Blogs
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California Land Use & Development Law Report

To Consult or Not To Consult – That Is the Question for the Ninth Circuit

The Ninth Circuit is at center stage again in the debate over the interpretation and enforcement of federal environmental laws.

In a sharply divided 7-4 en banc decision, the Ninth Circuit ruled that the U.S. Forest Service violated the Endangered Species Act (ESA) by allowing recreational gold mining activities in the Klamath National Forest in Northern California without consulting with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service regarding the potential impacts to protected species such as the threatened Coho salmon. *Karuk Tribe of California v. United States Forest Service.*

The June 1 decision—noteworthy for its broad definition of "agency action" for purposes of the ESA's consultation requirement—reversed an earlier decision by a three-judge panel of the Ninth Circuit. The panel decision followed a long line of prior court decisions in holding there was no duty to consult. The mining activities at issue were already authorized by federal law (the General Mining Law of 1872) and the applicants were required only to submit a Notice of Intent (NOI), which notifies the Forest Service of the proposed activities but does not trigger the need for any affirmative agency approval. The panel ruled that the Forest Service's decision ***not*** to require a more detailed Plan of Operations—which is needed where the Service determines that significant environmental disturbance is likely—amounts to a decision ***not*** to act and is therefore not agency action that triggers consultation.

But after hearing the matter en banc, the Ninth Circuit reversed its earlier decision and concluded that consultation was required. According to the majority opinion, the Forest Service makes a discretionary, affirmative approval when it accepts an NOI, determines that no Plan of Operations is needed, and allows the proposed mining activities to proceed.

In an animated dissent, four judges lamented that the decision "flouts crystal-clear and common sense precedent, and for the first time holds that an agency's decision ***not to act*** forces it into a bureaucratic morass." As the dissent explained, miners have "a statutory right," and not just a "mere privilege," to go upon and use the open domain lands of the National Forest System for purposes of mineral exploration, development and production. In accordance with this pre-existing right, the miners in this case were required only to follow a "simple notification procedure," instead of having to file a formal permit application for federal agency review and approval.

But the dissent did not confine its criticism to the holding in this case. The last part of the dissent – entitled "Brave New World" – launches into a broad-based attack of the court's recent environmental jurisprudence. The dissent:

- Lambasted the Ninth Circuit for its "extreme environmental decisions," asserting "this is not the first time our court has broken from decades of precedent and created burdensome, entangling environmental regulations out of the vapors."
- Catalogued the strenuous objections to these decisions from political leaders, the myriad of lost jobs for loggers and farmers, and the decreased revenues for struggling rural municipalities.

- Protested that "our court has strayed with lamentable frequency from its constitutionally limited role"—which is merely to interpret the law—and instead has worked to "enact sweeping new rules" that "undermine public support for the independence of the judiciary, and cause many to despair of the promise of the rule of law."
- And in a dramatic literary flourish, quoted Dante's Divine Comedy to conjure up a dark image of a Ninth Circuit environmental underworld: "Abandon all hope, ye who enter here."

But the Ninth Circuit may not have the last word. It is almost certain the Forest Service will seek review in the United States Supreme Court, especially given the forceful rebuke by the dissent. Stay tuned.

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