand rule. *See W. Energy Alliance*, 709 F.3d at 1047.

A. Timeliness

LMJV argues that RMW's motion to dismiss is untimely under Tenth Circuit Rule 27.3. Rule 27.3 requires that "a motion to dismiss the entire case for lack of appellate jurisdiction" be "filed within 14 days after the notice of appeal is filed, unless good cause is shown." Rule 27.3(A)(1)(a), (A)(3)(a). RMW did not file its motion within that fourteen-day window: LMJV filed its notice of appeal in October 2017, the government's appeal was voluntarily dismissed on May 14, 2018, and RMW filed its motion to dismiss on June 1, 2018. But RMW contends that it had good cause for delay because there were no grounds to dismiss LMJV's appeal until

the government's appeal was dismissed. RMW's Mot. to Dismiss at 2. LMJV insists that this does not constitute good cause. LMJV is mistaken.

RMW could not have sought an administrative remand until the government withdrew its appeal because "there is a limited exception [to the administrative-remand rule] permitting a government agency to appeal [an adverse ruling] immediately." *N.C. Fisheries*, 550 F.3d at 19. But if the government does not appeal, "that path is not normally available to a private party." *Id.* at 20. "This asymmetry may seem strange, but it flows from an evenhanded application" of the administrative-remand rule. *See Lakes Pilots Ass'n, Inc. v. U.S. Coast Guard*, 359 F.3d 624, 625 (D.C. Cir. 2004). If the government were not granted this exception, its agencies would "bear significant expenses that cannot be recovered or [would be forced to] take action pursuant to the remand that cannot be reversed if it is later determined that the order was improper." *N.C. Fisheries*, 550 F.3d at 19. "Deferring review" of a private party's claims, however, "leaves open the possibility that no appeal will be taken in the event the proceedings on remand satisfy all parties." *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 880 (D.C. Cir. 2000). Because RMW could not have sought an administrative remand before the government's withdrawal, it had good cause for its filing delay.

LMJV argues in the alternative that even if the government's voluntary dismissal constitutes good cause, RMW's motion is still untimely because it was filed more than fourteen days after the government's appeal was dismissed on May 14. But LMJV misreads the good cause exception. Good cause excuses the movant from the

requirement to file its motion within fourteen days of the notice of appeal, but nowhere in the rule is a further deadline imposed. The timeliness of a motion that was delayed for good cause is wholly within the discretion of the court and is subsumed in the initial determination that there was good cause for the delay. That is to say, when we determine that a motion is timely under the good cause exception, we have taken into account the timing of the delayed filing.

Because we conclude the government's belated withdrawal created good cause for RMW's delayed filing, RMW's motion to dismiss was timely. We now turn to the merits of RMW's motion.

B. Administrative Remand

"When considering whether a remand has occurred in a given case, appellate courts must consider [1] the nature of the agency action as well as [2] the nature of the district court's order." *Am. Wild Horse Preservation Campaign v. Jewell*, 847 F.3d 1174, 1184 (10th Cir. 2016) (quotation marks omitted). The nature of the agency action "is affected by the nature of the administrative proceeding" and "the remand rule [is] most appropriate in adjudicative contexts." *W. Energy Alliance*, 709 F.3d at 1047–48 (quotation marks omitted). Agency action that "settles the rights of specific parties," like permitting or "making a determination on a particular entity's lease application," is adjudicative. *Id.* Unlike legislative action that "affects the rights of individuals in the abstract and must be applied in a further proceeding before . . . any particular individual will be definitively touched by it," "adjudication operates

concretely upon individuals in their individual capacity." *Id.* (quoting 1 Richard J. Pierce, Administrative Law Treatise, § 6.1, at 403 (5th ed. 2010)).

USFS's action here was adjudicative. Like the agency action in *Western Energy Alliance*, USFS made a determination on an application and settled the rights of a specific party when it approved LMJV's inholding access application. *See* 709 F.3d at 1047. Thus, USFS's action here is different from other more general agency actions considered in our prior opinions. USFS did not promulgate a broadly-applicable regulation or policy as the Bureau of Land Management ("BLM") did in *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683 (10th Cir. 2009), and *American Wild Horse*, 847 F.3d 1174. In *Richardson*, BLM sought to amend its Resource Management Plan, 564 F.3d at 689–91, and in *American Wild Horse*, it issued a decision to remove wild horses from private lands, 847 F.3d at 1180–82. Because neither action affected the rights of a specific party, both were classified as legislative. *See Richardson*, 564 F.3d at 698 (calling the amendment to the resource management plan "quasi-legislative"); *Am. Wild Horse*, 847 F.3d at 1184–85, 1189–90 (noting that "nothing in the record indicates that BLM was acting in an adjudicative capacity" as BLM's actions affected "wild horse populations," not a specific entity's rights). In contrast, USFS's approval of LMJV's access application adjudicated the rights of a specific party.

When considering the nature of the district court's order, we ask whether it is a final order or "square[s] with the traditional notion of a 'remand,'" *Richardson*, 565 F.3d at 698, specifically whether it "require[d] that the agency take any further

action," *W. Energy Alliance*, 709 F.3d at 1048. The district court's order here does not explicitly require that USFS take any further action; it merely sets aside the ROD. *See Rocky Mountain Wild*, 2017 WL 6350384, at *18. But in deciding whether a district court order is appealable, we look "not to the form of the district court's order but to its actual effect." *See Pimentel & Sons Guitar Makers, Inc. v. Pimentel*, 477 F.3d 1151, 1153–54 (10th Cir. 2007) (quoting *Sierra Club v. Marsh*, 907 F.2d 210, 213 (1st Cir. 1990)).

The actual effect of the district court's order has been to remand LMJV's access request to USFS. LMJV contends that remand is inappropriate because "[t]he agency may do nothing at all" in response the district court's order. LMJV's Opp'n at 14. But that is contradicted by statute and the record. USFS concluded in both the FEIS and the ROD that it was statutorily required to take action to "allow the LMJV to access its property to secure reasonable use and enjoyment thereof as provided in ANILCA." LMJV's App., Vol. 12 at 2720, Vol. 15 at 3646. USFS explicitly considered a "no action" alternative but rejected it because of that statutory obligation. The district court did not disturb USFS's determination, *see Rocky Mountain Wild*, 2017 WL 6350384, at *11–12, and USFS's obligation under ANILCA has not changed. The district court did not hold that the land exchange is unlawful on the merits, only that USFS did not comply with APA procedures in reaching its decision. Whether USFS ultimately completes the land exchange, builds an access road across USFS land, or takes some other alternative, it is not free to "do nothing at all"; it *must* take some action to provide LMJV with access. *See*

Richardson, 565 F.3d at 698 (reasoning that district court order was "wholly unlike a traditional remand" because the agency "retain[ed] the option" of doing nothing).

As evidence of that reality, USFS has already taken further steps to comply with ANILCA at LMJV's behest. LMJV filed a new ANILCA access application in January 2018. "On July 19, 2018, the Forest Service published a new draft record of decision that would give LMJV reasonable access to its property (as required by ANILCA) by allowing the construction of a new road across Forest Service land to LMJV's parcel." Gov't's Br. at 15. The draft record of decision was available for public review until September 4, 2018. *Id.* USFS "take[s] no position" on LMJV's appeal, *id.* at 2, or on whether it would prefer the land exchange to the access road.[1] The government does maintain, however, that LMJV's new access application does not affect the decided-on land exchange at issue here. But USFS's acquiescence to the district court's order by voluntarily dismissing its appeal after receiving LMJV's new access application and its subsequent decision to move forward, albeit tentatively, with the access road alternative has created the real "prospect of entertaining two appeals, one from the order of remand and one from entry of a district court order reviewing the remanded proceedings," something the administrative-remand rule was created to avoid. *See Pueblo of Sandia*, 231 F.3d at 880 (quoting *In re St. Charles Pres. Inv'rs, Ltd.*, 916 F.2d 727, 729 (D.C. Cir. 1990)).

[1] However, in the draft record of decision, USFS purports to "turn[] down the land exchange proposal *without deed restrictions* and choos[e], instead, the ANILCA right-of-way alternative." RMW 28(j) Letter, Aug. 3, 2018, Ex. 1 at 8.

In these circumstances, the district court's order had the "actual effect" of a remand. *See Pimentel & Sons*, 477 F.3d at 1154 (quoting Sierra Club, 907 F.2d at 213).

Because "[o]nly in extraordinary circumstances do . . . district courts acting in an agency review capacity" "issue detailed remedial orders," *N.C. Fisheries*, 550 F.3d at 20, we conclude the district court's order was a remand to the agency. Thus, we lack jurisdiction over LMJV's appeal.

III. CONCLUSION

We therefore GRANT RMW's motion and DISMISS both LMJV's appeal and RMW's conditional cross-appeal.

Entered for the Court

Carolyn B. McHugh
Circuit Judge