STANFORD LAW SCHOOL
ENVIRONMENTAL AND NATURAL RESOURCES
LAW AND POLICY PROGRAM

SLS Case No. 98-022

The Endangered Delhi Sands Flower-Loving Fly

Part II

Fly Litigation

In the summer of 1995, County of San Bernardino ("County") officials were upset about how the U.S. Fish and Wildlife Service ("Service") had handled the Hospital situation. They anticipated that they would have to spend more taxpayer money on both the research commitment and on mitigation for the road improvement project. They were also concerned about the Fly's future impact on growth and development in the County.

The County found sympathetic allies in the City of Colton and two builders' groups, the National Association of Home Builders of the United States and the Building Industry Legal Defense Fund. The City of Colton was concerned that efforts to attract job-creating businesses through the creation of the Agua Mansa Enterprise Zone would be stymied by FWS and the Fly.

The two building industry groups were in part interested in the case because several of their local members were planning to begin development projects in the area. More important, they saw this case -- with its favorable fact pattern of insects versus human health -- as an optimal test case for their theory that Congress lacked the authority under the U.S. Constitution to regulate the take of "intrastate species," *i.e.*, species whose range was limited to one state. According to Paul Mordy, Deputy County Counsel, the building groups were so interested in the potential precedent of this case that they agreed to fund the entire litigation.

In October of 1995, the plaintiffs sued Secretary of Interior Bruce Babbitt and Service Director Mollie Beattie in the United States District Court for the District of Columbia, seeking a declaration that Congress could not constitutionally regulate take of the Fly under

the authority of the Commerce Clause. See Exhibit A, Complaint. They also sought an injunction prohibiting the FWS from enforcing the take restrictions of Section 9 with respect to plaintiffs' various construction projects.

According to Thomas C. Jackson, a Washington attorney who represented the plaintiffs in the litigation, this was a "single issue case." Plaintiffs would rely on the Supreme Court's decision in United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), to argue that Congress did not possess the power to regulate wildlife and the use of non-federal land under the Commerce Clause. In Lopez, the Court had found that the Gun-Free School Zones Act of 1990 exceeded Congress' Commerce Clause authority. The Lopez court held that Congress could regulate just three broad categories of activity under the Commerce Clause:

1. the use of channels of interstate commerce;
2. the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and,
3. those activities having a substantial relation to interstate commerce, that is, those activities that substantially affect interstate commerce.

Id. at 558-59, 115 S.Ct. at 1629-30. In a 1998 interview, Jackson said that the Fly case "was a good case for a Commerce Clause test" of the ESA because of the very limited range of the Fly and its lack of economic value. He said that he filed the complaint in Washington because he believed the case would be decided at the Court of Appeals level and felt that his clients would have a better chance in the District of Columbia Circuit than in the pro-environment Ninth Circuit.

Michael Bean, an attorney for the Environmental Defense Fund, which filed an *amicus* brief in the case along with several other environmental groups, called the case "extremely important." In a 1998 interview, Bean emphasized the fact that about half of all listed species occurred only in one state. Further, most of the intrastate species occurred in states with high levels of endemism, so-called "biological hotspots." These states, Hawaii, California and Florida, also happened to be development hotspots, characterized by a high influx of new residents that put tremendous pressure on species. Bean said that denying protection for intrastate species would have had a "disproportionate effect" on biodiversity in Florida, California and Hawaii.

Case Study Exhibits

Exhibit A: Complaint, National Association of Homebuilders v. Babbitt
Exhibit B: U.S. House of Representatives Report 93-412, July 27, 1973
Exhibit C: Declaration of Terry W. Taylor