

## [Before You Request Your Fees from Your Opponent, Be Sure You Have Prevalled](#)

Posted on January 11, 2010 by [Gary A. Bresee](#)

Although this sounds obvious, the Ninth Circuit recently illustrated, in [Klamath v. Bureau of Land Management](#), No. 08-35463 (9th Cir., Dec. 15, 2009), that a plaintiff must have actually received some kind of relief on the merits of her claim before she can be said to have prevailed, and thereby be entitled to her attorneys' fees. There must be a "material alteration" of the status quo, and the court's order must consist of relief, not merely a determination of legal merit. There must be some kind of "judicial imprimatur," which first means, typically, a court order of some kind.

The judicial imprimatur must also be an *enforceable entitlement* to relief:

"To receive what one sought is not enough to prevail: the court must require one's opponent to give it."

Consequently, a lawsuit which brings about a *voluntary* change in defendant's conduct would "lack a judicial sanction or imprimatur." In *Klamath*, Plaintiffs Klamath Siskiyou Wildlands Center, *et al.* ("Klamath") sued the Bureau of Land Management ("BLM") alleging that a timber sale in the Willy Slide area was illegal. Klamath sought an injunction against the sale taking place. During the pendency of the suit, however, the BLM vacated its earlier rulings and granted Klamath's protest of the Willy Slide timber sale.

The BLM then moved to dismiss the case, and the District Court agreed, dismissing the action as unripe or moot due to BLM's voluntary actions. Since this order did not conclude that Klamath was entitled to relief, it did not confer prevailing party status upon Klamath. Because it did not "require one party to do something it otherwise would not be required to do," the District Court's grant of attorneys fees was reversed.

This seems to be a valid strategy. If you find yourself a defendant in a suit where plaintiff would be entitled to her fees, consider a voluntary change to the status quo -- even if it occurs after the action has been commenced -- so long as it is prior to the plaintiff's ability to obtain a court order granting any kind of relief. This would, if successful, avoid any claim for attorneys' fees from the plaintiff in the future.