Nos. 06-16345, 06-16618, 06-16664

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONSEJO de DESARROLLO ECONOMICO de MEXICALI, A.C.;
CITIZENS UNITED FOR RESOURCES AND THE ENVIRONMENT;
DESERT CITIZENS AGAINST POLLUTION,
Plaintiffs/Appellants

CITY OF CALEXICO,
Plaintiff

v.

UNITED STATES OF AMERICA; DIRK KEMPTHORNE, SECRETARY OF THE DEPARTMENT OF THE INTERIOR; and ROBERT W. JOHNSON, COMMISSIONER OF THE BUREAU OF RECLAMATION
Defendants/Appellees

IMPERIAL IRRIGATION DISTRICT; SAN DIEGO COUNTY WATER AUTHORITY; CENTRAL ARIZONA WATER CONSERVATION DISTRICT; STATE OF NEVADA; SOUTHERN NEVADA WATER AUTHORITY; and COLORADO RIVER COMMISSION OF NEVADA,
Defendants/Intervenors/Appellees

UNITED STATES' REPLY IN SUPPORT OF MOTION FOR REMAND FOR DISMISSAL OF COUNTS 5-8 AND FOR VACATUR OF INJUNCTION PENDING APPEAL DUE TO MOOTNESS

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Introduction

On December 20, 2006, the President signed into law the Tax Relief and Health Care Act of 2006, which included a provision stating that:

> Notwithstanding any other provision of law, upon the date of enactment of this Act, the Secretary [of the Interior] shall, without delay, carry out the All American Canal Lining Project identified . . . in the [1994] record of decision . . . and . . . [2003] allocation agreement . . .

Pub. L. No. 109-432, Div. C., § 395(a), 120 Stat. 2922, 3046-47 (2006). As explained in the *United States' Motion for Remand for Dismissal of Counts 5-8 and for Vacatur of Injunction Due to Mootness* (Dec. 22, 2006) ("*U.S. Motion*"), this provision (hereinafter, "Section 395") directs the Secretary to proceed with the Lining Project, notwithstanding any alleged violation of the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), the Migratory Bird Treaty Act ("MBTA"), or the San Luis Rey Indian Water Rights Settlement Act ("SLRA"). Because Congress has exempted the Lining Project from further compliance with these statutes, this Court cannot issue injunctive relief for the violations alleged in Counts 5-8 of plaintiffs' First Amended Complaint, making those counts moot and mandating vacatur of the injunction pending appeal.

In response, plaintiffs-appellants Consejo de Desarrollo Economico Mexicali ("CDEM") *et al.* argue that Section 395 is ambiguous and does not exempt the Lining Project from the need to comply further with the stated statutes,

and that Section 395 is unconstitutional. *Appellants' Consolidated Response to United States' Motion* (Jan. 23, 2007) ("*CDEM Response*"); *Appellant Desert Citizens Against Pollution's Response to Motion To Remand And Dismiss Due To Mootness* (Jan. 23, 2007) ("*DCAP Response*"). These arguments lack merit.

I. SECTION 395 IS CLEAR

A. Section 395 Is Capable of Only One Interpretation

Section 395 directs the Secretary to proceed with the Lining Project (1) "upon the date of enactment of this Act," (2) "without delay" and (3) "notwithstanding any other provision of law." Pub. L. No. 109-432, Div. C., § 395(a), 120 Stat. 3046-47. These terms must be read as a whole. *Doe v. Mann*, 415 F.3d 1038, 1063 (9th Cir. 2005). In arguing that the clause "without delay" could mean "efficiently" or "with all deliberate speed" in accord with alleged outstanding NEPA obligations (*see CDEM Response* at 3, 7-11 & n. 10), CDEM completely disregards the other terms of Section 395, including the phrase "notwithstanding any other provision of law." NEPA and the other statutes at issue in the present case (the ESA, MBTA and SLRA) are "other provision[s] of law." Through Section 395, Congress mandated that the Secretary "shall" carry out the Lining Project "without delay" "notwithstanding *any other provision* of law." Pub. L. No. 109-432, Div. C., § 395(a), 120 Stat. 3046-47 (emphasis added). There is nothing ambiguous about this language.

CDEM likewise ignores the clause "upon the date of enactment of this Act." By directing that the Secretary to carry out the Lining Project without delay, notwithstanding any other law, and "*upon the date of enactment of this Act*," *id.* (emphasis added), Congress reinforced its intent that the Project proceed upon enactment, without the delay associated with further environmental review.[1/]

CDEM provides no legislative rationale to support its alternative reading (*CDEM Response* at 11) that Congress enacted Section 395 to direct the Secretary to conduct "environmental compliance activities . . . without delay." In Section 395(a), Congress specifically identified the Lining Project and the 1994 record of decision ("ROD") approving the Project. Pub. L. No. 109-432, Div. C., § 395(a), 120 Stat. 3047. Congress also specifically referenced the 2003 Allocation Agreement, *id.*, which was a critical part of the series of agreements that resolved longstanding disputes among California water users over the use of Colorado River water and opened the door to requisite State funding. *See U.S. Motion* at 3; *U.S. Brief* at 20. These references demonstrate that Congress was aware that the Project had been approved and funded. *See Doe,* 415 F.3d at 1064 (presuming Congressional knowledge of facts relevant to legislation). The only delay in

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[1/]This interpretation is further reinforced by § 395(b) of the Act, which directs the "Commissioner of Reclamation [to] cooperate with a State, to the extent practicable," if "a State conducts a review or study of the implications of the All American Canal Lining Project." Pub. L. No. 109-432, Div. C., § 395(b)(1), 120 Stat. 3047. Significantly, Congress provided that such cooperation "shall not delay [the Secretary in] carrying out . . . the Lining Project." *Id.*, § 395(b)(2).

Project implementation on the date of Section 395's enactment was the delay occasioned by the present litigation and the plaintiffs' claims that the Secretary had failed to comply with NEPA and other named statutory provisions. By directing the Secretary to carry out the Lining Project "without delay" "upon the date of enactment of this Act" and "notwithstanding any other provision of law," Congress plainly intended to exempt the Project from any remaining statutory requirements that would prevent immediate implementation. No other interpretation is available.

B. Congress's Failure to Identify NEPA and Other Statutes By Name is Not Determinative

That Section 395 does not refer to NEPA or the other relevant statutes by name (*CDEM Response* at 7-12; *DCAP Response* at 6-7) does not mean that this Court may disregard Section 395's manifest directive. Contrary to CDEM and DCAP's argument, the axiom of statutory construction that "repeals by implication are not favored," *Morton v. Mancari*, 417 U.S. 535, 549 (1974), does not apply here. Section 395 simply does not effect an open-ended repeal of NEPA or other legislative program. *Cf. id.* at 545-50 (addressing claim that Title VII of the Civil Rights Act impliedly repealed a statutory hiring preference favoring Indians). Rather, Section 395 provides a project-specific exemption for a discrete project that, at the time of the Section's enactment, had already undergone extensive environmental review and had already received formal administrative approval. There is nothing *implicit* about Congress's intent to excuse the Project from the

need to comply with *any* further statutory requirements that would delay Project implementation.

Moreover, to the extent the axiom applies, it is not controlling. While repeals by implication are "disfavored," they are not disallowed. *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992). Where a later enacted statute irreconcilably conflicts with an earlier statute, a repeal by implication, to the extent of the conflict, will be found. *National Wildlife Federation v. U.S. Army Corps of Engineers*, 384 F.3d 1164, 1178 (9th Cir. 2004); *Westlands Water Dist. v. United States Dep't of Interior*, 43 F.3d 457, 460 (9th Cir. 1994) (citing *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 779 (1976)). CDEM's assertion that the Secretary must take further actions to comply with NEPA and the other statutes – thus delaying the Project for some undetermined period of time – plainly conflicts with Section 395's directive to proceed "upon . . . enactment," "without delay," and "notwithstanding . . . *any* other provision[s] of law."

C. Section 395's Reference to the 1994 ROD Is Not Inconsistent With The Stated Exemption

DCAP argues that Section 395 is "unconstitutionally vague" because it exempts the Secretary from "other provision[s] of law," while simultaneously referencing the 1994 ROD, which includes "environmental commitments" undertaken pursuant to other statutory regimes (3ER 605-610). *DCAP Response* at 6-7. In so arguing, DCAP misconstrues the constitutional vagueness doctrine – which applies only to regulatory enforcement statutes, *see Forbes v. Napolitano*,

236 F.3d 1009, 1011 (9th Cir. 2000) (explaining due process "right to fair notice" when conduct is "prohibited by law") – and asserts a textual inconsistency that does not exist. Congress directed the Secretary to "carry out" the Lining Project approved in the 1994 ROD, which includes the mitigation measures and environmental commitments that are part of the approved Project. Section 395's exemption applies to the extent the approved Project may be noncompliant with NEPA and other statutory provisions. There is no conflict.

D. Section 395 Does not Conflict with Section 397

Nor is there any conflict with Section 397 of Public Law No. 109-432. CDEM argues that Section 395 "must be read in harmony with Section 397" and that the only to give Section 397 any meaning is to interpret Section 395, counter-textually, as *not* exempting the Lining Project from existing laws. *CDEM Response* at 8. This is patently mistaken. Section 397 provides that the 1944 Treaty between the United States and Mexico is the "exclusive authority for identifying, considering, analyzing, or addressing impacts occurring outside the boundary of the United States of works constructed, acquired, or used within the territorial limits of the United States." Pub. L. No. 109-432, Div. C., § 397, 120 Stat. 3047. This provision is not limited to the All-American Canal Lining Project identified and addressed in Section 395. *Id.*, §§ 395 & 397. Accordingly, there is no basis for CDEM's suggestion that the plain reading of Section 395 – as

exempting the Lining Project from further legal review as to impacts in the United States and Mexico – would render § 397 meaningless.

E. Section 395's Legislative History Does Not Raise Doubt About Congress's Intent

Finally, there is no merit to Plaintiffs' suggestion that the legislative history of Section 395 renders its meaning uncertain. Plaintiffs disparage Section 395 as a "rider" to an "appropriations bill" (*CDEM Response* at 1, 4-6; *DCAP Response* at 1, 4-5), and cite the Supreme Court's observation that the policy disfavoring repeal by implication applies with "greater force" to such acts. *CDEM Response* at 6 (citing *TVA v. Hill*, 437 U.S. 153, 190 (1978)). But Public Law No. 109-432 is not an appropriations act. While Public Law No. 109-432 contains a number of independent provisions, it does not appropriate funds.[2/] *See* Pub. L. No. 109-432, 120 Stat. 2922-33 (table of contents). Moreover – even if the Supreme Court's observations regarding appropriations acts were somehow relevant to Public Law 109-432[3/] – it is well settled that Congress "may amend substantive law in an

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[2/]CDEM relies on a legislative report on a proposed appropriations bill, which included a provision identical to Section 395. *CDEM Response* at 11-12 & Att. B (referencing Sen. Rep. 109-274, 109th Cong., 2d Sess. (June 29, 2006)). That appropriations bill (H.R. 5427) has not been enacted. The report on the enacted bill (H.R. 6111) is H.R. Rep. 109-722, 109th Cong., 2d Sess. (Dec. 7, 2006).

[3/]The Supreme Court reasoned that, "[w]hen voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden." *TVA v. Hill*, 437 U.S. at 190. This rationale does not translate to substantive legislation, even if passed quickly at the end of a legislative session.

appropriations statute, as long as it does so clearly." *Robertson*, 503 U.S. at 440; *see also Ecology Center v. Castenada*, 426 F.3d 1144, 1147 (9th Cir. 2005) (recognizing change of law in appropriations bill); *Portland Audobon Soc. v. Lujan*, 884 F.2d 1233, 1236-40 (1989) (*"PAS II"*) (same).

At bottom, plaintiffs' arguments regarding legislative history amount to nothing more than complaints about legislative process. While noting complaints by individual legislators regarding the manner in which the legislation as a whole was passed through Congress (*CDEM* at 4-5, n. 5), CDEM has not demonstrated any legislative history that draws Section 395's plain meaning into doubt.[4/]

II. SECTION 395 IS CONSTITUTIONAL

A. Section 395 Does Not Raise Article III Concerns

As explained (*U.S. Motion* at pp. 4-7), Congress may amend existing legislation to moot a pending injunction or pending action for injunctive relief, without raising separation-of-powers concerns under Article III of the Constitution. *Robertson*, 503 U.S. at 439. As further explained, this Court has

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[4/]There is no merit to CDEM's argument (*Response* at 5, 11) that Section 395 violates Senate Standing Rule XXVI, ¶ 12. That rule requires committee reports on a bill "repealing or amending any statute or part of any statute" to include the text "proposed to be repealed" and a "comparative print" of the proposed amendment. *Id.* at Att. B-4. As Section 395 does not effect a general repeal or amendment of any law, this standing rule is inapposite. Moreover, CDEM cites no authority for the proposition that courts may ignore the plain text of a Congressional enactment based on Congress's alleged noncompliance with its own procedural rules.

repeatedly applied this rule to legislative provisions, like Section 395, that exempt an individual project from existing environmental provisions. *See Ecology Center,* 426 F.3d at 1147-50 (upholding legislation that changed rules for specific timber-sale projects); *Mt. Graham Coalition v. Thomas*, 89 F.3d 554, 556-58 (9th Cir. 1996) *and Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1457-61 (9th Cir. 1993) (upholding legislation exempting observatory construction project from NEPA and ESA requirements); *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1432-38 (9th Cir. 1989) (upholding legislation exempting one highway project from an environmental provision in transportation statutes).

While acknowledging that these decisions control the present case, CDEM urges this Court to disregard its precedents on the grounds that the Supreme Court in *Robertson* "declined to decide the 'single project' issue." *CDEM Response* at 17 & n. 13 (citing *Robertson*, 503 U.S. at 441). But *Robertson* in no way invalidates this Court's specific rejection of the single-project argument. *See Ecology Center*, 426 F.3d at 1149-50 (finding it of "no consequence" that challenged amendment was targeted at particular timber sales).

Equally important, CDEM has not articulated a single rationale for why Congress cannot enact special legislation to exempt a particular project from general legislation. If there were no pending litigation in the present case – *e.g.,* if the Department of the Interior itself decided not to proceed with the Project until a Supplemental Environmental Impact Statement ("SEIS") was prepared and this

suit had never been filed – Section 395 would have the same effect. It would require the Secretary to "carry out" the Lining Project notwithstanding any outstanding NEPA obligations. In such a circumstance, Congress's decision to modify the statutory framework applicable to the Project would raise no Article III concerns, as there would be no litigation to influence.

Finally, the pendency of the present litigation does nothing to change this analysis. Section 395 does not overturn any judgment or "direct[] particular findings of fact or the application of old or new law to fact." *Ecology Center*, 426 F.3d at 1150. Rather, it alters the Secretary's statutory obligations. Counts 5-8 are moot because Congress has directed the Secretary to proceed with the Lining Project notwithstanding any other provision of law, including the statutory violations alleged in Counts 5-8. Pub. L. 109-432, Div. C., § 395, 120 Stat. 3046-47. This directive is well within Congress's constitutional prerogative.[5/]

B. Section 395 Does Not Violate the Equal Protection Clause

Plaintiffs' argument that Congress has violated the Equal Protection Clause by providing special legislative treatment for the Lining Project is likewise without merit. The predicate of any equal protection violation is differential treatment. *Dillingham v. I.N.S.*, 267 F.3d 996, 1006 (9th Cir. 2001). Contrary to

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[5/]There is no basis for CDEM's suggestion (*Response* at 16) that Section 395 violates the Ex Post Facto Clause or the prohibition against bills of attainder. The provision is not retroactive and does not "legislatively determine guilt [or] inflict[] punishment upon an identifiable individual without . . . a judicial trial." *Nixon v. Admin. of Gen. Services*, 433 U.S. 425, 468 (1977).

DCAP's argument (*DCAP Response* at 13), the mere fact that the Lining Project is sited in a county with a large Hispanic population does not mean that Congress has selectively denied Hispanics rights under NEPA or any other statute. Section 395 addresses the Lining Project, not classes of people. All persons with an interest in the project, wherever located, are equally impacted. Plaintiffs have raised a variety of statutory claims – *e.g.*, claims under the MBTA and ESA – that involve interests held by persons who do not reside locally. There is no basis for presuming that Section 395 effects one group of persons any differently than another. *Cf. Stop H-3 Ass'n*, 870 F.2d at 1431 (exemption for a federal highway project in Hawaii did not target Hawaiians as a class, but instead impacted "any United States citizen" with interests impacted by the Project).

In any event, even if Section 395 were found to have a differential effect on a racial minority or other protected class, there is no authority for DCAP's assertion (*Response* at 13) that "strict scrutiny" applies. "A facially neutral law . . . warrants strict scrutiny only if it can be proved that the law was motivated by a racial purpose of object . . . or if it is unexplainable on grounds other than race." *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (internal citations and quotations omitted). DCAP has not made and cannot make any such showing.

Nor has DCAP argued that Section 395 would fail a less stringent review standard. This Court's precedents are to the contrary. In *Stop H-3 Ass'n*, this Court presumed (without deciding) that "intermediate" scrutiny applied to a law

alleged to discriminate against Hawaiians because it exempted a federal highway project in Hawaii from the requirements of Section 4(f) of the transportation laws. *See* 870 F.2d at 1429-32. This Court concluded that there was no equal protection violation because the statute was "substantially related to the achievement of important governmental purposes," *viz.*, "expediting completion" of the subject project. *Id.* at 1432. No less is true of the Lining Project in this case.

C. Section 395 Does Not Violate the Tenth Amendment

Plaintiffs' argument that Section 395 violates California's Tenth Amendment rights is premised on the unsupported and untenable assertion that Section 395 requires the Bureau of Reclamation ("Reclamation") to "commandeer" Project funding from the State. *CDEM Response* at 13-14; *DCAP Response* at 9. Under the Tenth Amendment, "the Federal Government may not compel States to implement, by legislation or executive action, federal regulatory programs." *Envtl. Def. Ctr. v. EPA*, 344 F.3d 832, 847 (9th Cir. 2003) (quoting *Printz v. United States*, 521 U.S. 898, 925 (1997)). However, Congress has not done so here. Section 395 directs the Secretary to "carry out" a Project that the State had already committed to fund at the time of the statute's enactment. Section 395 does not direct the State of California to provide funding or other support.

Nor does it give Reclamation any "leverage," (*CDEM Response* at 14) to compel California's participation.[6/]

Finally, this Court cannot find a Tenth Amendment violation on the mere assertion that Section 395 might be read to compel State participation. This Court must construe Section 395 to avoid a constitutional problem if "fairly possible." *United States v. Buckland*, 289 F.3d 558, 564 (9th Cir. 2002). Here, a straightforward reading of Section 395 avoids any constitutional difficulty.

D. Section 395 Does Not Violate the Due Process Clause

Plaintiffs' due process claim here fails because they cannot demonstrate a deprivation of a protected property interest without adequate process. *See Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005). At issue here are procedural obligations (including public-participation requirements) imposed by NEPA for "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). DCAP argues that the Lining Project will significantly affect air quality, and that Congress has denied its due process rights by withdrawing NEPA's public-participation requirements with respect to such effects. *DCAP Response* at 10-13. This argument erroneously presumes: (1) that DCAP has a property right in air quality, and (2) that NEPA's

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[6/]The United States does not concede Plaintiffs' standing to assert California's Tenth Amendment rights. *See Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 144 (1939); *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F.3d 219, 235 (2nd Cir. 2006); *Medeiros v. Vincent*, 431 F.3d 25, 34 (1st Cir. 2006).

procedural requirements are constitutionally mandated whenever this property right might be impacted. Neither presumption is tenable or supported by any authority.

III. THERE IS NO REMAINING BASIS FOR AN INJUNCTION

As explained (*U.S. Motion* at 4, 7-8), the Plaintiffs sought and this Court granted an injunction pending appeal solely on the basis of the NEPA violations alleged in Count 5 of the First Amended Complaint. Because Congress has directed the Secretary to proceed with the Lining Project notwithstanding any other provision of law (including the provisions of NEPA), there is no legal basis for continuing the injunction and it must be lifted. CDEM and DCAP have not shown otherwise.

A. Alleged Violations of Section 395 Are Not Before the Court

DCAP observes (1) that Section 395 directs the Secretary to carry out the Lining Project approved in the 1994 ROD; and (2) that the approved Project incorporates various environmental commitments, including a commitment to obtain permits required under regulations of the Imperial County Air Pollution Control District. *DCAP Response* at 14. Based on these observations, DCAP argues that its "claims arising from those commitments" are not moot and therefore, that the injunction should stand. *Id.* This is a *non sequitur*.

Plaintiffs have no pending claims predicated on Section 395 or any alleged violation of the 1994 ROD. Count 5 of the First Amended Complaint alleges that

Reclamation violated NEPA by failing to prepare a Supplemental Environmental Impact Statement ("SEIS"). 2ER 349-351. Because Congress has directed the Secretary to carry out the Lining Project, without delay, notwithstanding any other law (and the alleged need for an SEIS), this claim is moot. If – when enacting Section 395 – Congress simultaneously imposed additional affirmative obligations on the Secretary (or Reclamation) – *e.g.*, obligations to "carry out" the Lining Project in a particular manner consistent with commitments made in the 1994 ROD – any viable claim that plaintiffs may have based on those obligations would constitute a new cause of action. Those claims are not before this Court in the present litigation. Nor has DCAP begun to make the showing required for preliminary injunctive relief with respect to these wholly new claims.

The same analysis holds for Plaintiffs' claim (*CDEM Response* at 18) regarding the elimination of slipform ridges from the canal design. Plaintiffs argued in their briefs to this Court that Reclamation was required to prepare an SEIS based on this change in Project design. *See Citizens United for Resources and the Environment Brief* (Sept. 13, 2006) at 42-43. Now CDEM argues that the design change is "plainly in derogation of the statutory command" in Section 395. *CDEM Response* at 18. Setting aside the merits of this argument,[7] it plainly is not properly before this Court. The Secretary has not been asked to render his opinion

[7]Nothing in the text of Section 395 suggests that Congress intended to confine Reclamation to a particular design; the FEIS and ROD disclosed that the ridges were subject to further testing. 3ER 610, 4ER 764.

on the scope of discretion under Section 395 and no administrative or legal challenge has been instituted. Injunctive relief cannot be granted on a claim that does not exist.

B. No Injunctive Relief is Available On the Water Rights Claims

Nor is there any merit to CDEM's request to continue the present injunction, pending appeal of the constitutional violations alleged in Counts 1-4 of the First Amended Complaint. *CDEM Response* at 18-20. CDEM did not seek preliminary injunctive relief on these counts in its original motion, and has never alleged or shown imminent and irreparable harm with respect to these Counts. Assuming, *arguendo*, that CDEM possesses a property interest in seepage from the All-American Canal, CDEM could suffer no injury to that interest until seepage stops, an event that will not happen for many months (or years) even if the present injunction were immediately lifted.

Equally important, as explained in the *U.S. Response*, CDEM has no claim to permanent injunctive relief based on the taking of its alleged property interest in canal seepage, even if such interest is entitled to Fifth Amendment protection. Contrary to CDEM's argument, the Tucker Act damage remedy is presumed available, unless Congress "explicitly precludes" such remedy. *AK Native Village Corp. v. AHTNA, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997). The fact that the SLRA contains no express provision for the purchase of water rights is irrelevant. The Tucker Act remedy has been held available for the alleged taking of water

rights. *See Washoe County Nevada v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003). CDEM cites no authority to the contrary.

IV. DCAP's CLAIM FOR ATTORNEY'S FEES IS PREMATURE

Under Circuit Rule 39-1.6, requests for attorneys fees are to be filed "within 14 days from the expiration" of the period within which a party may seek rehearing, or within 14 days from the Court's disposition of a petition for rehearing. Until this Court enters a decision, DCAP's claim for fees is premature.

Conclusion

For the foregoing reasons, this Court should (1) summarily deny CDEM's appeal as to Counts 5-8 of the First Amended Complaint; (2) remand Counts 5-8 to the district court with instructions that the district court dismiss the claims as moot; and (3) immediately vacate the injunction pending appeal, given the absence of any remaining basis for such injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing United States' Reply in Support of Motion for Remand For Dismissal of Counts 5-8 and For Vacatur of Injunction Pending Appeal Due to Mootness has been served, this 30th day of January 2007, *via* United States mail and courtesy electronic service, to all counsel of record, as indicated on the attached service list.

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