

APPEAL NO. 06-16345
(Cons. With Nos. 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; and
DESERT CITIZENS AGAINST POLLUTION,
Plaintiffs/Appellants

v.

UNITED STATES OF AMERICA, GALE NORTON, SECRETARY OF THE
DEPARTMENT OF THE INTERIOR, and JOHN W. KEYS, III
COMMISSIONER OF THE BUREAU OF RECLAMATION,
Defendants/Appellees.

Appeal from the United States District Court for the District of Nevada
THE HONORABLE PHILLIP M. PRO
Central District Case No. 2:05-cv-0870-PMP (LRL)

APPELLANTS' MOTION FOR SUPPLEMENTAL BRIEFING
REGARDING THE MOTION FOR PARTIAL REMAND AND VACATUR
OF THE INJUNCTION

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Appellants Consejo De Desarrollo Economico De Mexicali, A.C. (“CDEM”), Citizens United for Resources and the Environment (“CURE”) and the City of Calexico (“Calexico”) hereby move for an order allowing supplemental briefing in connection with the appellees’ motion for partial remand and vacatur of the injunction on the following narrow constitutional issues:

(1) Why Tax Relief & Health Care Act of 2006, Pub. L. No. 109-432, §§395-397 (2006) (“the rider”) does not pass a heightened level of scrutiny analysis under the equal protection and due process clauses of the U.S. Constitution. Specifically, this case raises factual issues significantly different than those presented in *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419,1431 (9th Cir. 1989). For example, nothing in the legislative history nor the record here demonstrates any substantial basis for completely eliminating the rights of citizens in a small impoverished area of the U.S. to the same environmental protections enjoyed by others in our nation. Case precedent does not compel this Court to blindly uphold such legislation where the plaintiffs have little or no access to the legislative process and are facing a project that affects the health and safety of their members and citizens. Unlike prior cases, the totality of the factors on the All American Canal – including the long dearth of environmental review, the last-minute Congressional maneuverings, and discriminatory effects of this legislation on poor minorities – warrant a closer analysis

of the limits of Congressional authority. *See U.S. v. Carolene Products Co.*, 304 U.S. 144, 153, 58 S.Ct. 778, 784 (U.S. 1938) fn. 4, acknowledging that instances exist in which courts should inquire "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of . . . political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

(2) Why the rider is unconstitutional under the petition clause of the First Amendment because it impermissibly limits the right of U.S. citizens to petition the court for redress of grievance. This issue was not raised and fully explored in the previous decisions of this Court.

(3) Why the rider violates the Tenth Amendment by essentially commandeering California assets. This issue is unique to *CDEM v. U.S.* Because no federal funds can be used for the All American Canal, the rider amounts to thinly disguised state-based mandate to construct only one alternative - the lining of the canal - rather than other alternatives set forth in the 1994 Record of Decision. Unless this Court finds plaintiffs lack standing (an issue that has not been briefed or plead), Plaintiffs have the right to amend their complaint and allege a Tenth Amendment violation based upon the record before this Court.

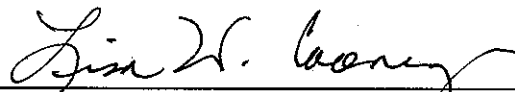
(4) Why the injunction should remain in place until all of the issues on appeal are resolved.

As the U.S. intended, the rider is fatal to the claims of the U.S. plaintiffs. A 20-page limit to respond to what amounts to a “terminating” motion rendered it impossible for the appellants to fully address and analyze all of these issues. As a terminating motion affecting significant rights, appellants should have the latitude to fully brief matters.

Importantly, the government concedes that no exigency exists for an immediate decision or the lifting of the injunction. At oral argument, the government conceded that no imminent need existed for a lifting on the injunction. The nesting season for certain endangered species is underway and the “window” for clearing brush so as not to disturb the nests will not reopen for another six months. Further, the “low flow” period for the canal, when certain work must be accomplished, is essentially passed until next winter. At least six to eight months exist before work can commence.

Appellants anticipate that supplemental briefing on these issues can be filed by March 19, 2007, or 21 days from an order permitting briefing. A short delay in ruling on the motion to ensure all issues are fully briefed and explored will not cause any irreparable harm.

DATED: February 23, 2007 LEWIS BRISBOIS BISGAARD & SMITH LLP

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Docket No. 06-16345

(Related Nos. 06-16618, 06-16664)

Consejo de Desarrollo Economico de Mexicali, A.C. v. United States of America,
et al.

CERTIFICATE OF SERVICE

I, the undersigned, declare that I am over the age of 18 years and not a party to the case; I am employed in the County of San Diego, California, where the service occurs; and my business address is 550 West "C" Street, Suite 800, San Diego, California, 92101.

On **February 23, 2007**, I served the document entitled:

**APPELLANTS' MOTION FOR SUPPLEMENTAL BRIEFING
REGARDING THE MOTION FOR PATIAL REMAND AND VACATUR
OF THE INJUNCTION**

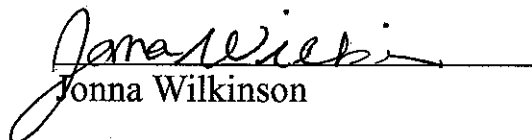
to the following parties and counsel of record:

SEE ATTACHED SERVICE LIST

VIA ELECTRONIC MAILING pursuant to written agreement of the parties.

I declare under penalty of perjury under the laws of the United States of America
State of California that the above is true and correct to the best of my knowledge.

Executed: **February 23, 2007**


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