

4. **FORESTS:** 9th Circuit to review controversial Idaho logging case (01/22/2008)

Dan Berman, *Greenwire* senior reporter

The 9th U.S. Circuit Court of Appeals will review an Idaho case in which a circuit judge blamed the federal judiciary for the downfall of the Pacific Northwest timber industry.

Last July, Circuit Judge Milan Smith Jr. garnered headlines when he blasted the court system for the decline of logging on public lands and subsequent economic hardships in timber country.

"It is not presently, and has never been, the policy of our national government under any administration to ban all logging in all of our national forests," Smith wrote. But some 9th Circuit decisions, "make it virtually impossible for logging to occur under any conditions because the Forest Service can never satisfy the constantly moving legal targets created by our circuit, sometimes out of whole cloth."

At issue is a Forest Service plan for logging 3,829 acres of the Idaho Panhandle National Forests. The Lands Council and Wild West Institute say the Mission Brush project, which also targets 277 acres of old-growth forest for logging, will harm species including flammulated owls, northern goshawks, fishers and Western toads.

The Forest Service says the project is necessary to restore a forest that had become too dense and populated mainly by Douglas fir and Ponderosa pine because of decades of logging and fire suppression ([Land Letter](#), July 5).

Judge Edward Lodge in Idaho denied a request for a temporary restraining order and preliminary injunction, but the three-judge panel last year sided with the environmentalists, citing the Forest Service's reliance on what it called an "unverifiable hypothesis" that "treating old-growth forest is beneficial to dependent species."

Last week, the full 9th Circuit voted to rehear the case before an en banc panel of 11 randomly selected judges. The order specifies the July opinion shall not be cited as precedent by any court of the 9th Circuit.

'Blunderbuss injunction'

"I've never seen an opinion that had more philosophical and political undertones than the facts of the law," said Chris West, vice president of the American Forest Resource Council. "I've never seen one where it is so 'in your face' in a written opinion."

The back-and-forth [written opinions](#) by Smith and Senior Judge Warren Ferguson mirrors the ongoing debate about the proper role of the courts in public lands management.

Smith actually "reluctantly" concurred with the majority opinion last July but said he would welcome the opportunity to vote to change previous circuit decisions.

"When we misconstrue federal law and compound the effects of that misconstruction by affirming or requiring the issuance of a blunderbuss injunction banning all logging in a particular area instead of using a finely crafted legal scalpel based upon correct legal interpretations, we needlessly create great hardship in the lives of

many people, harm the economic interests of our country, and foster disrespect for our courts," Smith wrote.

On Friday, the Supreme Court agreed to hear an appeal of another 9th Circuit ruling involving environmentalists' challenges of federal environmental laws. Part of the *Summers v. Earth Island Institute* case involves judges' ability to enjoin the Forest Service or other federal agency regulations ([E&ENews PM](#), Jan. 18).

In a reply, Ferguson says Smith is off-base and defends the ability of district and circuit court judges to intervene in regulatory affairs and agency actions.

"A pattern of injunctions means that there has been a pattern of illegal conduct, not that there is something wrong with the courts' handling of environmental cases," Ferguson wrote.

"District courts must not shy away from enjoining illegal activity by administrative agencies," Ferguson added. "The fact that we have upheld or required such injunctions in the past, and will continue to do so in the future, is required by, not contrary to, our role as an appellate court. The frequency of injunctions is evidence of the frequency of unlawful agency actions, nothing more and nothing less."

Environmental groups have had success in recent years with district judges in the 9th Circuit, where judges are seen as more liberal and likely to block regulations that limit public input or access. In recent years, 9th Circuit judges have been at the center of the battle over environmental regulations, issuing rulings reinstating the Clinton-era roadless rule and enjoining the Forest Service's national planning rule, among others.

Smith, brother of Sen. Gordon Smith (R-Ore.), joined the appeals court in 2006. He is one of 11 active judges appointed by Republican presidents, compared to 16 by Democrats.

Spokane, Wash.-based attorney Karen Lindholdt, representing the Lands Council, said she does not believe Smith is moving the court in a new direction.

"There are still these critical environmental laws of the National Environmental Policy Act and National Forests Management Act that require the Forest Service comply with these laws. In this particular case, the violations of the laws are very egregious," Lindholdt said.

"The law is the law and precedent is precedent, and it'd be hard to envision that judges there -- regardless of their political affiliation -- will undo the law," she added.

[Click here](#) to view the July 2007 decision.

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