



Oregon Natural Desert Association

July 3, 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 June 23, 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 Supreme Court's decision in Greenlaw v. United States, 554 U.S. --, 2008 WL 2484861 (June 23, 2008), supports its argument that ONDA may not rely on the catalyst theory to justify the district court's attorney fee award in ONDA's favor. Greenlaw discusses the principle of party presentation and the cross-appeal rule. However, for reasons already explained in ONDA's briefing before this Court, Greenlaw does not help Commerce's position.

First, by failing to appeal the district court's final judgment on the merits granting relief (nor the underlying district court decision rejecting Commerce's relief-based mootness arguments), Commerce has waived its relief- and mootness-based arguments. See ONDA Answering Br. at 12-21; ONDA Reply in Support of Motion to Dismiss at 1-2. The only district court decision on appeal is "the Opinion and Order on Plaintiff's Motion for Attorney Fees entered in this action on August 9, 2006." ER 65 (Commerce's Notice of Appeal). As observed by the Court in Greenlaw:

[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. Counsel almost always know a great deal more about their cases than we do, and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us.

Greenlaw, slip op. at 5–6 (quoting United States v. Samuels, 808 F.2d 1298, 1301 (8th Cir. 1987)). Thus, “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.” Id. at 8. Here, Commerce decided not to appeal the district court’s final judgment on the merits. It cannot now bootstrap mootness and scope of relief issues into its attorney fee appeal.

Second, Commerce is wrong in stating that application of the catalyst theory would “impermissibly ‘alter the judgment’” in this case. This Court may affirm the district court’s fee award decision under any grounds supported by the record and is not limited to reviewing the district court’s stated basis for its fee decision. Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1097 (9th Cir. 2003). In responding to Commerce’s appeal, ONDA does not seek to somehow expand the relief received—*i.e.*, alter the judgment in some way. See ONDA Reply in Support of Motion to Dismiss at 2. ONDA simply asks this Court to affirm, unaltered, the district court’s fee award in ONDA’s favor and dismiss Commerce’s appeal based on Congress’s clear intent in enacting the OPEN Government Act. By confirming the availability of the catalyst theory in the OPEN Government Act, Congress reaffirmed its previous intent that fees are available to prevailing parties in FOIA cases. The FOIA amendments do not alter the scope of the government’s legal duties or a requester’s right to request records and have them processed properly under the FOIA.

The cross-appeal rule at issue in Greenlaw, which in part is intended to provide fair notice to litigants by barring modification of a judgment in favor of a party who filed no notice of appeal, is irrelevant here. Because the 2007 FOIA amendments do not change the fact that the government has always been liable to prevailing parties for attorney fees under FOIA, this Court, by upholding the district court’s attorney fee award, will not be “modifying” either the order actually appealed by Commerce (the August 7, 2006 fee award decision) or the final judgment on the merits (April 24, 2006). Accordingly, Commerce’s supplemental authority does not help its arguments in this appeal.

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.*