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NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

OTAY MESA PROPERTY L.P.,)
a California limited partnership;)
RANCHO VISTA DEL MAR,)
a California corporation,)
and OTAY INTERNATIONAL, LLC,)
a California limited liability company,)
5440 Morehouse Drive)
Suite 4000)
San Diego, CA 92121,)

Plaintiffs,)

v.)

UNITED STATES DEPARTMENT OF)
THE INTERIOR,)
1849 C Street, N.W.)
Washington, DC 20240,)

UNITED STATES FISH)
AND WILDLIFE SERVICE,)
1849 C St., NW)
Washington, D.C. 20240.)

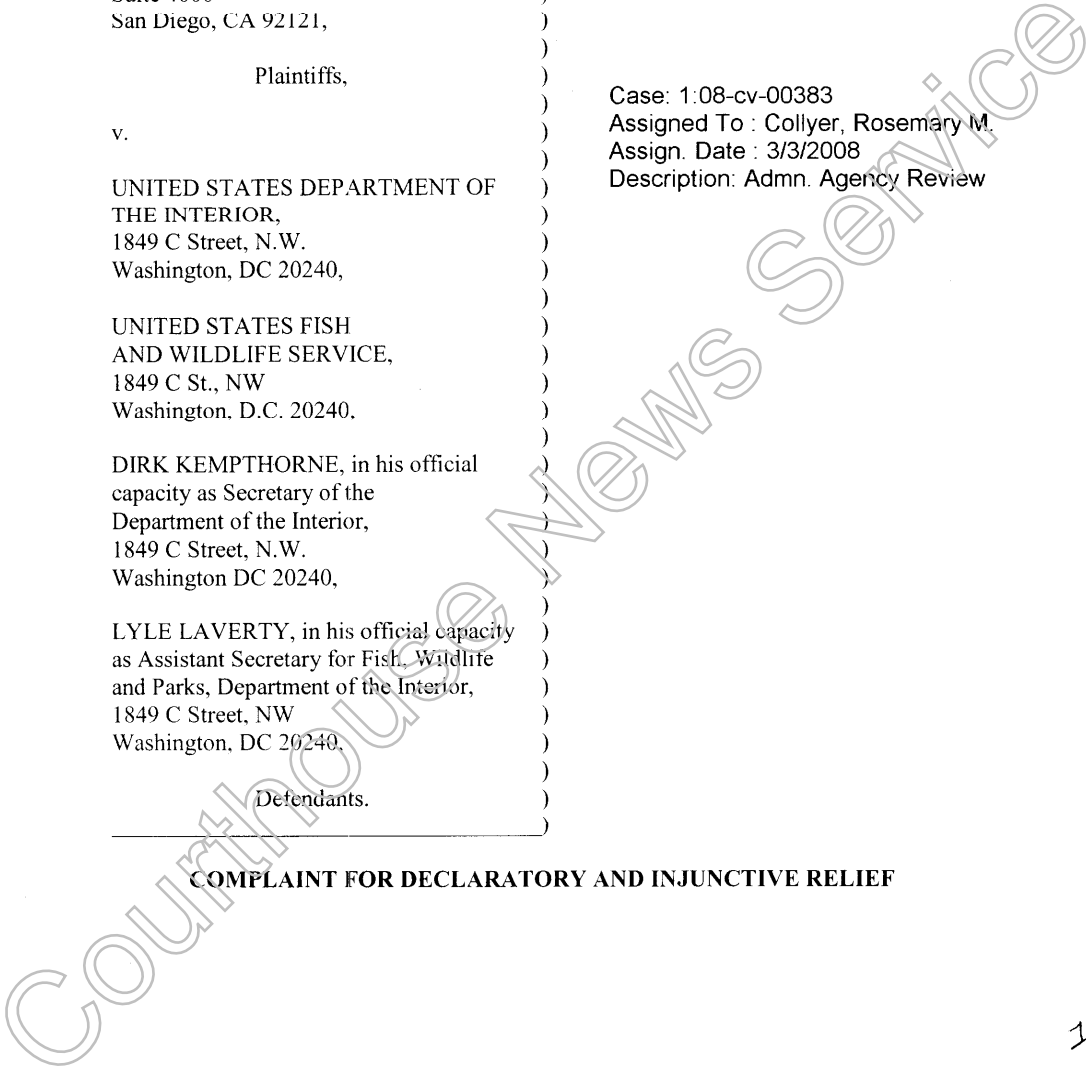
DIRK KEMPTHORNE, in his official)
capacity as Secretary of the)
Department of the Interior,)
1849 C Street, N.W.)
Washington DC 20240,)

LYLE LAVERTY, in his official capacity)
as Assistant Secretary for Fish, Wildlife)
and Parks, Department of the Interior,)
1849 C Street, NW)
Washington, DC 20240.)

Defendants.)

Case: 1:08-cv-00383
Assigned To : Collyer, Rosemary M.
Assign. Date : 3/3/2008
Description: Admn. Agency Review

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF



This is a suit under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706 (2006), to declare unlawful and set aside a final rule promulgated by the United States Fish and Wildlife Service designating portions of the land owned by Plaintiffs as critical habitat for the San Diego fairy shrimp (*Branchinecta sandiegonensis*), an endangered species, on the ground that the record contains no evidence that Plaintiffs' lands meet the statutory and regulatory definitions of critical habitat for the fairy shrimp. Because Plaintiffs' lands do not, in fact, contain fairy shrimp critical habitat, this rule so designating them, as it applies to Plaintiffs' lands, is arbitrary, capricious, and not in accordance with law.

Parties

1. Plaintiff Otay Mesa Property, L.P., is a limited partnership organized under the laws of the State of California and the owner in fee of several parcels of unimproved land in the Otay Mesa area of San Diego County, 74.55 acres that have been designated as critical habitat for the San Diego fairy shrimp, as described below. These lands are shown on Exhibit 1.

2. Plaintiff Rancho Vista Del Mar is a corporation organized under the laws of the State of California and the owner in fee of several parcels of unimproved land in the Otay Mesa area of San Diego County, 120 acres that have been designated as critical habitat for the San Diego fairy shrimp, as described below. These lands are shown on Exhibit 1.

3. Plaintiff Otay International, LLC, is a limited liability corporation organized under the laws of the State of Nevada and the owner in fee of approximately 80 acres of unimproved land in the Otay Mesa area of San Diego County that have been

designated as critical habitat for the San Diego fairy shrimp, as described below. These lands are shown on Exhibit 1.

4. Defendant, United States Department of the Interior, is an agency of the federal government, which is authorized to designate critical habitat for endangered species under 16 U.S.C. § 1533(a)(3)(A). Defendant, Secretary of the Interior Dirk Kempthorne, is sued in his official capacity as the officer of the United States charged with proper implementation of the Endangered Species Act, including the designation of critical habitat.

5. Defendant, United States Fish and Wildlife Service, is an agency of the Department of the Interior, which promulgated the rule under examination. Defendant, Assistant Secretary for Fish, Wildlife, and Parks, Lyle Laverty, is sued in his official capacity as the officer in charge of the United States Fish and Wildlife Service, the agency of the Department of the Interior, which published and administers the final rule under examination, designating Plaintiffs' land as critical habitat for the San Diego fairy shrimp.

Jurisdiction and Venue

6. This Court has jurisdiction under 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 702 (the APA), and 28 U.S.C. § 2201 (the Declaratory Judgment Act).

7. Specifically, the APA authorizes this Court to review final agency action and authorizes the Court to hold unlawful and set aside such action, findings, and conclusions when they are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of

statutory right; without observance of procedure required by law; or unsupported by substantial evidence. 5 U.S.C. § 706(2)(A)-(E).

8. This agency action became final on January 11, 2008, and is now ripe for review. Designation of Critical Habitat for the San Diego Fairy Shrimp, 72 Fed. Reg. 70,648 (Dec. 12, 2007) (to be codified at 50 C.F.R. pt. 17).

9. Venue is proper in the District of Columbia under 28 U.S.C. § 1391(e), as this is a civil action against two agencies of the United States and two officers of the United States, acting in their official capacities, brought in the district court in which they reside.

Statutory and Regulatory Framework

10. The Endangered Species Act (ESA) authorizes the Secretary of Interior to list a species as “endangered” if he finds that it is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). Once a species is listed as endangered, the Secretary has a duty, “to the maximum extent prudent and determinable,” to concurrently, “designate any habitat of such species which is then considered to be critical habitat.” 16 U.S.C. § 1533(a)(3)(A).

11. “Critical habitat” for an endangered species is defined in the ESA as follows:

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection

16 U.S.C. § 1532(5)(A).

12. The ESA requires the Secretary to make the designation of critical habitat and make revisions to the designation, “on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.” 16 U.S.C. § 1533(b)(2). It gives the Secretary the discretion to exclude any area from critical habitat if he determines that “the benefits of such exclusion outweigh the benefits of specifying such an area as part of the critical habitat,” unless he determines, “based on the best scientific and commercial data available,” that to do so will result in the extinction of the species. 16 U.S.C. § 1533(b)(2).

13. Department of the Interior regulations prescribe that:

When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

Criteria for Designating Critical Habitat, 50 C.F.R. § 424.12(b)(5).

Operative Facts

14. The San Diego fairy shrimp (*Branchinecta sandiegonensis*) is a small aquatic crustacean in the order *Anostraca*, generally restricted to vernal pools and other ephemeral basins in coastal Orange and San Diego Counties in southern California and in northwestern Baja California, Mexico. Under the authority of the Endangered Species Act, on February 3, 1997, Defendants published a final rule listing the fairy shrimp as an

endangered species. Determination of Endangered Status for the San Diego Fairy Shrimp, 62 Fed. Reg. 4,925 (Feb. 3, 1997) (codified at 50 C.F.R. § 17.11).

15. On October 23, 2000, Defendants published a final rule designating approximately 4,025 acres of critical habitat for the San Diego fairy shrimp in Orange and San Diego Counties, California. Plaintiffs' land was not included in this designation. Final Determination of Critical Habitat for San Diego Fairy Shrimp, 65 Fed. Reg. 63,438 (Oct. 23, 2000) (to be codified at 50 C.F.R. pt. 17)

16. Defendants' October 23, 2000 final rule designating critical habitat for the San Diego fairy shrimp was challenged in an Administrative Procedure Act lawsuit filed by multiple parties, including the Building Industry Association of Southern California, the National Association of Home Builders, and the Foothill/Eastern Transportation Corridor Agency. Following various proceedings in that case, Defendants requested remand of the final rule for further consideration and, on June 11, 2002, the U.S. District Court for the Central District of California granted that request.

17. Following their reconsideration, on April 22, 2003, Defendants published a new proposed rule to revise their October 23, 2000 final rule and designated approximately 6,098 acres of land within Orange and San Diego counties, California, as critical habitat for the San Diego fairy shrimp. That proposed rule is found at 68 Fed. Reg. 19,888.

18. In contrast to the 2000 final rule, the 2003 proposed rule included as proposed critical habitat a substantial portion of Plaintiffs' land.

19. On April 19, 2007 and at the request of the U.S. Fish and Wildlife Service, Plaintiffs submitted written comments on the 2003 proposed rule, pointing out that

Plaintiffs' land did not contain the physical and biological features necessary to the conservation of the San Diego fairy shrimp, and that it therefore did not meet the statutory definition for designation as critical habitat as proposed by Defendants.

20. Nevertheless, without explanation, on December 12, 2007, Defendants published a final rule designating Plaintiffs' land as critical habitat for the San Diego fairy shrimp. That final rule is found at 72 Fed Reg. 70,648. This rule became effective January 11, 2008. (A map of Plaintiffs' land, showing the designated critical habitat in blue, is attached as Exhibit 1.)

**CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF
(Administrative Procedure Act, 5 U.S.C. §§ 702, 706)**

21. 5 U.S.C. § 702 provides that the actions of each agency of the government of the United States is subject to judicial review. Section 706 provides that, in all cases, agency action must be set aside if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or immunity"; "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"; "without observance of procedure required by law"; or "unsupported by substantial evidence." Agencies must maintain a record in support of their action, and there must be evidence in that record to support the agency action.

22. Defendants' designation of Plaintiffs' land as critical habitat for the San Diego fairy shrimp is arbitrary, capricious, and otherwise not in accordance with law because, *inter alia*:

There is no evidence in the record to support the statutorily required finding that Plaintiffs' land is one of "the specific areas within the geographical area occupied by the

species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features” that are “(I) essential to the conservation of the species and (II) which may require special management considerations or protection,” as required by 16 U.S.C. § 1532(5)(A)(i).

There is no evidence in the record to support a finding that Plaintiffs’ land possesses the principal constituent elements identified for fairy shrimp conservation, viz.:

(i) Vernal pools with shallow to moderate depths (2 in. (5 cm.) to 12 in. (30 cm.)) that hold water for sufficient lengths of time (7 to 60 days) necessary for incubation, maturation, and reproduction of the San Diego fairy shrimp, in all but the driest years;

(ii) Topographic features characterized by mounds and swales and depressions within a matrix of surrounding uplands that result in complexes of continuously, or intermittently, flowing surface water in the swales connecting the pools described in paragraph (2)(i) of this entry, providing for dispersal and promoting hydroperiods of adequate length in the pools (i.e., the vernal pool watershed); and,

(iii) Flat to gently sloping topography, and any soil type with a clay component and/or an impermeable surface or subsurface layer known to support vernal pool habitat (including Carlsbad, Chesterton, Diablo, Huerhuero, Linne, Olivenhain, Placentia, Redding, and Stockpen soils).

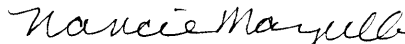
There is no evidence in the record to support Defendant’s finding, pursuant to Executive Order 12,630, that designation of Plaintiffs’ land as critical habitat for the San Diego fairy shrimp “does not pose significant takings implications for lands within or affected by the designation.” Exec. Order 12,630, 53 Fed. Reg. 8,859 (Mar. 18, 1988).

23. As a result of Defendants' wrongful acts, Plaintiffs have suffered and will continue to suffer substantial and irreparable injury by reason of their inability to develop and market this highly valuable land. This damage will continue until this Court sets aside Defendants' wrongful designation of Plaintiffs' land as critical habitat for the San Diego fairy shrimp. Plaintiffs have no plain, speedy or adequate remedy in the ordinary course of law, and pecuniary damages are inadequate.

WHEREFORE, Plaintiffs pray for relief as follows:

1. An order of this Court declaring unlawful and setting aside that portion of Defendants' December 12, 2007 final rule designating Plaintiffs' land as critical habitat for the San Diego fairy shrimp, and permanently enjoining Defendants from enforcing that final rule as it applies to Plaintiffs' land;
2. Attorneys' fees and costs for the bringing of this action; and,
3. Such other and further relief as the Court may deem just.

Respectfully submitted,



Nancie G. Marzulla, D.C. Bar No. 400985 ✓

Roger J. Marzulla, D.C. Bar No. 394907

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Dated: March 3, 2008

Counsel for Plaintiffs