No. 17-35808

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA ENVIRONMENTAL INFORMATION CENTER,

Plaintiff–Appellee,

v.

U.S. OFFICE OF SURFACE MINING, an agency within the U.S. Department of the Interior, et al.,
Defendants–Appellants,

and

SIGNAL PEAK ENERGY, LLC,
Intervenor-Defendant–Appellant.

On Appeal from the United States District Court for the District of Montana
District Court No. 9:15-cv-00106-DWM
Honorable Donald W. Molloy, District Judge

SIGNAL PEAK ENERGY, LLC'S EMERGENCY MOTION PURSUANT TO CIRCUIT RULE 27-3(a) TO RECONSIDER ORDER ISSUED UNDER CIRCUIT RULE 27-7

Action Needed Within 48 Hours

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Circuit Rule 27-3 Certificate

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2. Facts Showing the Existence and Nature of the Emergency

As set forth more fully below, on August 14, 2017, the district court issued an order vacating and setting aside a challenged Mining Plan Environmental Assessment and enjoined all mining of federal coal within an amended permit area boundary at Signal Peak's Bull Mountains Mine in Montana. The district court issued its injunction before hearing any legal argument or factual evidence on the appropriate remedy, and without weighing the mandatory factors set out in *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 156-57 (2010). In response to Signal Peak's motion alerting the district court to this defect, on October 2, 2017, the district court issued an order declining to dissolve the injunction. The district court nevertheless scheduled a one-hour oral argument on October 31 to

address remedy but prohibited the parties from submitting briefing or evidence on the issue.

On October 5, 2017, Appellant, Signal Peak Energy, LLC ("Signal Peak") filed a Notice of Appeal pursuant to 28 U.S.C. § 1292(a)(1) from the district court's August 14, 2017 order issuing the injunction and from the district court's October 2, 2015 order refusing to dissolve the injunction. Notice of Appeal at 1, attached as Exhibit 1. On the same date, Signal Peak filed an Emergency Motion for Stay Pending Appeal (Dkt. 5) ("Emergency Motion") requesting action before October 26, 2017, and the court issued an expedited briefing schedule on that motion.

In Signal Peak's Emergency Motion it sought (i) a stay of the injunction, which was reaffirmed in the district court's October 2, 2017 order, that would avert layoffs of 30 employees at the Bull Mountains Mine near the end of October, and (ii) an order requiring the district court to allow briefing and submission of evidence bearing on the *Monsanto* factors. Because the injunction was not lifted by the requested date, Signal Peak and its workforce now face irreparable injury because Signal Peak is forced to begin the process of laying off employees.

This Court did not consider the merits of Signal Peak's emergency motion. Rather, on October 25, 2017, a deputy clerk of this Court issued an order under Circuit Rule 27-7 holding the appeal in abeyance on the grounds that there is a

pending Rule 59(e) in the district court and concluding that, pursuant to Federal Rule of Appellate Procedure 4(a)(4), the Notice of Appeal is ineffective until proceedings are resolved on the motion. (Dkt. 11). The one-paragraph order does not reference the procedural status of this case. Signal Peak respectfully submits that Rule 4(a)(4) does bar consideration of an appeal brought under 28 U.S.C. § 1292(a)(1) from an interlocutory order made by the district court during the pendency of its review of a post-judgment motion. Therefore, Signal Peak respectfully requests that the deputy clerk reconsider the October 25, 2017 order, reinstate the appeal, and submit Signal Peak's fully briefed Emergency Motion for consideration by the motions panel.

3. When and How Opposing Counsel Were Notified

Signal Peak and the Federal Defendants provided Counsel for Plaintiff/Appellee notice that it intended to file this motion on October 27, 2017. A copy of this motion was provided to Plaintiff/Appellee on October 27, 2017.

4. Submission to District Court

Because this emergency motion relates to an order issued by a deputy clerk of this Court (Dkt. 11) in the first instance, the question was not submitted to the district court.

/s/ John C. Martin

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INTRODUCTION

The deputy clerk's order of October 25, 2017 applies Federal Rule of Appellate Procedure 4(a)(4) to preclude Signal Peak from pursuing an urgent interlocutory appeal. Federal Rule of Appellate Procedure 4(a)(4) is intended to prevent jurisdictional double-booking when the substance of a post-judgment motion and an appeal of a final judgment may overlap. It is not intended to create a lockout period in which a district court's injurious interlocutory orders cannot be appealed under 28 U.S.C. 1292(a). Signal Peak Energy, LLC ("Signal Peak") appeals from the district court's October 2, 2017, interlocutory order is not the subject of a post-judgment motion.[1] Federal Rule of Appellate Procedure 4(a)(4) is indisputably not implicated by the appeal from that order. Therefore, this Court's order of October 25, 2017, should be reconsidered, the appeal reinstated, and Signal Peak's fully briefed emergency motion submitted to the motions panel for a decision.

[1] Signal Peak respectfully submits that Federal Rule of Appellate Procedure 4(a)(4) also does not deprive the Court of jurisdiction over its appeal of the injunction and vacatur in the district court's August 14, 2017 order because its appeal was brought under 28 U.S.C. 1292(a)(1), which provides that interlocutory decisions related to injunctions are "immediately appealable." *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995). Because the district court ordered additional proceedings after the August 14, 2017 order, the injunction and vacatur within that order must be "immediately appealable" to prevent serious and irreparable harm during the pendency of the district court's additional proceedings.

FACTS AND BACKGROUND

On August 14, 2017, the district court improperly issued a permanent injunction. By law, the district court is required to weigh the equities *before* issuing any injunction. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010). The district court's order did not do so. *See* Dkt. 60.

Signal Peak availed itself of Federal Rule of Civil Procedure 59(e) in an effort to allow the district court to correct the legal error. In response, on October 2, 2017, the district court issued another order setting a hearing on remedy in which it expressly declined to dissolve or modify the injunction. In this interlocutory order the district court did not weigh the required equities. *See* Dkt. 86.

Signal Peak filed a Notice of Appeal, challenging the October 2, 2017 interlocutory order as well as the vacatur and injunction in the district court's August 14, 2017 order. *See* Notice of Appeal, Exhibit 1. On the same day Signal Peak filed an Emergency Motion requesting action before October 26, 2017, in an attempt to avoid the irreparable harm now facing the company and its employees as it must now begin the process of layoffs forced by the improper injunction. This

Court issued an expedited briefing schedule to resolve Signal Peak's Emergency Motion.[2]

On October 25, 2017, a deputy clerk of this Court issued an order under Circuit Rule 27-7 holding the appeal in abeyance on the grounds that there is a pending Rule 59(e) motion in the district court and concluding that, pursuant to Federal Rule of Appellate Procedure 4(a)(4), the Notice of Appeal is ineffective until proceedings are resolved on the motion. (Dkt. 11). The one-paragraph order does not address the procedural status of this case, including the authority granted under 28 U.S.C. § 1292(a) and the October 2, 2017 Order.

ARGUMENT

The October 25, 2017 Order reads: "The court's records indicates that this appeal was filed during the pendency of a timely-filed Fed. R. App. P. 4(a)(4) motion. The notice of appeal is therefore ineffective until the entry of the order disposing of the last such motion outstanding." Oct. 25, 2017 Order. The October 25, 2017 Order therefore appears to interpret Federal Rule of Appellate Procedure 4(a)(4) as precluding *any* appeals from the district court "during the pendency" of a post-judgment motion at the district court. This interpretation is far too broad and

[2] The Federal Defendants filed their Response in Support of Signal Peak's Emergency Motion (Dkt. 8) on October 12, 2017.

improperly deprives litigants of the ability to appeal from interlocutory orders issued by the district court during that time.

The Advisory Committee Notes for the 1979 Amendment to Federal Rule of Appellate Procedure 4(a)(4) explain that the rule is designed to conserve judicial resources: "it would be undesirable to proceed with the appeal while the district court has before it a motion the granting of which would vacate or alter the judgment appealed from." The reason for the rule, therefore, is to minimize the risk of the appellate court expending resources to review a decision where that decision may be changed by the district court in response to a pending post-judgment motion. Rule 4(a)(4) provides no support for a blanket prohibition on all appeals – including interlocutory appeals during the pendency of a post-judgment motion.

Indeed, to do so would override Congress's explicit grant of jurisdiction to the courts of appeals to hear appeals from interlocutory orders of the district courts related to injunctions. 28 U.S.C. § 1292(a)(1). Such an appeal does not deprive the district court of jurisdiction to resolve the underlying case. This Court routinely reviews injunctions on an interlocutory basis, and has even included in its review district court findings in support of those injunctions issued after the notice of interlocutory appeal related to the injunction was filed. *See e.g., Federal Trade Comm'n v. Enforma Natural Products, Inc.*, 362 F.3d 1204, 1215 n.11 (9th Cir.

2004) (considering oral findings made five days after order issuing injunction); *Thomas v. County of Los Angeles*, 978 F.2d 504, 507 (9th Cir. 1992) (considering later filed findings of fact and conclusions of law in support of preliminary injunction order).

In discussing Congress's choice to authorize interlocutory appeals related to injunctions, the Supreme Court acknowledged the potential challenges of allowing litigants to appeal without satisfying the final judgment rule, but noted that the purpose for this grant of jurisdiction "seem[s] plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequences." *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955). In other words, potential duplication of judicial effort incurred by interlocutory appeals related to injunctions is justified to prevent "serious, perhaps irreparable consequences." *Id.*

Just as the final judgment rule does not preclude interlocutory appeals related to injunctions, Federal Rule of Appellate Procedure 4(a)(4) does not preclude such appeals from interlocutory orders related to injunctions during the pendency of a post-judgment motion. A rule designed to conserve judicial resources should not be applied as a blanket prohibition on appeals to prevent precisely the kind of appeal that Congress believed was important enough to justify an exception to the final judgment rule.

This case is a perfect example of why the ability to obtain "immediate" interlocutory review was important enough to merit a statutory exception to the final judgment rule. The district court has committed an obvious legal error with serious, and perhaps irreparable, consequences for Signal Peak. Rather than promptly lifting the improperly issued injunction upon notification of the legal error, the district court retained it and scheduled a hearing almost a full month later – further jeopardizing Signal Peak and its employees. The interests of justice demand that Signal Peak's appeal of this illegal injunction be heard promptly.

REQUEST FOR RELIEF

Signal Peak respectfully requests that the Court reconsider the October 25, 2017 Order, reinstate the appeal, and submit Signal Peak's fully briefed Emergency Motion to the motions panel for a decision.

DATED October 27, 2017.

Respectfully submitted,

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Attorneys for Defendant-Intervenor–Appellant, Signal Peak Energy, LLC

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

/s/ John C. Martin
John C. Martin

CERTIFICATE OF COMPLIANCE

I hereby certify that this Emergency Motion Pursuant to Circuit Rule 27-3(a) to Reconsider Order Issued Under Circuit Rule 27-7 is in compliance with Federal Rule of Appellate Procedure 27(d)(2)(A) and Ninth Circuit Rule 27-1(1)(d) (applying the page/word count conversion in Circuit Rule 32-3(2)). The total word count is 1,319, excluding caption, table of contents, table of authorities, and certificates. The undersigned relied on the word count of the word processing system used to prepare this document.

/s/ John C. Martin
John C. Martin

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