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Enviros Urge 9th Circ. To Revive ESA Battle Over Golf Course

By **Michael Macagnone**

Law360, Washington (March 11, 2015, 3:39 PM ET) -- A coalition of environmental groups asked a Ninth Circuit panel Wednesday to revive their suit against San Francisco, saying they should be allowed to litigate whether a permit for handling protected species at a city golf course applied before U.S. Army Corps of Engineers approval.

The Wild Equity Institute and other groups sued the city in 2011, alleging the city's golf course operations were illegally killing and harassing the endangered California red-legged frog and San Francisco garter snake without an Endangered Species Act permit. However, the city obtained a biological opinion from the Fish and Wildlife Service for its operations in 2012, and the case was tossed as moot.

However, Brent Plater, attorney for the groups, said that biological opinion was not valid until the Army Corps of Engineers accepted it because the city sought its permit under Section 7 of the ESA, which covers federal actions.

"We will be in this limbo of whether there can be any action over the killing of any endangered species in the process," he said.

Plater said they should be allowed to resolve in court whether the city can be liable for any damage to protected species in the 18-month period between when the FWS gave its opinion and when the Army Corps issued the final permit in February 2014.

One panel member, Circuit Judge William Fletcher, expressed doubts about Wild Equity's case, saying he doesn't understand how the groups could meet the standards for a mootness exception.

"The lawsuit that you had seems to me to have gone away," he said. "You were saying 'You were killing endangered species without a permit, without a biological opinion and without an incidental take statement,' and they have all those things now."

The ESA permit covers the city's golf course maintenance projects, including operation of an 11,500-gallon water pump used to drain the course after winter rains that allegedly kills the frogs and their eggs. Other activities covered include grass cutting and use of golf carts on the course.

San Francisco argued that only the parts of the biological opinion about draining the course dealt with the Army Corps, while most of the permit directed the city to take actions, meaning the court should consider the biological opinion valid and in force.

In addition, the city and the intervenor nonprofit San Francisco Public Golf Alliance argued the 18-month gap was covered by a stay in the district court case pending the ESA action. Joseph

Palmore of Morrison & Foerster LLP, attorney for the alliance, said the environmental groups don't have a cause of action as both their original suit and their appeal are moot.

"It is kind of mootness squared; it's doubly moot," he said.

The intervenors and the city asked the panel to uphold the lower court's ruling.

Circuit Judges William Fletcher, Andre Davis and Morgan Christen sat on the panel.

Wild Equity and the other environmental groups are represented by in-house counsel Brent Plater along with Howard M. Crystal and Eric Robert Glitzenstein of Meyer Glitzenstein & Crystal.

San Francisco and the mayor and parks director are represented by in-house counsel Owen J. Clements and James Moxon Emery in addition to Benjamin Zachary Rubin and Paul S. Weiland of Nossaman LLP.

The San Francisco Public Golf Alliance is represented by Christopher J. Carr and Joseph R. Palmore of Morrison & Foerster LLP.

The case is Wild Equity Institute et al. v. City & County of San Francisco et al., case number 13-15046, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Brian Baresch.