

Grand Canyon Trust v. Babbitt, No. 2:98CV0803S (D. Utah, decided April 19, 2000)

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

FILED

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\*\*\*\*\* DISTRICT OF UTAH

GRAND CANYON TRUST, a non-profit )  
corporation; GRAND COUNTY, UTAH, )  
a political subdivision of the )  
State of Utah; DAVE BODNER; KEN )  
SLEIGHT; COLORADO PLATEAU RIVER )  
GUIDES, and unincorporated )  
association; 3-D RIVER VISIONS, )  
a Utah corporation; JOSEPH )  
KNIGHTON; SIERRA CLUB, a non- )  
profit corporation, )

Plaintiffs, )

vs. )

BRUCE BABBITT, in his official )  
capacity as Secretary of the )  
Interior of the United States; )  
UNITED STATES FISH AND WILDLIFE )  
SERVICE; and RALPH MORGANWECK, )  
in his official capacity as )  
Regional Director (Region 6), )  
Denver, United States Fish and )  
Wildlife Service, and the U.S. )  
NUCLEAR REGULATORY COMMISSION, )

Defendants. )

Case No. 2:98-cv-00808-ERK

MEMORANDUM DECISION  
ADDRESSING NUCLEAR  
REGULATORY COMMISSION'S  
MOTION TO DISMISS  
(Docket Entry # 20)

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I. INTRODUCTION

Defendant United States Nuclear Regulatory Commission ("NRC") moves to dismiss plaintiffs' claims against it for lack of subject matter jurisdiction pursuant of Fed. R. Civ. P. 12(b)(1) and

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12(h)(3). The full facts surrounding this matter are set forth in the pleadings and will not be repeated here. In brief, however, on a site approximately two miles northwest of Moab, Utah, on the west bank of the Colorado River, is a sizable deposit of tailings from milling uranium ore. Toxic pollutants from the site are alleged to be leaching through groundwater into the Colorado River and impacting two native fish, the Colorado Pike Minnow and the Razorback Sucker. Since 1962, the site has been owned by Atlas Corporation and operated under a license from the NRC. Atlas sought an amendment to its NRC license in order to close and clean up the site.<sup>1</sup> The licensing procedure raised environmental concerns and NRC, therefore, consulted with the United States Fish and Wildlife Service. Plaintiffs complain that the NRC in its administration of the Atlas license has violated the Endangered Species Act in various respects. NRC asserts that exclusive jurisdiction for review of its licensing decisions lies with the United States Courts of Appeal and that the claims against it should be dismissed as this court lacks subject matter jurisdiction.

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<sup>1</sup>On May 28, 1999, subsequent to the filing of NRC's motion to dismiss, NRC amended the Atlas license. Decl. Of Joseph J. Holonich at ¶ 5. On December 27, 1999, NRC transferred the Atlas license to the Moab Mill Reclamation Trust. See Motion for Substitution of Parties.

## II. MOTION TO DISMISS STANDARD

A party may move for a dismissal of a case based on lack of subject matter jurisdiction at any time. Fed. R. Civ. P. 12(b)(1). Whenever it appears that the court lacks subject matter jurisdiction, it shall dismiss the action. Id. 12(h)(3) "In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." Holt v. United States, 46 F.3d 1000, 1002 (10<sup>th</sup> Cir. 1995). "When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations." Id. at 1003. Plaintiff bears the burden of establishing that subject matter jurisdiction is proper. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994).

## III. DISCUSSION

The essence of plaintiffs' allegations is that the NRC has violated the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544 and its implementing regulations, in its administration of the Atlas license. NRC moves to dismiss plaintiffs' claims against it for lack of subject matter jurisdiction.

Challenges to NRC licensing decisions are governed by the Hobbs Act, 28 U.S.C. §§ 2341-2351. The Hobbs Act provides that courts of appeals shall have "exclusive jurisdiction to enjoin, set aside, suspend . . . all final orders of the [NRC] made reviewable by § 2239 of Title 42 [The Atomic Energy Act]." 28 U.S.C. 2342(4).<sup>2</sup> The Atomic Energy Act, 42 U.S.C. § 2239(b), provides that the Hobbs Act governs review of "[a]ny final order entered in any proceeding of the kind specified in subsection (a) of [§ 2239]." Subsection (a) proceedings are those "for the granting, suspending, revoking, or amending of any license". 42 U.S.C. § 2239(a)(1)(A). The Supreme Court in Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985), "broadly interpreted this jurisdictional grant, holding that decisions that are ancillary to licensing decisions may be challenged only in the court of appeals." Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n, 854 F. Supp. 16, 17 (D. Mass. 1994) (characterizing Lorion, 470 U.S. 729 (1885)).

Plaintiffs attempt to evade the jurisdictional consequences of the Hobbs Act by urging that the NRC's violation of the ESA "does

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<sup>2</sup>"The Hobbs Act actually refers to the Atomic Energy Commission, not the NRC. Pursuant to the Energy Reorganization Act of 1974 . . . 42 U.S.C. § 5841, the Hobbs Act now applies to final orders of the NRC." Envirocare of Utah, Inc. v. United States, 44 Fed. Cl. 474, 478 n. 4 (Fed. Cl. 1999).

not constitute a final order in a licensing proceeding", (Mem. in Opp'n at 6), for purposes of the Hobbs Act. Rather, plaintiffs assert that its claims "arise from the NRC's on-going failure to ensure that its regulation of the Atlas site does not result in jeopardy or a taking of the Colorado squawfish and razorback sucker of the adverse modification of critical habitat." (Mem. in Opp'n at 8).

Although plaintiffs' claims against the NRC are plead as violations of the ESA, the complaint on its face clearly reflects that those claims are in the context of and related to NRC's decision in licensing Atlas. See, Third Amended Complaint at pp. 2, 14, 18, 20, and 34-38. In a nutshell, plaintiffs allege that NRC in its licensing of Atlas has failed to take steps required of it by the ESA to protect fish in the Colorado River. The NRC actions of which plaintiffs complain are clearly ancillary to NRC's amendment of Atlas' license. The licensing procedure has been completed. As noted, the Hobbs Act grants exclusive jurisdiction to the courts of appeal with respect to NRC final licensing orders. Notwithstanding plaintiffs' ESA claims, the Hobbs Act is controlling. "It is well settled that . . . a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute' . . . .

Thus courts will dismiss a claim challenging NRC licensing decisions if it is brought under a more general jurisdictional statute." Envirocare of Utah, Inc. v. United States, 44 Fed. Cl. 474, 478 (Fed. Cl. 1999) (citations omitted). See also, Northwest Resource Info. Ctr., Inc. v. National Marine Fisheries Serv., 25 F.3d 872, 875 (9<sup>th</sup> Cir. 1994) (exclusive statutory grant of jurisdiction to Ninth Circuit takes precedence over Endangered Species Act); Southwest Center for Biological Diversity v. Federal Energy Regulatory Comm'n, 967 F. Supp. 1166, 1173 (D. Ariz. 1997) (claims alleging violation of Endangered Species Act by Federal Energy Regulatory Commission dismissed due to grant of exclusive jurisdiction to courts of appeals under Federal Power Act). In sum, the court agrees with NRC that both the language of the relevant statutes and the analogous case authority compels the conclusion that this court lacks subject matter jurisdiction over plaintiff's claims as to defendant NRC. See e.g., General Atomics v. U.S. Nuclear Regulatory Comm'n, 75 F.3d 536 (9<sup>th</sup> Cir. 1996) (under expansive interpretation of Hobbs Act, issue of whether purchaser of corporate licensee of NRC was jointly and severally liable for site cleanup was related to licensing over which Court of Appeals had exclusive jurisdiction); Citizens Awareness Network, Inc. v. Nuclear Regulatory Comm'n, 8554 F. Supp. 16 (D. Mass. 1994) (underlying issue of National Environmental Policy Act claim related to

NRC licensing decision and therefore subject matter jurisdiction rests with courts of appeals); State of Michigan v. United States, 944 F.2d 1197 (6<sup>th</sup> Cir. 1993) (action to force NRC to prepare a supplemental environmental impact statement pursuant to National Environmental Policy Act was related to effects on licensing regulation and therefore subject to judicial review provisions of Hobbs Act).


IV. CONCLUSION

For the foregoing reasons, as well as those additional reasons outlined by NRC in its pleadings, defendant NRC's motion to dismiss plaintiffs' claims against it is GRANTED.

IT IS SO ORDERED.

DATED this 10<sup>th</sup> day of March, 2000.

BY THE COURT:

  
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DAVID SAM  
SENIOR JUDGE  
U.S. DISTRICT COURT



ce

United States District Court  
for the  
District of Utah  
April 19, 2000

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:98-cv-00803

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