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 WILLIAM E. RINNE, ACTING 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' MOTION FOR REMAND FOR DISMISSAL OF COUNTS 5-8 AND FOR VACATUR OF INJUNCTION PENDING APPEAL DUE TO MOOTNESS

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Introduction

This case was argued and submitted on December 4, 2006. On December 20, 2006, the President signed into law the Tax Relief and Health Care Act of 2006 (hereinafter: the "new legislation"). Pub. L. No. 109-___ (H.R. 6111, 109th Cong.) (2006).[1/] The new legislation contains provisions pertaining to the All-American Canal Lining Project, the project challenged in this appeal. *Id.*, Div. C, §§ 395-397 (Title III, Subtitle J) (attached). Among other things, Section 395(a) provides 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 – (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.

Id., § 395(a) (emphasis added). Under this provision, the Secretary immediately must carry out the Lining Project, notwithstanding the statutory violations alleged by Plaintiffs-Appellants Consejo de Desarrollo Economico *et al.* (collectively "CDEM") in Counts 5-8 of their First Amended Complaint. Defendants-Appellees the United States, the Secretary of the Interior, and the Commissioner of the Bureau of Reclamation (collectively, the "United States") therefore

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[1/]At the time this motion was completed, a public law number had not yet been assigned to the new legislation. The United States will provide the Court with the public law number when it becomes available. The complete text of the enacted bill is available at http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.06111:

respectfully ask this Court: (1) to summarily deny CDEM's appeal on Counts 5-8 and remand those Counts to the district court for dismissal on grounds of mootness; and (2) to immediately vacate the injunction pending appeal, which was entered solely on the basis of violations alleged in Count 5 (relating to the National Environmental Policy Act or NEPA).

Background

The Bureau of Reclamation ("Reclamation") approved the All-American Canal Lining Project by Record of Decision ("ROD") executed on July 29, 1994.[2/] 3ER 604. As explained in the *Answering Brief for the United States* (Oct. 20, 2006) (hereinafter "*U.S. Br.*") (pp. 19-20), Reclamation did not immediately proceed with Project implementation due to the need to obtain non-federal funding from participating California Contractors, a task complicated by longstanding disputes between California users regarding rights and priorities to California's share of Colorado River water (including water to be conserved by the Lining Project).

[2/]The *Answering Brief for the United States* (pp. 18-19) inadvertently identified the project approval date as "May 1994," the date on the front of the ROD (3ER 595) as opposed to the date of execution (3ER 593, 604). "ER" citations are to the Excerpts of Record (Sept. 13, 2006) filed by Plaintiffs-Appellants CDEM *et al.*.

On October 10, 2003, the United States, various California users[3] and the San Luis Rey Bands of Mission Indians[4] entered into an "Allocation Agreement" that, among other things, allocated the water to be conserved by the All-American Canal Lining Project.[5] 1SER(IID) 135-210. Following the execution of the Allocation Agreement and related agreements, the California legislature approved funding necessary to enable the Lining Project to proceed. *See U.S. Br.* at 20.

In Counts 5-8 of its First Amended Complaint, CDEM contends that the United States cannot lawfully proceed with the Lining Project approved in the 1994 ROD and referenced in the 2003 Allocation Agreement unless and until Reclamation: (1) completes a Supplemental Environmental Impact Statement ("SEIS") under Section 102(2)(C) of NEPA (42 U.S.C. § 4332(2)(C)); (2) re-initiates and completes consultation under Section 7 of the Endangered Species

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[3]The California parties to the Allocation Agreement are intervenor defendants/appellees Imperial Irrigation District ("IID") and San Diego County Water Authority ("SDCWA"), and the Metropolitan Water District of Southern California ("Metropolitan"), the Coachella Valley Water District, the City of Escondido, and the Vista Irrigation District.

[4]The Bands are the La Jolla, Pala, Pauma, Rincon, and San Pasqual Bands.

[5]The Allocation Agreement defines the "All-American Canal Lining Project" as that portion of the work authorized in Title II of Public Law 100-675 "which will result in a lined All-American Canal from one mile west of Pilot Knob to Drop 3." 1SER(IID) 140. This is the preferred alternative approved in the 1994 ROD. 3ER 595-96. "SER(IID)" refers to the Supplemental Excerpts of Record (October 20, 2006) filed by Intervenor Defendants-Appellees IID and the Central Arizona Water Conservation District.

Act (16 U.S.C. § 1536); and (3) takes other measures allegedly required for compliance with the Migratory Bird Treaty Act ("MBTA") and the San Luis Rey Indian Water Rights Settlement Act ("SLRA"). The district court rejected these arguments by final judgment entered on July 3, 2006 (2ER 541-2) and this appeal followed. On August 10, 2006, CDEM filed a motion for injunction pending appeal, predicated solely on the alleged NEPA violations. By order dated August 24, 2006, this Court granted that motion without discussion.

Argument

A. Counts 5-8 Are Moot

An action is moot and no longer subject to the jurisdiction of the courts if, as a result of a change in law during the course of litigation, the courts no longer can grant effective relief. *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir. 1999); *Sierra Club v. United States Forest Serv.*, 93 F.3d 610, 614 (9th Cir. 1996). In the present case, Section 395 of the new legislation forecloses the possibility of injunctive relief on Counts 5-8.[6]

Section 395(a) directs the Secretary to proceed with the Lining Project "without delay" and "notwithstanding any other provision of law." Pub. L. No. 109-___ (H.R. 6111), Div. C, § 395(a). The import of this directive is plain. To the extent that implementation of the Lining Project conflicts with "any other

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[6]Counts 5-8 are all premised on the Administrative Procedure Act, which does not provide any action for damages. *See* 5 U.S.C. §§ 702, 706.

provision of law" – *e.g.*, any provision of NEPA, the ESA, the MBTA, or the SLRA – Congress has declared the Project *exempt* from those provisions and directed the Secretary to proceed.

There is no question that Congress has the authority to exempt specific projects from the general requirements of NEPA, the ESA, and similar statutes. *See, e.g., Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 437-38 (1992) (recognizing project-specific exemption from provisions of MBTA, NEPA and other statutes); *Sierra Club*, 93 F.3d at 614 (recognizing exemption from NEPA requirements); *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) (recognizing exemptions from NEPA and ESA requirements).

Nor can there be any doubt that Congress intended such an exemption for the Lining Project. There are two critical provisions in Section 395(a). First, Congress mandated that the Secretary "*shall* . . . carry out" the Lining Project "without delay" "upon the date of enactment of this Act." Pub. L. No. 109-___ (H.R. 6111), Div. C, § 395(a). This Court addressed a nearly identical directive in *Westlands Water District v. United States Dept. of the Interior*, 43 F.3d 457 (9th Cir. 1994). In that case, this Court held that statutory language directing Reclamation to effect a new water allocation "upon enactment of this title" was the equivalent of directing "immediate" action and presented an "irreconcilable conflict" with NEPA's procedural obligations (which require months or years to

complete). *Id.* at 460-62. Given the irreconcilable conflict, this Court determined that the NEPA provisions did not apply. *Id.*

Second, even without the language mandating implementation of the Lining Project "without delay," the other terms of Section 395 would provide an exemption from NEPA and other statutes. Section 395 authorizes implementation of the Lining Project "notwithstanding any other provision of law." Pub. L. No. 109- ____ (H.R. 6111), Div. C, § 395(a). The provisions of NEPA, the ESA, the MBTA, and the SLRA upon which CDEM relies in Counts 5-8 are "other provision[s] of law." Because the Secretary must – and therefore *may* – carry out the Lining Project "notwithstanding" these "other provision[s]," this Court cannot compel the Secretary to comply with such provisions (should this Court determine a conflict to exist) before or in lieu of implementing the Lining Project. *See Sierra Club*, 93 F.3d at 614 (reading identical phrase as exempting project from NEPA requirements).

Finally, the fact that Congress enacted Section 395 during the pendency of the present litigation does not alter the legislation's effect. *See Robertson*, 503 U.S. at 439. While constitutional (separation of powers) concerns might arise if Congress acts to overturn judicial findings, no such concerns arise where Congress acts to moot ongoing litigation through a statutory amendment or change in law.[7]

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[7]"An act of Congress . . . intended to affect litigation" will not raise constitutional concerns as long as the legislation "changes the underlying substantive law in *any detectable way*." *The Ecology Center v. Castaneda*, 426 F.3d 1144, 1150 (quoting

Id.; *Cook Inlet Treaty Tribes*, 166 F.3d at 991; *Mt. Graham Coalition*, 89 F.3d at 557. As Judge Noonan noted in his concurring opinion in *Mt. Graham Coalition*, "there is no question that Congress has the power to change the law so as to deprive an injunction of further effect." *Id.*, 89 F.3d at 559 (Noonan, J., concurring); *see also Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1431 (9th Cir. 1989) (stating that there is "nothing illegitimate about a decision to enact legislation exempting a particular project, the subject of pending litigation, from the requirements of existing statutes"). Here, Congress has permissibly exercised its power to change the law to enable the Lining Project to proceed, notwithstanding alleged violations of NEPA, the ESA, MBTA, and SLRA.

B. There Is No Basis for Continuing the Injunction Pending Appeal

Because Counts 5-8 are moot, there is no basis for continuing the injunction pending appeal. Although the present appeal involves constitutional claims by CDEM (relating to Counts 1-4 of the First Amended Complaint) that are not rendered moot by the new legislation,[8/] CDEM did not rely on those claims in its

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Gray v. First Winthrop Corp., 989 F.2d 1564, 1568 (9th Cir. 1993)) (emphasis added); *accord Cook Inlet Treaty Tribes*, 166 F.3d at 991.

[8/]Congress cannot by ordinary legislation abrogate constitutional rights, if any, that CDEM might possess. On the other hand, the Congressional directive in Section 395 to conserve the seepage water from the All-American Canal (Pub. L. No. 109-___ (H.R. 6111), Div. C, § 395) – as well as the provisions in Section 397 regarding the 1944 Treaty (*id.*, § 397) – provide further support for the United States' argument that CDEM's water-rights claims in Counts 1-4 present non-justiciable political questions. *See U.S. Br.* at 31, 47-50; *see also* n. 11, *infra.*

Motion for Injunction Pending Appeal (August 10, 2006). Rather, CDEM moved for the injunction pending appeal solely on the grounds of the NEPA claims (asserted in Count 5).[9] *Id.* Accordingly, this Court's August 24, 2006 order granting CDEM's motion is likewise predicated solely on the NEPA claims, which are now moot.

Equally important, CDEM's arguments under Counts 1-4 do not provide an alternative basis for injunctive relief. CDEM concedes that Counts 1-4 are predicated on the Takings Clause of the Fifth Amendment. *See Consolidated Reply Brief* (Oct. 27, 2006) at 12-16. As explained in the United States' Brief (*U.S. Br.* at 42), the Takings Clause "is designed 'not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.'" *Nevada Land Action Ass'n v. U.S. Forest Service*, 8 F.3d 713, 720 (9th Cir. 1993) (quoting *Presault v. ICC*, 494 U.S. 1, 11 (1990)). This Court has no jurisdiction to enjoin Congressionally authorized action alleged to effect a taking, "where Congress has provided a means for paying compensation for any taking that might have

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[9]While CDEM noted in its motion that all eight counts of the First Amended Complaint were implicated in its appeal, CDEM asserted that "this motion relies just on the NEPA claim." *Motion* at 4, n. 1.

occurred." [10/] *AK Native Village Corporation v. AHTNA, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997).

Through Section 395 of the new legislation (Public Law No. 109-___ (H.R. 6011), Div. C), Congress has reiterated its directive to the Secretary to conserve All-American Canal seepage for beneficial use in the United States (*see U.S. Brief* at 12-14) and directed the Secretary to proceed "without delay" with the conservation project identified as the preferred alternative in the 1994 ROD. Assuming, *arguendo*, that such action could somehow be deemed to effect a Fifth Amendment taking within the jurisdiction of U.S. courts,[11/] CDEM's exclusive remedy for such taking would be an action for "just compensation" under the

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[10/]CDEM cannot avoid this rule simply by alleging that damages (or the payment of "just compensation") would be "inadequate" to remedy the alleged taking of alleged property rights in All-American Canal seepage. Just compensation is the exclusive remedy for a taking. *See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 94 n. 39 (1978) (noting that where a Tucker Act remedy is available, a "constitutional challenge . . . under the Just Compensation Clause must fail.") The only exception is where Congress simultaneously authorizes a taking *and* prohibits the payment of just compensation through the removal of the Tucker Act remedy. *See Eastern Enterprises v. Apfel* 524 U.S. 498, 521-22 (1998) (O'Connor, J., plurality opinion) (finding injunction to be an appropriate remedy where Tucker Act remedy is unavailable).

[11/]As explained in the United States' brief: (1) CDEM does not possess and cannot obtain a property interest in All-American Canal seepage under U.S. law or the 1944 Treaty with Mexico, *see U.S. Br.* at 35-38; (2) CDEM's claims to such water cannot be adjudicated by this Court, due to the absence of any applicable waiver of sovereign immunity, and the non-justiciable nature of the claims (under the political-question doctrine), *id.* at 39-50; and (3) the Fifth Amendment does not reach property interests claimed in Mexico, *id.* at 41, n.8.

Tucker Act. CDEM has not alleged (and cannot show) that Congress removed the Tucker Act remedy under the SLRA (when authorizing the Lining Project). Nor is there anything in the new legislation that removes the Tucker Act remedy.

Conclusion

For the foregoing reasons, the United States respectfully asks this Court to (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' Motion for Remand For Dismissal of Counts 5-8 and For Vacatur of Injunction Pending Appeal Due to Mootness has been served, this 22nd day of December, 2006, *via* United States mail and courtesy electronic service, to all counsel of record, as indicated on the attached service list.

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Attachment

H. R. 6111

One Hundred Ninth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the third day of January, two thousand and six

An Act

To amend the Internal Revenue Code of 1986 to extend expiring provisions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE, ETC.

(a) SHORT TITLE.—This Act may be cited as the "Tax Relief and Health Care Act of 2006".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Tahoe Basin (to be developed in conjunction with the Tahoe Regional Planning Agency), the Carson Range in Douglas and Washoe Counties and Carson City in the State, and the Spring Mountains in the State, that are—

"(I) subject to approval by the Secretary; and

"(II) not more than 10 years in duration;"; and

(B) by inserting after subparagraph (C) the following:

"(D) TRANSFER REQUIREMENT.—Subject to such terms and conditions as the Secretary may prescribe, and notwithstanding any other provision of law—

"(i) for amounts that have been authorized for expenditure under subparagraph (A)(iv) but not transferred as of the date of enactment of this subparagraph, the Secretary shall, not later than 60 days after a request for funds from the applicable unit of local government or regional governmental entity, transfer to the applicable unit of local government or regional governmental entity the amount authorized for the expenditure; and

"(ii) for expenditures authorized under subparagraph (A)(iv) that are approved by the Secretary, the Secretary shall, not later than 60 days after a request for funds from the applicable unit of local government or regional governmental entity, transfer to the applicable unit of local government or regional governmental entity the amount approved for expenditure."; and

(2) by adding at the end the following:

"(4) LIMITATION FOR WASHOE COUNTY.—Until December 31, 2011, Washoe County shall be eligible to nominate for expenditure amounts to acquire land (not to exceed 250 acres) and develop 1 regional park and natural area.".

Subtitle I—Amendments to the Lincoln County Conservation, Recreation, and Development Act of 2004

SEC. 391. DISPOSITION OF PROCEEDS.

Section 103(b)(2) of the Lincoln County Conservation, Recreation, and Development Act of 2004 (Public Law 108–424; 118 Stat. 2405) is amended by inserting "education, planning," after "social services,".

Subtitle J—All American Canal Projects

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.

SEC. 396. REGULATED STORAGE WATER FACILITY.

(a) CONSTRUCTION, OPERATION, AND MAINTENANCE OF FACILITY.—Notwithstanding any other provision of law, upon the date of enactment of this Act, the Secretary shall, without delay, pursuant to the Act of January 1, 1927 (44 Stat. 1010, chapter 47) (commonly known as the "River and Harbor Act of 1927"), as amended, design and provide for the construction, operation, and maintenance of a regulated water storage facility (including all incidental works that are reasonably necessary to operate the storage facility) to provide additional storage capacity to reduce nonstorable flows on the Colorado River below Parker Dam.

(b) LOCATION OF FACILITY.—The storage facility (including all incidental works) described in subsection (a) shall be located at or near the All American Canal.

SEC. 397. APPLICATION OF LAW.

The Treaty between the United States of America and Mexico relating to the utilization of waters of the Colorado and Tijuana Rivers and of the Rio Grande, and supplementary protocol signed November 14, 1944, signed at Washington February 3, 1944 (59 Stat. 1219) 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.

TITLE IV—OTHER PROVISIONS

SEC. 401. TOBACCO PERSONAL USE QUANTITY EXCEPTION TO NOT APPLY TO DELIVERY SALES.

(a) DEFINITIONS.—Section 801 of the Tariff Act of 1930 (19 U.S.C. 1681) is amended by adding at the end the following:

"(3) DELIVERY SALE.—The term 'delivery sale' means any sale of cigarettes or a smokeless tobacco product to a consumer if—

"(A) the consumer submits the order for such sale by means of a telephone or other method of voice transmission, the mail, or the Internet or other online service, or the seller is otherwise not in the physical presence of the buyer when the request for purchase or order is made; or

"(B) the cigarettes or smokeless tobacco product is delivered by use of a common carrier, private delivery service, or the mail, or the seller is not in the physical