

Appeal Nos. 06-16345, 06-16618, 06-16664 [Consolidated]

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CONSEJO DE DESARROLLO ECONOMICO DE MEXICALI, AC;
CITIZENS UNITED FOR RESOURCES AND THE ENVIRONMENT,**

Plaintiffs-Appellant,

vs.

UNITED STATES OF AMERICA, ET. AL.,

Defendants-Appellees.

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

**SAN DIEGO COUNTY WATER AUTHORITY'S REPLY AND JOINDER
TO UNITED STATES AND IMPERIAL IRRIGATION DISTRICT'S
REPLY BRIEF TO APPELLANTS' OPPOSITION TO UNITED STATES'
MOTION FOR REMAND FOR DISMISSAL OF COUNTS 5-8 AND FOR
VACATUR OF INJUNCTION PENDING APPEAL DUE TO MOOTNESS**

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I. PRELIMINARY STATEMENT

The San Diego County Water Authority (SDCWA) filed a joinder to the remand/dismissal Motion filed by the United States, and provides this short reply only with respect to the air quality issues raised by Appellant Desert Citizens Against Pollution (DCAP) in its opposition. SDCWA further joins in the replies of the United States and by the Imperial Irrigation District (“IID”).

In its case in chief, DCAP argued, based merely on an unfounded assumptions, that applicable local air quality regulations would be ignored during the construction of the All American Canal Lining Project (“AACLP”). Here, in its responses to United States’s Motion for Remand, For Dismissal of Counts 5-8 and Vacatur of Injunction Pending Appeal Due to Mootness, DCAP makes the same claims. However, DCAP goes even further. They frame their argument in an accusatorial tone asserting, inter alia, that IID and SDCWA will move forward with the AACLP and ignore all air quality related regulations. By doing so, DCAP claims IID and SDCWA would purposely subject minority communities near AACLP to all manners of airborne hazards. There is no basis for any of the assertions made by Appellant.

It is of interest that in the case in chief, DCAP took the position that the Final Environmental Impact Statement (FEIS) and the Supplemental Information Report (SIR) were inadequate and improper because they merely stated that all applicable air quality permits would be obtained from the Imperial County Air Pollution Control District (ICAPCD) and that ICAPCD Rules must be followed. SDCWA, in its reply brief, demonstrated that this was more than adequate, as the necessary ICAPCD permits' operational requirements were not only extensive, but would cover all the issues of concern raised by DCAP specifically as to the PM-10¹ issues. DCAP now asserts that it would be a travesty if those rules were not followed, based on their apparent assertion that, given the passage of Pub.L.No. 109-432 ("PL 109-432") all laws, including the ICAPCD Rules, can be ignored.

SDCWA must point out that not only do the contracts between IID and its contractors to perform the construction of the AACLP require that the ICAPCD Rules be followed, but that Water Code Section 12565(b), which provides for the funding by the State of

¹ PM-10 is the commonly used abbreviation for particulate matter less than 10 microns in size.

California for the AACLP, also requires adherence to the ICAPCD Rules. Lastly, IID's Board of Directors publicly reaffirmed in 2006 that the ICAPCD Rules would be followed as well.

Appellants' arguments as to the alleged air quality impacts of construction under PL 109-432 are not only inflammatory, but they have no basis in fact or law either.

II. ARGUMENT

In October 2003, this Court ordered the EPA to reclassify the Imperial Valley as a "serious nonattainment area" for PM-10, Sierra Club v. EPA, 346 F.3d 955, 963 (9th Cir. 2003). The EPA did so in August 2004². In response to this reclassification, the ICAPCD adopted more stringent requirements to control PM-10. (6ER 00972.)

In November 2005, ICAPCD adopted a new set of standards for controlling PM-10 emissions. (6ER 00972.) The ICAPCD Rules and Regulations Revised November 8, 2005 ("ICAPCD Rules") contain detailed air quality mitigation provisions for construction activities (for example: limitations on visible dust emissions opacity, timing and

² See "Finding of Failure to Attain and Reclassification to Serious Nonattainment; Imperial Valley Particulate Matter of 10 Microns or Less", 69 FR 48792.

frequency of watering activities, phasing to control dust, dust control plan requirements). As an example, ICAPCD Rule 801 discusses mitigation measures for construction and earthmoving activities, and ICAPCD Rule 805 discusses the use of paved and unpaved roads. (6ER 00972-00973.) There is also a requirement that the ICAPCD must review all applicable plans and determine compliance in order to issue a permit. (ICAPCD Rule 201.) A permit must contain language requiring the permittee to “be in compliance with all applicable federal, state and local agencies.” (ICAPCD Rule 115(C).) Failure to abide by these requirements subjects the permittee to enforcement actions, administrative fines, and even required abatement. (ICAPCD Rules 104, 105, 106.)

In July 2006, the IID Board of Directors approved an Addendum to the Final EIS/EIR and Amendment to Environmental Commitment Plan (Exhibit A to Declaration of Michael L. King, 2SER 000356, Doc. 199, “Addendum”). IID, as lead agency under the California Environmental Quality Act (Cal. Pub. Resources Code section 21000, et seq) issued the Addendum in order to amend and supplement the 1994 Final EIS/EIR and its 2004 Environmental Commitment Plan. The Addendum addressed the designation of the

Imperial Valley as a serious nonattainment area for PM-10 and the ICAPCD's resulting adoption of more stringent PM-10 emissions regulations. The Addendum again reiterates what IID had earlier committed to undertake – that, in the AACLP, it would implement all then current ICAPCD rules and regulations regarding PM-10 emissions.

Additionally, the specifications in the IID's contracts for the AACLP require that all contractors comply with the ICAPCD Rule 800 on fugitive dust. (Declaration of Michael L. King, 2SER 000356, Doc. 199.) Furthermore, "IID's own contract specifications are even more restrictive than Rule 800...No earthen material may be moved without being moisture conditioned to +/- 2% of optimum moisture content, and all access and haul roads must be kept moist at all times." (Id.) There has never been any contradiction of this in the record.

Finally, the funding for this project came from the State of California. California Water Code Section 12565 sets for the purpose and other considerations for the commitment of funds and further states:

"The two hundred million dollars... made available...may be expended solely for the lining of the All American Canal and the

Coachella Branch of the All American Canal and *only if all of the following requirements have been met:* (b) *Environmental documentation and permits required by [CEQA], [NEPA] and any other applicable state and federal environmental laws are approved and certified for [AACLP] or the Coachella Branch Lining Project."* California Water Code Section 12565(b). (Emphasis added).

DCAP and CDEM assert that because of the passage of PL 109-432 the AACLP will proceed without adherence to the ICAPCD Rules. To the contrary as described above, IID and its contractors have committed by contract, independent of the Secretary's obligations, by contract to comply with the ICAPCD Rules. Secondly, the IID Board of Directors have reaffirmed this commitment in a public forum. Finally, California Water Code Section 12565(b) makes it patently clear that if, at the very least, California environmental laws are not carried out, there will be no funding for the AACLP. The ICACPD Rules are clearly included within this broad net set forth by the California Legislature.

III. CONCLUSION

Based on the reasons described above, Appellant's allegations as to the air quality impacts of PL 109-432 are unfounded.

Respectfully submitted,

Dated: January 30, 2007

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 14(c)(2))

The text of this SAN DIEGO COUNTY WATER AUTHORITY'S REPLY AND JOINDER TO UNITED STATES AND IMPERIAL IRRIGATION DISTRICT'S REPLY BRIEF TO APPELLANTS' OPPOSITION TO UNITED STATES' MOTION FOR REMAND FOR DISMISSAL OF COUNTS 5-8 AND FOR VACATUR OF INJUNCTION PENDING APPEAL DUE TO MOOTNESS consists of 1,128 words as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: January 30, 2007

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CERTIFICATE OF SERVICE

The undersigned is a citizen of the United States and resident of the State of California, is over the age of eighteen and is not a part to the within action.

The foregoing SAN DIEGO COUNTY WATER AUTHORITY'S REPLY AND JOINDER TO UNITED STATES AND IMPERIAL IRRIGATION DISTRICT'S REPLY BRIEF TO APPELLANTS' OPPOSITION TO UNITED STATES' MOTION FOR REMAND FOR DISMISSAL OF COUNTS 5-8 AND FOR VACATUR OF INJUNCTION PENDING APPEAL DUE TO MOOTNESS was served this date by placing a copy in the United States mail, with postage prepaid thereon, addressed to:

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