

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WISCONSIN RESOURCES
PROTECTION COUNCIL, CENTER
FOR BIOLOGICAL DIVERSITY,
AND LAURA GAUGER,

Plaintiffs,

Case No. 11-cv-45

v.

FLAMBEAU MINING COMPANY,

Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Defendant, Flambeau Mining Company, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final Judgment by the Honorable Barbara B. Crabb entered on July 27, 2012, Docket No. 257, including all prior interlocutory rulings.

Respectfully submitted this 24th day of August, 2012.

DEWITT ROSS & STEVENS S.C.

By: *s/ Harry E. Van Camp*

Harry E. Van Camp (#1018568)
Henry J. Handzel, Jr. (#1014587)
Two East Mifflin Street, Suite 600
Madison, WI 53703-2865
608-255-8891

**ATTORNEYS FOR DEFENDANT,
FLAMBEAU MINING COMPANY**

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**SEVENTH CIRCUIT RULE 3(c) DOCKETING STATEMENT
OF DEFENDANT, FLAMBEAU MINING COMPANY**

Defendant, Flambeau Mining Company (“FMC”), by its undersigned counsel, respectfully submits this Docketing Statement pursuant to Circuit Rule 3(c)(1) of the United States Court of Appeals for the Seventh Circuit.

I. DISTRICT COURT JURISDICTION.

The United States District Court for the Western District of Wisconsin (“District Court”) has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question) and the Clean Water Act, 33 U.S.C. § 1365(a)(1).

II. APPELLATE COURT JURISDICTION.

28 U.S.C. § 1291 and 28 U.S.C. § 1294 confer jurisdiction over this appeal on the United States Court of Appeals for the Seventh Circuit. The final Judgment was entered by the District Court on July 27, 2012. FMC’s Notice of Appeal was timely filed with the District Court on August 24, 2012.

As explained below, it is unclear whether a motion claimed to toll the time within which to appeal has been filed. Accordingly, FMC filed its Notice of Appeal out of an abundance of caution so as to preserve appellate jurisdiction.

On August 10, 2012, Plaintiffs filed “Plaintiffs’ Motion to Alter or Amend the Judgment Under Fed. R. Civ. P. 59(e).” Dkt. 258. That motion is still pending before the District Court. Although cast as a motion under Rule 59(e), the sole relief Plaintiffs seek is alteration or amendment of the Judgment for the sole purpose of requesting the District Court to reconsider its order that “Plaintiffs’ request for attorney fees and costs other than those permitted by statute to prevailing parties is DENIED.” (Dkt. 256, Opinion and Order, July 24, 2012, p. 38). Plaintiffs’ motion attaches a Rule 54(d) “[Proposed] Motion for Award of Attorney’s Fees and Costs of Litigation”. Dkt. 258-1. It is unclear whether this Court would construe Plaintiffs’ pending motion as one brought under Rule 59(e) (which would toll the time to appeal) or as a motion brought under Rule 54(d) (which would not toll the time to appeal). *See, e.g., Yost v. Stout*, 607 F.3d 1239, 1241-42 (10th Cir. 2010) (holding that a challenge to the district court’s denial of attorney’s fees, even when filed as a motion to alter or amend the judgment under Rule 59(e), concerns a matter collateral to the merits of the case and therefore does not toll the time to file an appeal); *Moody Nat. Bank of Galveston v. GE Life and Annuity Assur. Co.*, 383 F.3d 249, 253 (5th Cir. 2004) (finding that unless the court specifically orders that a post-trial motion addressing attorney’s fees will be considered as a Rule 59 motion, the time to appeal is not tolled); *Jones v. UNUM*

Life Ins. Co. of America, 223 F.3d 130, 141 (2d Cir. 2000) (Cabranes, J., concurring) (acknowledging that whether a post-trial motion brought pursuant to Fed. R. Civ. P. 59 or 60 seeking reconsideration solely of a district court's denial of attorney's fees tolls the time to appeal is an "open question in this Circuit."). In *Hastert v. Illinois State Bd. of Election Com'rs*, 28 F.3d 1430, 1438 and n.8 (7th Cir. 1993), this Court recognized that a Rule 59(e) motion challenging a denial of attorney's fees could toll the time to appeal, and that a petition for attorney's fees filed after the court denied fees could be a substantive matter under Rule 59(e) that would toll the time to appeal. However, the notice of appeal in *Hastert* was filed prior to the 1993 amendments to the Federal Rules of Civil Procedure, and thus it is unclear whether *Hastert* is determinative of the issue.

Given the ambiguity as to whether Plaintiffs' pending motion tolls the time to appeal, FMC filed its Notice of Appeal within 30 days from the entry of the final Judgment on July 27, 2012.

This case is not a direct appeal from the decision of a magistrate judge.

III. THIS IS AN APPEAL OF AN IMMEDIATELY APPEALABLE FINAL JUDGMENT.

As noted above, a final appealable judgment was entered by the District Court on July 27, 2012. This is a civil appeal as a matter of right pursuant to Federal Rule of Appellate Procedure 3(a) and Circuit Rule 3(a).

IV. PRIOR OR RELATED APPELLATE PROCEEDINGS.

There have been no prior or related appellate proceedings in this case.

V. ADDITIONAL REQUIREMENTS OF CIRCUIT RULE 3(c)(1).

This is a civil case that does not involve any criminal convictions. 28 U.S.C. § 1915(g) is inapplicable.

None of the parties to the litigation appear in an official capacity.

This case does not involve a collateral attack on a criminal conviction.

Respectfully submitted this 24th day of August, 2012.

DEWITT ROSS & STEVENS S.C.

By: s/ Harry E. Van Camp
Harry E. Van Camp (#1018568)¹
Henry J. Handzel, Jr. (#1014587)
Two East Mifflin Street, Suite 600
Madison, WI 53703-2865
608-255-8891
**ATTORNEYS FOR DEFENDANT,
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¹ For purposes of this appeal, Mr. Van Camp will be counsel of record.