



Oregon Natural Desert Association

May 15, 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 in support of 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"). I enclose four copies of this letter pursuant to the rule. ONDA filed its motion on February 26, 2008 and the briefing on that motion is complete. ONDA files this supplemental authority in addition to the separate authority ONDA submitted to the Court by letter dated May 1, 2008.

On May 14, 2008, yet another court ruled that the attorney fee provision in the OPEN Government Act of 2007 applies retroactively to pending FOIA cases. United States District Judge Donald W. Molloy, of the District of Montana, ruled that "[u]nder the principles set forth in [Bradley v. Richmond School Bd., 416 U.S. 696 (1974)] and [Landgraf v. USI Film Prods., 511 U.S. 255 (1994)], the OPEN Government Act applies" retroactively to cases filed before the statute's enactment. Wildlands CPR v. U.S. Forest Serv., No. CV-06-101-M-DWM (D. Mont. May 14, 2008), slip op. at 9 (attached hereto as Attachment A). This is the same position ONDA argues in its briefing in support of its motion to dismiss Commerce's appeal.

Quoting Landgraf, Judge Molly concludes that the government's argument in favor of a "presumption against retroactivity" is "easily dispatched":

[T]he attorney's fee provision at issue in Bradley did not resemble the cases in which we have invoked the presumption against statutory retroactivity. Attorney's fee determinations, we have observed, are collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial.

Wildlands CPR v. U.S. Forest Serv., slip. op. at 5-6 (internal quotes omitted and quoting Landgraf, 511 U.S. at 277).

Judge Molloy also rejected the government's "manifest injustice" argument, observing that "[t]he Court in Bradley directly addressed the very argument Defendant makes here, when it found 'no such matured or unconditional right affected by the application of' the intervening statutory amendments at issue in Bradley that altered the standard for awarding attorney fees." Wildlands CPR v. U.S. Forest Serv., slip. op. at 7 (quoting Bradley, 416 U.S. at 720).

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.*