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U.S. Prosecutors Take Heat Over Handling of Moonlight Fire Case

SACRAMENTO — Two years ago, federal prosecutors in California's Eastern District could not have been riding higher.

After years of intense litigation, the U.S. attorney's office had secured a $122 million deal with Sierra Pacific Industries Inc. to settle charges that the timber giant was liable for the 2007 Moonlight Fire, an inferno that blackened 65,000 acres of northeast California forest land. SPI agreed to pay $47 million and to donate 25,000 acres to the national forest system.

The settlement was the largest ever negotiated by federal prosecutors for forest fire damage. Attorney General Eric Holder presented Assistant U.S. Attorneys Kelli Taylor and Richard Elias with a 2013 director's award, hailing their "exceptional efforts" on the case.

"We were outmanned, outspent and outpapered, but not outlawyered," U.S. Attorney Benjamin Wagner said at the time.

Two years later, the proclamations of pride and victory have been replaced by the defensive stance of an office under attack. SPI in October asked the Eastern District court to vacate the record settlement, claiming in voluminous filings that prosecutors withheld key evidence and covered up for fire investigators who were less than truthful.

US Forestry Service

The ensuing three months of accusations traded between the U.S. attorney's office and attorneys with Downey Brand, Sacramento's largest firm, have flummoxed the federal bench and gripped the local bar. And they reflect two sides that have a seemingly endless supply of energy, patience and funding to litigate a matter that germinated more than seven years ago.

SPI's petition is more than just a laundry list of complaints made by a losing litigant. In its motion under Rule of Civil Procedure 60(d)3—for fraud upon the court—the company submitted the declaration of a former Eastern District prosecutor who suggested that he was kicked off the Moonlight Fire case because of his "zero tolerance of litigation misconduct by the government." SPI is also citing the criticisms of a state judge overseeing a related Moonlight Fire case who blasted prosecutors' discovery practices as "reprehensible."

The U.S. attorney's office fired back with its own motion to oust the SPI lawyers, claiming that they engaged in "egregious professional misconduct" by inducing the former assistant U.S. attorney to disclose confidential information about the Moonlight Fire prosecution.

"The claims of improper conduct by attorneys in this office made by defense counsel in the Moonlight Fire case are totally without merit," Wagner said in a statement released by his office. "I have complete confidence in the attorneys who are handling this matter."

The federal court wanted nothing to do with the ethical conduct warfare. Chief Judge Morrison England tried to recuse the entire bench from the case, only to be rebuffed by Alex Kozinski, then the chief judge of the U.S. Court of Appeals for the Ninth Circuit. Senior Judge William Shubb has now been tasked with trying to sort through the allegations.

Court practitioners, meanwhile, are largely sitting back and watching the spectacle unfold like a car crash, unwilling to take sides.

"This level of vitriol," said one longtime Sacramento attorney, "is unheard of."

SPARKS FLY

The Moonlight Fire, named for the nearby Moonlight Valley, erupted on Labor Day in 2007 on privately owned Plumas County timberland. It quickly spread through the Plumas and Lassen national forests and took 2,000 firefighters more than two weeks to contain. Fifteen million trees—some of them more than 400 years old—were charred.

Federal and state investigators looking for the fire's origin zeroed in on a hillside where a private contractor, hired by SPI, had been operating bulldozers to build berms in a logging area. A joint state-federal report concluded in June 2009 that the fire started when a dozer struck a rock, spraying nearby brush with sparks.

The attorney general's office filed suit against SPI, a handful of other landowners and the dozer contractor in Plumas County Superior Court on Aug. 9, 2009. Three weeks later, the U.S. attorney followed suit in federal court, seeking recovery of fire-fighting costs and damages for the harm caused to public land.

The litigation was messy from the start. Anderson-based Sierra Pacific, the state's largest landowner, showed no interest in settling. Lawyers accused investigators of making mistakes and hiding fire scene photographs. They issued press releases attacking prosecutors for operating with a "bounty hunter" mentality.

"We were ready to talk settlement from day one," Assistant U.S. Attorney Richard Elias told The Recorder in a 2013 interview. "But there were many accusations of wrongdoing on our part which were not true. It was just one of those cases where the other side refused to budge and caused us to go full-tilt toward trial."

The defendants ended that march to federal trial, however, after Judge Kimberly Mueller issued a pre-trial order on July 2, 2012 rejecting their request for summary judgment. The land-donation and cash-payment deal with the U.S. government was announced less than two weeks later.

SPI did not announce the settlement with gratitude.

"Typically, a settlement signifies the end of a dispute, but this is just the beginning," SPI's attorney, William Warne of Downey Brand in Sacramento, said on the day the deal was made public.

Sierra Pacific issued a statement that day also, saying it was "now itself mission-driven to expose what actually happened regarding the Moonlight Fire."

"This case, it gave new meaning to scorched-earth litigation," Assistant U.S. Attorney Kelli Taylor told The Recorder in 2013. "It was truly behavior I've never seen from the other side."

Taylor declined to comment on the current hostilities and referred questions to the U.S. attorney's press office. Elias left the federal prosecutor's office in 2014 and now works at a Missouri law firm.

FANNING THE FLAMES

SPI would not have to wait long for help in its mission.

On July 26, 2013, Judge Leslie Nichols, a retired Santa Clara County Superior Court judge sitting by assignment in Plumas County, dismissed all state actions against SPI and the other defendants, holding that the California Department of Forestry and Fire Protection, or Cal Fire, couldn't prove the defendants' liability.

Six months later Nichols dropped

a bombshell, awarding the defendants $32.4 million in attorney fees and expenses plus monetary and terminating sanctions against the government. In a 26-page order, the judge blasted Cal Fire and lawyers with the state attorney general's office for willfully failing to comply with discovery obligations.

"This court finds that Cal Fire has engaged in misconduct during the course of the litigation that is deliberate, that is egregious and that renders any remedy short of dismissal inadequate to preserve the fairness of the trial," Nichols wrote.

The judge specifically cited documents, produced months after prosecutors told the court and the defendants that they had handed over everything relevant, showing that Cal Fire had funneled millions in legal settlement money to a nonprofit that funded wildfire training and equipment. Nichols said the late document dump violated discovery rules and hurt the defendants' ability to probe records "which reveal information that is inconsistent with the testimony of Cal Fire's witnesses." SPI cited the program's existence as proof that investigators had an incentive to place blame on a wealthy defendant.

Nichols also accused prosecutors of sitting by while a fire investigator attempted "to steamroll the truth" about where the fire started during a pretrial deposition. Two investigators—one from the state, the other from the U.S. Forest Service—concluded in the joint report that the fire ignited in two places showered with sparks when a bulldozer hit a rock. But defense attorneys say that during discovery they found a sketch and photos the investigators created—but did not include in their report—that suggest that the fire started elsewhere, records that cast doubt on the final conclusions about how the blaze began.

"One hopes that this conduct is not explained in our schools as what 'good lawyers do to win their cases," Nichols wrote.

The judge declined the defendants' request to sanction two deputy attorneys general working on the case, Tracy Winsor and Daniel Fuchs. He did not, however, spare them a tongue-lashing.

"The sense of disappointment and distress conveyed by the court is so palpable, because it recalls no instance in experience over 47 years as an advocate and as a judge, in which the conduct of the attorney general so thoroughly departed from the high standard it represents, and, in every other instance, has exemplified," Nichols wrote.

WHERE THERE'S SMOKE…

While the state has appealed the judge's rulings, SPI has used them to bolster its contention that the 2012 settlement rests on faulty legal work.

The federal defendants' memorandum of points and authorities seeking to undo the 2012 settlement runs 100 pages.

The defendants assert many of the same claims made in the state suit: that fire investigators identified a "different, secret point of origin" about 10 feet away from the ignition site originally flagged, but never included that information or related photos in the final wildfire report. They also cite the discovery of an authorized Cal Fire program that used damages recovered in civil wildfire litigation to fund a training and equipment program administered by the California District Attorneys Association.

Then there are claims involving a resident near the fire area; the defendants' lawyers identified him as a potential suspect, but he was never arrested or charged. The defendants say the man's father had falsely told federal prosecutors that SPI or Downey Brand had offered his son $2 million to take the fall for the fire. Defense attorneys say prosecutors should have alerted them to the claim, as the information would have shown the man to be untrustworthy.

But the defendants' biggest new claim of wrongdoing rests with the declaration of former Assistant U.S. Attorney E. Robert Wright, who retired from the Eastern District in 2010. Wright said that as leader of the office's fire litigation team, he was heavily involved in pursuing the Moonlight Fire case—until he got into a dispute with the civil division chief.

Wright said that when he flagged an error with a damages calculation in a different wildfire case, Assistant U.S. Attorney David Shelledy disagreed with his conclusion that the office was ethically required to disclose the mistake to the defense. Wright said the U.S. Department of Justice's Professional Responsibility Advisory Office sided with him, at which point his relationship with Shelledy turned frosty.

In January 2010, Shelledy removed Wright from the Moonlight Fire case, the declaration says. Wright retired at the end of 2010. But his interest in the case reignited after Nichols issued his scathing rulings in Plumas County. He agreed to submit a declaration for the defense, detailing his qualms with Shelledy and the way that the Moonlight litigation had been handled.

"In light of what has finally been exposed regarding the Moonlight Fire action, I suspect that someone connected with the Forest Service or Cal Fire communicated with Civil Division management in late 2009 that there was or might be a problem with the Moonlight Fire investigation and report, and that with my zero tolerance of litigation misconduct by the government, I should be removed from the case," Wright wrote.

In court filings, Wagner's office did not directly address Wright's allegations. But Wagner accused his former deputy of violating professional ethics rules by breaching confidentiality and his loyalty to the prosecution. Wagner also blasted Warne and other defense attorneys for eliciting "15 pages of improper disclosures that any first-year law student would know were forbidden by the most fundamental duties of our profession."

The U.S. attorney's office demanded that Warne and other defense attorneys involved with the Wright declaration be booted off the case and that their motion to nix the settlement be dismissed.

"Even if every word of the declaration of E. Robert Wright ... were true, it would show that Wright and defendants' attorneys have engaged in egregious professional misconduct," prosecutors wrote.

TOO HOT TO HANDLE

It was quickly clear that the Eastern District bench wanted no part of the renewed fight between SPI and prosecutors. On Oct. 15, Chief Judge Morrison England issued an order recusing the entire bench from the case, referring it instead to Ninth Circuit Chief Judge Alex Kozinski for assignment to an outside judge.

"Defendants state that they perceive the court itself as a victim," Morrison wrote. "Based upon facts alleged in the motion and accompanying declarations and exhibits, the impartiality of the district and magistrate judges in the Eastern District might reasonably be questioned."

Six days later, Kozinski sent the case right back to the Eastern District, saying he would not appoint a replacement unless "each and every judge has been offered the case and refused to take it."

Mueller, who had handled the litigation from the beginning, did just that, recusing herself on Oct. 23 in an order that offered no explanation. But England found a taker in William Shubb, the most senior judge on the bench.

Shubb has not acted on prosecutors' request to remove defendants' counsel from the case or SPI's request to temporarily stay the settlement. Instead, he has ordered briefing on the "threshold issue" of whether SPI can seek relief under Rule 60(d)(3).

Accusing a litigant of committing a fraud upon the court is "very hard to prove, and it's very hard to win," said Rory Little, a professor of law at UC-Hastings who has no involvement in the case. "Courts are reluctant to find fraud in litigation that has settled."

There are also the issues of reputations and professional relationships. The two prominent players in the Moonlight Fire case have been advocates and adversaries for years. Wagner is a career federal prosecutor, having served 17 years in the Eastern District office before President Barack Obama named him U.S. attorney in 2009. Warne is a former federal law clerk who has been a prominent trial attorney in Sacramento for more than two decades.

Mark Reichel, a criminal defense attorney in the capital, said he expects lawyers on both sides to emerge from the litigation unscathed.

"It can be very contentious here at times," Reichel said. "There are wars of words and very contentious litigation."

But Little, who has represented prosecutors accused of misconduct, isn't so sure.

These kind of cases "almost always leave hard feelings, no matter who wins," he said. "And I can tell you, the sting of that [accusation] never goes away."

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