

May Courts Review Congressional Review Act Compliance by Agencies?



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A district court ruling in Idaho, Tugaw Ranches, L.L.C v. Department of the Interior, promises or threatens — depending on your perspective — to breathe new life into the Congressional Review Act. Under the CRA, lawmakers can invalidate federal agency actions within 60 legislative or session days of either the agency’s formal publication of its decision in the Federal Register or its provision of notice to Congress, whichever comes later. Importantly, the agency is then barred from later issuing the same or a “substantially similar” rule unless authorized by a subsequent law.

Until November 2016, environmental lawyers (or at least this one) paid no attention to the CRA. For good reason. That statute had only been triggered once in two decades, and not for an environmental rule. On the morning after the presidential election, however, environmental lawyers quickly appreciated that the 1996 law was back in business. Even more conservative Republican majorities would soon dominate both congressional chambers and the newly elected occupant of the White House would welcome, rather than reject, those congressional resolutions.

Fourteen significant Obama-era rules, mostly environmental, became quick victims of the new Congress and White House in 2017. While the green community then breathed a sigh of relief, two recent developments unsettled their assumption that the act’s 60-day clock had run. The first shoe dropped late last summer when Republicans in Congress began to argue that the CRA still applied to a host of federal agency actions taken during the Obama administration for which the agencies had never provided formal notice to Congress and had not been subject to Federal Register publication requirements. If true, CRA overrides are still timely years later.

The district court’s ruling in Tugaw Ranch is the second shoe. At issue in that case is the validity of decisions in 2015 by the Bureau of Land Management and Forest Service to amend land use plans in 11 western states to provide greater protection to the Greater Sage Grouse, a once-listed endangered species. The plaintiff in the case, an Idaho ranch, claims the amended land use plans are unlawful under the CRA because the federal agencies never submitted

those amended land use plans to Congress (such plans are not published in the Federal Register).

The federal government did not dispute that the plans were not submitted to Congress but instead defended on the ground that the case should be dismissed because Section 805 of the law precludes judicial review. The unqualified statutory language of Section 805, moreover, gives surprising force to the government's view. It provides that "no determination, finding, action, or omission under this chapter shall be subject to judicial review."

The Tugaw Ranch judge, however, was unpersuaded. He concluded that the omission in Section 805 of any specific reference to actions of an "agency" — there are references to Congress and the president — rendered ambiguous whether Congress intended to make judicially unenforceable statutory violations by federal agencies. And the judge then found unreasonable the federal government's interpretation because it would mean "that essentially any rule or law can go into effect without [congressional] oversight or approval and there is no legal remedy available for an affected third party."

If the Tugaw Ranch court's view becomes controlling law, the CRA could quickly become a far more potent weapon for challenging the validity of a potentially massive number of federal agency actions that have, until now, been assumed invulnerable to judicial challenge. The land use plans at issue in this one case could prove the tip of the iceberg of litigation targets.

Federal regulators and the beneficiaries of their past regulations, however, should not be overly worried. The most likely result is that the Tugaw Ranch holding will prove short-lived. As harsh as no-judicial review provisions like Section 805 may seem, the judge's discovery of ambiguity in the relevant language falls far short of convincing. And, notwithstanding his effort to suggest support for his view in other court rulings, there is essentially none.

Virtually all the courts have ruled the other way — that Section 805 precludes this kind of lawsuit — led by the U.S. Court of Appeals for D.C. Circuit's 2009 ruling in *Montanans for Multiple Use v. Barboletosi*. Nor are other courts likely to be persuaded by the Tugaw Ranch judge's effort to discount *Montanans* because "the entirety of the D.C. Circuit's analysis of § 805 is three sentences." Certainly the author of that opinion, Judge Brett Kavanaugh, is unlikely to be persuaded. Of course, were a Justice Kavanaugh to conclude differently, all bets would be off.

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