

## Citizen Suit Action/Clean Water Act: Federal Appellate Court Addresses Claim Preclusion Issue



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The United States Court of Appeals for the Ninth Circuit ("9th Circuit") addressed in a September 28th Opinion an issue arising out of a Clean Water Act citizen suit action. *See State of Washington, et al., v. Crown Resources Corporation, et al.*, No. 25-2397.

The question addressed was whether a settlement by one of the citizen suit plaintiffs precluded continued pursuit of the lawsuit by the other plaintiff.

Crown Resources Corp. ("Crown") owns and operates the Buckhorn Mountain Mine in Okanogan County, Washington. The underground gold mine operates pursuant to a Clean Water Act National Pollutant Discharge Elimination System ("NPDES") Permit issued by the Washington State Department of Ecology.

Two separate Clean Water Act citizen suits were filed in 2020 against Crown and its parent company alleging violations. One suit was filed by the Okanogan Highlands Alliance ("OHA") and the other was filed by the state of Washington.

The United States District Court ("District Court") referred the cases to mediation after they were consolidated. Mediation failed and OHA entered into a Consent Decree with Crown without Washington's knowledge or involvement.

The Consent Decree was noted to expressly indicate that it resolved OHA's claims against Crown. Subsequent to the District Court entering the Consent Decree between OHA and Crown, the company moved for judgment on the pleadings in Washington's case. Crown argued that Washington's claims were now claim-precluded.

The District Court granted judgment for Crown and Washington appealed to the 9th Circuit.

The 9th Circuit states that claim-preclusion applies when there is:

1. An identity of claims;
2. A final judgment on the merits; and,
3. Identity or privity between the parties.

The third requirement was deemed by the 9th Circuit to be unsatisfied. This is due to the fact that Washington was not a party to the Consent Decree between OHA and Crown.

The District Court had, however, concluded that two exceptions to the privity requirement resulted in Washington's cause of action still being precluded.

The first exception cited by the District Court held that in certain limited circumstances, 'a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who was a party' to the suit. The 9th Circuit rejected this exception, because two of the three requirements were not met, which included:

1. The interests of the nonparty and her representative are aligned; and
2. Either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty.

Washington argued that there were additional types of relief it would seek if not precluded by OHA's settlement, along with a number of other monetary issues.

The District Court claimed that either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty.

As to the second exception, the 9th Circuit concluded that there was overwhelming evidence that OHA neither acted in a representative capacity for Washington nor understood itself to be so acting. It noted the Consent Decree expressly resolved only the claims of OHA against Crown.

In addressing the other exception to claim preclusion, the 9th Circuit stated it did not apply because the Clean Water Act does not expressly foreclose successive civil litigation by nonlitigants. Crown was noted to have conceded that the Clean Water Act does not expressly foreclose successive citizen suits based on a prior citizen suit.

The 9th Circuit reversed the District Court.

A copy of the Opinion can be found [here](#).