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California Land Use & Development Law Report

Federal Agencies Cannot Use Consent Decrees To Adopt Stricter Regulatory Requirements, According to Ninth Circuit

Can a district court "approve resolution of litigation involving a federal agency through a consent decree, which substantially and permanently amends regulations that the agency could only otherwise amend by complying with statutory required rulemaking procedures"? The Ninth Circuit's answer was no. [Conservation Northwest v. Sherman](#) (9th Cir. Case No. 11-35729, Apr. 25, 2013). The case involved the "Survey and Manage Standard" for the Northwest Forest Plan, which governs about 25 million acres of federal land from San Francisco to the Canadian border. The Standard seeks to aid the Bureau of Land Management, the U.S. Forest Service, and other federal agencies in assessing the impacts of logging on 400 little-known but ecologically important species. In 2007, the agencies decided to eliminate the Standard due to its costs and complexity. But environmental groups sued and succeeded in obtaining a favorable summary judgment ruling under the National Environmental Policy Act. The environmental groups and the agencies then settled their dispute and the district court approved a consent decree. But a logging company, which had previously intervened as a defendant, objected to the consent decree because it imposed new regulatory requirements under the Survey and Manage Standard without satisfying the public notice and comment requirements for rulemaking proceedings. The Ninth Circuit ruled that the district court abused its discretion in approving the consent decree. The court found that the consent decree made substantial substantive amendments to the Survey and Manage Standard, and that these types of regulatory changes could only be adopted through formal rulemaking procedures. The court distinguished its previous decision in *Turtle Island Restoration Network v. U.S. Dept. of Commerce*, 672 F.3d 1160 (9th Cir. 2012), where the consent decree merely vacated a portion of a challenged regulation and temporarily reinstated the prior version of that regulation to preserve the *status quo* pending a new rulemaking. Here, the agencies were effectively using a consent decree to make new rules. Although it addresses a limited procedural issue, the ruling is important, since environmental groups and agencies often resort to consent decrees to resolve disputes over how environmental regulations should be implemented and enforced.

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