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Wolves Return to Oregon

by Daniel Kruse

When Europeans first established settlement in Jamestown, Virginia in 1607, Wolves inhabited what is now every state in the continental United States. In Oregon, the presence of wolves was documented both by Native Americans and in the writings of early European settlers, such as Lewis and Clark. By the time of the enactment of the Federal Endangered Species Act in 1974, however, wolves were erradicated in the entire lower forty eight states except in a small area of northern Minnesota.

The cause of the wolf's demise is rooted largely in the cultural values the settlers brought to the new world and their dependence on domesticated animals for sustenance. Conflicts can be traced as far back as early European civilization. Demonizing wolf metaphors can be found in both old and new testaments, and continue to be reaffirmed in children's nursery rhymes and stories. Moreover, European culture reflected a domesticated paradigm, a lifestyle that favors a civilized landscape rather than a wild one, and encouraged, if not required, the settlers to conquer, subdue, and cultivate the natural world. This ideology, too, can be traced, at least in large part, to religious beliefs. In Genesis, God instructs Adam, "Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." Genesis 1:28.

The cultural values that promote both the domestication of wildlife and the civilization of the wilderness have had enormously detrimental effects on wolves in both Europe and North America. Wolves, a threat to livestock and in constant defiance of domestication itself, quickly became an obstacle. As a result, wolves were brought to near extinction in Europe by the time the first settlements in North America were being established. This same belligerent attitude towards wolves could also be found in the European settlements of North America. In 1630, Plymouth Colony enacted a wolf bounty, and settlements all along the east coast soon followed suit. By 1700, wolves had disappeared from New England.

Photo Courtesy Monty Sloan - www.wolfpark.org

As settlers swept across the United States, so too did the desire to be rid of wolves. In 1915 the federal government established the Division of Predator and Rodent Control, which paid official hunters to kill the last wolves in the country. By 1930 wolves had disappeared almost entirely from the continental United States. The last wolf in Oregon was killed in 1946 in the Umpqua National Forest.

The last thirty years, however, has seen a shift in both the public's perception of wolves, and the government's policies toward the animal. These new protective policies first took form in 1974 when wolves were listed as endangered under the Federal Endangered Species Act. 16 U.S.C. § 1531 *et seq.* Since then, many states, including Oregon, have enacted similar state Endangered Species Acts that provide protection for wolves. *See, e.g.,* ORS 496.171 *et seq.*

In addition to the passive protections offered to those few wolves that still inhabited the country, the federal government has also sought to actively reintroduce grey wolves in two separate locations. Amendments to the Endangered Species Act in 1982 gave the Secretary of the Interior the authority to introduce "experimental populations" of endangered and threatened species. 16 U.S.C. § 1539(j). In 1995 and 1996, a total of 66 wolves were caught in Canada, of which 35 were released in Central Idaho and 31 were released in Yellowstone National Park. By 2003, the original wolves had increased to an estimated population of 761. In the past few years, wolves in these population centers have begun to disperse.

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The Early Bird Gets the Court: Why Public Interest Plaintiffs Should File First and Ask Questions Later

by Zack Mazer

The "first-to-file" rule, a little-known federal rule, may allow potential private defendants to short circuit a public interest plaintiff's natural or statute-based choice of jurisdiction. Using documents generated by public or private peripheral parties as jurisdictional hooks, defendants can file in defendant-friendly forums before the public interest plaintiff files its case. The public interest plaintiff's claim to jurisdiction may then be defeated (or stayed), no matter where the plaintiff files. Defeat of the plaintiff's basic claim may not be permanent, but the delay, hassle, and expense of litigating in a distant forum (or litigating in two forums simultaneously) make it worth any public interest attorney's time to become familiar with this little used but powerful rule.

Applying the First-to-File Rule

When complaints involving the same parties and issues are filed in different federal courts, the "first-to-file" rule allows the court in the second-filed action to transfer, dismiss, or stay the case pending the outcome of the first-filed action. *See Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 623 (9th Cir. 1991). For the rule to apply, the parties and issues in the two cases must be roughly the same, and one case must have been filed before the other. *See Landis et al. v. North American Co.*, 299 U.S. 248, 254 (1936). For simplicity's sake, the public interest plaintiff will be termed "the plaintiff" in this article, regardless of the forum or procedural posture under discussion.

Application of the first-to-file rule is at the discretion of the second-filed court, but should not be disregarded lightly. *Alltrade*, 946 F.2d at 625. The second-filed court will consider several issues of judicial administration, including whether waiting on the first-filed action will simplify the issues, and whether it will impose a hardship or inequity on the defendant (usually the plaintiff in the first-filed action) to go forward. *Cohen v. Carreon*, 94 F.Supp. 2d 1112, 1115-21 (D. Or. 2000). The Supreme Court has supported this approach, noting that "[w]ise judicial administration … does not counsel rigid mechanical solution of such problems" as determining which of two courts should proceed with a given case. *Kerotest Mfg. Co. v. C-O-Two Fire Equip.*, 342 U.S. 180, 183 (1952). Consistent with that proposition, first-to-file decisions are reviewable on appeal only for abuse of discretion. *See Alltrade*, 946 F.2d at 628.

Cohen, a non-environmental case, provides a helpful illustration. In *Cohen*, a second-filed action, the defendants disputed the ownership of an internet domain name and instituted proceedings in California against Cohen before Cohen filed his case. *See Cohen*, 94 F.Supp. 2d at 1114. Cohen then filed in Oregon, alleging (inter alia) defamation as a result of a press release issued by defendants. *See id.* at 1114-15. Because truth is a complete defense to defamation in Oregon, and because the California case would determine the true owner of the domain name, the Oregon court stayed its proceeding, in order to wait on the California court. *Id.* at 1117.

The Oregon court determined that, for three reasons, a stay would not harm Cohen. First, a favorable determination would support his defamation claims. *Id.* Second, an unfavorable determination would provide a complete defense, saving him from litigating a doomed claim. *Id.* at 1117-18. Finally, the court determined that proceeding on its case would unduly burden the defendants by forcing them to litigate the same issues in two forums. *Id.* at 1118-21.

Jurisdictional Hooks

It may not be readily apparent how the first-to-file rule could apply in a typical environmental suit. In truth, the rule likely will not come into play at all – especially if the plaintiff files its case before the defendant can find a "jurisdictional hook" to pull the plaintiff into a different jurisdiction.

A jurisdictional hook can be anything bearing on the case. The hook is most likely unwittingly created by a third party in another jurisdiction – allowing the defendant a colorable excuse to file a case in that jurisdiction by adding the creator of the "hook" as a party. Hooks will often come from federal agencies, such as happened in the case of the "interim guidance memo"

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Measure 37 Changes Land Use in Oregon

by Jonathan Evans

Oregon has long been hailed as a leader for comprehensive land use planning in the country. Now Oregon's status as a leader in land use planning is in doubt. Underlying Oregon's land use program was the broadly shared sentiment of much of the population that the land use controls went too far. This sentiment manifested itself in a solid margin of victory for Measure 37 in November 2004. Official results from the Secretary of State's office show that 61% of voters approved the measure. At a lecture at the University of Oregon Law School in January Governor Ted Kulongoski said this was not a surprise. Kulongoski noted that since land use laws were enacted in the 1970s pressure for compensation from stringent property laws has been building. Since the legislature failed to address the issue, Oregon voters responded with a heavy hand.

Ballot Measure 37 added a new statute to ORS Chapter 197 on December 1, 2004. http://www.oregon.gov/LCD/measure37.shtml. On its face, Measure 37 requires governments to pay owners, or forego enforcement, when certain land use restrictions reduce the value of property purchased by the owner, the owner's parents, or even the owner's grandparents. Cities, counties and the state now must reevaluate their land use planning efforts. Measure 37 requires government agencies to take a two step analysis. A state, county or city must determine if one of its land use regulations restricts the use of the owner's property, and reduces its value. If so, the agency will have a choice to pay the owner of the property an amount equal to the reduction in the value, or to modify, change or not apply the regulation to the owner's property. In other words, Measure 37 forces Oregon governments to pay up or waive its laws. Provisions in the United States and Oregon Constitutions already safeguard citizens from unfair governmental "taking" of private land without just compensation. U.S. Const. amend. V; Or. Const. art. I, § 18. Measure 37 goes beyond these Constitutional rights and expands the takings analysis. The measure, however, does make exceptions for restrictions related to historic public nuisances, public health and safety, compliance with federal laws, and pornography.

> Since land use laws were enacted in the 1970s, pressure for compensation from stringent property laws has been building

Origins of Measure 37

The property rights group "Oregonians in Action" (OIA) has long been pushing for repeal of Oregon's land use laws. In 2000 a similar ballot initiative, Measure 7, amended Oregon's constitution to provide for compensation in the same fashion as Measure 37. The Oregon Supreme Court struck down Measure 7 because it contained too many constitutional changes on the same initiative. It "violated the separate-vote requirement of Article XVII, section 1, of the Oregon Consitution which provides, in part: 'When two or more amendments shall be submitted * * * to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately.'" League of Or. Cities v. State, 334 Or. 645, 664, 56 P.3d 892, 904 (2002). Measure 37 was drafted as a statutory change to avoid such a challenge.

OIA again engineered the support behind Measure 37. Campaign finance reporting forms filed with the Secretary of State show that timber companies and real estate developers provided the largest amount of funding for the Political Action Committee (PAC) funding Measure 37. Twenty nine timber companies, real estate developers, and individuals contributed a total of over 95% of Family Farm Preservation PAC's total contributions during the election cycle. These 29 contributors gave an average of $43,371. OIA, in turn, contributed in kind contributions of staff time and overhead.

Implementing Measure 37

Much of the same cost and uncertainty that surrounded Measure 7 also surrounds Measure 37. The Secretary of State estimates that Measure 37 will cost taxpayers up to $344 million per year in administrative costs alone. The final costs for payment of claims for compensation to landowners "cannot be determined."

Measure 37 provides no funding mechanism for the processing and payment of claims. Thus state and local jurisdictions are working to

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Dual Soverignty and the National Elk Refuge: Achieving Cooperative Federalism

by Rachel Kastenberg

The debate over the proper role of state and federal actors in the management of wildlife came to a head in Wyoming. The federal government manages the National Elk Refuge (NER) within state boundaries of Wyoming. Federal management of the National Wildlife Refuge System has impacts on states' land and the states themselves. While federal authority currently exists for specified purposes, state authority remains concurrent with the power of the federal government and provides "the comprehensive backdrop applicable in the absence of specific, overriding Federal law." *See Wyoming v. U.S.*, 279 F.3d 1214, 1231 (10th Cir. 2002) [hereinafter *Wyoming*] (citing 43 C.F.R. § 24.3(a-c)). In conflicts such as *Wyoming*, the establishment of a test to balance the harm to the state and the preeminence of federal management decisions will lead to a more cooperative federal-state wildlife management approach.

Brucellosis in the Greater Yellowstone Area and the National Elk Refuge

Brucellosis represents a real threat to domestic cattle production in Montana, Idaho, and Wyoming. From 1951-81 it is estimated to have cost the nation's cattle industry nearly two billion dollars. The disease was first detected in Yellowstone bison in 1917 and ironically, scientists think it was first passed to wildlife through infected livestock. It is caused by a bacterial born pathogen, *Brucella abortus*, which affects the reproduction of elk and other hoofed mammals. Brucellosis affects roughly thirty percent of to free-ranging elk in the Greater Yellowstone Area, including the NER north of Jackson Hole, Wyoming. The NER is managed by the United States Fish and Wildlife Service (FWS) and provides habitat and feed grounds for elk during the winter.

Although there are no documented cases of elk infecting domestic cattle with brucellosis, the State of Wyoming has long been concerned with the possibility of transmission. Wyoming's current brucellosis-infected status entails expensive testing and export limitations on its cattle. That is exactly what Wyoming sought to prevent when it started using the brucellosis vaccination Strain 19 on elk at state feed grounds in 1985. Wyoming deemed the use of Strain 19 a success, reporting a seventy percent calving success rate for vaccinated elk in comparison to a thirty percent success rate in unvaccinated elk. Wyoming vaccinated elk on the NER on a trial basis from 1989-91 but vaccination was discontinued when the FWS imposed restrictions that made the efforts ineffective and then denied Wyoming the authority to vaccinate elk on the NER. The FWS claimed that the data on the effectiveness of Strain 19 was questionable. Wyoming consequently filed suit in federal district court against the U.S. and the Secretary of the Interior alleging interference with the State's sovereign right to manage wildlife within its own borders. *Wyoming*, 279 F.3d at 1221.

***Wyoming v. U.S*: State vs. Federal Control**

Wyoming brought several claims against the FWS, one of which succeeded on appeal to the Tenth Circuit. The court dismissed Wyoming's claim alleging a violation of the Tenth Amendment based on sovereign immunity. *Id.* at 1227. A second losing claim alleged that the

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Red Rocks and the APA: Norton v. Southern Utah Wilderness Alliance

by G. L. LeBlanc

> *A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain.* (From the Wilderness Act, 16 U.S.C.S § 1131.)

The battle to set aside wilderness is often fought in the procedural, not the substantive, arena. In *Norton v. Southern Utah Wilderness Alliance*, the Supreme Court raised the bar for citizens hoping to hold agencies to their statutory mandates and non-statutory requirements.

The decision rested on three rulings. First, the Court determined whether the Bureau of Land Management (BLM) was neglecting its duty to maintain the land's suitability for wilderness designation. To this end, the Court limited the extent to which the Court could force an "agency action unlawfully withheld or unreasonably delayed." Second, the Court addressed whether the BLM had to comply with its own land use plans. Third, the Court decided whether the BLM had to take a "hard look" at the increased off-road vehicle (ORV) use. *Norton v. Southern Utah Wilderness Alliance*, 124 U.S. 2373 (2004) (hereinafter *SUWA*). This article relates the background of the case, illustrates the discrete and nondiscrete premise on which Justice Scalia bases much of his reasoning, and presents the three main Supreme Court holdings, along with their arguments.

Wilderness and ORVs

Almost half of Utah is federal land, managed by the BLM under the direction of the Department of the Interior (DOI). In the Wilderness Act of 1964, Congress decided that certain wilderness areas should not have roads or motorized vehicles, and that only Congress could designate an area as wilderness. To this end, Congress directed the DOI to set up "wilderness study areas" (WSA). A WSA is defined, in part, as "an area of undeveloped Federal land retaining its primeval character and influence . . . which is protected and managed so as to preserve its natural conditions and which generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable." The Federal Land Policy and Management Act of 1976 (FLPMA) mandates further investigation and public comment before making a recommendation to Congress on the land's status as wilderness.

Since Congress has not yet decided which of the WSAs will be designated as wilderness, FLPMA orders the Secretary of the Interior (Norton) to manage these lands "so as not to impair [their] suitability . . . as wilderness," while awaiting direction from Congress. Hence, the BLM must interpret and apply the Wilderness Act concerning the WSAs they manage. Congress has clearly expressed its desire to maintain the option of designating land as wilderness by ordering the DOI to stop "actions that would preempt that decision," and requiring the DOI to "take all actions necessary to ensure full compliance."

In 1991, 2 million acres in Utah were recommended as suitable for WSA status. In the intervening years, off-road vehicle (ORV) use grew considerably on Utah's WSAs, and became the source of this legal battle. A web of deeply grooved ORV trails has rendered some of the WSAs unfit for designation as wilderness (for specific instances, see http://www.suwa.org.), prompting a coalition of conservation groups to ask the judiciary to enforce statutory wilderness mandates already in place.

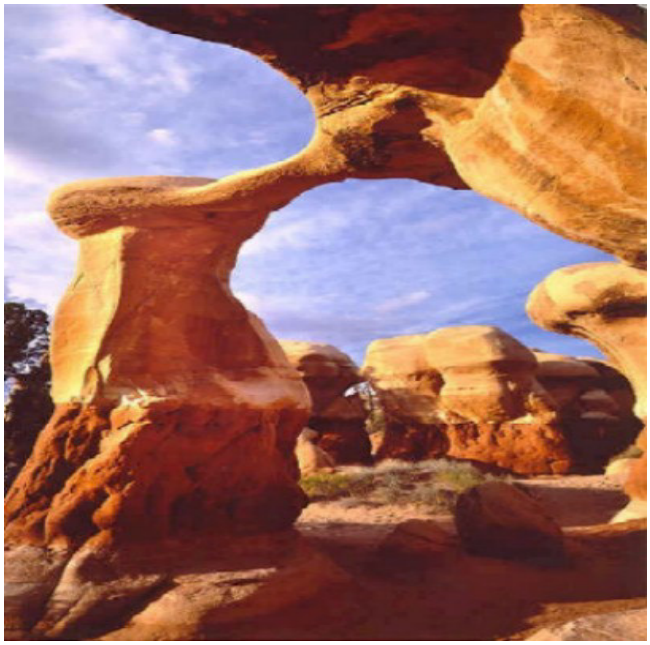

Photo Courtesy of the BLM

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Wolves from p.2

In 1999, after nearly sixty years without a documented wolf sighting in Oregon, a lone grey wolf from the Idaho population crossed the Snake River and entered Oregon. The wolf was captured and returned to Idaho. That same year, two more wolves came into Oregon from Idaho. However, one was found dead after being hit by a car on Interstate 84, and the other was illegally shot and killed by a cattle rancher. The arrival of these three wolves sparked statewide public interest over the possibility of wolves repopulating Oregon. It also required state and federal wildlife agencies to act in fulfillment of their legal obligations under the ESAs.

Legal Status of Wolves

Wolves in Oregon are currently protected by both the federal and state Endangered Species Acts. However, federal law sets only the floor for protection, and the state is free to impose any further regulations that are constitutionally permissible. Thus, when the Oregon ESA is more protective of wolves than its federal counterpart, the state law will establish the permissible bounds of human interactions with wolves.

Under the federal ESA, an endangered species is "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Under this classification, people, including livestock producers, are expressly prohibited from "taking" a wolf. *Id.* at § 1538(a)(1)(B). "Take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* at § 1532(19). However, the increase in wolf populations in central Idaho and Yellowstone National Park led the United States Fish and Wildlife Service (USFWS) to down-list wolves within the Western Distinct Population Segment to "threatened" in 2003. A threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* at § 1532(20). Under this classification, the "take" of wolves is not generally prohibited. *Id.* at § 1538(a)(1).

Also in 2003, the USFWS promulgated new rules under § 4(d) of the ESA which states, "[w]henever any species is listed as a threatened species . . . the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species." *Id.* at § 1553(d). Under this authority, the USFWS issued regulations allowing the take of wolves only in narrowly defined situations. 50 CFR § 17.40(n)(3). Many of these situations pertain directly to livestock production. For example, the regulations permit "any landowner [to] take a gray wolf that is in the act of biting, wounding, or killing livestock . . ." *Id.* at § 17.40(n)(3)(iii)(A). Killing wolves under similar circumstances is also permitted on public land grazing allotments, though a permit is required. *Id.* at § 17.40(n)(3)(iv). Additionally, the rules allow agency personnel to take any problem wolf on public or private lands. *Id.* at § 17.40(n)(3)(viii). Problem wolves are defined as "wolves that attack livestock." *Id.* at § 17.40(n)(2)(v). Finally, the regulations allow injurious harassment of wolves on both private land and public land grazing allotments whenever there is "persistent wolf activity." *Id.* at § 17.40(n)(3)(ii).

However, on January 31, 2005, the United States District Court for the District of Oregon enjoined and vacated the 2003 decision to down-list the wolf from endangered to threatened, holding it in violation of the Endangered Species Act. *Defenders of Wildlife v. Norton*, No. Civ. 03-1348-JO, slip op. at 20 (D. Or. Jan. 31, 2005). In order to remove a species from the endangered species list, the court held that the USFWS must find that the species is no longer in danger of extinction throughout all or a significant portion of its range. *Id.* at 5, 13; 16 U.S.C. § 1532(6); 50 C.F.R. § 424.11(c). As stated above, the USFWS's decision to down-list the wolf in the Western Population Segment was based entirely on the wolf's status in central Idaho and Yellowstone National Park. While the number of wolves in these two population centers has indeed grown over the past ten years, the area is quite small compared to the historic range of wolves within the Western Population Segment, which includes Oregon, Washington, California, Nevada, Idaho, Montana, Wyoming, and parts of Utah and Colorado. The

court in *Defenders of Wildlife* held that by basing the decision to down-list wolves in the entire Western Population Segment solely on the wolves' recovery in two relatively small population centers, the USFWS failed to consider the status of the wolf in "all or a significant portion of its range." *Id.* at 20, 23. Finding that the decision to down-list wolves would cause irreparable injury, the court enjoined and vacated the decision, thereby putting wolves back into their former endangered status. *Id.* at 34-35.

There is, of course, the likely possibility that the *Defenders of Wildlife* decision will be appealed in the Ninth Circuit. It thus remains to be seen whether wolves will enjoy this heightened protection for very long.

While federal protection of wolves has changed several times in the past few years, and while the federal status of wolves after the *Defenders of Wildlife* decision is all but certain, Oregon State law has remained relatively strict with regard to wolf conservation. The State of Oregon first offered legislative protection to wolves upon the enactment of the Oregon Endangered Species Act in 1987. ORS 496.171 *et seq*. Wolves were listed as "endangered," and remain so today. Unlike the federal ESA, the Oregon ESA prohibits take of both endangered and threatened species. ORS 498.026. Thus, so long as wolves are listed either as endangered or threatened, no one, including livestock producers, may take a wolf in Oregon under current law.

Since wolves are legally protected by both Federal and State law, their arrival into Oregon has propelled the Oregon Department of Fish and Wildlife (ODFW) to adopt management plans for the species. The ODFW created a Wolf Advisory Committee (Committee), and on September 30, 2004, the Committee published its draft Oregon Wolf Conservation and Management Plan (Wolf Management Plan). However, this plan was drafted under the presumption that wolves were federally listed as threatened. This, of course, has changed with the recent District Court decision in *Defenders of Wildlife*. Whether or not the plan is still workable after this recent development is a question that remains to be answered.

The ultimate success or failure of the wolf will depend largely on how the public reacts to this newcomer.

Further, while the Wolf Management Plan is comprehensive in many respects, it was drafted with little first hand knowledge of how wolves will behave in Oregon when they return in numbers. When the first wolf crossed into Oregon in 1999, wolves had been absent for over fifty years, and little scientific study was conducted before they were exterminated. Thus, the agencies can only speculate as to how wolves will disperse, how they will affect the overall ecosystem, and how they will interact with people and domesticated animals.

As a result of this speculation, the future status of wolves, both legally and biologically, is anything but definite. However, while the management plan for wolves in Oregon has not yet been finalized or officially adopted, one thing is fairly certain: the plan will raise concerns both with conservationists who view it as inadequate for the protection of the wolf, and livestock producers who view it as a threat to their animals. These concerns may very well lead to legal disputes between conservationists, livestock producers, and government wildlife agencies.

The reaction of Oregon residents to wolves is another uncertainty that may have a drastic effect on wolves. Considering the strong public sentiment towards the animal, the legislature may be quick to act if public perception runs afoul. The future legal status of wolves will therefore be influenced not only by science, but by the public's attitude. While battles may be fought and won in the court room, the ultimate success or failure of the wolf will depend largely on how the public reacts to this newcomer. Laws may seek to control this reaction; but in reality, it is the reaction that may end up controlling the laws.

The public perception of wolves has changed much since the times of government sponsored extermination, and it continues to do so. People are beginning to value the wild for what it is, and people have begun to see beauty in the unconquered. It is in the wide distribution of this value and beauty that the fate of wolves lies. As Anthony Miles said, "Wolves may feature in our myths, our history and our dreams, but they have their own future, their own loves, their own dreams to fulfill."

Measure 37 from p.4

develop a means for processing claims, while struggling to determine the intent and interpretation of vague language within the measure.

The governor's office has issued temporary rules for claims filed against the state. Or. Admin. R. 125-145-0010 *et seq*. (2004). However, local agencies are developing independent ordinances that will implement the measure in their jurisdictions.

The attorney general's office is not planning to issue a formal opinion, as it did after the passage of Measure 7. 49 Op. Att'y Gen. Or. 284 (2001). Instead, it will answer specific questions from state agencies, legislators, or the governor's office as necessary to process state claims. Without uniform rules for state and local jurisdictions Measure 37 will likely be implemented in varying fashions throughout the state. Jurisdictions, however, have agreed on several things.

The League of Oregon Cities, Association of Oregon Counties and the State of Oregon have agreed to coordinate and share information on claims processed at the state and local level. MardiLyn Saathoff, general counsel for Governor Kulongoski, has stated the attorney general will provide advice for uniform application of some aspects of the measure. The attorney general's office has produced an advisory opinion that waivers are nontransferable, and Ms. Saathoff reiterated that the state would likely litigate any "blanket" waivers by local governments. She emphasized that waivers of any and/or all claims by a city or county should be determined on a case-by-case basis.

Measure 37 Reform

Critics have begun several attempts to strike down or reform Measure 37, including both legal and legislative changes. Farm bureaus in the Willamette valley, as well as seven individual farmers, are co-plaintiffs with 1000 Friends of Oregon, claiming that the measure will lead to rural development and ruin their ability to farm. Several state agencies, as well as Clackamas, Marion and Washington counties, are named as co-defendants.

John S. Allen photo

All of the lawsuit's claims assert that measure 37 violates the state and federal Constitution. There are six challenges under the Oregon constitution. The first challenge alleges that Measure 37 is a violation of equal privileges and immunities because it applies unequally to those who owned land prior to land use laws. It also applies unequally to similarly situated people in different jurisdictions, since their claims will be processed and resolved differently.

According to the second challenge Measure 37 is a violation of the separation of powers, *Id*. at Art. III, § 1, through legislative overreaching. Specifically, because the measure directs the courts to narrowly construe exceptions "in favor of a finding of compensation," it intrudes on the inherent police power of the legislative branch of government.

The third challenge claims Measure 37 impermissibly intrudes on state sovereign immunity, *Id*. at Art. III, § 24, by allowing state and local governments to be sued for harm caused by legislative acts. The fourth challenge argues that Measure 37 violates the suspension of laws provision, *Id*. at Art. I, § 22, because it allows claims to be filed and waived while the legislature is not in session. The fifth challenge asserts Measure 37 violates prohibitions on compensation to a religious institution, *Id*. at Art. I, § 5, if a religious institution seeks compensation under Measure 37.

Finally, according to the sixth challenge Measure 37 violates the freedom of speech, *Id*. at Art. I, § 8, because it prohibits compensation for individuals restricted from using their property for selling pornography and performing nude dancing. Additionally, the plaintiffs claim that Measure 37 will not provide adjacent landowners with pre-deprivation notice and hearing before a waiver occurs, thus violating the neighbor's right to due process when their property may be devalued. U.S. Const. Amend. XIV.

The Oregon legislature has introduced several bills aimed at reforming Measure 37. Senate Bills (S.B.) 308 and 406 still provide for compensation due to land use

restrictions, but they clarify the guidelines, structure and process for resolving those claims. S.B. 308, 406, 73rd Leg., Reg. Sess. (Or. 2005). Both bills set limits on claims for compensation. A property owner may file a claim for compensation if a restriction reduces the fair market value of his property by 25 percent or more as the direct result of a single restriction, or 45 percent or more as the direct result of multiple restrictions. Both bills also include a "givings" provision whereby property owners must also account for property increases resulting from land use restrictions. For example, if land use restrictions, such as exclusive residential zoning in a wealthy area, have increased property values by five percent or more then the land owner must calculate for this increase in filing a claim. S.B. 308 and 406 both create a funding mechanism for property compensation claims that is absent in Measure 37. They create a compensation and conservation tax on property that benefits from the imposition of a land use restriction.

S.B. 308 improves the administrative structure for the implementation of land use compensation claims. It removes the judicial burden from Oregon's circuit courts, which are ill prepared and ill equipped to handle property compensation challenges. The additional pressures placed upon circuit courts to handle cases brought under Measure 37 would otherwise hinder civil and criminal cases brought in state court. S.B. 308 places challenges of compensation claims in the better suited Oregon Tax Court and the Land Use Board of Appeals. S.B. 308 at § 12. S.B. 308 also provides for greater flexibility for state and local governments in the compensation of claims. It allows for compensation in cash, transferable development rights, increased density provisions, and waivers of state and local property tax. *Id.* at § 4. Finally, SB 308 creates a state Compensation and Conservation Authority (CCA), appointed by the Governor, to handle the processing of claims under Measure 37.

Alternatively, S.B. 350 recognizes the difficulty in addressing these complex land issues in such a short period. S.B. 350, 73rd Leg., Reg. Sess. (Or. 2005). S.B. 350 creates a waiting period for claims under Measure 37 and postpones the claims period to allow state and local government time to craft a better solution. S.B. 350 also recognizes that pending lawsuits will alter the nature of our future land use system and allows the judicial branch time to reconcile the thorny constitutional issues in Measure 37. However, these proposed changes have had an unwelcome reception.

The long term effects of Measure 37 are unclear. Exact figures are not currently available, but approximately 120 county claims, 15 city claims, and 30 state claims have been filed as of January 10. Land Use advocates speculate that developers will hold off submitting their biggest Measure 37 claims until after the 2005 Legislature adjourns in order to downplay the measure's impact and avoid inflaming the political climate. One thing is clear; the land use system in Oregon will never be the same.

Cooperative Federalism from p.5

FWS acted in excess of its powers by denying the vaccination of elk on the NER. *Id*. The State based this claim on the construction of the National Wildlife Refuge System Improvement Act (NWRSIA). 16 U.S.C. § 668dd *et. seq.* (2004). The Tenth Circuit noted that the NWRSIA specifically mentions federal and state cooperation. *Wyoming*, 279 F.3d at 1228. The Act also directs the FWS "to the extent practicable . . . [to] consult with adjoining Federal, State . . . and affected State conservation agencies . . . [and] coordinate the development of the conservation plan or revision with relevant State conservation plans for fish and wildlife and their habitats." *Id.* citing NWRSIA 16 U.S.C. § 668dd(e)(3). Despite these sections of the NWRSIA, the Tenth Circuit found that the FWS acted within its powers because NWRSIA only requires the FWS to conform to state objectives "to the extent practicable." *Id.* at 1230.

Finally, Wyoming sought review of the FWS decision under the Administrative Procedure Act (APA). 5 U.S.C. §§ 701-706. The Tenth Circuit focused on whether the FWS's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). The court contrasted Wyoming's responsibility to protect both the domestic livestock and wildlife within its borders with the FWS's reluctance to conduct an independent study of Strain 19 despite having an outdated and ineffective brucellosis program. *Wyoming*, 279 F.3d at 1238-39.

The Tenth Circuit then lamented the political nature of the

Cooperative Federalism from p.10

dispute and said that the "FWS's apparent indifference to the State of Wyoming's problem did little to promote 'cooperative federalism.'" *Id.* at 1240. The court further stated that the FWS had done too little too late, in "typical bureaucratic fashion" and seemed to leave the door slightly open for the states in these kind of disputes by stating, "we do not read the NWRSIA as providing the FWS . . . with unlimited discretion to act or fail to act in a manner that threatens the well-being of a neighboring sovereign's livestock or game industry." *Id.* at 1240-41.

On remand, the district court directed both the FWS and Wyoming to comply with a settlement agreement requiring the FWS to make a vaccination decision based on an environmental assessment, compatibility determination, and biological assessment. It was already too late. In 2003, state officials discovered thirty-one infected cows in a cattle herd near Boulder and also another six in Washakie Country. Consequently, Wyoming is now classified as brucellosis-infected and unable to regain a brucellosis-free status until February of 2005. Furthermore states including Idaho, Nebraska, Colorado, and California enacted restrictions on Wyoming cattle. In February 2004, Wyoming's Governor created a nineteen member brucellosis task force to help Wyoming regain its brucellosis-free status.

Balancing Federal and State Wildlife Management

The National Wildlife Refuge System is based upon the idea of national management of refuges for the conservation of wildlife. However, when there are conflicts between state and federal management of national wildlife refuges, FWS decisions cannot always fully preempt state concerns. A better solution would be a standard approach to help courts better determine which interests should prevail, or when they should make "to the extent practicable" a tool for incorporating state needs into FWS management decisions. One such approach is a balancing test that weighs the severity of harm to the state against the presumption that federal management prevails. This balancing test parallels some of the factors used by the Tenth Circuit in *Wyoming*.

To truly achieve cooperative federalism, state concerns and potential harm must be taken into consideration. There are several important factors to consider when evaluating the harm to the state. The first factor is the duration and persistence of the problem. If the issue appears to be longstanding and one that will continue well into the future, it is likely that the state will be more gravely harmed than if the problem is short term. In this case, brucellosis was discovered a century ago and is still a persistent problem in both wildlife and, more recently, domestic cattle, in Wyoming. Therefore, the harm to Wyoming is greater than if the issue were short term.

Second, the urgency of the problem must be examined. The threat should be evaluated in terms of immediacy on both a scientific and an economic basis. In Wyoming, brucellosis has been a state concern for decades. The state perceived the transfer of brucellosis from elk to domestic cattle as a real and immediate threat to the industry and instantly began vaccinating elk on state lands to maintain a brucellosis-free status. It still remains unproven that brucellosis can be transmitted from wildlife to cattle. However, if the recent findings of brucellosis in Wyoming cattle are indeed proven to be a result of contact with unvaccinated elk from the NER, it would seem the FWS should have acted more quickly in response to the urgency of the situation. When there is disputed science, urgency can perhaps be best determined by a neutral scientific body. The state dependence on the affected industry will either add or detract from the economic urgency of the situation. It must also be noted that there will be political factors that come into play, but on which this analysis does not focus.

Severity of harm to the state can be determined by combining the previous two factors: how long the problem has existed and is expected to persist, and the urgency of the threat. The more long term, urgent and persistent the harm is, the more severe the consequences to the state will be. Severity will thus include the timeframe of the problem, economic analysis, scientific analysis, and expected future consequences if the state's proposed action is not taken.

The other side of the test is the federal component. The federal government is automatically granted more weight based on the power of preemption in the Supremacy Clauses, the federal NWRS mission, and discretion under the NWRSIA. The idea of the NWRS is to provide for unified conservation of wildlife and that mission should not be superceded by an individual state's desires. While

this balancing test takes the potential (or existing) harm to the state into account, it does not suggest that a state proposal contrary to the purpose of the NWRS should prevail. Rather, it gives states the opportunity to "tip the scale" to promote a more equalized balance.

"To the Extent Practicable": Integration of State Management

After balancing the state and federal interests there are several possibilities. If the degree of harm to the state is determined to be significant, one must then examine the extent to which proposed state solutions should be practicably integrated into federal management of the refuge. The first factor in this determination is the level of Congressional engagement on the issue. A high level of Congressional action on the issue may render an individual state concern irrelevant. However, as was the case with brucellosis, if Congress is not acting to resolve the problem, the state proposal gains much more weight and significance.

Secondly, we must examine the length of time the FWS has known of the problem and of the state's desire to change management on the refuge. With brucellosis, the FWS knew of Wyoming's concern long before the state asked for permission to use Strain 19 for vaccination. The FWS had previously allowed Strain 19 to be used on the NER and in all likelihood foresaw the request. However, the FWS did not conduct its own independent study of Strain 19 and was slow to change elk management in other ways. When neglect or delay is the case, the incorporation of state proposals is more warranted than if the FWS had immediately responded and begun its own testing program or taken some other immediate action to remedy the situation.

Finally, the degree to which the state and federal management ideas differ will influence the extent of state incorporation. If the state proposal is at complete odds with federal objectives and the purpose of the NWRS, it will be difficult to integrate the state plan. However, if the objectives align and the only difference is how to reach those objectives, the state has a stronger argument for incorporation of its plan. That was the case in Wyoming. Both the state and federal government were concerned with the spread of brucellosis; the state wanted to use Strain 19 while the FWS had minimally attempted to reduce feed ground density by changing feeding from hay to alfalfa pellets.

A state's argument for integration of their proposal will be strengthened when the FWS refuses to act or at least examine the alternative solution. In this case, Wyoming's argument is further reinforced by the fact that the FWS refused to allow the use of Strain 19 due to unreliable data, but then did not further evaluate the vaccine under its own studies. When a state faces significant harm, the FWS must at least consider and evaluate the proposal before dismissing it. Wyoming is now administering Strain 19 on the NER. Is there a reason this could not have been integrated into the management plan in 1997?

In conclusion, if there is conflict between a state and the FWS, the following balancing test applies. If the harm to the state is found to be significant, the preeminence of federal management decisions will yield to a joint state-federal effort to determine if and how the state proposal should be incorporated into the management of the refuge. Ideally, this will provide for more cooperation between the state and federal government. However, if the separate concerns cannot be integrated without destroying federal objectives and the NWRS mission of conserving wildlife, federal decisions will continue to preempt state proposals. In the future, this balancing test may serve to better remedy some management disputes by allowing states a larger, but still limited, role in the management of national wildlife refuges within their borders. It represents a step towards true cooperative federalism.

SUWA from p.6

ORV use on WSAs is defined as wilderness "impairing" activity in a BLM 1979 Interim Management Policy for Lands Under Wilderness Review (IMP), and ORV use, with few exceptions, is not allowed in the WSAs. The Bush administration is now revising many IMPs, but this ORV limitation was applicable at the time of this suit.

The APA demands that the court reviewing a case "shall . . . compel agency action unlawfully withheld or unreasonably delayed." The Southern Utah Wilderness Alliance (SUWA) argued that the BLM must therefore carry out the "mandatory, nondiscretionary duties required by FLPMA" and the 1969 National Environmental Protection Act (NEPA). *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d, 1217, 1222 (10th Cir. 2002). The district court in Utah dismissed the claims, SUWA appealed, and the Tenth Circuit reversed and remanded. The DOI petitioned for, and received, certiorari from the U.S. Supreme Court.

Discrete and Nondiscrete Action

Justice Scalia stated that the "only agency action that can be compelled under the APA is a *discrete* action that it is *required to take*," which includes an action unlawfully withheld. Failure to act is also understood as a discrete action. Justice Scalia tied this into the traditional writ of mandamus remedy, which ordered a "precise, definite act . . . about which [an official] had no discretion whatever." The reviewing court could only order an agency to act, not how to act. In addition, Justice Scalia declared that an act must be final. Thus, an action or inaction must be final, discrete, and required by law for the court to consider compelling action or inaction. Once it overcomes these hurdles the act becomes mandatory, giving the court the power to enforce it under the older mandamus remedy.

The Tenth Circuit disagreed with the Court's interpretation of the APA and writs of mandamus:

> There is, however, an important distinction between compelling agency action through a writ of mandamus and through § 706(1) [APA]. Even if a party shows that the 'prerequisites [for a writ of mandamus] have been met, a court still exercises its own discretion in deciding whether or not to issue the writ. By contrast, once a court determines that an agency 'unlawfully withheld' action, the APA *requires that courts compel agency action*." *SUWA v. Norton*, 301 F.3d at 1226 (10th cir. 2002) (emphasis added).

SUWA went even further, arguing that Congress never meant to retain "every subtle nicety of All Writs practice" when crafting the APA.

Another way to approach the case is to look at one of the listed, discrete agency actions, such as a license is a "permit . . . or other form of permission." The Court could have found that by allowing the ORVs on the land, the BLM was giving an "other form of permission," which could then be challenged as a discrete agency action. In addition, as Justice Scalia points out, agency action includes the whole or part of actions, so the definition of finality is more ambiguous than it might seem.

Nonimpairment Mandate

SUWA alleged that by allowing ORV use in particular WSAs, the BLM breached its nonimpairment mandate to keep the WSAs in a condition fit for "preservation as wilderness." SUWA claimed that while the BLM did have discretion concerning the methods used to comply with the nonimpairment mandate, the BLM did not have discretion to ignore it.

Justice Scalia cited *Lujan v. National Wildlife Federation* to explain that SUWA must go to the "Department or the halls of Congress, where programmatic improvements are normally made," rather than seeking such change through the Court. *Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (U.S., 1990)*. APA restrictions on Court authority are in place to protect agencies from excessive judicial interference, and if courts could order agencies to adhere to general policies, then the courts would have to figure out the methods of compliance, leading to judicial interference. To illustrate his reasoning, Justice Scalia cited a statute that required the Federal Communications Commission (FCC) to establish regulations to implement interconnection requirements. The Court can require the FCC to issue the regulations, but the Court cannot create the regulations. Justice Scalia concluded that while FLPMA mandates the end goal, it does not give the Court the authority to demand the total exclusion of ORV use.

SUWA argued the contrary. The APA already has built-in limitations on judicial interference, and contrary to the purpose put forth by the Court, SUWA believed that the APA codifies a method by

which the judiciary can order compliance with a statute. A better analogy would be the FCC's issuance of regulations that did not "implement interconnection requirements" mandated by statute. The Court could then require the FCC to do so. Alternatively, imagine that the FCC issued regulations in accordance with the statute, but the agency representatives in Utah were allowing actions that went against the clear purpose of both the Congressional mandate and the FCC regulations. Again, the Court could fashion a remedy to ensure that all levels of the FCC were in compliance with the statute, allowing the FCC to implement the method. Thus, the Court can order the BLM to make sure the natural areas remain suitable for wilderness designation, as ordered by Congress. If banning ORV use is the only way to obey the mandate, then ORV use in the WSAs should be ceased. BLM action should not proceed contrary to Congressional mandate.

The Tenth Circuit held that Congress proscribes a mandatory, continuous deadline through FLPMA, which insists that the land in question be kept in a condition suitable for designation as wilderness. This condition must be maintained until Congress decides how to classify the area. Courts have often directed an agency to take an action, without ordering the method by which the act must be completed. As the Tenth Circuit asserted, the BLM could take any number of actions to comply with the nonimpairment mandate: "closing roads, fining unauthorized ORV users, licensing some users but not others, issuing new rules restricting ORV use," and so on.

SUWA was not asking for overall, programmatic change. SUWA wanted the BLM to comply with the Congressional nonimpairment mandate and its own land use plans. If citizens are required to lobby Congress every time they ask an agency to comply with an existing federal statute, statutes would be pointless. Here, much of the land will be forever lost by the time any enforcement will occur. Congress has already declared its desire: maintain the land so as to keep it suitable for wilderness designation.

Accordance with Available Land Use Policies

The BLM, in their land use policy, promised continued supervision and monitoring of damaged land in the Henry Mountain's area, and recommendations for any corrective action. SUWA argued that the BLM regulations order immediate closure of areas suffering considerable adverse effects from ORV use. Hence, the BLM's very inaction constituted a discrete, final action. The Court replied that lacking a specific, binding commitment, it could not demand compliance with a vague plan for an unspecified future.

The Court compared specific, statutory commands to general land use plans. Congress could not have meant general plans to be binding, as a plan is only a guiding affirmation of priorities, and the budget may not have future funds to carry out a plan. If a plan has within it duties the agency already promised to perform, or when the program itself creates a binding commitment, then the Court can direct the agency to perform those duties. Justice Scalia claimed that the Court was actually helping the environment, by ensuring that resources were not taken from other areas to meet specific commitments like these, and by discouraging departments from creating vague plans in order to avoid compliance.

The Court asked counsel for SUWA why he did not request the BLM to treat a specific land use plan regulation as a rule, and then file a proposed amendment to the rule with the BLM, asking for a "timely response." SUWA pointed to the BLM's ongoing disregard of SUWA's requests:

> We just wanted to point out to you there's all this irreparable harm going on. There's ORVs rampant in these wilderness areas, and as you well know . . . [the regulation] . . . directs BLM managers to immediately close areas suffering considerable adverse effects from ORV use and abuse. So we brought it to the agency's attention, and they, as — as they have done throughout the period, simply didn't do anything.

Regardless, the Supreme Court would not order the BLM to comply with "use supervision and monitoring" of ORVs in the Henry Mountains area, as outlined in the land use plan, leaving open the question of whether the courts could someday demand that the BLM "enforce a duty to monitor ORV use imposed by a BLM regulation."

Justice Scalia is concerned that compelling the BLM to follow their land use plans might cause a redistribution of remedies, thereby harming the environment in the

long run. This is contradicted by the Court's willingness to allow immediate and lasting harm to the environment by altering some of the land to the point that it will not be considered for wilderness designation. In addition, neglect now will also lead to future maintenance and restoration costs.

In the same vein, the Tenth Circuit held that courts should only consider funding concerns when fashioning a remedy, such as considering contempt. Funding was not to be considered in deciding if an agency action was or was not lawful. Furthermore, stated the Tenth Circuit, "whether requiring a federal agency to comply with its own regulations would discourage that agency from enacting the regulation in the first place" was irrelevant. The matter before the court was whether an agency had "unlawfully withheld or unreasonably delayed" a legally required discretionary duty.

Hard Look

SUWA's last claim was that NEPA commands an agency to take a "hard look" at any important new circumstances, such as ORV use, and decide if a supplement to the initial EIS is necessary. Justice Scalia asserted that this is true only if a major federal action still remains to occur. Here, the Court held that since the land use plan was the proposed action, and since this action was already completed, there was no ongoing major, federal action that would require a supplemental EIS. SUWA contended that a supplemental EIS should be triggered by new, possibly damaging actions that were not apparent during the initial EIS. The major federal action requires a "hard look," due to the new circumstances of harmful, increased ORV use on WSAs, which might in turn lead to a revision of the land use plan. The Court did not accept this argument.

In summary, citizen plaintiffs may now face greater difficulties in demanding agency compliance with statutes and regulations. The Court affirmed its preference for building up power in the Executive Branch, and for a hands-off approach to agency decisions. Still, it is hard to see why the Supreme Court was unanimous in its willingness to allow irreversible damage that clearly goes against the purposes of the Wilderness Act and FLPMA. SUWA sums it up nicely: once procedural standards such as standing, finality and a clear mandatory duty are met, the courts have a residual power to take action when "the violation gets sufficiently serious and harmful." If not, the law "really isn't enforceable at all."

Attorneys General Take the Reins of the CAA

by Sarah Peters

State Attorneys General can be a force to be reckoned with in the environmental enforcement arena. New York Attorney General Eliott Spitzer has proven that point. He has been busy fighting the overwhelming battle against air pollution in New York. Attorney General Spitzer isn't willing to wait around for the Environmental Protection Agency (EPA) to drop yet another enforcement action against the Midwestern coal fueled power plants. Instead, he is addressing the concern head on. It all started in 1999, when Spitzer decided to sue 17 Midwestern power plants for violations of the Clean Air Act in an effort to stem the effects of air pollution drifting into New York from the Midwest. New York was ultimately joined by the EPA, environmental groups, and many other states facing the same problem of transboundary pollution. One major win out of these cases was an Ohio Federal District Court ruling holding that Ohio Edison Co. had violated the New Source Review provisions of the Clean Air Act.

Spitzer's next attempt to combat air pollution beyond New York's borders was a suit against the EPA and the Bush Administration in 2002. The lawsuit alleged the administration was responsible for weakening the enforcement standards of the Clean Air Act by removing the New Source Review provisions mentioned above. Spitzer was once again joined by nine of his fellow Attorneys General. And again, in 2003, the Attorneys General exercised their collective voice against the EPA's decision to rollback Clean Air Act standards monitoring emissions that contribute to global warming. In December 2003, a D.C. Circuit Court halted implementation of the new regulations proposed by the Bush Administration

Spitzer's most recent attempt to combat air pollution contributing to global warming is the most novel. Building on the momentum gained in the success of previous suits, the states of California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, along

with the City of New York, filed suit in federal district court in New York against American Electric Power Company, the Southern Company, Tennessee Valley Authority, Xcel Energy Inc., and Cinergy Corporation. At first glance the suit seems like a run of the mill Clean Air Act case, but this time it was much more. The lawsuit alleges a public nuisance claim under federal common law for production of carbon dioxide, which ostensibly contributes to global warming and produces a harm borne by all members of the public. The outcome sought is not monetary, but instead a dramatic reduction in greenhouse gases from the top five carbon dioxide emissions contributors in the United States. For now, we'll just have to wait and see what happens with this innovative attempt by state governments to bypass the weakened federal regulations of the Bush Administration. For more information about these and other suits, and to view the nuisance complaint, visit the Attorney General of New York's website at www.oag.state.ny.us.


NASA image

Cont. First-to-File from p.3

that was used as a jurisdictional hook in *Gem County*, discussed below.

Exceptions to the First to File Rule

The first-to-file rule has several exceptions that fall into two rough groups. The first group relates to the use of the rule as a strategic device, and includes the anticipatory suit, bad faith, and overt forum shopping exceptions. These are the most common exceptions and the only ones to receive extensive commentary in case reporters. The second group of exceptions includes exceptions drawn from considerations of equity, such as the convenience of the forums to the parties and witnesses. The U.S. Supreme Court, in *Kerotest*, provided broad language on which a public interest plaintiff in a first-to-file scenario may base an argument, if equitable factors are present that do not fit in the first category. 342 U.S. at 183 ("factors relevant to wise administration here are equitable in nature").

Exceptions Related to Strategy

Exceptions relating to strategic use of the first-to-file rule by defendants are particularly relevant for attorneys handling citizen suits, due to the existence of notice provisions in environmental statutes such as the Clean Water Act (CWA). These provisions require notice of the intent to sue, and must be sent in advance of filing (60 days in advance in the case of the CWA). *See* 33 U.S.C. § 1365. Because defendants have advance notice of impending lawsuits once notice letters are sent they have time to concoct pre-emptive lawsuits and avail themselves of the first-to-file rule. Fortunately, by virtue of the anticipatory suit exception**,** the notice letter process itself remedies the problem it creates. When the first case is filed in anticipation of the second, the second action may be allowed to proceed. *Alltrade*, 946 F.2d at 628.

The anticipatory suit exception may apply "when the plaintiff filed its suit upon receipt of specific, concrete indications that a suit by the defendant was imminent." *Ward v. Follett Corp.*, 158 F.R.D. 645, 648 (N.D. Cal. 1994). The exception particularly applies when a declaratory judgment action is "triggered" by notice of a pending suit. *Z-Line Designs, Inc. v. Bell'O Int'l LLC*, 218 F.R.D. 663, 667 (N.D. Cal 2003) ("where ... a declaratory judgment action has been triggered by a … letter, equity militates in favor of allowing the second-filed action to proceed...").

Timing is critical. Timing can relate to the time between the notice that "triggered" a declaratory action and the actual filing of the notified action, as well as to the time between the first and second action. *See id.*, 218 F.R.D. at 667. When the second-filed suit is filed within mere days of a first-filed declaratory action that appears anticipatory, the "importance of the earlier filing date is diminished." *Z-Line*, 218 F.R.D. at 667. In *Z-Line*, the second-filed action was filed two days after the instant declaratory action. *Id.* Citing cases that refused to apply the first-to-file rule when up to 20 days separated the actions, the *Z-Line* court granted defendant's motion to dismiss in the first-filed declaratory suit. *Id.*

Timing can cut both ways, however. If the defendant risks sanctions in going forward with planned activities, plaintiff's delay would make it easier to present the "between a rock and a hard place" argument in filing for declaratory judgment. *See British Telecommunications plc v. McDonnell Douglas Corp.*, No. C-93-0677 MHP, 1993 U.S. Dist. LEXIS 6345, at *9-10 (N.D. Cal May 3, 1993) (the court wonders "how long McDonnell Douglas might have had to live under the threat of a suit … if it had not acted first by instituting the [first-filed] action.").

Further, the longer the plaintiff waits to file, the harder it becomes to show that the defendant's suit is in response to the notice letter (because plaintiff is not acting on the notice). When the first-filed suit is not filed in response to a notice letter or other "concrete indication" of an imminent suit, a court may decline to apply the anticipatory suit exception. *Ward*, 158 F.R.D. at 649. In *Ward*, Follett Corp. (the defendant in a California action) had, without informing Ward, filed a suit three months earlier in Illinois on the same controversy. *Id.* at 647. The action was unknown to Ward because Follett Corp. delayed service to pursue a settlement. *Id.* at 649. As the Illinois suit was not filed in response to any notice from Ward of intent to file in California, the California court declined to apply the anticipatory suit exception and dismissed the second-filed suit. *Id.*

Ward illustrates a tactic the plaintiff may use to buy time for settlement discussions while nullifying the chance of losing jurisdiction under the first-to-file rule. Plaintiff may file as soon as the notice period has ended but delay service for up to 120 days (four months). *See* FRCP 4(m). Because the plaintiff has filed first, jurisdiction will be preserved as long as the plaintiff otherwise complies with the rules of civil procedure.

The close cousins of the anticipatory suit exception – the bad faith and forum shopping exceptions – are very likely to appear in conjunction with an anticipatory suit. This is because an anticipatory suit for strategic purposes will most often occur because the defendant wants to control the forum (forum-shopping), which is an act of bad faith. They could conceivably appear on their own as well. Few cases, though illustrate the potential scenarios.

Equitable Considerations

The second category of exceptions derives from equitable considerations. These are not well-recognized exceptions, even though the principle that first-to-file scenarios are to be equitably resolved is well established. *See Kerotest*, 342 U.S. at 183; *see also Alltrade*, 946 F.2d at 627-28. Precedent in the Ninth Circuit is clear that the disposition of a second-filed action calls for a balancing of competing interests. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). Two examples are pertinent here: forum non conveniens, *see Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 96 (9th Cir. 1982), and the argument that the second-filed case may provide a more thorough resolution of the controversy. *Schmitt v. JD Edwards World Solutions Co.*, No C 01-1009 VRW, 2001 U.S. Dist. LEXIS 7089, at *5-6 (N.D. Cal May 18, 2001) (dismissing first-filed declaratory action in part because broader action should go forward, even if second filed).

Generally, the fact that the second-filed court may be more convenient is not considered justification for departing from the first-to-file rule. *Alltrade*, 946 F.2d at 628. Convenience should be addressed in the first-filed court. *Id.* However, there is precedent in the Ninth Circuit indicating that, "[i]n appropriate cases, it would be relevant for the court in the second-filed action to give consideration to the convenience of the parties and witnesses." *Pacesetter*, 678 F.2d at 96. If the defendant's first-filed action is in a distant forum, the plaintiff should not hesitate to raise forum issues in both the first and second-filed courts. But as *Gem County*, below, illustrates, it is best to raise a venue argument in the first-filed court only after filing the plaintiff's case, even if this occurs in a second forum. This is because, without the second case, the first-filed court is more likely to transfer the case to the proper district, leaving the plaintiff as defendant. *See* 28 U.S.C. § 1406(a).

The question as to which action is broader amounts to the question as to which of the two cases would provide a more "comprehensive solution to the entire controversy." *Schmitt*, 2001 U.S. Dist. LEXIS 7089, at *5 (quoting *Koch Engineering Co. v. Monsanto*, 621 F.Supp. 1204, 1208 (E.D. MO 1985) (internal quote marks omitted)). In *Schmitt*, the plaintiff's claim in the first-filed case was really just a defense to the

underlying contract claim in the second-filed case. Because the second case offered a more thorough treatment of the situation, the first-filed court dismissed. *Id.* at *7-8.

Gem County Mosquito Abatement District Example

The controversy between the Gem County Mosquito Abatement District (Gem County) and St. John's Organic Farm provides a textbook example of the first-to-file rule in an environmental controversy, and illustrates an effective strategy for a plaintiff caught in a first-to-file scenario. Three facts were critical to the strategy's success. First, the plaintiff proceeded to file its CWA citizen suit, even though it filed second. Second, the plaintiff avoided outright dismissal of its second-filed case. Third, the plaintiff supported the federal defendants' arguments for dismissal in the first-filed action since, as a general rule, without the federal defendant venue fails against the plaintiff (unless the first-filed court would otherwise have jurisdiction over plaintiffs).

In *Gem County*, the plaintiff, a small organic farm, sought to challenge a county agency's spraying insecticides into water bodies (as mosquito control) without an NPDES discharge permit. In June 2003, the parties met and began settlement discussions. On July 11, 2003, the EPA released a directive to its regional headquarters expressing its opinion that, at least in the context of mosquito abatement activities, use of a FIFRA licensed chemical in accordance with FIFRA did not require additional permitting. The Memo also instructed regional headquarters not to issue NPDES permits for FIFRA substances until EPA released a final decision. *Id.* On August 4, 2003, an EPA employee sent an informal email to Gem County stating that EPA would not issue a permit "as stated in the memo."

Now well after the expiration of the 60-day notice period (but before plaintiff had filed its CWA suit) defendant Gem County used the Memo as a jurisdictional hook to file a declaratory judgment action in the district of D.C., adding EPA as a party. This rationale was based on the theory that the Memo was released from EPA headquarters in D.C. Four months after Gem County filed in the District of D.C., plaintiff St. John's filed its CWA citizen-suit in the District of Idaho.

Having been named a defendant in the D.C. action, and now also the plaintiff in an Idaho action, St. John's Organic Farm found itself litigating the first-to-file rule in the second-filed court while simultaneously trying to win dismissal of the D.C. case. In Idaho, Gem County moved (fortunately for plaintiff) only to stay the case. In D.C., St. John's, buttressing EPA's position, argued that neither the Administrative Procedure Act nor the Declaratory Judgment Act provided the court with jurisdiction, that Gem County had not established a case or controversy that was ripe for resolution, and that the case should be dismissed against St. John's due to improper venue.

The district court agreed, dismissing the federal defendant based mostly on the CWA itself and on the finding that the Memo and the ensuing email from EPA were not final agency action. Without EPA, whose issuance of the Memo gave Gem County the ostensible grounds to file in D.C., the court turned to venue considerations for the private defendant, St. John's. Finding venue improper, the court dismissed the claims against St. John's.

Significantly, the court refused to transfer venue to Idaho, choosing to dismiss the case in deference to the second-filed action already instituted by St. John's. Had jurisdiction not been preserved with the conditional stay in Idaho while the D.C. action was pending, the action against St. John's in D.C. might well have been transferred instead of dismissed, leaving St. John's as a defendant. It is important, therefore, to evaluate St. John's arguments to the second-filed court that resulted in the stay rather than outright dismissal.

Technically speaking, St. John's opposed Gem County's motion to stay. However, the first-to-file rule affords wide discretion to the district courts, which are free to stay or dismiss on their own choice. *See Kerotest*, 342 U.S. at 183-184 ("[A]n ample degree of discretion … must be left to the lower courts."). Thus, in effect, an argument in this situation is against both the defendant and the court.

St. John's focused on several factors: the first-to-file rule is discretionary; the seemingly anticipatory nature of defendant's D.C. action; the implications of forum shopping given the presence of adverse precedent (for Gem County) in the Ninth Circuit; and the possibility of harm to the plaintiff if the case were stayed. (St. John's also raised the "broader action" argument discussed above, as well as convenience issues). The plaintiff drew enough attention to the tenuous nature of the D.C. action that, while the Idaho case was stayed, it was only stayed until the D.C. court resolved the pending motions to dismiss. Importantly, the plaintiff also provided a plausible excuse for the nearly eight-month delay in filing its

citizen-suit. Once the D.C. court dismissed, the second-filed Idaho case proceeded as a normal CWA citizen-suit. Unfortunately, well over a year – and an entire mosquito season – had passed since expiration of the 60-day notice period.

Conclusion

The important thing to remember is that such a scenario may be avoided if the plaintiff files its case as soon as is legally possible. While there is pressure in today's legal system to pursue settlement discussions, the rules permit the plaintiff to withhold service, creating a four-month window for such discussions to take place without the fear of losing a preferable forum and facing duplicative litigation. Mandatory notice periods add to this time, giving a CWA plaintiff, for example, six months (two months notice, four months under the service rules). In the event a clever defendant pulls the plaintiff into another forum, however, a well-litigated case such as *Gem County* may provide a helpful guide to navigating the hazards of the first-to-file rule.

*Citations to the record are not included. All record documents are on file with WELU. Please contact Land Air Water if you have any questions.

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