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Ninth Circuit decision stops "sue and settle" tactic

A recent settlement agreement between federal land management agencies and environmental litigators over how to protect a slew of species in northwestern forests was struck down by the 9th Circuit Court, which ruled that the settlement violated federal laws requiring public participation for major rule changes.

The court's ruling has received plaudits from the logging and ranching industries, which have strongly criticized environmental litigators' practice of cutting deals with federal agencies by suing the agencies and then modifying agency rules in closed-door settlement agreements—a tactic commonly known as "sue and settle."

"That was a sweetheart deal between the environmental organization and the agency," said Ann Forest Burns, vice president of the American Forest Resource Council (AFRC). "We're hoping that this is a wake-up call, and will stiffen the spine of the agencies to make sure that the public processes are followed."

In the case in question, 11 environmental groups, including Conservation Northwest, Oregon Wild, and the Center for Biological Diversity (CBD), sued the U.S. Forest Service, Bureau of Land Management, and U.S Fish and Wildlife Service (USFWS) over a 2007 joint agency decision to eliminate "survey and manage" standards from the Northwest Forest Plan, which governs the management of over 24.5 million acres of forest stretching from San Francisco to the Canadian border. The standards outline management for nearly 400 lesser-known species— such as lichens, fungi, slugs and arthropods—defined as "ecologically crucial."

Long criticized by the timber industry for hamstringing the approval of timber contracts, survey and manage standards require the agencies to conduct extensive research on the species and protect them from logging. "It was essentially a poison pill that was put in at the end of the Northwest Forest Plan," Burns said. Burns added that the survey and manage standards "keep the Northwest Forest Plan from functioning appropriately," since they prevent logging from occurring at the levels originally envisioned by the plan's authors.

In 2011, a federal district court ruled against the agencies, determining that their decision to scrap the survey and manage standards, which the agencies claimed were excessively costly and onerous, had violated the National Environmental Policy Act (NEPA). The agencies and the environmental groups then privately revised the survey and manage standards, which were subsequently approved by the district court in a consent decree.

D.R. Johnson Lumber Co., interveners in the case, appealed the decision, claiming that the settlement had shut them and other stakeholders out of the rule-making process.

In its April 25 ruling, the 9th Circuit agreed, stating that the district court had committed an "abuse of discretion;" since the settlement had created new survey and management standards—essentially amending the Northwest Forest Plan—it had side-stepped statutory public input requirements for new rule making.

"Because the consent decree in this case allowed the Agencies effectively to promulgate a substantial and permanent amendment to Survey and Manage without having followed statutorily required procedures, it was improper," the court wrote in its opinion.

NEPA, the National Forest Management Act, and the Federal Lands Policy and Management Act all require agencies to solicit public input before making major changes to land use plans.

Although the timber industry is chalking up the decision as a major victory, environmental advocates are not ready to concede that the ruling constitutes a serious blow. According to Susan Jane Brown, staff attorney with the Western Environmental Law Center, the timber industry has also engaged in sue and settle tactics, making the ruling equally relevant to industry litigation.

Brown called the timber industry claims that the ruling will rein in environmentalists' sue and settle tactics "extremely disingenuous," adding that industry litigators, specifically on the Western Oregon Plan Revisions for O&C lands in southern Oregon, engaged in the same sue and settle maneuver during the Bush administration.

"I would be very careful about throwing stones at glass houses if I was the timber industry on that issue," said Brown. "This outcome has reinforced the fact that we're [all] going to have to be very diligent when coming to a settlement agreement that may result in changes in land management. That cuts both ways, whether you're an environmental litigant or a timber litigant."

Brown also suggested that the 9th Circuit's decision to toss out the settlement and revert back to a 2001 version of the Northwest Forest Plan while proper public input procedures are observed actually hurt the timber industry's interests. By contrast, Brown maintained that the settlement agreement— lack of public input notwithstanding—was much friendlier to timber interests than the 2001 rule.

"What had been negotiated as a result of the settlement agreement that had been overturned […] allowed additional logging to go forward without surveys," claimed Brown. "What the timber industry has done is reinstate all of the requirements to survey and buffer […] which means there will be more surveys, less logging, more buffers, more money spent, more time spent than under what we were trying to do with this settlement agreement."

Brown concluded that the timber industry's legal approach "doesn't make a lot of sense," given that the net result is that "there will probably be less logging."

Though it remains to be seen exactly how this recent ruling will affect litigation strategies against federal agencies, timber and grazing interests are optimistic that the decision will make it harder for environmental groups to cut deals like the now notorious 2011 settlement between CBD and USFWS, which required USFWS to fast-track endangered listing decisions on 757 species, including the greater sage grouse and Mexican grey wolf. It is also unclear whether previous settlements that involved substantive rulemaking changes could be challenged anew given the 9th Circuit's opinion.

At very least, Burns of AFRC is optimistic that future settlements will leave room for the public to weigh in. "We hope that since the Circuit has decided it, this it's going to apply throughout the 9th Circuit and that we will stop having quite so many instances where the environmental organizations, sue, [then] settle without any input through the public process." — **Andy Rieber, *WLJ* Correspondent, andyrieber.com**