

April 2004

Interesting developments in The Cetacean Community v. Bush and Rumsfeld, lawsuit.

For those who are following The Cetacean Community v. Bush and Rumsfeld, the past week brought a very interesting development.

To summarize the litigation to date, The Cetacean Community (Whales, Dolphins, and Porpoises) sued President Bush and Secretary of Defense Rumsfeld for failing to prepare any environmental assessment for the use of low frequency active sonar (LFAS) during threat and warfare conditions. The environmental impact statement (EIS), letters of authorization (LOA) for "takes" of marine mammals issued by the National Marine Fisheries Service, the Biological Opinion (BO) prepared pursuant to the Endangered Species Act (ESA), and the litigation led by NRDC all dealt only with use of LFAS during routine training and military exercises.

The Cetacean Community challenged the failure to prepare an EIS, seek an LOA, and prepare a BO for use of LFAS during threat and warfare.

At the District Court level, Judge David Ezra in Honolulu dismissed the suit. As part of the basis for dismissal, he ruled that The Cetacean Community did not have standing to file suit in its own name. In making his ruling, Judge Ezra dismissed an earlier ruling by an appellate panel in the Ninth Circuit finding that the Palila bird on the Island of Hawai'i did have standing to sue under the ESA. Judge Ezra ruled that the Palila decision on standing was only dicta, meaning a statement by a court that is not part of the issues before the court and, therefore, not a precedent for future cases. Had Judge Ezra acknowledged Palila as a precedent, he, as a district court judge, would have been bound by the appellate ruling.

The Cetacean Community filed an appeal that came before a Ninth Circuit appellate panel in February. For those interested in hearing the oral argument, web master Cheryl Magill has made a recording available at www.cetaceancommunity.com. In that argument, the judges indicated that they did consider Palila to be a precedent, which could only be overturned by an en banc ruling of the Ninth Circuit. An en banc hearing is convened before the Chief Judge and ten other judges selected at random from the judges on the Ninth Circuit.

After the oral argument, the panel hearing the appeal issued an order that the parties brief the question whether the case should be reheard en banc. A copy of that order is available at www.cetaceancommunity.com as well. The order is highly unusual.

Normally, an en banc hearing is reserved for two situations: (1) a panel at the appellate level has issued an opinion conflicting with the decision of another panel or (2) an appellate panel in the Ninth Circuit has issued an opinion conflicting with a decision by an appellate panel in another circuit. An en banc hearing usually results when one party in a case petitions the court to hold such a hearing.

In The Cetacean Community case, the panel has not issued an opinion. There is, therefore, no conflict between an opinion in this case and any other opinion. With no opinion issued by the panel, neither party in The Cetacean Community case had any reason to file a petition seeking an en banc consideration.

On the issue of standing for endangered species to file suit in their own name, the two appellate decisions in the Ninth Circuit are consistent. In both Palila and a case involving the Marbled Murrelet, standing for endangered species is specifically granted. The only other appellate decision addressing this issue is also consistent. In the

Eleventh Circuit, an appellate decision upheld standing for the Loggerhead Turtle. There are, thus, no conflicting opinions that would call for an en banc hearing.

At the same time, the rule on en banc hearings does permit judges to submit a case for such a hearing if the issue is of exceptional importance. The Cetacean Community panel asked the parties to file simultaneous briefs on three questions: (1) should an en banc rehearing of the case be held, (2) should animals have standing to sue in their own name, and (3) was the Palila case correctly decided?

The third question would seem to foreclose any argument that Palila was only dicta, accept plaintiffs argument that Palila was a binding precedent, and amount to a reversal of the district court's dismissal on the standing issue.

As soon as the plaintiffs brief is filed, the brief will be posted at www.cetaceancommunity.com.

Counsel for the Government is requesting an extension of time until May 20 to file the brief. The plaintiffs do not object, so the court will probably grant that extension.

Can the Whales, Dolphins, and Porpoise sue Bush and Rumsfeld? Stay tuned.