UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IMPERIAL IRRIGATION DISTRICT,

Plaintiff,

v.

THE UNITED STATES OF AMERICA, et al.,

Defendants.

CASE NO. 03-CV-0069 W (JFS)

ORDER REMANDING ACTION

On March 18, 2003 this Court requested supplemental briefing in order to properly fashion a remedy in light of the Federal Defendants' likely failure to properly conduct a Part 417 review. Having reviewed the submitted papers and the applicable law, the Court hereby **REMANDS** this case to the Department of the Interior for a *de novo* Part 417 review.

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I. IMMEDIATE REMAND AND *DE NOVO* REVIEW IS WARRANTED

The Court finds that remand is appropriate for several reasons. First, the United States Supreme Court, in Arizona v. California, 373 U.S. 546 (1963), affirmed the Secretary of the Interior's importance in resolving both interstate and *intrastate* water disputes:

> These several provisions, even without legislative history, are persuasive that Congress intended the Secretary of the Interior, through [her] § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water.

Id. at 580 (emphasis supplied). Second, the Supreme Court has also explicitly held that state law does not control the Secretary's determination in apportioning water.[1] See id. at 585-586 ("we hold that the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by the sections to follow state law."); see also Bryant v. Yellen, 447 U.S. 352 (1980) (reaffirming Arizona's holding).

Third, relevant decisional authority overwhelmingly suggests that remand is the appropriate remedy when a federal agency fails to properly follow administrative procedures. See, e.g., Florida Power and Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985); UOP v. United States, 99 F.3d 344, 351 (9th Cir. 1996). Accordingly, this Court finds that any remedy other than remand for *de novo* review would violate clearly established Supreme Court and Ninth Circuit precedent.[2]

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[1] Ironically, IID strenuously argued this very point in its Imperial Irrigation District v. State Water Resources Control Board Petition for Writ of Certiorari to the United States Supreme Court, as well as its Reply Brief. (Masouredis Decl., Exs. 1 and 2 attached thereto.)

[2] Moreover, the Court notes that Plaintiff's proposed special master, the State Water Resources Control Board ("SWRCB") is precluded from refusing to

II. PLAINTIFF'S CONCERNS ARE UNSUBSTANTIATED AND PREMATURE

Plaintiff devotes considerable briefing to the suggestion that any Part 417 *de novo* review will be unfair in light of the parties' rancorous litigation to date. However, the Administrative Procedures Act, 5 U.S.C. § 702 *et seq.* forecloses any unfairness that may arise. The Court reminds the parties that one of the Court's bases for preliminary injunction relief was the Federal Defendants' failure to comply with Part 417's required procedures. (Tr. at 130). The APA's remedy for this type of violation is clear; immediate remand is warranted. See 5 U.S.C. § 706(2)(D) ("The reviewing court shall – (2) hold unlawful and set aside agency action, findings, and conclusions found to be – (D) without observance of procedure required by law."). Should the Federal Defendants fail to *meticulously* follow Part 417's prescribed procedures in determining IID's reasonable beneficial use, Plaintiff may again elect to bring the matter before a district court for judicial review.

III. THE CURRENT BOND IS MORE THAN ADEQUATE GIVEN PLAINTIFF'S LIKELIHOOD OF SUCCESS

The final issue before the Court is whether the current bond amount is adequate. As the parties are well aware, the Court set a $250,000 bond. (Tr. at 135.) District courts are granted wide discretion is determining a security bond's amount. See Fed. R. Civ. Proc. 65(c); see also Walczak v. EPL Prolong, 198 F.3d 725, 733 (9th Cir. 1999). After considering the evidence presented both in the briefs and at the hearing, as well as Plaintiff's significant likelihood of success on the merits, the Court finds the $250,000 bond adequate.

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enforce a state statute on federal preemption grounds unless an appellate court has first made such a determination. See Cal. Const. art. III, § 3.5. Notwithstanding the Court's other bases for remand, the Court cannot, and will not, appoint a special master statutorily barred from following the Supremacy Clause.

IV. CONCLUSION AND ORDER

In light of the foregoing, the Court **REMANDS** the entire matter to the Department of the Interior for *de novo* Part 417 proceedings consistent with this Court's March 18, 2003 order. All parties are **ORDERED** to complete such *de novo* Part 417 review as detailed in the Federal Defendants' April 1, 2003 supplemental brief, which the Court incorporates herein by reference. The Court **VACATES** all prior Department of Interior findings and conclusions previously rendered during its purported 2002 Part 417 review. The Court **DENIES** without prejudice all remaining motions as moot. Finally, the Court **STAYS** this litigation in its entirety pending *de novo* Part 417 review completion.

IT IS SO ORDERED.

DATE: April 16, 2003

HON. THOMAS J. WHELAN
United States District Court
Southern District of California

CC: ALL PARTIES