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D.C. Circuit Court of Appeals Rules in Favor of Landowners

WASHINGTON, D.C.—The D.C. Circuit Court of Appeals has invalidated a rule designating 143 acres of valuable commercial property in San Diego, California as critical habitat for an endangered species—the San Diego fairy shrimp. Friday’s decision reversed a ruling on summary judgment in favor of the Fish and Wildlife Service in May 2010 by the D.C. District Court in *Otay Mesa Property, LP v. U.S. Department of Interior*, Case No. 09-383.

“We are pleased that the appellate court agreed that occupied should mean just that, and not whatever the agency argues it should mean,” said Nancie Marzulla, attorney for the landowners. “This land should never have been designated as critical habitat in the first place.”

Describing the endangered fairy shrimp as a crustacean about the size of an ant and a lifespan of 30 days, the appellate court based its ruling on the U.S. Fish and Wildlife's failure to demonstrate that the land designated was in fact “occupied,” as required by the Endangered Species Act. The court noted that the agency had erroneously based its critical habitat designation on an isolated sighting of four fairy shrimp found in a tire rut on a heavily travelled dirt road. That was the only sighting, despite numerous visits to the property both before and after the one isolated sighting.

The agency had tried to bolster its slim to none evidence for the presence of fairy shrimp by pointing to the finding of Riverside fairy shrimp on the property, speculating that some of that fairy shrimp could be “presumed” to be San Diego fairy shrimp. The court of appeals concluded that presumed occupied was not the same as actually occupied.

Marzulla Law, LLC is one of the nation’s leading law firms in helping property owners resolve federal environmental issues. ML also represents clients in environmental enforcement actions and litigation involving natural resources and permitting issues, in federal district courts and courts of appeal. Nancie Marzulla has been selected by her peers to be included on the list of Best Lawyers in America, and ML has the highest AV rating from Martindale-Hubbe. For more information, visit <http://www.marzulla.com>, or call 202-822-6070. Follow Nancie Marzulla on Twitter at <http://www.twitter.com/takingslawyer>.

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