

A Pattern Of Legal Wins For Natural Resource Industries (Newsletter)*

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The past nine months has had positive legal results for natural resource industries. One specifically addressed the issuance of logging permits by the Forest Service and two were filed to stop mining operations. In all three instances the environmental NGOs who filed the law suits lost; one at a preliminary hearing and two by federal Appeals Courts.

In July 2008 The Lands Council and Wild West Institute sued the Idaho Panhandle National Forest for failing to comply with the National Forest Management Act (NFMA), National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA). The request for a preliminary injunction was denied by the district court, overruled by a 3-judge panel of the 9th Circuit Court of Appeals, and finally overturned by the full Appeals Court. The key issue was whether the courts know more science than do the regulatory agency's staff. The final decision is that they don't, and should not presume to. Congress authorized executive branch regulatory agencies to make decisions based on their own regulations, and the courts need to allow them to do so. The plaintiff's claim that the regulator based its decision on insufficient data and inadequate analyses was not to be decided by the legal system, but by the agency itself.

At the end of January 2009, a federal district judge in Reno, NV, refused a request for a preliminary injunction against the continue construction of Barrick Gold's Cortez Hill Mine. Plaintiffs claimed violation of the Religious Freedom Act because the base of Mt. Tenabo (adjacent to the project site) is a sacred religious place for the Te-Moak Western Shoshone Tribe. Plaintiffs also alleged that the Bureau of Land Management did an inadequate review of data in the EIS, but the judge rejected that argument very strongly.

In the middle of February 2009 the 4th Circuit Court of Appeals overturned a district court judge's ruling withdrawing four coal mining permits issued by the Huntington District of the Army Corps of Engineers. Plaintiffs had claimed the permits violated the Clean Water Act (CWA), NEPA, and the APA. Key issues in the original trial included whether the Corps properly followed

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its own regulations, that the definition and application of 'stream functions' was inadequate to protect Waters of the United States, and insufficient data and analyses were applied to the Environmental Assessment under NEPA.

While these are all good news for mining companies, they present common broad themes of regulatory agency decisions being arbitrary and capricious, of insufficient data being used when experts battled over their analyses and interpretation, and of inadequate consideration of public input on a wide range of topics. These challenges are a result of the inherent subjectivity involved in determinations of impact significance, resource allocations among competing interests, and consideration of values and beliefs.

The coal mining case was in the courts for about 3 years until the Appeals Court issued its decision. That is a lot of time taken away from revenue-producing primary activities. If you would prefer to minimize the chances of your project being delayed, call us. Our robust, inclusive, and objective approach to NEPA compliance produces results guaranteed to be technically sound and legally defensible. There is a time value of money, and we might be able to increase that value to you.