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Subject Summary of Eagle Decision

For those interested, here is Ben's summary of the eagle decision:

Subject: The Eagle Has Landed ...

... Or it will in 6 months. The court in the eagle delisting suit (Contoski v. Scarlett (D. Minn. Aug 10, 2006) (Sullins, Rothstein, and Gayer, lead SOL attorneys?) issued an opinion setting a deadline for a final determination (Feb. 17, 2007). Plaintiff sought to have the court order FWS to make a determination on the outstanding 1999 proposal to delist bald eagles.

The court first rejected our standing argument. I usually don't get wrapped up in standing issues, but this one merits discussion. We argued that plaintiff (a landowner with an eagle nest on his property, which he wants to develop) lacked a redressible injury because even after delisting the eagle would be protected by the Eagle Act, which would still prevent development. Plaintiff argued that the Eagle Act does not prevent habitat modification, and therefore that he could develop the property after delisting. The court disagreed with the plaintiff:

There is no merit to plaintiff's argument that the Eagle Protection Act cannot prohibit adverse modification of bald eagle habitat. Both the ESA and the Eagle Protection Act prohibit the take of bald eagles, and the respective definitions of "take" do not suggest that the ESA provides more protection for bald eagles than the Eagle Protection Act. . . . The plain meaning of the term "disturb" is at least as broad as the term "harm," and both terms are broad enough to include adverse habitat modification.

Slip op. at 5-6. Nonetheless, the court found that plaintiff has standing because delisting of the eagle will remove one barrier to the development. Id. at 6-7.

Next, the court rejected our prudential mootness argument. We argued that because we recently reopened the comment period on the proposed delisting, the court should refrain providing plaintiff with relief. The court noted that there is no guarantee that there will not be further delays. Id. at 7-8.

Nonetheless, the court used its equitable discretion to provide FWS with a "reasonable amount of time" to consider the new information received in the recent comment period, ordering a final determination "no later than February 16, 2007, unless defendants present persuasive evidence of just cause for further limited delay." Id. at 8-9. The court also ordered FWS to file a status report with an estimate of when it will issue the final determination, and denied plaintiff's request for fees.

#### Commentary

The court's discussion with respect to the relationship of "harm" and "disturb" is relevant to the current rulemaking to define "disturb," and could be important to the future management of the eagle under the Eagle Act (and thus to the analysis of existing regulatory mechanisms for delisting

purposes). Depending on the nature of future legal challenges to the "disturb" regulation, this case could be helpful to FWS or used as a weapon against FWS. If strictly construed, the court's language could undermine any definition of "disturb" that in any circumstances does not apply where "harm" would. For example, the proposed definition of "disturb" requires that eagles be agitated or bothered by the activity in question, whereas there is no such requirement under the regulatory definition of "harm," and one can imagine numerous scenarios under which habitat-related "harm" would occur without agitation or bothering.

The court could hardly have been more deferential in the amount of time it gave FWS: a year from the reopening of the comment period, with the express possibility of a further limited extension. On the other hand, given the complications of coordinating the delisting decision with the regulation defining "disturb" and the Management Guidelines, it may be difficult for FWS to comply with the deadline.

Ben

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