

CONSOLIDATED NOS. 06-16345, 06-16618, 06-16664

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONSEJO DE DESARROLLO ECONOMICO DE MEXICALI, A.C.;
CITIZENS UNITED FOR RESOURCES AND THE ENVIRONMENT,

Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA; ET AL.,

Defendants - Appellees.

AND CONSOLIDATED ACTIONS

Appeal From United States District Court, District of Nevada
Case No. 2:05-cv-0870-PMP-LRL
Judge Philip M. Pro, Chief United States District Judge

**IMPERIAL IRRIGATION DISTRICT'S REPLY TO APPELLANTS'
RESPONSES TO UNITED STATES' MOTION FOR REMAND, FOR
DISMISSAL OF COUNTS 5-8 AND VACATUR OF INJUNCTION
PENDING APPEAL DUE TO MOOTNESS**

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I.

INTRODUCTION

The Imperial Irrigation District ("IID") filed a joinder to the remand/dismissal Motion filed by the United States, and provides this short reply to the two separate response briefs filed by Appellants.

II.

**APPELLANTS IGNORE THE HISTORY OF THE FEDERAL AAC
LEGISLATION, AND ITS IMPORT ON THE INJUNCTION**

Appellants complain that the new federal legislation is a minor piece of a large package of unrelated legislation adopted at the end of Congress's term, as if such facts should suggest somehow that the legislation is not really an expression of Congressional intent. Appellants fail to note that the pattern of the three separate federal enactments concerning the AAC Lining Project have consistently narrowed the discretion afforded the Secretary and consistently pushed the project to completion to fulfill Congressional intent to satisfy Indian water right settlement commitments and United States and California Colorado River water supply needs with the conserved water from the project. This Congressional directive mandates the Vacatur of the current injunction pending appeal (the "Injunction") as requested by the United States.

As detailed in earlier briefs, Congress has acted no less than three times regarding the AAC:

- 1) In 1988, Congress passed the San Luis Rey Indian Water Rights Act ("San Luis Rey Act"), PL 100-675, 102 Stat. 4000. Title II, Sections 201 to 209, specifically authorized the lining of the All-American Canal. 102 Stat. 4005. Three alternatives were *identified*, including the well field recovery alternative promoted by Appellants in their Complaint as the alternative that should be selected to protect the environment and Mexican water use, an "in-place" lining alternative and a lined parallel canal alternative. The San Luis settlement water could come from any of the four alternatives, or some other federal project.
- 2) In 2000, Congress enacted the Packard Amendment to the San Luis Rey Act which mandated that conserved water from the AAC Lining Project be used as the source of water for the San Luis Rey Settlement and directed the Secretary of the Interior to implement the project, if funded. PL 106-377 at 114 Stat. 1441A-71.
- 3) In December of 2006 and after funding sources for the AAC Lining Project were procured¹, a preferred alternative *identified*, and mitigation, design and construction plans completed, Congress instructed the Secretary of the Interior to implement the alternative identified in the final EIR/EIS and the Allocation Agreement, the parallel lined canal-alternative, negating Appellants' Complaint to compel the Secretary of the Interior to study and select a different alternative. Congress also directed

¹ California Water Code § 12562, which provided funding that expires on December 31, 2008.

the Secretary of the Interior to complete the AAC Lining Project "without delay" PL 109-432 at Section 395.

This legislative history reflects increasing, and now very specific, Congressional directive to Interior to line a canal parallel to the AAC. In the context of this very pointed Congressional intent, the Court needs to address not only the impact on the appeal of Appellants, but also its earlier-issued Injunction pending appeal. There should be no legitimate argument or ambiguity about what the words "the Secretary shall, without delay, carry out the All American Lining Project." Mitigation and construction activities interrupted by the Injunction need to promptly resume.

Within the context of this new, even more specific Congressional mandate to proceed without delay, the following undisputed facts are even more compelling as to why the Injunction should be immediately vacated:

1. No injury asserted by the Appellants will occur from construction over the next 12 months. The construction is of a 23-mile parallel lined canal next to the 82-mile unlined canal. No water will be diverted into the new lined segment for at least 12 months. Declaration of Timothy K. Larson in Support of IID's November 14, 2006, Motion to Lift or Modify Injunction Pending Appeal ("Larson Decl."), ¶ 7. Seepage will also, therefore continue for at least a year, even if the Injunction is lifted immediately. Certain of the construction work must take place during the winter low flow season in order to prevent impacts to existing water users. Any air quality impacts caused by construction activity will be strictly monitored and mitigated as required by the environmental mitigation plan and

construction contracts which require compliance with all federal, state, and local air quality regulations. Larson Decl., ¶ 9.

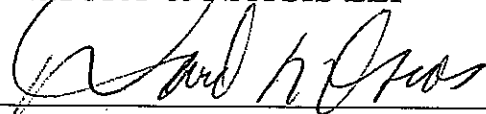
2. Time is of the essence to complete the project within the funding deadline established by the State of California, which is December 31, 2008 (California Water Code § 12562).
3. There are imminent habitat preservation needs, and minimizing interference with species during breeding and nesting seasons, that will result in a long project delay if the Injunction continues. Larson Decl., ¶ 18. IID is enhancing 44 acres of wetland and riparian habitat between Hydroelectric Drops 3 and 4. Declaration of Michel D. Remington in Support of IID's November 14, 2006, Motion to Lift or Modify Injunction Pending Appeal ("Remington Decl."), Exhibit "C" thereto. The work was started by IID, but was suspended due to the Injunction, leaving large environmental habitat areas in an unstable condition. Remington Decl., ¶¶ 9-10. Additionally, some brush clearing needs to be done to avoid adverse affects on the bird nesting season. Larson Decl., ¶ 17.
4. Certain Native American artifacts were discovered at a potential quarry site and those assets need to be protected and preserved. Larson Decl., ¶ 22. The Injunction stopped such work. Larson Decl., ¶¶ 19-22.

In summary, the continuance of the Injunction needs to be reviewed again, this time with the new Congressional directive to avoid delay factored into the analysis. IID believes that in such context, the Injunction should be immediately vacated.

Dated: January 29, 2007

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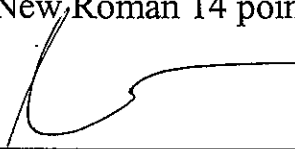


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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE
REQUIREMENTS**

1. This reply complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this reply contains 1,138 words, excluding the parts of the reply exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This reply complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this reply has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in Times New Roman 14 point font.



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Dated January 29, 2007

PROOF OF SERVICE

(Consolidated Case Nos. 06-16345, 06-16618, 06-16664)

I am employed in the county of San Diego, state of California. I am over the age of 18 and not a party to the within action. My business address is 501 West Broadway, 15th Floor, San Diego, California 92101-3541.

On January 29, 2007, I served on interested parties in said action the within:

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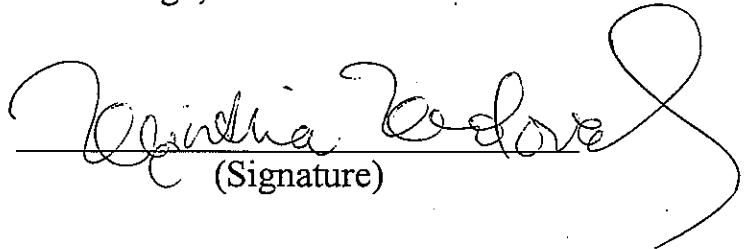
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I declare under penalty of perjury that I am employed in the office of a member of the bar of this court at whose direction the service was made and that the foregoing is true and correct.

Executed on January 29, 2007, at San Diego, California.

Cynthia Sandoval
(Type or print name)


(Signature)