

Ninth Circuit Rejects Use of Preemptive Litigation to Validate Federal Approvals

SheppardMullin

Article By

[James Rusk](#)

[Sheppard, Mullin, Richter & Hampton LLP](#)

[Real Estate, Land Use & Environmental Law Blog](#)

- [Constitutional Law](#)
- [Utilities & Transport](#)
- [Environmental, Energy & Resources](#)
- [Litigation / Trial Practice](#)

- [Alaska](#)
- [Mexico](#)
- [9th Circuit \(incl. bankruptcy\)](#)

Monday, November 24, 2014

[Shell Gulf of Mexico, Inc., v. Center for Biological Diversity](#), (11/12/14, No. 13-35835 (9th Cir. 2014))

The **Ninth Circuit has rejected a “novel litigation strategy” that Shell Gulf of Mexico, Inc.**, employed in an effort to **preempt a possible litigation challenge to federal approvals that Shell received for Arctic oil exploration.** After receiving the approvals, but before any suit had been filed to challenge the approvals, Shell sued the Center for Biological Diversity and other groups that had publicly opposed the approvals and had threatened legal action. Shell sought a declaratory judgment that the approvals were valid and did not violate the federal Administrative Procedure Act. Shell argued that it needed an advance determination of the approvals’ validity in order to remove the threat of litigation (and delay) during the brief Arctic drilling season and protect its investment in mobilizing for the drilling season.

CBD and other defendants filed a motion to dismiss Shell’s suit on the ground that no “case or controversy” existed between the parties as required by Article III of the U.S. Constitution. But the federal district court for Alaska denied the motion and

went on to grant summary judgment to Shell, after consolidation with another suit that some of the defendants had later filed to challenge the Shell approvals.

The Ninth Circuit last week reversed, holding that the district court should have granted the motion to dismiss because no case or controversy existed between Shell and CBD, and thus the court lacked jurisdiction. The court relied on the fact that only the federal agency that issued the approvals, not Shell, could have been sued by CBD under the APA. That agency, the Bureau of Safety and Environmental Enforcement, was not a party to Shell's suit. Thus there were no "adverse legal interests" between Shell and CBD, which is a prerequisite for a justiciable case or controversy.

The court stated: "Shell's lawsuit represents a novel litigation strategy, whereby the beneficiary of agency action seeks to confirm its lawfulness by suing those who it believes are likely to challenge it. We must decide whether this strategy runs afoul of Article III's case or controversy requirement. We hold that it does."

The court's reasoning leaves open the possibility that the outcome could have been different if the Bureau had participated.

Copyright © 2019, Sheppard Mullin Richter & Hampton LLP.

Source URL: <https://www.natlawreview.com/article/ninth-circuit-rejects-use-preemptive-litigation-to-validate-federal-approvals>