

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issue, volume 6, number 8, is reproduced in part below.

Today's Koan:¹ Can an Agency be Arbitrary and Reasonable at Same Time?

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. The 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 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.

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. Dist. LEXIS 8870 (D. Kan. May 24, 1999).

3. 42 U.S.C.A. § 4321 (West 1999).

4. 28 U.S.C.A. § 2412 (West 1999).

5. 5 U.S.C.A. § 706(2)(A) (West 1999).

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

7. 28 U.S.C.A. § 2412(d)(1)(A).

8. *Ross v. Federal Highway Admin.*, 1999 U.S. Dist. LEXIS 8870, at *8, citing *Cohen v. Bowen*, 837 F.2d 582, 585 (2d Cir. 1988) (quoting H.R. Rep. No. 96-1418, 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).

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. Lieutenant Colonel Howlett.

Migratory Bird Treaty Act May Now Apply To Federal Agencies

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 taking 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. In the case of *Sierra Club v. Martin*,¹¹ the Eleventh Circuit held that Congress did not clearly intend for the MBTA 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 Act (ESA).¹² "Congress has demonstrated that it knows how to sub-

ject federal agencies to substantive requirements when it chooses to do 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 Ass'n v. United States*.¹⁵ In that case environmentalists seeking to halt timber sales in the Ozark National Forest, along the Buffalo River sued the United States. 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 [n]ation 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

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.A. § 703 (West 1999).

The MBTA carries criminal penalties of 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. *Id.* § 707.

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

12. 16 U.S.C.A. § 1532(13).

13. *Martin*, 110 F.3d at 1555.

14. *Id.* at 1556.

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

16. *Id.* at 115.

17. *Id.*

18. *Id.*

On 6 July 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 executing 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.

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 that may be construed as taking migratory birds. That being the case, installation environmental law specialists should offer the following guidance to natural resource managers and other relevant installation staff. Where activities to control nuisance birds are proposed for the intentional destruction of migratory bird species, the installation should apply to the USFWS for depre-

tion permits allowing for intentional taking at specified levels and through particular methods. For other activities that foreseeably will result in unintentional destruction, 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 the integrated natural resource management planning processes. Environmental law specialists should contact ELD for further guidance on a case-by-case basis. Major Robinette.

Second Circuit Clarifies Burden of Proof under RCRA

Thomas and Filomena Prisco were simply trying to find an economical way to level their land when they began operating a landfill on their property in Putnam County, New York.²⁶ Little did they know that they were embarking on an odyssey that would ultimately clarify the burden of proof under the Resource Conservation and Recovery Act (RCRA)²⁷ 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.²⁸

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

19. *Id.* at 116.

20. *Humane Soc'y v. Glickman*, Civ. Act. No. 98-1510, mem. op. (D.D.C. July 6, 1999).

21. *Robertson v. Seattle Audubon Soc'y*, 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 Soc'y*, Civ. Act. No. 98-1510 at 10.

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

27. 42 U.S.C.A. § 6972 (West 1999).

28. *Prisco*, 168 F.3d at 599-600.

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.²⁹

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.³⁰

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.³¹ 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.³²

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 RCRA § 7002 suit the government must ensure that the plaintiff is able to link a particular

waste with the alleged imminent and substantial endangerment. Major Egan.

Litigation Division Note

Federal Subject Matter Jurisdiction under the Tucker Act in Military Personnel Cases: *James v. Caldera*

Introduction

Every year, hundreds of former service members file suit challenging various military personnel actions that have affected their pay or retirement eligibility, potentially subjecting the government to enormous financial liability. Among the jurisdictional bases for these claims, the Tucker Act³³ and the Administrative Procedures Act (APA)³⁴ are the most significant. The Army Litigation Division has sought to ensure that all actions with military pay implications are treated as Tucker Act claims, to be adjudicated primarily in the United States Court of Federal Claims,³⁵ rather than APA claims, which are heard in the district courts. The Litigation Division has done this to ensure that such actions: (1) will generally be considered by the court having the most expertise with military pay claims, and (2) will be subject to uniform precedent.

The United States Court of Appeals for the Federal Circuit has generally held that claims must be pursued under the Tucker Act when recovery of back pay or allowances is the essential nature of the relief sought.³⁶ This matter has never been completely settled, however, and late last year the Federal Circuit added to the quandary that government counsel face with its decision in *James v. Caldera*.³⁷ In this decision, the Federal Circuit found that a plaintiff’s claim could be dissected for purposes of determining whether jurisdiction in certain military personnel cases lies exclusively in the Court of Federal Claims or in the district courts. In so doing, the Federal Circuit has increased the likelihood of “confusion, unpredictability,

29. 42 U.S.C.A. § 6972(a)(1)(B).

30. *Prisco*, 168 F.3d at 608-09.

31. *Id.* at 609.

32. *Id.*

33. 28 U.S.C.A. § 1346, 1491 (West 1999).

34. 5 U.S.C.A. § 501 (West 1999).

35. The United States Court of Federal Claims has exclusive jurisdiction over any claim in excess of \$10,000. 28 U.S.C.A. §§ 1491, 1346. “[D]istrict courts shall have original jurisdiction, concurrent with the United States Claims Court, of . . . (2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any act of Congress, or any regulation. . . .” 28 U.S.C.A. § 1346(a)(2). Moreover, the United States Court of Appeals for the Federal Circuit has exclusive appellate jurisdiction over district court Tucker Act claims, so that the court’s precedents apply equally to Court of Federal Claims and district court actions in which jurisdiction is based in whole or in part on the Tucker Act. *See* 28 U.S.C.A. § 1295(a)(2).

36. *Mitchell v. United States*, 930 F.2d 893 (Fed. Cir. 1991); *Bobula v. United States*, 970 F.2d 854, 859 (Fed. Cir. 1992) (holding that the Court of Federal Claims has jurisdiction over equitable claims for injunctive and declaratory relief when incident to a “concurrent colorable claim for monetary recovery”).

37. 159 F.3d 573 (Fed. Cir. 1998), *reh'g denied*, 1999 U.S. App. LEXIS 5084 (Fed. Cir. Feb. 24, 1999).

expense, and delay in the litigation of claims for military pay and benefits.”³⁸

Background

In 1988 through 1989, plaintiff, Augustin S. James, was a First Sergeant at Tripler Army Medical Center with almost twenty years of active service. James’ duties included scheduling random drug urinalysis testing for his unit’s soldiers. Although James was not required to schedule himself, he did so voluntarily, and his specimen tested positive for cocaine. James’ commander administered nonjudicial punishment³⁹ for wrongful possession of cocaine-laced tea.⁴⁰ In April 1989, the Army initiated administrative discharge proceedings against James. However, the Board of Officers hearing the proceedings found that James had not knowingly ingested cocaine and recommended his retention.

James’ company commander then initiated a bar to James’ reenlistment based on his nonjudicial punishment and his positive drug test. James asked to have his current enlistment extended by five months so that he would be able to retire with twenty years service. James’ company and battalion commanders recommended approval of the request for extension of enlistment, but his division commander disapproved it.⁴¹ The Army honorably discharged James in August 1989, about five months short of retirement eligibility.

Procedural History

James applied for relief to the Army Board for Correction of Military Records (ABCMR)⁴² in February 1992. The ABCMR denied his application in November 1993. In May 1996, James filed an action in the U.S. District Court for the Northern District of California challenging on various grounds the Army’s actions in discharging him, refusing to permit him to extend his

enlistment, and barring his enlistment. The relief he requested included correction of his records to reflect that he had twenty years of service and a retroactive grant of backpay, retired pay, and benefits.⁴³

The government moved the district court to transfer James’ case to the Court of Federal Claims,⁴⁴ arguing that the district court lacked jurisdiction. The government maintained: first, that James’ complaint essentially was an action for over \$10,000 over which the Court of Federal Claims has exclusive jurisdiction; and, second, no waiver of sovereign immunity existed under the APA because plaintiff had an adequate remedy under the Tucker Act. The district court granted the government’s motion in January 1997.

Discussion

After the district court declined to amend its ruling and the case was transferred to the Court of Federal Claims, James made an interlocutory appeal to the Federal Circuit.⁴⁵ On 28 October 1998, the Federal Circuit, in a split decision, reversed in part, vacated in part, and remanded the decision of the United States District Court for the Northern District of California transferring the plaintiff’s case from the U.S. District Court to the Court of Federal Claims. The court observed that, in its view, James was making two claims, one challenging his bar to reenlistment and the other challenging the denial of his extension on active duty. The court held first that James’ challenge to the bar to reenlistment sought purely injunctive or declaratory relief, over which the Court of Federal Claims lacks jurisdiction. The court remanded to the district court for further consideration of James’ enlistment extension claim, noting that the record below did not address whether James had any “firm right” to extend his enlistment. The majority of the court indicated that, if the district court found that James had such a right,

38. *James*, 159 F.3d. at 589.

39. *See* 10 U.S.C.A. § 815 (West 1999).

40. The charge arose as a result of James’ assertion that he had unknowingly ingested cocaine when he drank Health Inca Tea.

41. The commanding general endorsed for higher headquarters the request for the bar to reenlistment, but recommended against granting the extension of enlistment. He based his recommendation on the following facts: Mr. James’ positive urinalysis results; his failure of a voluntary polygraph examination; that each of Mr. James’ commanders had carefully considered and dismissed plaintiff’s defense of unknowingly using cocaine; Mr. James’ request to the drug coordinator to lose the positive urinalysis report; his departure on a thirty-day leave of duty following the initial positive urinalysis test results; his explanation that he unknowingly ingested cocaine from some Inca Health Tea, which had been used as a successful defense in a recent unrelated court-martial where the accused had been acquitted; and Mr. James’ demeanor during the nonjudicial punishment hearing.

42. *See* 10 U.S.C.A. § 1552 (authorizing the secretaries of the military departments to create boards of civilian officials to consider when military records should be corrected in cases of error or injustice).

43. Had James filed his complaint in the Court of Federal Claims, his action would have been barred by the applicable statute of limitations. *See* 28 U.S.C.A. § 2501 (West 1999); *see also* *Hurick v. Lehman*, 782 F.2d 984, 987 (Fed. Cir. 1986) (holding that resort to a correction board such as the ABCMR neither tolls the running of the statute, nor does an adverse decision by a board create a new period of limitations).

44. Under 28 U.S.C.A. § 1631, a court may transfer an action over which it lacks jurisdiction to another court where the action could properly have been brought.

45. *See* 28 U.S.C.A. § 1292(d)(4)(A). The Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals of district court orders transferring cases to the Court of Federal Claims. *See also James*, 159 F.3d at 575.

that the extension claim was necessarily a claim for monetary relief (for example, the back pay and allowances for the five months that James would have been extended on active duty), which could only be pursued in the Court of Federal Claims.

A strong dissent criticized the majority on several grounds. First, the majority's opinion conflicts with prior Federal Circuit and Supreme Court precedent holding that claims that seek monetary relief, as an essential or primary component, must be brought under the Tucker Act.⁴⁶ Second, the majority's holding "frustrates the legislative purpose of the Tucker Act as amended and [is] likely to create unnecessary confusion, unpredictability, expense, and delay in the litigation of claims for military pay and benefits."⁴⁷ "The most worrisome effect of" the decision, the dissent noted, will be its creation of "a new, easily utilized escape route from Tucker Act jurisdiction in the Court of Federal claims for military pay and benefit cases."⁴⁸

The decision of the Federal Circuit panel in *James* could have a far-reaching effect on all the services, and further confuse an already troubled area of federal jurisdiction. As the dissent notes, the majority's decision will enable potential plaintiffs to evade Tucker Act jurisdiction simply by casting their claims as suits for declaratory or injunctive relief, even though their clear goal is recovery of back pay and other money benefits.

James may lead to an increasingly inefficient procedure for determining Tucker Act jurisdiction. Courts may employ this precedent to analyze all discernible components of a claim to find a basis for the district courts to entertain suits that plainly seek monetary relief. In the absence of curative legislation,⁴⁹ the Litigation Division will continue to be proactive in its initial motions' practice and argue as aggressively as possible that claims involving monetary relief must be filed in the Court of Federal Claims. Captain Levy.

46. *Bowen v. Massachusetts*, 487 U.S. 879 (1988); *Mitchell v. United States*, 930 F.2d 893 (Fed.Cir. 1991) (holding that back pay cases fall under the Tucker Act).

47. *James*, 159 F.3d at 584.

48. *Id.* at 589.

49. For example, one provision of the proposed Military Personnel Review Act of 1997 would have made the U.S. Court of Appeals for the Federal Circuit the exclusive tribunal for judicial review of nearly all military personnel cases.