

Oregon Natural Desert Association

June 14, 2007

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

Re: Oregon Natural Desert Association v. Gutierrez et al., No. 06-35851

Dear Ms. Catterson:

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 authorities. I enclose four copies of this letter pursuant to the rule. The authorities cited herein are relevant to the issues raised on appeal by the Department of Commerce, and are decisions issued by this Court after ONDA filed its Answering Brief in this appeal.

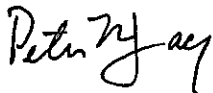
1. V.S. v. Los Gatos-Saratoga Joint Union High Sch. Dist., 484 F.3d 1230 (9th Cir. 2007). The Court held that a hearing officer's determination that a student was deprived of a free and appropriate public education under the Individuals with Disabilities Education Act ("IDEA"), required the school district to do something it otherwise would not have to do, therefore warranting attorney fees under the IDEA's attorney fee provision. This decision is relevant because it follows the existing line of Ninth Circuit cases cited by ONDA in its Answering Brief, which describe what it means to be a "prevailing party" under various attorney fee provisions that use this language similar to the FOIA's "substantially prevailing party" language. See esp. ONDA Br. at 21-25, 39-41. Thus, to be a "prevailing party" a litigant must demonstrate that there has been "a material alteration of the legal relationship of the parties" and that the defendant was "required to do something it otherwise would not have to do." Los Gatos-Saratoga, 484 F.3d at 1233 (citing Shapiro v. Paradise Valley Unified Sch. Dist., 374 F.3d 857 (9th Cir. 2004); Fischer v. SJB-P.D. Inc., 214 F.3d 1115 (9th Cir. 2000)).
2. Whitaker v. Garcetti, -- F.3d --, 2007 WL 1366069 (9th Cir. May 10, 2007). The Court held that it lacked jurisdiction over the plaintiff's request for attorney fees as a prevailing party under 42 U.S.C. § 1988, because the plaintiff waived its right to appeal that claim. This is relevant to ONDA's first argument, set forth in Section II of its Answering Brief, that Commerce waived its attorney fee argument by not appealing the district court's final judgment granting relief, nor the underlying decision denying Commerce's motion to dismiss on mootness grounds. See ONDA

Br. at 12–21. In Whitaker, the plaintiffs raised the issue (concerning the district court’s denial of their request for attorney fees) in their opening brief, but “never filed a notice of appeal on this claim as required by Federal Rule of Appellate Procedure 3(a)(1).” 2007 WL 1366069, at \*11. On April 28, 2005, the plaintiffs filed a notice of appeal from the district court’s partial grant of summary judgment to defendants. On June 16, 2005, the district court denied the plaintiffs’ request for attorney fees. The plaintiffs neither amended their prior notice of appeal nor filed a new notice. Id. The Court explained:

It is the filing of a notice of appeal that invokes our jurisdiction and establishes the issues to be addressed. A timely notice of appeal from the judgment or order complained of is *mandatory and jurisdictional*. Where no notice of appeal from a postjudgment order [regarding] attorneys’ fees is filed, the court of appeals lacks jurisdiction to review the order.

Id. (emphasis in original, quoting Culinary & Serv. Employees Union v. Haw. Employee Benefit Admin., Inc., 688 F.2d 1228, 1232 (9th Cir. 1982)). This is directly analogous (albeit reversed, with respect to which decision *was* and *was not* appealed) to the situation here. As ONDA explains in its brief, Commerce in this case declined to file a notice of appeal of the district court’s April 24, 2006 final judgment granting relief and the underlying decision denying Commerce’s motion to dismiss on mootness grounds. ONDA Br. at 13–14. Instead, Commerce only appealed the district court’s August 9, 2006 order awarding attorneys fees and costs to ONDA. As was the case in Whitaker, Commerce “never filed a notice of appeal on this claim” as required by Rule 3(a)(1). 2007 WL 1366069, at \*11. Because such notice is “mandatory and jurisdictional” Commerce has waived its arguments concerning mootness and the appropriateness of the relief granted by the district court, both of which were decided by that court in its order and judgment dated April 24, 2006.

Sincerely yours,



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