



Oregon Natural Desert Association

May 20, 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
Response to Supplemental Authority Filed by Defendant-Appellees

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 this letter in response to supplemental authority filed by letter dated May 13, 2008 by defendant-appellees Carlos Gutierrez *et al.* (hereafter "Commerce"). I enclose four copies of this letter pursuant to the rule.

Commerce argues that the Eighth Circuit's decision in Bone Shirt v. Hazeltine, -- F.3d --, 2008 WL 1930954 (8th Cir. May 5, 2008), supports its argument that the OPEN Government Act amendments to the FOIA should not be applied retroactively in this case. In Bone Shirt, the Eighth Circuit ruled that awarding expert witness fees under the Voting Rights Act Reauthorization and Amendments Act of 2006 ("VRARA") would have impermissible retroactive effect because it would attach "new legal consequences to events completed before its enactment." 2008 WL 1930954 at *2.

Bone Shirt is readily distinguished from the facts here. As the Eighth Circuit explains in its decision, the Voting Rights Act did *not* have a fee provision prior to the 2006 amendments. Id. Thus, awarding fees would indeed constitute a "new legal consequence" not previously present under that statute. Id.

By contrast here, the Freedom of Information Act ("FOIA") has, since 1974, provided for an award of attorney fees to any substantially prevailing party. 5 U.S.C. § 552(a)(4)(E). Section 4 of the 2007 amendments simply restates Congress's previous intent to award fees to plaintiffs in the type of factual situation present here, by stating that Buckhannon does not apply, and never should have been applied, to FOIA cases. As explained in ONDA's motion to dismiss, Section 4 has no impact on the government's processing of FOIA requests. It does not impose a new penalty for previously proper conduct, because prior law already provided for attorney fee awards to prevailing parties. From the time this action was initiated, Commerce had the obligation to process FOIA requests in accordance with the FOIA and pay attorney fees. See

ONDA Motion to Dismiss, at 10. This is consistent with the Supreme Court's analysis in Landgraf:

In light of the prior availability of a fee award, and the likelihood that fees would be assessed under preexisting theories, we concluded that the new fee statute simply 'd[id] not impose an additional or unforeseeable obligation' upon the school board.

511 U.S. at 278 (quoting Bradley, 416 U.S. at 721).

Accordingly, the Eighth Circuit's decision concerning amendments to the Voting Rights Act is readily distinguishable from this case. Recent decisions in the District of Columbia and Montana district courts (brought to this Court's attention via Fed. R. App. P. 28(j) letters dated May 1 and May 15, 2008) confirm that the attorney fee provision in the OPEN Government Act of 2007 should indeed apply retroactively to pending FOIA cases. Wildlands CPR v. U.S. Forest Serv., No. CV-06-101-M-DWM (D. Mont. May 14, 2008); Davis v. Dep't of Justice, No. 88-130 (D.D.C. Apr. 29, 2008).

Sincerely yours,



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