CLIENT ALERT

Citizen Suit Watch: Ninth Circuit Rejects 'Sue and Settle' Consent Decree

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In a decision that strikes a blow against the federal government's controversial practice of excluding industry from consent decrees with environmental citizen groups, a practice known as "sue-and-settle," the U.S. Court of Appeals for the Ninth Circuit overturned the district court's approval of a consent decree between a coalition of environmental groups and several federal agencies in *Conservation Northwest v. Sherman*, No. 11-35729 (9th Cir. Apr. 25, 2013).

The Ninth Circuit held that "a district court abuses its discretion when it enters a consent decree that permanently and substantially amends an agency rule that would otherwise have been subject to statutory rulemaking procedures."[1] The Ninth Circuit agreed with the industry defendant-intervenor that the district court had in fact abused its discretion in approving what amounted to substantial, permanent amendments to federal agencies' wildlife species management obligations.

The unanimous panel reversed and remanded the case to the district court, potentially setting the stage for widespread challenge to similar decrees, and illustrating the importance of early and active intervention by the regulated community in such cases.

Background

Plaintiff Conservation Northwest brought the underlying litigation on behalf of a coalition of other environmental groups against the Bureau of Land Management, U.S. Forest Service, and U.S. Fish and Wildlife Service (collectively, the "Agencies"), arguing that the Agencies violated various federal statutes – the National Environmental Policy Act (NEPA), the National Forest Management Act, the Federal Land Policy Management Act (FLPMA), and the Endangered Species Act – when they issued a final environmental impact statement (EIS) and record of decision (2007 ROD) eliminating a key part of the Northwest Forest Plan. The Northwest Forest Plan (which has been extensively litigated) sets forth criteria for managing nearly 24.5 million acres of federal land in the Pacific Northwest. The relevant part of the National Forest Plan includes a program called "Survey and Manage." Under the Survey and Manage program, the Agencies must carry out obligations affecting approximately 400 ecologically important species to better assess the impact of logging on those species.

After litigation dating back to 2001, the Agencies issued a final EIS and the 2007 ROD, which eliminated Survey and Manage entirely. *Id.* Plaintiffs challenged the action, arguing that the decision violated an array of environmental statutes. After D.R. Johnson Lumber Company intervened as a defendant, the district court held on cross-motions for summary judgment that the decision had violated NEPA. The court, however, declined to decide on a remedy, noting the "highly complex issues at stake, and the procedural posture after partial summary judgment."[2] The ensuing settlement negotiations between the Agencies and environmental groups resulted in a consent decree that contained changes to Survey and Manage, including new exemptions from pre-disturbance surveys and new management requirements for certain species. D.R. Johnson objected to the settlement.

D.R. Johnson argued that the changes to Survey and Manage under the agreement were subject to public participation requirements under federal law, and that a court could not waive those obligations through a consent decree. The district court

disagreed, finding that approval of a consent decree is a judicial act rather than an agency action subject to the usual rulemaking procedures. D.R. Johnson then appealed.

Ninth Circuit Opinion

The Ninth Circuit reversed the district court's decision, holding that the consent decree was subject to statutory rulemaking procedures and that the district court had abused its discretion in approving a consent decree amending an agency rule that would otherwise have been subject to statutory rulemaking procedures.

The court began its analysis by stating the maxim that a consent decree may not violate a statute.[3] It then analogized to cases discussing the contours of agency obligations to comply with rulemaking procedures. For instance, in *Klamath Siskiyou Wildlands Ctr. v. Boody*, which also implicated Survey and Manage, the Ninth Circuit held that BLM could not avoid amending the program under FLPMA when it removed the red tree vole from the program's species' list.[4] Doing so violated FLPMA's public participation requirement because the agency's action meaningfully changed the resource management plan. Another decision laid down the principle that decisions by governments to settle litigation without complying with procedural mechanisms in FLPMA are reviewable.[5] Finally, the court distinguished a 2012 decision, *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, where the court upheld a consent decree.[6] There, the consent decree approved only *temporary* regulatory changes, and merely restored the *status quo ante* while the agency promulgated a new rule.

In the case at hand, the court found that unlike the temporary nature of the consent decree in *Turtle Island*, the changes in this consent decree were potentially permanent. Moreover, the changes to Survey and Manage were substantial enough to qualify as amendments, and thus were subject to public participation rules.[7] The only remaining question was whether the consent decree, as a "judicial act," immunized the Agencies from rulemaking procedures. The court found that it did not, and laid down a bright-line rule: "[A] district court abuses its discretion when it enters a consent decree that permanently and substantially amends an agency rule that would have otherwise been subject to statutory rulemaking procedures."[8] Thus, because the consent decree allowed for substantial, permanent changes to Survey and Manage, it impermissibly ran afoul of federal laws governing the process for making such changes.

Implications

The Ninth Circuit's ruling is an implicit rebuke to plaintiff organizations' "sue and settle" strategy. Industry intervenors now have powerful precedent to challenge the results of such lawsuits, and to compel agencies to abide by their statutory authority and rulemaking obligations. Notably, the ruling highlights the importance of early industry intervention when possible; had D.R. Johnson not intervened, there would have been no party to challenge the consent decree, unless delayed intervention was attempted (a tactic with mixed results).

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[1] Slip op. at 12.

[2] *Id.* at 7 (internal quotation marks omitted).

[3] *Id.* at 9-10.

[4] *Id.* at 7 (discussing *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 556-558 (9th Cir. 2006)).

[5] *Id.* at 11 (discussing *United States v. Carpenter*, 526 F.3d 1237 (9th Cir. 2008)).

[6] *Id.* at 11-12 (discussing *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 672 F.3d 1160 (9th Cir. 2012)).

[7] *Id.* at 10-11, 13 (citing *Boody*, 468 F.3d at 556-57).

[8] *Id.* at 12.

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