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UTAH PRAIRIE DOG ONLY IN UTAH SO NO FEDERAL ESA PROTECTION

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A Utah federal district court has ruled that the United States Constitution does not authorize the U.S. Fish and Wildlife Service ("FWS") to regulate impacts to the Utah prairie dog as a listed "threatened" species living on private lands within a single state. *People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Service*, No. 2:13-cv-00278-DB (D. Utah Nov. 5, 2014). The ruling departs from five federal appellate courts that have reached the opposite conclusion for other similarly situated species, and calls into question some of the key legal foundations of the Endangered Species Act ("ESA") as applied to species with confined ranges.

The case arises from FWS's designation of the Utah prairie dog as a "threatened" species and its subsequent issuance and modification of a special rule under Section 4(d) of the ESA, which allowed take of the species on private land under certain narrow circumstances. Here, FWS had authorized five to six thousand takes per year on private lands within the Utah prairie dog's range, until 2012 when FWS changed its 4(d) rule to impose a permit requirement and sharply limit the scope of the lands where future takes could be authorized. The regulatory changes restricted private property owners' ability to develop their land for fear of unauthorized take of the Utah prairie dog and resulting FWS enforcement. This spurred a landowners group (People for the

Ethical Treatment of Property Owners, or "PETPO"), to file suit under the Administrative Procedure Act, alleging that the section 4(d) rule was unconstitutional.

The Court agreed with PETPO, ruling that neither the Commerce Clause nor the Necessary and Proper Clause authorizes Congress or, by delegation, FWS to regulate the Utah prairie dog because the species is located exclusively in Utah and does not substantially affect interstate commerce. The Court rejected as too attenuated the federal government's argument that the loss of tourism, scientific research, and publications caused by the potential extinction of the species would substantially affect interstate commerce. The Court also disagreed with Defendants' contention that "the Necessary and Proper Clause authorizes special rule 4(d) because the rule is essential to the economic scheme created by the ESA." *Id.* at 13. Instead, the court ruled that "there is no evidence that the diminution of the Utah prairie dog on private lands in Utah would significantly alter the supply or quality of animals for which a national market exists" and that "there is no evidence that the extinction of the Utah prairie dog would cause any other species to lose value or likewise become extinct." *Id.* at 15.

The case's full implications for ESA protections, and for transportation and other projects potentially impacting listed species, are not yet clear. Because many listed species occur only in a single state, the Court's reasoning, if upheld, could significantly curtail FWS's ability to protect threatened and endangered species. In particular, because the ESA does not prohibit takes of threatened species—protection of those species is grounded in a blanket 4(d) rule—the decision immediately casts doubt on FWS's authority to list species as threatened when they live within a single state.

The opinion also raises other important questions regarding FWS's ESA authority to regulate impacts on species and their habitat within a state. Some of these issues could be beneficial to landowners and developers. For example, the *PETPO* decision arguably could be extended to limit FWS's ability to designate critical habitat for listed species within a single state or could call into question ESA listing decisions based on FWS's new "significant portion of a species' range" policy when the species population that triggers the listing occurs within a single state.

On the other hand, some of the unanswered questions could prove problematic to private stakeholders. For example, even where a listed species inhabits multiple states, *PETPO* may threaten FWS's ability to develop a 4(d) rule authorizing take of the species within a single state. With less flexibility to tailor 4(d) rules to specific locations, FWS could be forced to develop broader regulations covering the entire range of a species, a far more difficult undertaking, and may instead decide not to issue a 4(d) rule at all—an outcome that likely would prove costly to project proponents.

The ruling has been appealed to the Tenth Circuit. And it is not unreasonable to think that the decision ultimately could make its way to the U.S. Supreme Court, given that it highlights an unresolved issue of constitutional law and statutory interpretation under the ESA that has received divergent treatment among the federal appellate courts—they have all upheld FWS's powers to regulate in-state species, but for different reasons. That said, it is important to recognize that the decision is highly fact-specific—

it only applies to a species residing on private land in a single state and rests on a constrained view of that species' economic value. Stay tuned.

EIS AND CONFORMITY DETERMINATION FOR PM 2.5

UPHELD FOR SOUTHERN CALIFORNIA FREEWAY

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The Port of Long Beach together with the Port of Los Angeles comprise one of the ten busiest port complexes in the world, handling approximately 40 percent of all waterborne cargo that enters the United States. In addition to providing great economic benefits to the region, however, the port complex also affects air quality in the areas surrounding the ports, in particular the communities of San Pedro and Wilmington. As the ports' cargo volumes are projected to continue to rise during the coming decades, the negative air impacts are likewise projected to increase over time. The State Route 47 Expressway Project, a joint effort of the California Department of Transportation (Caltrans) and the Federal Highway Administration (FHWA), is among several planned projects intended to address traffic congestion and related air pollution in the port area. This project will consist of an elevated 1.7-mile-long expressway that will connect the Ports of Los Angeles and Long Beach to the I-405 freeway. FHWA and Caltrans contend that better integrating the ports with the existing freeway system will reduce the need for trucks bearing shipping containers to use surface streets, thus reducing air pollution by reducing traffic congestion and idle time at railroad crossings and traffic signals. The Real Party In Interest, the Alameda Corridor Transportation Authority (ACTA), will build the project.

During the project's approval process, Caltrans, in its role as NEPA lead agency under assignment from FHWA pursuant to 23 U.S.C. 327, prepared an Environmental Impact Statement (EIS), releasing a draft in August 2007. In response to comments generated by that draft, including comments from Natural Resources Defense Council (NRDC), Caltrans as lead agency and ACTA as the project proponent conducted additional studies, including a Traffic Sensitivity Analysis and a Health Risk Assessment, and recirculated the document for additional public comment. The final EIS was released in May 2009, and the Record of Decision was signed in August of that same year.

Also during the approval process, a PM2.5 conformity analysis was prepared under the direction of Caltrans, and FHWA ultimately issued a final Conformity Determination for the project in May 2009. The conformity determination was based on a qualitative "hot spot" analysis to measure concentrations of PM 2.5, as required by the then-applicable federal rules and guidance. The hot spot analysis was based on data from a receptor located five miles from the project area.

In November 2009, Plaintiffs NRDC and two citizens' groups – East Yard Communities for Environmental Justice and Coalition for a Safe Environment – filed a complaint in the Central District of California, claiming that Defendants Caltrans and the United States Department of Transportation (USDOT), along with Real Party in Interest ACTA, had

violated the Clean Air Act (CAA), the National Environmental Policy Act (NEPA), and the Administrative Procedures Act (APA) in approving the project. (United States District Court, Central District, No. CV09-8055.) The Plaintiffs challenged the CAA conformity determination, the adequacy of the EIS, the range of alternatives and the climate change analysis. Pursuant to an agreement of the parties, the court addressed the matters via cross-motions for summary judgment. In its order issued on June 29, 2012, the District Court found that the Plaintiffs had failed to establish that Defendants' approval of the project was not in compliance with the CAA, NEPA or the APA and granted summary judgment in favor of the Defendants.

On appeal, Plaintiffs argued that Defendants' CAA Conformity Determination was arbitrary and capricious because Defendants had failed to investigate emissions closer to the neighborhoods adjacent to the project where the emissions were expected to be the greatest. This failure violated the CAA and applicable regulations requiring that to be considered in conformity, a project "will not […] (ii) increase the frequency or severity of any existing violation of any standard *in any area*; or (iii) delay timely attainment of any standard or required interim emission reductions or other milestones *in any area*." (42 U.S.C. § 7506(c)(1)(B), italics added.) The Court here recognized that resolution of Plaintiffs' CAA claim depended upon the meaning of the phrase "any area"; however, none of the applicable statutes, regulations, or guidance defines that term. Plaintiffs argued that based on the plain meaning of the term, "any area" means " 'all' or 'every' part of the 'area' affected by project emissions. Concluding that the term "area" resulted in a "critical, obvious ambiguity in the phrase," the Court instead found that the term "any area" is ambiguous. Pursuant to the holding in *Chevron v. NRDC*, 467 U.S. 837, 842 (1984), the Court then looked to the relevant EPA regulations for an interpretation but found none. Ultimately, the Court found that the Conformity Guidance promulgated by the Environmental Protection Agency (EPA) and the USDOT "fills this void by interpreting these ambiguous regulations to permit the type of analysis Defendants performed here." And because this interpretation was not " 'plainly erroneous or inconsistent with the regulation,' " the Court held that it must afford that interpretation considerable deference, consistent with the holding in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), and that the Defendants' Conformity Determination was not, therefore, arbitrary and capricious.

Plaintiffs further argued that Defendants' EIS violated NEPA because it relied on outdated air quality standards for its analysis of the project's potential environmental impacts. The updated standards, however, were not in effect for transportation conformity purposes until December 2010, over a year after the Conformity Determination was completed, and the Court found in favor of the Defendants on this issue as well. Additionally, Plaintiffs claimed that the Defendants had failed to fully disclose the project's likely effects on public health. The Court concluded that the EIS and its underlying studies, including an extensive HRA, appropriately examined and analyzed the potential public health effects. Accordingly, the Court was satisfied that the Defendants had taken the requisite "hard look" at the project's likely consequences and potential alternatives, and held that the EIS had complied with NEPA. The District Court's granting of summary judgment in favor of the Defendants was affirmed in full.

Natural Resources Defense Council, et al. v. United States Dept. of Transportation, et al.

770 F.3d 1260 (9th Circuit 2014)

EQUAL ACCESS TO JUSTICE ACT: WHY PREVAILING ON ONLY 1 OUT OF 3 CLAIMS IN OREGON FORESTRY CASE CAN STILL BE QUITE REWARDING

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Generally, a failure rate of two-thirds would indicate that what you are doing isn't profitable. However, when dealing with environmental law, that clearly isn't the case. In *Cascadia Wildlands v. Bureau of Land Management*, 987 F.Supp.2d 1085 (D. Or. 2013), after prevailing on only one of three claims, and after the district court imposed a variety of reductions, the court awarded plaintiffs approximately three-quarters of the attorneys' fees requested and 100% of the costs.

In 2010, the Bureau of Land Management ("BLM") completed its environmental assessment ("EA") for the Alsea River Watershed Restoration project. The project authorized, among other things, commercial thinning on public lands. In 2011, after exhausting their administrative remedies, plaintiffs filed a lawsuit in federal court alleging that the EA violated the Federal Land Policy and Management Act ("FLPMA") and the National Environmental Policy Act ("NEPA") because it failed to analyze whether the project would harm the red tree vole.

On cross-motions for summary judgment, the district court ruled in favor of the defendants on two of the claims, and in favor of the plaintiffs on the third and final claim. Specifically, the district court found that the BLM did not violate the FLPMA by authorizing the project prior to conducting a pre-disturbance survey for red tree vole sites, and that the BLM had taken the requisite "hard look" at the project's effects on the vole as mandated by NEPA. However, the district court also found that the BLM violated NEPA by failing to adequately consider a 12-month finding issued by the U.S. Fish and Wildlife Service after the adoption of the EA, which concluded that listing of the north Oregon Coast population of the red tree vole was warranted but precluded by higher priority species. As a result of this finding, the district court enjoined the BLM from going forward with the project until a supplemental EA was completed. Because of their partial victory, plaintiffs sought fees under the Equal Access to Justice Act ("EAJA").

The purpose of the EAJA is to eliminate the financial deterrent for a private individual to challenge unreasonable government action. *Commissioner v. Jean*, 496 U.S. 154, 163 (1990). Under the EAJA, "a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the

court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d). In the Ninth Circuit, the EAJA has been parsed into a two-part test:

> (1) Was the plaintiff a prevailing party?
>
> (2) Was the government substantially justified or are there special circumstances that exist that would make an award of fees unjust?

See Flores v. Shalala, 49 F.3d 562, 567 (9th Cir. 1995).

Addressing the first part of the two-part test, the district court found that it was undisputed that plaintiffs were the prevailing parties. Thus, the district court briefly turned to the second part of the test. The court found that in an attempt to oppose an award of fees, the defendants essentially attempted to reargue the merits. The district court rejected these efforts in short order, stating that it was bound by its previous holding, and therefore the only issue was the appropriate amount of fees and costs to award.

In addition to opposing an award of fees, defendants also attempted to reduce any amount awarded by arguing that an award should be limited to the time spent on the sole NEPA claim that plaintiffs prevailed on. The district court agreed in part with defendants' argument.

The district court explained that in the Ninth Circuit, when a lawsuit is comprised of distinct claims, an award of fees should not include the time spent on the claims that plaintiffs failed to prevail on. Analyzing the claims at issue, the district court found that the failed FLPMA claim was distinct from the successful NEPA claim, as the FLPMA claim was "legally, factually, and temporally distinct from plaintiffs' successful NEPA claim." The district court reached the opposite conclusion with respect to the two NEPA claims, stating:

> [P]laintiff's unsuccessful NEPA claim centered on the reasonableness of the BLM's evaluation of evidence that existed before the authorization of the [project], whereas plaintiffs' successful NEPA claim focused on the reasonableness of the BLM's failure to analyze new evidence that emerged five months after the 2010 EA. Nevertheless, the relief sought pursuant [to] these claims was identical. . . Under these circumstances, the Court cannot conclude that plaintiffs' unsuccessful NEPA claim is separate and distinct from their successful NEPA claim.

Therefore, the court deducted from the fee award any time "clearly attributable" to the FLPMA claim.

The district court further reduced the number of compensable hours in light of the limited success obtained by plaintiffs. The court described its ruling as providing merely

"limited relief," and not significantly effecting the status of the proposed project, as the BLM could examine the new information, find that it either did not impact the prior NEPA analysis or only required slight revisions, and proceed with the project under a substantially similar EA. Thus, the court found that a 15% reduction in the total amount of compensable hours was warranted. The district court also refused to award fees based on time spent for clerical tasks, for which there was an inadequate description, and for preparing expert declarations for a motion that was never filed.

Finally, the district court turned to the issue of hourly rates. While the EAJA provides for a statutory rate, the court explained that it has the discretion to award fees in excess of those hourly rates if the attorney possesses distinctive knowledge and specialized skill that was important to the litigation and not otherwise available at the statutory rate. Applying this rubric, the district court found that an upward departure from the statutory rate was appropriate for plaintiffs' lead attorney, who had over 20 years of environmental litigation experience, but not appropriate for two other counsel who graduated from law school in 2011.

Multiplying the compensable hours by their respective court-adjusted hourly rates, the district court found that a fee award of $75,035 was appropriate. As plaintiffs had requested an award of $99,918.45, the court's fee award represented a haircut of only 25%. Thus, although plaintiffs lost on two-thirds of their claims, and the court acknowledged that its ruling provided "limited relief" that did not significantly affect the status of the project, plaintiffs were able to recover three-quarters of their requested fees and all of their costs.

SAN DIEGO MPO's ANALYSIS OF RTP'S GREENHOUSE GAS EMISSIONS REJECTED

Submitted by

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In a decision with implications for all transportation projects in California, the California Court of Appeal held that the analysis of greenhouse gas emissions from transportation projects in a metropolitan transportation plan violated the California Environmental Quality Act ("CEQA"). The metropolitan planning organization for San Diego, the San Diego Association of Governments ("SANDAG"), certified an environmental impact report ("EIR") evaluating the impacts of the San Diego metropolitan transportation plan. The transportation plan also serves as a Sustainable Communities Strategy to implement state law regarding regional housing needs and to comply with regional targets for reductions in greenhouse gas emissions from autos and light trucks. SANDAG concluded that the transportation plan achieved greenhouse gas emission reductions for 2020 and 2035 approved by the California Resources Board (CARB) for the San Diego region.

The EIR disclosed that GHG emissions in the SANDAG region would increase after 2035 with implementation of the transportation plan as a result of population increases, but the EIR did not analyze whether the transportation plan was consistent with the much more aggressive 2050 GHG's reduction goal in the Executive Order adopted by Governor Schwarzenegger in 2005. The Executive Order established a goal of reducing GHG emissions to 1990 levels by 2020 and to 80 percent below 1990 levels by 2050. In 2006 the Legislature enacted a law ("AB 32") that required CARB to determine the state's 1990 GHG emission level and to identify GHG reductions to achieve the 2020 goal. In 2008 the Legislature enacted another law ("SB 375") that directed CARB to establish regional GHG reduction targets for autos and light trucks for 2020 and 2035. Neither AB 32 nor SB 375 required CARB to establish GHG reduction targets to achieve the Executive Order's 2050 reduction goal, but SB 375 required CARB to update the regional GHG reduction targets through 2050.

In a 2-1 decision, the Court held that SANDAG violated CEQA because the EIR (1) did not evaluate the RTP's consistency with the 2050 GHG emission reduction goal in the Executive Order, and (2) did not evaluate adequately alternatives and mitigation measures that could "substantially lessen the [RTPs'] significant" GHG emissions impacts.

The Court reasoned that the Legislature endorsed the Executive Order's 2050 goal because the Legislature tasked CARB with establishing GHG emission reduction targets after 2020, and required CARB to revisit the SB 375 regional emission targets every eight years through 2050. The Court concluded that the "EIR's failure to analyze the transportation plan's consistency with the . . . Executive Order's overarching goal of ongoing greenhouse gas emission reductions, was therefore a failure to analyze the transportation plan's consistency with state climate policy."

SANDAG has voted to seek review of the decision by the California Supreme Court.

Cleveland National Forest Foundation v. San Diego Association of Governments, 231 Cal.App.4th 1056 (2014).

NEXT DEADLINE IS MARCH 16, 2015

Anyone interested in submitting an article for the April, 2015 edition of this newsletter should submit to the Editor at Richard.christopher@hdrinc.com by close of business on March 16, 2015. Please use Microsoft Word.