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Today's Koan¹: Can an Agency be Arbitrary and Reasonable at the Same Time?

LTC David B. Howlett

In *Ross v. Federal Highway Administration*,² a federal district court ruled that an agency's action could be both "arbitrary and capricious" under the National Environmental Policy Act (NEPA)³ and "substantially justified" for purposes of the Equal Access to Justice Act (EAJA).⁴

In *Ross*, the Federal Highway Administration (FHWA) was participating with local authorities to build an expressway near Lawrence, Kansas. A 1990 NEPA Environmental Impact Statement (EIS) and Record of Decision drew opposition from property owners on the eastern side of the proposed project. In 1994, the State of Kansas and FHWA agreed to proceed on the western segments of the project. FHWA then began to supplement the EIS as it applied to the eastern side of the project. The various parties involved could not agree on a route on the eastern side. Kansas and local governments agreed in 1997 to fund the eastern project themselves. Taking the view that it was no longer a federal project, the FHWA published a notice in the Federal Register withdrawing the Notice of Intent to supplement the EIS.

Plaintiffs sued to enjoin the project and to compel completion of the supplemental EIS. Applying the arbitrary and capricious standard of review in the Administrative Procedure Act,⁵ the court found that the FHWA had violated NEPA by not completing the supplemental EIS. The Tenth Circuit Court of Appeals affirmed this decision.⁶

Plaintiffs applied to the court for attorneys' fees under EAJA. The relevant portion of EAJA provides:

Except as otherwise specifically provided by statute, 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

¹ In Zen practice, a koan is a short vignette describing a paradoxical situation. It is used by the zen master to cause the student to depart from established patterns of thinking.

² No. 97-2132, 1999 U.S. LEXIS 8870 (D. Kan. May 24, 1999), 48 ERC 1980.

³ 42 U.S.C. §4321 et seq.

⁴ 28 U.S.C. §2412.

⁵ 5 U.S.C. §706(2)(A).

⁶ *Ross v. Federal Highway Administration*, 162 F.3d 1046 (10th Cir. 1998).

finds that the position of the United States was substantially justified or that special circumstances make an award unjust.⁷

It was undisputed that plaintiffs were a “prevailing party.” Even though the court found the FHWA’s actions arbitrary and capricious, it held that the agency could argue that its position was substantially justified. The court cited precedent and legislative history for this proposition.⁸

The FHWA restated its position that the eastern part of the project was not a “major federal action” because it was not federally funded. This position was supported by case law governing at the time as well.⁹ The court found that since the FHWA’s argument had a reasonable basis in fact and law, the government’s position was substantially justified and plaintiffs’ EAJA motion was therefore denied.

This case means that a court requirement to do new or additional NEPA analysis does not necessarily mean that an award of attorneys’ fees under EAJA will automatically follow. (LTC Howlett/LIT)

Migratory Bird Treaty Act May Now Apply To Federal Agencies

MAJ James H. Robinette II

Federal agencies’ obligations under the Migratory Bird Treaty Act¹⁰ (MBTA) were recently thrown into greater confusion at the hands of the federal district court for the District of Columbia. In direct opposition to two federal circuit courts of appeals, the district court held that the MBTA does apply to Federal agencies, who must therefore obtain appropriate permits before engaging in activities resulting in the “take” of migratory bird species. If upheld on appeal, this ruling could require installations to revert to traditional means of obtaining “take” permits from the U.S. Fish and Wildlife Service, including intentional depredation permits for the control of nuisance birds.

In 1997, two federal circuit courts ruled that the MBTA does not apply to the United States, its instrumentalities, or its officers and agents. The Eleventh Circuit held in the case of *Sierra Club v. Martin*¹¹, that Congress did not clearly intend for the Act to apply to the federal government. In *Martin*, the Sierra Club sued the Forest Service to prevent the taking of migratory birds in the course of timber harvesting for which the Forest Service had contracted. The court concluded that the MBTA did not apply to the federal government by contrasting the definition of the term person under the MBTA with the definition of the term person under the Endangered Species Act¹² (ESA). “Congress has demonstrated that it knows how to subject federal agencies to substantive requirements when it chooses to do

⁷ 28 U.S.C. §2412(d)(1)(A)

⁸ *Ross v. Federal Highway Administration*, 48 ERC at 1982, *citing* *Cohen v. Bowen*, 837 F.2d 582, 585 (2d. Cir. 1988)(quoting H.R. Rep. No. 96-1418, 96th Cong., 2d. Sess., at 11 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4990).

⁹ See *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477 (10th Cir. 1990).

¹⁰ The Migratory Bird Treaty Act (MBTA) provides in pertinent part: “[E]xcept as permitted by regulations..., it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill... any migratory bird, any part, nest, or egg of any such bird, or any product... composed in whole or in part, of any such bird....” 16 U.S.C. § 703. The MBTA carries criminal penalties: up to six months confinement and/or a \$15,000 fine for violation of a regulation made pursuant to the MBTA, or up to two years imprisonment and a maximum \$250,000 fine if the violation is done with a pecuniary motive. 16 U.S.C. § 707.

¹¹ *Sierra Club et al. v. George G. Martin et al.*, 110 F.3d 1551 (11th Cir. 1997).

¹² 16 U.S.C.S. § 1532(13) (LEXIS 1999).

so.”¹³ The court also examined the historical context of the MBTA’s enactment, noting that twenty years before the MBTA became law, Congress had authorized the Forest Service to manage the national forests to provide timber for the nation. The court reasoned:

In light of that purpose, it is difficult to imagine that Congress enacted the MBTA barely twenty years later intending to prohibit the Forest Service from taking or killing a single migratory bird or nest ‘by any means or in any manner’ given that the Forest Service’s authorization of logging on federal lands inevitably results in the deaths of individuals birds and destruction of nests.¹⁴

The Eighth Circuit reached a similar result in *Newton County Wildlife Assoc. v. United States*.¹⁵ In that case the United States was sued by environmentalists seeking to halt timber sales in the Ozark National Forest, along the Buffalo River. Similar to the plaintiffs in *Martin*, the plaintiffs in *Newton County* sought to enjoin the timber sales because the Forest Service had not obtained a permit from the Fish and Wildlife Service to take migratory birds, among other reasons. The court first noted that the definition of the term “person” does not ordinarily include the sovereign.¹⁶ The court disagreed with the plaintiffs’ assertion that “[the] MBTA must apply to federal agencies if our Nation is to meet its obligations under the 1916 treaty,”¹⁷ noting that “the government’s duty to obey arises from the treaty itself; the statute extends that duty to private persons.”¹⁸ Finally, the court noted that the Fish and Wildlife Service did not require, and its MBTA regulation did not contemplate, federal agencies applying for migratory bird taking permits.¹⁹

On July 6, 1999, a memorandum opinion handed down in the case of *Humane Society v. Glickman*²⁰ by the district court for the District of Columbia came to the opposite conclusion, holding that the strictures of the MBTA apply to federal officials. In that case, the Department of Agriculture had developed a program to euthanize Canada geese in Virginia, thereby alleviating problems caused by the burgeoning Canada geese population. The Humane Society filed suit to enjoin execution of the program, citing violations of NEPA and the MBTA. In a lengthy analysis of the MBTA’s applicability to federal officials, the court eventually determined that the MBTA does bind federal agency actions.

First, the court examined the Supreme Court’s dicta in *Robertson v. Seattle Audubon Society*,²¹ in which the Supreme Court seemed to assume that federal agencies are bound by the MBTA, though the opinion never directly addressed or analyzed that issue squarely. Next, the court examined the exceptions to the canon that “[s]ince, in common usage, the term ‘person’ does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it.”²² The court found that compliance with the MBTA would not “deprive the sovereign of a recognized or established prerogative title or interest,”²³ and that “the sovereign is embraced by general words of a statute intended to prevent injury and wrong.”²⁴ Thus, the court reasoned, federal agencies are bound by the MBTA, given the Supreme Court’s “considered dictum,”²⁵ and the applicability of the two exceptions to the general rule regarding sovereign immunity.

¹³ *Martin*, 110 F.3d at 1555.

¹⁴ *Martin*, 110 F.3d at 1556.

¹⁵ *Newton County Wildlife Assoc. et al. v. United States*, 113 F.3d 110 (8th Cir. 1997).

¹⁶ *Newton County*, at 113 F.3d 115.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*, at 116.

²⁰ *Humane Society, et al., v. Dan Glickman et al.*, Civ. Act. No. 98-1510 (D.D.C. 1999).

²¹ *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992).

²² *United States v. Cooper*, 312 U.S. 600, 604 (1941).

²³ *Nardone v. United States*, 302 U.S. 379, 383 (1937).

²⁴ *Id.*

²⁵ *Humane Society*, at 10.

As of this writing in late August, a decision has not yet been made on whether to appeal the district court's ruling, leaving an open question as to whether federal agencies will now have to apply for permits from the USFWS before engaging in any activities which may be construed as taking migratory birds. That being the case, installation ELSs consider offering the following guidance to natural resource managers and other relevant installation staff. Where activities to control nuisance birds are proposed for the intentional take of migratory bird species, the installation should apply to the USFWS for depredation permits allowing for intentional take at specified levels and through particular methods. For other activities which foreseeably will result in unintentional take, such as contracting for the harvest of timber, the installation should consider whether to apply for an appropriate permit. In all permitting actions, installations should carefully prepare and maintain their application and the USFWS response. In all circumstances where installation activities may result in adverse impacts to migratory birds, such impacts should be considered and, where appropriate, mitigated through the NEPA and Integrated Natural Resource Management Planning processes. ELSs should contact ELD for further guidance on a case by case basis. (MAJ Robinette/RNR)

Second Circuit Clarifies Burden of Proof under RCRA

MAJ Mike Egan

Thomas and Filomena Prisco were simply trying to find an economical way to level their land when they began operation of a landfill on their property in Putnam County, New York.²⁶ Little did they know that that they were embarking on a odyssey that would ultimately clarify the burden of proof under the Resource Conservation and Recovery Act (RCRA) and have a potential impact on all future citizen suits under this statute.

From sometime in 1986 until February 1988, the Priscos served as largely absentee managers of the landfill with day to day operation falling at different times to three separate entities. As might be imagined, based upon the relative inexperience and lack of attention on the part of the Priscos, New York's Department of Environmental Conservation (DEC) discovered that hazardous substances from the landfill had leached into nearby wetlands.²⁷

While contesting the imposition of civil penalties, the Priscos went on the offensive by suing a large and diverse array of people who had any association with the landfill. Among the causes of action was RCRA 7002(a)(1)(B), known as a private attorney general provision, that allows citizen suits. This provision states that any person has a right of action

against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to or the environment.²⁸

During the course of protracted litigation, the district court dismissed the RCRA claim stating that the plaintiff had failed to prove that waste attributed to particular defendants was linked to an imminent and substantial endangerment. Specifically, the district court held that the Priscos had not carried their burden under RCRA because they could not link any specific defendant to any particular waste.²⁹

²⁶ Prisco v. A & D Carting, 168 F.3d 593 (2nd Cir. 1999)

²⁷ *Id.* at 599-600

²⁸ 42 U.S.C. §6972(a)(1)(B)

²⁹ Prisco v. A & D Carting, 168 F.3d 593, 608-9 (2nd Cir. 1999)

On appeal to the Second Circuit, the Priscos claimed that the lower court had acted contrary to the intent of the statute when it required an additional burden of linking a defendant and its waste to an imminent and substantial endangerment.³⁰ The appellant claimed that the word “may” was intended to capture anyone who contributed any waste to a site at which there ultimately arose a risk to health or the environment. The appellate court disagreed. Relying on the plain language of the statute, the Second Circuit affirmed the holding of the district court.³¹

Environmental Law Specialists should be aware that this additional burden now presents another arrow in the quiver in the defense of citizen suits. In any 7002 suit the government must ensure that the plaintiff is able to link a particular waste with the alleged imminent and substantial endangerment. (MAJ Egan/CPL)

³⁰ *Id* at 609

³¹ *Id.*