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Injunctive Relief in Environmental Litigation: Leveraging Recent Court Treatment and Navigating Evidentiary Issues

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Today's faculty features:

Sandra A. Edwards, Partner, **Farella Braun + Martel**, San Francisco

Peter Hsiao, Partner, **Morrison & Foerster**, Los Angeles

Daniel Riesel, Prinicpal, **Sive Paget & Riesel**, New York

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Introduction

Introduction to *Cottonwood Environmental Law Center v. U.S. Forest Service* (9th Cir. 2015)

Cottonwood Decision: Underlying Facts

Cottonwood Environmental Law Center v. U.S. Forest Service, 789 F.3d 1075 (9th Cir. 2015)

- In 2000, U.S. FWS listed Canadian lynx as threatened species
- In 2006, U.S. FWS designated 1,841 sq miles as critical habitat
- In 2007, Forest Service adopted management plans for lynx
- Forest Service initiated Section 7 consultation with FWS
- FWS issued biological opinion in 3/2007
  - Forest Service management plan did not jeapardize lynx
- Four months later, FWS announced critical habitat designation “improperly influenced” by DOI official

Cottonwood Decision: Underlying Facts

Cottonwood Environmental Law Center v. U.S. Forest Service, 789 F.3d 1075 (9th Cir. 2015)

- 2009, FWS revised critical habitat designation to 39,000 sq miles
  - Critical habitat in 11 National Forests
- Forest Service declined to reinitiate Section 7 consultation
- FWS issued biological opinion that two projects within Gallatin Forest unlikely to adversely affect critical habitat

Cottonwood Decision: Procedural History

- CELC filed suit: Forest Service violated ESA by failing to reinitiate consultation
- District Court: revised designation required reinitiation of Section 7 consultation
  - Granted summary judgment for CELC
  - Ordered reinitiation of consultation
  - Declined to enjoin any specific project

Cottonwood Decision: Ruling

Ninth Circuit Affirmed:

- "There is nothing in the ESA that explicitly, 'or by a necessary and inescapable inference,' restricts a court's discretion to decide whether a plaintiff has suffered irreparable injury."
- No presumption of irreparable injury where there has been a procedural violation in ESA cases. "A plaintiff must show irreparable injury to justify injunctive relief."

Cottonwood Decision: Impact

Court declined to follow nearly thirty-years of precedent that relieves plaintiffs of traditional burden of establishing irreparable harm when seeking injunctive relief to remedy a procedural violation of the ESA.

Context - Injunctions in Environmental Cases

Introduction

- Injunctive relief, including preliminary injunctions and interlocutory injunctions, plays a key role in environmental litigation
- Injunctive relief is primarily sought by government and environmental groups
- Although injunctive relief is rooted in common law principles of equity, several environmental statutes explicitly provide for injunctive relief

Introduction

- Examining interlocutory injunctive relief in the context of environmental litigation is appropriate because certain procedural elements of this remedy receive unique treatment in the environmental context.
- A reason for this treatment could be that interlocutory relief touches a fundamental aspect of environmental law, the tension between procedural fairness and the protection of the public from unreasonable risks. Compare Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975) (en banc) with United States v. Rielly Tar & Chem. Corp., 546 F. Supp. 1100 (D. Minn. 1982).

Clean Water Act

- Section 309(b) of the Federal Water Pollution Control Act, 33 U.S.C. § 1319(b), P.L. 92-500, § 2, authorizes "[t]he Administra-tor . . . to commence a civil action for appropriate relief including a permanent or temporary injunction . . . ."
- Section 504 provides for injunctive relief in situations of “imminent and substantial endangerment

Clean Air Act

- Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b), P.L. 91-604, § 4(a), as amended by P.L. 95-95, § 111(b), (c), specifically provides "[t]he Adminis-trator shall . . . and may . . . commence a civil action for a permanent or temporary injunction . . . ."
- Section 303 provides for injunctive relief in situations of "imminent and substantial endangerment

Citizen Suit Provisions

- Federal environmental statutes provide for citizen suits, allowing private individuals, business entities and public interest groups to bring suits against the government or violators of specific statutory provisions. See, e.g., Section 304 of the Clean Air Act, 42 U.S.C. § 7604; Section 505 of the Federal Water Pollution Control Act, 33 U.S.C. § 1365.
- As a result, environmental groups often also seek injunctive relief

Targets of Injunctions

- These provisions have provided a fertile basis for suits which include applications for interlocutory relief against the government as well as private entities. See TVA v. Hill, 437 U.S. 153 (1978); Wuillamey v. Werblin, 364 F. Supp. 237 (D.N.J. 1973); Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972).
- Members of the regulated community have also utilized this interlocutory remedy to frustrate governmental action. See, e.g., Industrial Park Dev. v. EPA, 604 F. Supp. 1136 (E.D. Pa. 1985).

Analysis – What is the effect of *Cottonwood* on the law of environmental injunctions?

Practical Tips

INJUNCTION STANDARDS

Four-factor test for plaintiff by showing:

- has suffered an irreparable injury;
- remedies available at law, such as monetary damages, are inadequate to compensate;
- considering balance of hardships between plaintiff and defendants, a remedy in equity is warranted; and
- public interest would not be disserved by a permanent injunction.

[*eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006)]

INJUNCTION STANDARDS

- *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (applying NEPA exception to traditional test to ESA cases; irreparable damage presumed to flow from procedural violation)

  "It is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed."

INJUNCTION STANDARDS

- *Winter v. NRDC*, 555 U.S. 7, 22 (2008) (rejecting 9th Cir. test for preliminary injunctions under NEPA)
- *Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010) (improper to "presume an injunction is the proper remedy for a NEPA violation except in unusual circumstances")

Defensive Tactics In Preliminary Injunction Proceedings

- Roadmap of topics:
  A. 1. On whose side is time?
  B. 2. Movant’s delay in seeking an injunction
  C. 3. Litigating factual uncertainty
  D. 4. Litigating the legal standard for injunctive relief
  E. 5. Bonds or other security for the injunction
  F. 6. Consolidation of the hearing with trial on merits
  G. 7. Interlocutory appeal
  H. 8. Litigate the required findings

1. On whose side is time?

- From a tactical standpoint this is often the crucial question
- The Respondent's practical burden is increased when a Movant seeks a TRO pending an accelerated hearing on a motion for a preliminary injunction
- Purchasing time by a partial or full stipulation
  A. Stay until decision
  B. Stay until hearing
- Agreement to accelerated discovery and trial

2. Movant's delay in seeking an injunction

- Where a movant does not immediately seek an injunction upon gaining knowledge of the condition purportedly posing a risk of imminent harm, a respondent should take advantage of the lapse in time

3. Litigating factual uncertainty

- Inaccuracies in the moving papers
- Opposing affidavits
- Demand for a hearing
- Appear at application hearing with witnesses prepared to testify
- Interim discovery pending hearing
- Movant may seek interim discovery to “facilitate” hearing; no reason why respondent can’t seek similar relief if there is a claim of significant inaccuracy
  A. (i) demand for documents
  B. (ii) deposition
  C. (iii) Discovery can go to the merits but also the elapsed time between notice of alleged injury and the commencement of action

4. Litigating the legal standard for injunctive relief

- Roadmap of topics (Winter v. Natural Resources Defense Council, 555 U.S. 7 (2008))
  A. Irreparable injury
  B. Success on the merits
  C. Balance of hardships
  D. Public interest
  E. Standing

A. Irreparable injury

- Injury that cannot be compensated for by money at end of case.
- Does the nature of the underlying action alter the Movant's burden?
  A. ESA: Cottonwood Environmental Law Center v. United States Forest Service,et ano. U.S. Docket No 13-35624 (June 17, 2015); Weinberger v. Romero-Barcello, 456 U.S. 305 (1987)
  B. RCRA: Imminent and Substantial Endangerment
  C. NEPA: Commitment of irretrievable resources
  D. CAA and CWA: Provisions for interlocutory injunctive relief (do they work?)

A. Irreparable injury

- Some courts have held that the provisions in the CWA and CAA which authorize preliminary injunctions operate to remove the requirement for demonstrating irreparable injury in enforcement cases
    A. See e.g. United States v. City of Painesville, Ohio, 644 F.2d 1186, 1194 (6th Cir. 1981) (dispensing with irreparable harm requirement in CAA enforcement case)
- However, recent case law suggests a movement towards re-establishing a requirement for demonstrating irreparable harm
    A. See e.g. Cottonwood Environmental Law Center v. United States Forest Service,et ano. U.S. Docket No 13-35624 (June 17, 2015); Weinberger v. Romero-Barcello, 456 U.S. 305 (1987)

B. Success on the merits

- Some Courts have lessened the Movant's burden by requiring only a fair question for litigation

C. Balance of hardships / Public interest

- This is a balancing test between the needs of the Movant and the public interest (as opposed to the interests of the Respondent).
- It is often a telling makeweight argument

D. Standing

- Can be tested on pleadings or on an evidentiary basis

5. Security for damages

- Substantial body of law holding that if Movant is pursuing the public interest that real bond or other security will be dispensed with, despite the rule to the contrary
- Evidence of damages
  A. Significant damages resulting from delay if injunctive relief is granted.
  B. Loss of opportunity
- Lack of Plaintiff’s pro bono public status

6. Consolidation of hearing with trial on merits

- Rule 65(a)(2), Fed.R.Civ.P.
- Wouldn’t work where there is a jury demand

7. Interlocutory appeal

- An exception to the Federal Rule against interim appeals
- Mark up the papers and go upstairs
- A stay of the Order may be obtained from the Clerk

8. Litigate the required findings

- A mini-hearing will be involved in the required findings and hearings
- This provides a further opportunity for defensive litigation

Question & Answers

Sandra A. Edwards
sedwards@fbm.com

Peter Hsiao
phsiao@mofo.com

Daniel Riesel
driesel@sprlaw.com