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Article

## Politics decide environmental court cases, nonpartisan study finds.

By Patty Henetz

Nov. 1--Lawyers for the Utah Environmental Congress were surprised when they read that President Bush had a say in U.S. District Judge Dee Benson's ruling against their attempt to stop a coal-mining operation in the Manti-La Sal National Forest.

Benson ruled in July that not allowing the mining company to remove 1.9 million tons of coal from the East Fork Box Canyon tract would mean the loss of electricity to 1.5 million citizens for a year.

"This is especially adverse to the public's interest in light of the president's energy policy that elevated the public interest in energy resources," Benson wrote in support of the federal Bureau of Land Management.

At the core of Benson's decision was a ruling that BLM officials -- despite environmentalists' claims to the contrary -- had sufficiently complied with the National Environmental Policy Act, which requires government agencies to prepare environmental impact studies of major federal actions involving land use.

A judgment in favor of an agency on a NEPA claim isn't unusual. But in the 34 years since President Nixon signed the act into law during a Super Bowl halftime, politics increasingly have colored court and agency actions, the nonpartisan Environmental Law Institute has found.

In a study of 325 NEPA cases decided from Jan. 21, 2000 to June 30, 2004, the Washington, D.C.-based institute found what it calls "a remarkable pattern" of rulings by federal judges appointed during Republican administrations: A plaintiff's chance of winning a NEPA case varies dramatically, with Republican-appointed judges far more likely to rule against environmentalists.

And under President Bush, the trend is accelerating, the law institute claims. In the 23 NEPA-related cases decided so far by this president's district court appointees, pro-environment plaintiffs have prevailed only four times.

Attorneys who work on NEPA cases say the trend is pushed by the Bush administration's selective application of science at the agency level for maximum political gain, a phenomenon that only makes already science-shy judges more reluctant to wade into substantive issues in

environmental cases.

"Judges are uncomfortable with science, with things having to do with biological decisions, ecological decisions," said Constance Lundberg, an associate dean at Brigham Young University's law school. "For that reason, they like to look at process."

That means NEPA, designed to expose the public to the science the agencies use to make their decisions, increasingly has been reduced to a set of technical procedures, with courts nearly always deferring to agency discretion.

"My sense is that we have lost an understanding of the value that NEPA was supposed to bring," said Lundberg, a member of the Council on Environmental Quality under President Ford.

The ELI study shows a rough balance over time between competing interests. In 217 district court rulings during the Bush administration, the overall success rate of NEPA plaintiffs was 44 percent, consistent with an earlier study of federal court rulings from 1969 to 1984.

The study found that environmental plaintiffs had a somewhat higher-than-average success rate than pro-development plaintiffs.

But when the legal institute analyzed the cases to account for the political affiliation of the presidents who appointed the judges, it found that environmental plaintiffs appearing before Democrat-appointed judges had a 59.2 percent success rate, while environmentalists pleading their cases before Republican-appointed judges prevailed only 28.4 percent of the time.

For pro-development NEPA claims, the reverse was true, the study found. Development plaintiffs invoking NEPA succeeded 14.3 percent of the time before Democratic-appointed judges but 57.9 percent of the time before GOP-appointed judges.

The study found a similar pattern in the federal appellate courts.

"Judicial polarization over NEPA is acute and may be growing," the Environmental Legal Institute concluded. "The fact that party affiliations of judges appear to influence NEPA cases is cause for concern about the objectivity of adjudications under the Act."

Jay Austin, one of the study's authors, describes NEPA as a sunshine law. By setting comprehensive ecological goals, it aims to improve decision-making by incorporating environmental information into all major federal decisions.

It also established the Council on Environmental Quality, which monitors NEPA application but doesn't enforce the statute.

"It was a very ambitious statute," Austin said. "It's kind of straight out of the '70s good-government playbook. Really, all you're doing is opening up the process."

But as politics leaked into science, administrative remedies for objections to federal actions have been weakened, leaving the courts to sort out disputes.

Over time, the courts have decided to defer to agencies unless they can be found to have been arbitrary or capricious in their decisions -- a high standard indeed.

"The positions the courts have taken toward the agencies is the old common law notion, 'The king can do no wrong,'" said Karen Budd-Falen, a Cheyenne, Wyo., attorney who served for three years under President Reagan in the Interior Department and who has worked for Mountain States Legal Foundation, a conservative public interest legal foundation located in Denver.

Heidi McIntosh, an attorney and conservation director for the Southern Utah Wilderness Alliance, said the deference to the agencies harms the public.

"If the agency starts to see that deference as a kind of immunity, all of the positive effect of NEPA would be lost," she said. And while NEPA isn't likely to be repealed, she said, the Bush administration's pressure on the agencies weakens "a very democratic statute."

While five of Utah's nine federal judges were appointed under Democratic presidents, the state's conservative senators have controlled their nominations.

Sixteen Utah cases were included in the ELI study, 11 from the district court and 5 from the 10th U.S. Circuit Court of Appeals.

The sample is too small to be statistically significant on its own, but with all but one of the 11 cases going against the environmentalists, it seems to support the ELI study's findings.

Perhaps the most significant NEPA case to come out of Utah during the period ELI studied was *Norton v. Southern Utah Wilderness Alliance*. In July, the U.S. Supreme Court unanimously overturned a 10th Circuit ruling that federal courts could compel the BLM to protect public lands from off-road vehicle damage.

The Bush administration petitioned the court in 2003 to overturn the ruling, arguing NEPA analysis is only required for proposed major federal actions, but that inaction by land managers was discretionary and didn't require environmental review. The court agreed.

Earthjustice attorney Jim Angell has characterized the Bush administration's intervention as a way to "get the public out of the way."

But Budd-Falen and other pro-development attorneys are looking at NEPA as a way to inject a different kind of public comment into the process. Her firm started using NEPA about nine years ago, perhaps most successfully in getting anti-snowmobile rules at Yellowstone National Park overturned, by getting the agencies to look at smaller bites of the environment in question and to examine economic issues.

"I predict you're going to see a lot more litigation over NEPA, not less," Budd-Falen said. "I've talked to enough environmental attorneys and their clients feel just the same."

And count on more Utah federal court rulings heading for appeals courts and even on to the U.S. Supreme Court.

"In general, we consider the Utah courts to be very conservative.

When we file, we have the assumption they will have to go to the 10th Circuit to get a fair hearing," said Utah Environmental Congress spokesman Kevin Mueller.

BYU's Lundberg finds the polarization implicit in Mueller's statement disturbing.

Utah's federal judges, she said, are "strong-willed people who take seriously their task."

But because the courts have tipped away from science in favor of procedure, "you can pretty much stop anything from either side," she said.

"We are evenly divided and there is no middle. If you have discretionary laws when there is no middle, it's hard to find an answer."