ALSEA VALLEY, "*AL-SEE*" YOU LATER? AFTER *CENTER FOR BIOLOGICAL DIVERSITY V. BLM*, THE NINTH CIRCUIT MAY RECONSIDER LONGSTANDING PRECEDENT LIMITING APPEALABILITY OF ORDERS REMANDING WITH VACATUR

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A recent Ninth Circuit decision suggests that the court may reconsider a nearly 20-year-old precedent that has frustrated many unsuspecting appellants in natural resources cases. In 2004, the Ninth Circuit held, in a case named *Alsea Valley Alliance v. Department of Commerce*, 358 F.3d 1181 (9th Cir. 2004), that district court orders vacating and remanding federal agency actions are not final and not appealable unless certain conditions are met. Earlier this year, two Ninth Circuit judges called *Alsea Valley* into question and urged the court to reevaluate that holding. For many would-be appellants, this could foreshadow a welcome change to this frequently litigated question of appellate jurisdiction.

I. Remand with Vacatur Under *Alsea Valley*

In *Alsea Valley*, the Alsea Valley Alliance brought suit in federal district court challenging a final rule from the National Marine Fisheries Service. The challenged rule designated certain populations of coho salmon as "threatened" under the Endangered Species Act. The district court found the Service's rule to be arbitrary and capricious, set it aside, and remanded to the agency for further consideration. The Service opted not to appeal the district court's decision, but certain intervenors pursued an appeal without the Service. The Ninth Circuit dismissed the appeal for lack of jurisdiction, holding that appellate jurisdiction extends only to *final* district court decisions, and that, with limited exception, remand orders are not final.

The limited exception recognized in *Alsea Valley* is a three-part test that has since become a staple portion of appellate briefing in many cases involving remand with vacatur. The court determined that a remand order is final only where (1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule that may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable. Note the "*and*." These were not described as three separate exceptions, but as a single exception with three distinct criteria.

The court in *Alsea Valley* declined to address the first two criteria, finding that the third was not satisfied. The critical point for the court was that the agency itself did not appeal the district court's order. According to the court, "only *agencies* compelled to refashion their own rules face the unique prospect of being deprived of review altogether." Though the agency itself could not challenge the result of its own decision on remand, others would be free to do so and could pursue an appeal if unsuccessful. Thus, appellate review would not be foreclosed for non-agency litigants. The court left open the possibility that non-agency litigants could appeal an order remanding with vacatur under some circumstances, but suggested those circumstances would be rare.

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Since *Alsea Valley*, parties have strenuously litigated the appealability of orders remanding with vacatur, and not only in the agency rulemaking context. Recipients of federal land-use permits or other authorizations often find themselves intervening in lawsuits that challenge those permits. In a sense, permit holders are the real parties in interest in such lawsuits because it is their permit that is at stake. And therein lies the frustration of *Alsea Valley*. If a lawsuit challenging a federal permit is successful and the agency issuing the permit decides not to appeal the decision, an intervenor seeking to defend the permit may face an uphill battle to establish appellate jurisdiction. A similar frustration can be felt by any party that intervened in district court proceeding to defend an agency action when the agency loses and does not appeal. Such would-be appellants may even face summary dismissal of their appeals.

II. *Center for Biological Diversity v. BLM*, 69 F.4th 588 (9th Cir. 2023)

In cases since *Alsea Valley*, its framework for determining jurisdiction over remand orders has been applied with varying degrees of rigor. The three criteria that *Alsea Valley* characterized as "prerequisites" have, in some cases, been softened to mere "considerations."[2] But the risk of getting an appeal kicked for lack of jurisdiction remains. Even if a party can successfully defend its right to appeal a remand order, the need to litigate that right takes away valuable space in appellate briefs and increases litigation costs.

But the litigation landscape for appeals involving remand orders may be changing, or at least that is the hope of two Ninth Circuit judges as expressed in a recent concurring opinion in *Center for Biological Diversity v. BLM*, 69 F.4th 588 (9th Cir. 2023). In that case, several organizations attempted to intervene as defendants in a lawsuit challenging the Bureau of Land Management's (BLM) grant of two rights-of-way. The district court denied intervention, and the intervenors appealed that denial. While the appeal was pending, the district court determined that the decision to grant the rights-of-way was arbitrary and capricious, vacated the decision, and remanded it to the agency.

The Ninth Circuit dismissed the appeal on mootness grounds. The only issue on appeal was the denial of intervention, and the court held that clear Ninth Circuit precedent compelled the conclusion that resolution of the case on the merits during the pendency of the appeal mooted the question of whether intervention was appropriately denied. But the court also stated that, under *Alsea Valley*, it would lack jurisdiction over an appeal by the would-be intervenors even if they had been permitted to intervene in the district court.

The court's application of *Alsea Valley* to the facts before it was reminiscent of *Alsea Valley* itself in that the analysis rested entirely on the third *Alsea Valley* factor. The court concluded that this was not a case in which future appellate review was effectively foreclosed because if the BLM reissued the rights-of-way on remand, the appellants would have what they wanted. If the BLM did not, appellants could challenge that decision in a new lawsuit and eventually make their way up the appellate chain if unsuccessful. (If you are envisioning a game of litigation ping pong where agencies are subject to successive lawsuits by opposing parties, you may see where this is going.)

Judge Friedland authored the Ninth Circuit opinion in *Center for Biological Diversity v. BLM*, but she also authored a separate concurrence joined by Judge Bennett. In that concurrence, Judge Friedland criticized *Alsea Valley* as resting on "flawed assumptions" that risk "serious

[2] United States v. U.S. Bd. of Water Comm'rs, 893 F.3d 578, 594 (9th Cir. 2018).

injustice in high-stakes disputes." Judge Friedland faulted *Alsea Valley* for not recognizing that while remand orders generally are not final for purposes of appeal, an order vacating an agency decision is fundamentally a final judgment. In other words, a remand *with vacatur* is not the same thing as a simple *remand*. Vacatur ends the parties' dispute over whether the challenged agency action will stand, and, according to Judge Friedland, that vacatur should be given independent consideration apart from the remand itself.

Judge Friedland's concurrence also notes that 28 U.S.C. § 1292(a)(1) provides for appellate jurisdiction over orders granting injunctions, and that vacatur of an agency decision fundamentally operates as an injunction forbidding enforcement of the challenged agency action. Thus, even if an order remanding with vacatur were not a final, appealable judgment in the traditional sense, the court should still have appellate jurisdiction because the order is tantamount to an injunction.

Because the issue on appeal was limited to denial of intervention, Judge Friedland did not urge reconsideration of *Alsea Valley* in that case. But Judge Friedland urged her colleagues on the Ninth Circuit to reconsider *Alsea Valley* when the right opportunity arises, and urged a "more pragmatic" approach to determining when an order remanding with vacatur is considered final and appealable.

III. Conclusion

Whether the Ninth Circuit will reevaluate *Alsea Valley*, and what a "more pragmatic" approach to evaluating the appealability of orders remanding with vacatur may look like, is to be determined. One thing is certain—appellants should be prepared to litigate appellate jurisdiction over orders remanding with vacatur, especially if the agency does not file an appeal. This applies to any would-be appellants, including environmental interests groups, industries, and municipal and state governments, among others. For parties hoping to pursue an appeal, early coordination with agencies as they decide whether to appeal can also be beneficial. And if you find yourself litigating this issue in the Ninth Circuit, be prepared for the possibility that you may need to seek en banc review for the court to reconsider its decision in *Alsea Valley*.