



Oregon Natural Desert Association

May 1, 2008

Ms. Molly Dwyer
U.S. Court of Appeals
Post Office Box 193939
San Francisco, CA 94119-3939

Re: Ore. Natural Desert Ass'n v. Gutierrez et al., No. 06-35851
Supplemental Authority in Support of Plaintiff-Appellant's Motion to Dismiss

Dear Ms. Dwyer:

Pursuant to Federal Rule of Appellate Procedure 28(j) and Circuit Rule 28-6, plaintiff-appellee Oregon Natural Desert Association ("ONDA") in the above-referenced matter hereby submits supplemental authority. I enclose four copies of this letter pursuant to the rule. The authority cited herein is relevant to the issues raised by ONDA's Motion to Dismiss the Department of Commerce's appeal of the district court's fee award under the Freedom of Information Act ("FOIA"). ONDA filed its motion on February 26, 2008 and the briefing on that motion is now complete.

On April 29, 2008, Magistrate Judge Alan Kay of the District of Columbia ruled that the attorney fee provision in the OPEN Government Act of 2007 applies retroactively to pending FOIA cases as ONDA argued in its briefing in support of its motion to dismiss Commerce's appeal. The Magistrate observed that "[t]he Supreme Court has held that fee shifting statutes do not resemble the types of cases in which the traditional presumption against retroactivity has been invoked because '[a]ttorney's fee determination[s] . . . are collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial.'" Davis v. Dep't of Justice, No. 88-130 (D.D.C. Apr. 29, 2008), slip op. at 7 (quoting Landgraf v. USI Film Prods., 511 U.S. 255, 277 (1994); internal quotation marks omitted) (attached hereto as Attachment A).

The court noted "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary." Id. (quoting Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1974)). "[T]he substantial weight of judicial precedent is that the right to costs, including [FOIA] attorney fees, is controlled by the law at the time the action is terminated, and not the law in force at the time of commencement." Id. at 8 (quoting Cuneo v. Rumsfeld, 553 F.2d 1360, 1367 (D.C. Cir. 1977) (internal quotation marks omitted) (FOIA's attorney fee provision enacted in 1974 should apply to action commenced in 1967), overruled on other grounds by Baurka v. Dep't of Health & Human Servs., 142 F.3d 1286 (D.C. Cir. 1998)).

The court concluded:

Based on these precedents, the undersigned concludes that § 552(a)(4)(E), as amended by the OPEN Government Act of 2007, controls Plaintiff's eligibility for attorneys' fees and costs because the present litigation was commenced before, and still pending as of, the statute's effective date. The undersigned further concludes that Plaintiff has substantially prevailed, as that term is defined in § 552(a)(4)(E)(ii)(II), because Defendant voluntarily produced 158 of the 163 tapes that Plaintiff sought. Accordingly the undersigned recommends that the trial court find that Plaintiff is eligible for an award of attorneys' fees.

Davis v. Dep't of Justice, slip op. at 8.

Sincerely yours,



Peter M. Lacy ("Mac"), Senior Attorney
Oregon Natural Desert Association

Of Attorneys for Plaintiff-Appellee

917 SW Oak Street, Suite 408
Portland, OR 97205
503-525-0193
lacy@onda.org

Cc: Mark Pennak [VIA FEDERAL EXPRESS]
Attorney for defendant-appellants Carlos Gutierrez *et al.*