

Greens join 'Let's derail a judge' game by Ray Ring

Federal judges around the West have often been the backstop protecting everything environmental, from stream quality to spotted owls. So it's surprising when green groups say some judges are systematically undercutting their work.

But some "highly ideological and activist judges are threatening the very core of environmental law," warns a campaign by a dozen groups, including the Natural Resources Defense Council, the Southern Utah Wilderness Alliance and the green law firm, Earthjustice.

Their view: Past Republican presidents Ronald Reagan and George H.W. Bush stocked the federal bench with judges who are biased against environmental protection. The evidence: Recent court decisions have reduced the standing of citizens to file environmental lawsuits, and reduced the reach of some protections.

Not much can be done about that. Federal judges are typically appointed for life, immune from uprisings. But there is a vulnerable target. The George W. Bush administration is trying to appoint a bunch of federal judges - to fill at least 132 vacancies across the country, roughly one in seven of all federal judge seats.

This administration has already kicked up sand in the face of environmentalists, and the concern is the damage will continue with the new judges. That's of particular concern to Westerners, because more than a dozen vacancies are on courts that handle cases from the region, including the appeals courts based in Denver and San Francisco.

The environmental groups' alarm is also a laudable attempt at coalition politics, with broader interest groups such as the Alliance for Justice and Community Rights Counsel bundling in concerns about how the new judges might feel about minority rights and civil rights.

Fair enough. That's how it works with federal judges. When your side occupies the White House, you get to nominate judges that make the other side squawk, and vice versa. This is the same country where our highest authority, the U.S. Supreme Court, held right up until the 1950s that it was fine to have one drinking fountain for white people only, and another beside it for black people. Then a differently stocked Supreme Court said that was not fine.

But it can be difficult for a president to ram a slate of judicial nominees through evaluation by the U.S. Senate, which has the power to say thumbs down. It's especially difficult when the Senate is

evenly divided by parties, as now. So the greens hope to derail some nominees in the Senate Judiciary Committee, which recommends to the full Senate which ones to accept. The tactic worked for the other side, when Sen. Orrin Hatch, R-Utah, who ran the committee during the Clinton years, was notoriously tough on Clinton nominees. The committee is now run by Sen. Patrick Leahy, D-Vt., who may cause similar troubles for Bush nominees.

-Yet despite all the general warnings, there aren't many tangible negatives tarring the nominees to courts in the West. Some of the nominees' records hint of insensitivity to church and state separation, gay rights, or women's rights. About environmental issues, there is less to go on.

The most significant worry for Westerners whose priority is the environment, it turns out, is a native New Yorker nominated to an obscure court in Washington, D.C.

Lawrence Block has spent his 20-year career as a lawyer east of the Mississippi River, according to his bio. But his next career step could have sweeping consequences. He's nominated to the Court of Federal Claims, which decides so-called "takings" cases from around the nation. These cases, all the rage among libertarians, are filed by property owners who demand compensation from the federal government, claiming the value of their property has been diminished by environmental regulations.

Takings cases can be huge and complex, against local or federal regulations. Wayne Hage (HCN, 10/30/95: Nevada's ugly tug-of war: A visit to the heart of the Sagebrush Rebellion), the Nevada rancher who led the Sagebrush Rebellion, has pressed a case in the Court of Claims for 10 years, arguing he's owed money for the impact of grazing regulations. Hundreds of property owners around Lake Tahoe are pressing a case all the way to the Supreme Court, arguing that a mere temporary moratorium on new development, imposed by regional planners, was a taking.

The argument is based on the Fifth Amendment, which says the government must provide "just compensation" whenever it takes private property for public use. Courts have generally held that no taking occurs unless all value of a property is lost, but that standard has eroded.

It might even be washed out. In a stunning decision last spring, Court of Claims Judge Paul Wiese ruled that farmers in California's Tulare Lake irrigation district must be compensated because the government reserved water for fish. The government was enforcing the Endangered Species Act. The farmers claimed \$25 million in damages; a second phase of the trial will determine how much they get.

Another claims court case originated in Klamath Falls, Ore., where the federal government cut off farmers' irrigation water last summer for endangered fish (HCN, 8/13/01: No refuge in the Klamath Basin). The farmers claim it's as much as a \$1 billion takings.

If such claims arrived in a court where Lawrence Block is in charge, he might well order the federal government - meaning the taxpayers - to cough up the money or back off from saving fish.

For seven years, Block has been the Republican senior counsel to the Judiciary Committee, working closely with Hatch. One of Block's missions was to push radical takings legislation. In 1996, for example, he was involved in an effort to pass a law that would require the government to pay for just about any kind of regulation. That attempt failed, but now the takings rebels seem to be trying a different strategy.

Block's nomination will be the test of whether environmentalists will have any effect on who gets to be a judge. Bigger tests may come. It's expected one or more Supreme Court justices will retire soon, giving the Bush administration an opportunity there, too.

In recent takings cases that reached the Supreme Court, the justices issued sharply divided rulings - 5-to-4 one way or the other. The trend has been small steps giving property owners more compensation.

A core of three ultraconservative justices - Antonin Scalia, William Rehnquist and Clarence Thomas - seems ready. If the next appointments to the Supreme Court align with them, we'll see a revolutionary change in takings law.