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., ET AL.

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, ET AL.

Defendants-Appellees.

AND CONSOLIDATED ACTIONS

Appeal from the United States District Court, District of Nevada
Case No. 2:05-cv-0870-PMP (LRL)

APPELLANT DESERT CITIZENS AGAINST POLLUTION'S RESPONSE TO MOTION TO REMAND AND DISMISS DUE TO MOOTNESS

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TABLE OF CONTENTS

Page

		Page
I.	INTRODUCTION	1
II.	STATEMENT OF FACTS AND PROCEDURAL POSTURE	3
III.	THE PUB. L. NO. 109-432 RIDER VIOLATES CONSTITUTIONAL PRINCIPLES	5
	A. The Rider Violates The Principle Of Separation Of Powers If It Fails To Change Underlying Law Or If It Is Unconstitutional	5
	B. The Rider Is Unconstitutionally Vague And Does Not Moot NEPA Or Air Quality Compliance	6
	C. The Appropriations Rider Violates Separation Of Powers Because It Fails To Change Underlying Substantive Law	7
	D. The Rider Violates The 10th Amendment's Prohibition on Commandeering	9
	E. The Rider Violates Procedural Due Process Rights Of DCAP Members And Residents Of Imperial County	10
	F. The Rider Violates Substantive Due Process and Equal Protection For DCAP Members And Residents Of Imperial County	12
IV.	EVEN IF CONSTITUTIONAL, THE RIDER DOES NOT MOOT CLAIMS ARISING FROM AIR QUALITY COMMITMENTS IN THE FEIS AND ROD	14
V.	EVEN IF THE RIDER IS CONSTITUTIONAL, REVIEW AND IMPLEMENTATION OF AIR QUALITY MITIGATION MEASURES WILL NOT DELAY THE PROJECT	16
VI.	EVEN IF THE RIDER IS CONSTITUTIONAL, PLAINTIFFS ARE ENTITLED TO ATTORNEYS' FEES	17

I. INTRODUCTION

Plaintiff-Appellant Desert Citizens Against Pollution ("**DCAP**") hereby opposes the United States' Motion to Remand and Dismiss due to mootness. The obscure rider to the appropriations bill Pub. L. No. 109-432, one page in the 274 page omnibus tax law and passed after midnight on the last day of the 109th Congress, does not moot the National Environmental Policy Act ("**NEPA**") claims in this case.

The rider, which the government claims impliedly repealed environmental review of the All-American Canal parallel canal project, is unconstitutional. The Rider is impermissibly vague because it fails to describe what provision of NEPA it repeals and because it specifically adopts the 1994 Final Environmental Impact Statement ("**FEIS**") and Record of Decision ("**ROD**") that contain a host of NEPA and environmental compliance commitments. The legislation provides no clear sanction for the government's effort to evade NEPA and air pollution mitigation compliance and no legislative history explains the rider's ambiguities. In addition, the rider violates separation of powers principles because it fails to change underlying substantive law. It also runs afoul of the 10th Amendment because it inconsistently legislates in an appropriations bill when it previously forbade the federal government from appropriating funds for the Project in the first instance.

Even more troubling, the singling out of this Project as exempt from NEPA violates the due process and equal protection provisions of the 14th Amendment.

The effect of the legislation is adjudicative in nature because it directs a result in a particular case. Fundamental life and property interests are at issue in this region recently ordered by the Ninth Circuit to be in "serious" air quality "non-attainment." The purported repeal of environmental laws discriminates against the life and property interests of the protected category of latino/hispanic persons that comprise seventy-two percent (72%) of Imperial County and ninety-five percent (95%) of the border city of Calexico. In this circumstance, the rider cannot satisfy strict scrutiny review. There is an absence of legislative history to disclose the purpose or compelling interest for the rider.

Moreover, even if constitutional, the legislation does not moot this case because effective relief can be granted pursuant to *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 193-194 (2000). The rider expressly adopts the 1994 FEIS and ROD for the Project that contain environmental and air quality mitigation requirements including compliance with the regulations of the Imperial County Air Pollution Control District. The commitments require consideration and implementation of numerous additional air pollution mitigation control measures as requested in this NEPA case. Further, review of these measures will not impermissibly "delay" the Project and the legislation sets forth no fixed time period for compliance. Finally, Plaintiffs are entitled to attorneys' fees because they obtained from this Court an injunction of the Project pending appeal and because the evidence shows that the government's conduct violated NEPA.

II. STATEMENT OF FACTS AND PROCEDURAL POSTURE

The parallel canal lining of the All American Canal ("**AAC**") is a federally-authorized project ("**Project**") funded by the State of California. Passed in 1988, the San Luis Rey Indian Water Rights Settlement Act ("**SLRA**") (Public Law 100-675) authorizes the lining of the AAC. SLRA §203. However, the SLRA states that "No federal funds are authorized to be appropriated to the Secretary [of the Interior] for the construction of the [AAC lining]." SLRA §203(e)(1).

The Project is located entirely within Imperial County, California west of Yuma, Arizona along the U.S.-Mexico border. (4 ER 617.) The Project involves construction of a twenty-three mile parallel Canal over three years involving excavation of 25,000,000 cubic yards of earth, laying of 215,000 cubic yards of concrete and disturbance of 185,000 cubic yards of sand and gravel. (4 ER 624, 6 ER 1107.) The Project will contribute to environmental degradation in the form of air and particulate matter pollution in an Imperial County region already in "serious" air quality non-attainment. [*Sierra Club v. U.S.E.P.A.*, 346 F.3d 955 (9th Cir. 2003);1 ER 181-187).] In 2003, the County of Imperial was deemed the worst of all California counties in terms of days exceeding state particulate matter air pollution standards. (1 ER 80.) County childhood and adult asthma prevalence significantly exceed Statewide levels. (1 ER 80.)

In June 2005, Desert Citizens filed the instant suit for violation of NEPA in connection with construction of the Canal Project. The NEPA claim is stated in the Fifth Cause of Action and alleges that the government failed to supplement the

1994 FEIS to account for the designation of Imperial County as a "serious PM-10 nonattainment area" and to analyze significant new information on air pollution impacts and mitigation. Review and implementation of additional particulate matter and diesel fume mitigation for the Project will improve the air breathed by DCAP members and others in the Project area. (1 ER 187; Supplemental Declaration of Paul Rosenfeld Ph.D. submitted herewith ¶¶ 7-9.) DCAP seeks declaratory and injunctive relief and attorneys' fees pursuant to the Equal Access to Justice Act. (2 ER 340-42, 358.)

The government's motion for summary judgment was granted in July 2006. The District Court heavily relied on a Supplemental Information Report ("**SIR**") inserted into the record six months into the case with no comment or review by the U.S.E.P.A., the Imperial County Air Pollution Control District or the public. (2 ER 529, 6 ER 1227-1575.) This appeal followed and the Ninth Circuit issued an injunction pending appeal on August 25, 2006 halting construction of the Project. Oral argument was heard on December 6, 2006.

On December 9, 2006, the U.S. Congress passed appropriations bill Pub. L. No. 109-432, the Tax Relief and Health Care Act of 2006 (Pub. L. No. 109-432), which was signed into law on December 20, 2006. Contained in Pub. L. No. 109-432 was a rider relating the AAC ("**Rider**"); specifically section 395 that provides:

SEC. 395. ALL AMERICAN CANAL LINING PROJECT.

(a) Duties of the Secretary- Notwithstanding any other provision of law, upon the date of enactment of this Act, the Secretary shall, without delay, carry out the All American Canal Lining Project identified--

> (1) as the preferred alternative in the record of decision for that project, dated July 29, 1994; and
> (2) in the allocation agreement allocating water from the All American Canal Lining Project, entered into as of October 10, 2003.

(b) Duties of Commissioner of Reclamation-

> (1) IN GENERAL- Subject to paragraph (2), if a State conducts a review or study of the implications of the All American Canal Lining Project as carried out under subsection (a), upon request from the Governor of the State, the Commissioner of Reclamation shall cooperate with the State, to the extent practicable, in carrying out the review or study.
> (2) RESTRICTION OF DELAY- A review or study conducted by a State under paragraph (1) shall not delay the carrying out by the Secretary of the All American Canal Lining Project.

On December, 22, 2006, the United States petitioned the Ninth Circuit for vacatur of the injunction and remand for dismissal on the ground of mootness.

III. THE PUB. L. NO. 109-432 RIDER VIOLATES CONSTITUTIONAL PRINCIPLES

A. The Rider Violates The Principle Of Separation Of Powers If It Fails To Change Underlying Law Or If It Is Unconstitutional

Legislation may violate the constitutional principle of separation of powers if Congress has impermissibly directed certain findings in pending litigation without changing any underlying law or if the challenged statute is independently unconstitutional on other grounds. *Robertson v. Seattle Audubon Soc'y*, 503 U.S.

429, 436-438 (1992); *Cook Inlet Treaty v. Shalala*, 166 F.3d 986, 990-91 (9th Cir. 1999). Although repeals by implication are especially disfavored in the appropriations context, Congress nonetheless may amend substantive law in an appropriations statute as long as it does so clearly. *National Audubon Society v. United States Forest Service*, 46 F.3d 1437, 1445 (9th Cir. 1993). Further, "Congress enacted the ESA and NEPA for the purpose of protecting the ecosystem for future generations . . . any exemption from such humanitarian and remedial legislation [as the ESA and NEPA] must . . . be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress." *Mount Graham Coalition v. Ward*, 53 F.3d 970, 974-75 (9th Cir. 1995).

B. The Rider Is Unconstitutionally Vague And Does Not Moot NEPA Or Air Quality Compliance

The Rider is unconstitutionally vague and unclear because it fails to describe what provision of NEPA it repeals and because it specifically identifies the 1994 FEIS and ROD which contain a host of NEPA and environmental compliance commitments. (3 ER 597-605.) Laws are unconstitutionally vague when persons "of common intelligence must necessarily guess at their meaning and differ as to their application." *Planned Parenthood v. Arizona*, 718 F.2d 938, 947 (9th Cir. 1983); *see also Forbes v. Napolitano*, 236 F.3d 1009, 1011 (9th Cir. 2000). This is the case with the Rider that requires the Project be carried out "notwithstanding any other provision of law" and "without delay" but which adopts the 1994 FEIS and ROD that include requirements for, *inter alia*,

"[p]ermits required for the various construction activities" and compliance with "regulations" of the Imperial County Air Pollution Control District. (3 ER 605, 4 ER 691.)

The government's argument that there is an "implied repeal" of NEPA and these environmental compliance commitments collides with the "'cardinal rule . . . that repeals by implication are not favored.'" *Morton v. Mancari*, 417 U.S. 535, 549 (1974). Moreover, there is no legislative history to clear up this ambiguity, facts that distinguish this case from *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1144, 1148 (9th Cir. 2005) and *Stop H-3 Association v. Dole*, 870 F.2d 1419, 1431 (9th Cir. 1989) cited by the government.

In this circumstance, Pub. L. No. 109-432 fails to clearly repeal or amend substantive law. For example, in *Natural Resources Defense* Council, 421 F.3d at 805, the Ninth Circuit found that an appropriations rider passed during the case to explicitly exempt NEPA was ambiguous and therefore limited only the wilderness element of the 1997 ROD. So too, in *National Audubon*, 46 F.3d at 1145-46, the case was remanded to the district court for a determination of the scope of the Northwest Timber Compromise that ambiguously purported to preclude the NEPA suit. Finally, in *Mount Graham Coalition*, 53 F.3d at 976-77, the court disagreed with the government's position that the provisions of the Arizona-Idaho Conservation Act at issue precluded all ESA and NEPA review.

In sum, Pub. L. No. 109-432 provides no clear sanction to the government's effort to evade NEPA and air pollution mitigation compliance.

C. The Appropriations Rider Violates Separation Of Powers Because It Fails To Change Underlying Substantive Law

The government argues that the Rider directs the particular result of mooting this case. However, the legislation impermissible singles out this Project while making no change to the substantive or generally applicable provisions of NEPA or environmental laws. As a result, the presumption that appropriations acts such as Pub. L. No. 109-432 "are generally in force during the fiscal year of the appropriation and do not work a permanent change in the substantive law" fully applies here. *Natural Resources Defense Council v. United States Forest* Service, 421 F.3d 797, 806, n19 (9th Cir. 2005).

These facts distinguish the case from *Robertson*, 503 U.S. at 434, 440, where the legislation set forth specific procedures for spotted owl protection and provided expressly that "compliance with certain new law constituted compliance with certain old law." [1] These facts also distinguish *The Ecology Center v. Castaneda*, 426 F.3d 1144, 1148 (9th Cir. 2005) where the legislation mentioned NEPA and set forth substantive legal changes concerning 10% old growth habitat and *Cook Island*, 93 F.3d at 612 where the new legislation contained provisions for a combined environmental and biological report. Further, unlike *Mt. Graham*

[1] *Robertson* did not reach the question presented here of whether "a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of application at issue in the pending cases." *Robertson*, 503 U.S. at 441. In such a circumstance the legislation amounts to improper legislative decision of particular cases.

Coalition v. Thomas, 89 F.3d 554, 558 (9th Cir. 1996) (dissent J. Noonan) cited by the government, Congress here did not make "its own interpretation" of the law.

D. The Rider Violates The 10th Amendment's Prohibition On Commandeering

The Tenth Amendment has been construed to prohibit commandeering of the states by the federal government, also referred to as "federal tyranny" of the states. Here, the federal government is barred from providing any funding for the Project, and the State and its sub-units are the entities literally "carrying out" the Project. Thus, the Rider's command to carry out the Project "without delay" improperly imposes an affirmative duty on the state government. *Reno v. Condon*, 528. U.S. 141, 151 (2000). Congress legislated on an appropriations bill when it previously forbade the federal government from appropriating funds for the Project in the first instance.

This conflict violates the 10th Amendment. *Printz v. United States*, 521 U.S. 898 (1997) (Brady Handgun Violence Prevention Act to be unconstitutional on 10th Amendment and separation of powers grounds, because it required state and local law enforcement officers to perform background checks on prospective gun buyers); *New York v. United States*, 505 U.S. 144, 172 (1992) (Low-Level Radioactive Waste Policy Amendments Act unconstitutionally violated the 10th Amendment because it gave state government the choice of "either accepting ownership of waste or regulating according to the instructions of Congress").

E. The Rider Violates Procedural Due Process Rights Of DCAP Members And Residents Of Imperial County

Procedural due process requirements include the provision of adequate notice and an opportunity to heard before governmental deprivation of an individual's life, liberty or property. *Goldberg v. Kelley* 397 U.S. 254, 267 (1970). A due process claim lies where, as here, the effect of the legislation is adjudicative in nature and directs a result in a particular case. *Harris v. County of Riverside*, 904 F.2d 497, 501 (9th Cir. 1990); *Horn v. County of Ventura,* 24 Cal.3d 605, 612 (Cal. 1979).

Fundamental life and property interests are at issue. The legislation's repeal of environmental laws will impact the air breathed and health of DCAP members. (1 ER 186-87; Suppl. Rosenfeld Decl. ¶¶ 7-9.) Increased particulate matter pollution will occur due to the government's failure to implement new, industry-standard mitigation measures for the Project. (1 ER 182-87; Suppl. Rosenfeld Decl. ¶¶ 7-9.) These emissions will worsen air pollution in the Imperial Valley – a region recently ordered in "serious non-attainment" by the Ninth Circuit with the worst record of all California counties in terms of days exceeding state PM-10 standards. (1 ER 80, 177.) This is a life or death issue with serious implications on health and mortality. (1 ER 199-207.) The American Heart Association has concluded that prolonged exposure to particle pollution is a factor in reducing life expectancy and hospital admissions for cardiovascular and pulmonary disease increase with exposure. (Id.) Thus, Imperial County childhood

and adult asthma prevalence significantly exceed Statewide levels. (1 ER 80.) The most affected are the elderly and persons of low socioeconomic status. (1 ER 199-207.) Approximately twenty-six percent (26%) of Imperial County residents report a household member with asthma and seventy-two percent (72%) report that air pollution affects their family's health. (1 SER 86.)

DCAP members confirm their interaction with the Project site and the negative impacts on air quality and breathing. (1 ER 188-207.) By way example, DCAP member Jane Williams declares that:

> "The impacts from the Canal lining project will curtail and lessen my use and enjoyment of the recreational and aesthetic benefits of the lining project site . . . the Canal lining process itself, involving the removal of millions cubic yards of dirt, will also contribute to environmental degradation in the form of air and particulate matter pollution in a region that is already out of air quality attainment. It will make it harder for me to breathe during my planned future visits to the Canal project lining site for work, recreational and aesthetic use and benefit." (1 ER 196-197.)

This concrete evidence of injury distinguish this case from the generalized allegations of environmental harm made in *Stop H-3 Association*, 870 F.2d at 1426, 1429, where the government had already prepared three SEISs.

Despite this, the Rider failed to provide procedural due process protections to DCAP members and persons in Imperial County. The obscure Rider passed after midnight on the last day of the 109th Congress, one page in a 274 page omnibus page tax law, was enacted without due process protections or public participation. *Harris*, 904 F.2d at 501; *Dooley v. Reiss*, 732 F.2d 1392 (9th Cir. 1984). This legislation singles out this Project as exempt from this nation's

environmental laws to the detriment of DCAP's members and Imperial Valley residents' protected life and property interests.

F. The Rider Violates Substantive Due Process And Equal Protection For DCAP Members And Residents Of Imperial County

The singling out of this Project also violates Constitutional protections of substantive due process and equal protection. The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This clause protects individuals or classes of people against discrimination and safeguard fundamental rights. *Romer v. Evans*, 517 U.S. 620 (1996). The Equal Protection Clause ensures that "all persons similarly situated should be treated alike." *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004). "The touchstone of due process is protection of the individual against arbitrary action of government." *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). Thus, governmental actions that discriminate against suspect classifications including race must satisfy strict scrutiny and be justified by a compelling state interest. *Kawaoka v. City of Arroy*, 17 F.3d 1227, 1239 (9th Cir. 1994). So too, courts will apply stricter scrutiny in cases where the burdened group, as here, has been shut out of the political process. *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

The Rider's purported repeal of environmental laws violates the fundamental life and property interests of a protected category – latino/hispanic persons in Imperial County, California. The County is seventy-two percent (72%)

latino/hispanic and 95% and the border city of Calexico is ninety-five percent (95%) latino/hispanic. (1 SER 79.) Approximately forty-three percent (43%) of children under seventeen years-old live in poverty. (1 SER 079.) The Canal lining Project will contribute to environmental degradation in the form of air and particulate matter pollution in this region already out of air quality attainment. (1 ER 181-187.) The repeal of environmental laws for the Project discriminates against the life and property interests of the Imperial Valley hispanic/latino community when compared to those similarly situated. *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822, 831 (9th Cir. 2003).

In this circumstance, the Rider cannot satisfy strict scrutiny review. There is an absence of legislative history to disclose the purpose or compelling interest for the Rider. The Fourteenth Amendment is violated by laws so vague that they fail to provide a reasonable opportunity to know what conduct is prohibited or so indefinite as to allow arbitrary and discriminatory enforcement. *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 554 (9th Cir. 2004) (citations omitted). For example, there is no legislative history on the Rider displaying an intention to repeal environmental laws, including the mitigation requirements contained in the SRLA and 1994 ROD. These facts plainly distinguish the case from *Stop H-3 Association*, 870 F.2d at 1432, where the extensive Committee Report that accompanied the statute contained findings to satisfy intermediate scrutiny review.

IV. EVEN IF CONSTITUTIONAL, THE RIDER DOES NOT MOOT CLAIMS ARISING FROM AIR QUALITY COMMITMENTS IN THE FEIS AND ROD

As noted above, the Rider adopts the 1994 FEIS and ROD for the Project. These approvals contain a host of environmental and air quality mitigation commitments including compliance with the regulations of the Imperial County Air Pollution Control District. (3 ER 597-605, 4 ER 691.) In this circumstance, even if constitutional, the legislation by its terms does not moot or repeal claims arising from these requirements. It is well-established that a case is not moot where some form of effective relief is available. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 193-194 (2000) (mootness is a disputed factual matter not aired in the lower courts that remained open for consideration on remand). Thus, a NEPA case is not moot where the government "could still study and mitigate the impact" of the Project. *Earth Island Institute v. United States Forest Service*, 442 F.3d 1147, 1158 (2006); *see also Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065 (2002); *Tyler v. Cuomo*, 236 F.3d 1124, 1137 (2000).

This is the case here. The analysis of air quality matters for the preferred alternative in the 1994 FEIS and ROD indicates that future "[p]ermits required for the various construction activities would be obtained" pursuant to "regulations of the Imperial County Air Pollution Control District." (3 ER 605, 4 ER 691.) Thus, the FEIS and ROD commit to comply with the Imperial County Air Pollution Control District's *Air Quality Handbook* (1 ER 97-115, 6 ER 1083-85) and newly implemented fugitive dust Rules 800 *et seq*. (6 ER 1085-86; 1 SER 106-122), as well as the U.S.E.P.A.'s *AP 42*

Compilation of Air Quality Pollutant Emission Factors sections 13.2.2-13.2.4 identified in the SIR (1 ER 150, 162-164, 168-171, 180, 6 ER 1091-1095, 1127). In fact, the SIR confirms that stationary source air permits are required. (6 ER 1085.)

The governing *2005 Air Quality Handbook* provides that environmental review "should quantify emissions from construction activities, such as fugitive PM-10 and exhaust emissions from construction equipment." (1 ER 103-104.) "A thorough emissions analysis should be conducted for each of the proposed alternatives identified," "hot spot modeling," "cumulative impacts analysis . . . to evaluate combined air quality impacts," and "[t]emporary construction impacts . . . should be quantified." (1 ER 97-115.) The government's SIR references this *Handbook* but includes only some of this analysis and none of the required agency or public review. (1 ER 178, 6 ER 1089, 1097.)

Further, the *Handbook* and the Imperial County Pollution Control District's newly implemented fugitive dust Rules 800 *et seq*., as well as the U.S.E.P.A.'s *AP 42* sections 13.2.2-13.2.4 require consideration and implementation of numerous additional industry-standard air pollution mitigation control measures for this Project. (1 ER 178-197; Suppl. Rosenfeld Decl. ¶¶ 7-9.) Review and implementation of these mitigation measures is consistent with the Rider because the 1994 FEIS and ROD commit that "[p]ermits required for the various construction activities would be obtained" pursuant to regulations of the Imperial County Air Pollution Control District." (4 ER 691.) Even if the legislation is constitutional, this case is not moot because effective relief remains. The government can study and implement air pollution mitigation measures in an SEIS in compliance with the referenced rules and requirements.

V. EVEN IF THE RIDER IS CONSTITUTIONAL, REVIEW AND IMPLEMENTATION OF AIR QUALITY MITIGATION MEASURES WILL NOT DELAY THE PROJECT

Pub. L. No. 109-432 requires that the Project be carried out "notwithstanding any other provision of law" and "without delay." Even if the law is constitutional, compliance with the 1994 FEIS and ROD air quality commitments will not impermissibly "delay" the Project and the legislation sets forth no fixed time periods for compliance.

As Plaintiff's soil chemist expert has declared:

> "It will not delay the All-American Canal lining project preferred alternative to review and implement these significant feasible new air quality mitigation measures that have become industry-standard since the Project was approved . . . Review of these mitigation measures can be performed during the three-month pre-construction vegetation clearance phase, if necessary. (6 ER 1107.) In my professional opinion and based on my extensive experience in chemical fate and transport and risk assessment and environmental modeling, review and analysis of these industry-standard PM-10 mitigation measures can be conducted within 60-120 days including agency and public comment that can be expedited. This analysis can be completed simultaneously with project planning so as not to delay other planning efforts. This opinion is supported by the contents of the air quality analysis in the SIR itself which appears to have been conducted in well under 60 days. [6 ER 1068, 1127 (emission model calculated on December 22, 2005 and SIR published on January 9, 2006.] Further, implementation of these measures during the various construction phases of the project is consistent with the 1994 FEIS and will not delay the three-year construction schedule. (6 ER 1107.) There is plenty of time to implement these mitigation measures with no project delay and the measures themselves will not meaningfully delay construction." (Suppl. Rosenfeld Decl. ¶ 8.)

In this circumstance, the case is distinguishable from *Westlands Water District v. Natural Resources Defense Council*, 43 F.3d 457, 460 (1994) cited by the government that concerned direction to deliver water "upon enactment of this

title." That case, unlike here, involved a "fixed time period" that was "too short to allow the agency to comply with NEPA." Also distinguishable is *Sierra Club*, 93 F.3d at 614, where the direction to permit the timer sales "notwithstanding any other provisions of law" directed a fixed time period of 45 days.

VI. EVEN IF THE RIDER IS CONSTITUTIONAL, PLAINTIFFS ARE ENTITLED TO ATTORNEYS' FEES

Even if the Rider is constitutional, Plaintiffs are entitled to attorneys' fees. First, Plaintiffs obtained from this Court an injunction of the Project pending appeal pursuant to Ninth Circuit Rules 3-3 and 27-3. This "extraordinary remedy" required a strong showing of likelihood of success, irreparable harm and an analysis of the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Shelton v. Nat'l Collegiate Athletic Ass'n*, 539 F.2d 1976 (9th Cir. 1976). This injunction demonstrates the requisite judicial imprimatur for Plaintiffs to be considered prevailing parties. *Watson v. County of Riverside* 300 F.3d 1092, 1096 (9th Cir. 2002); *Williams v. Alioto*, 625 F.2d 845 (9th Cir, 1980). Second, to the extent that this Court finds that the government violated NEPA, Plaintiffs are entitled to fees. *Buckhannon Bd & Care Home v. West Va. Dep't of Health*, 532 U.S. 598, 605 (2001). This Circuit has held that the government violates NEPA where, as here, it failed to "compile the information and analysis presented in the SIRs at the earliest possible time" or where "SIRs were prepared in response to the litigation years after the original decisions to approve" the Project. *Idaho Sporting Congress v. Alexander*, 222 F.3d 562, 568 (9th Cir. 2000). So too, even though

the Court lifted the injunction in *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 558-559 (9th Cir. 2000), it held that the Forest Service violated NEPA where, as here, it "failed to timely prepare, or even sufficiently to consider and evaluate the need for, an SEIS . . ." and that "[n]othing in the record indicated that the Forest Service prepared the SIR "until after FOC sued it . . ." Plaintiffs therefore are entitled to attorneys' fees even if the injunction is lifted.

Dated: January 22, 2007

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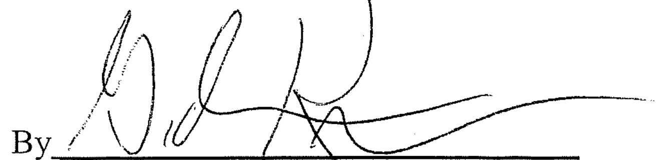

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CERTIFICATE OF SERVICE

The undersigned is a citizen of the United States and resident of the State of California, is over the age of eighteen (18) and is not a party to the action. The RESPONSE TO MOTION TO REMAND was served this date by placing a copy in United States mail, posted prepaid, addressed to:

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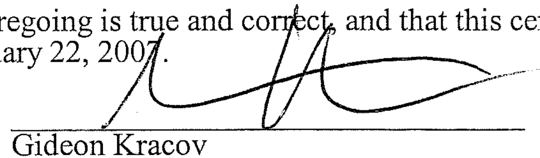
I declare under penalty of perjury that the foregoing is true and correct, and that this certificate is executed in Los Angeles, California on January 22, 2007.



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