2. In re Border Infrastructure Environmental Litigation*, 915 F.3d 1213 (9th Cir. 2019)*

Environmental organizations and the State of California{{1}} challenged decisions by the Secretary of the Department of Homeland Security (DHS) waiving a number of laws pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996{{2}} (IIRIRA) for border wall projects in Southern California. In one set of claims, they alleged that DHS' waivers of environmental laws were *ultra vires* that exceeded DHS' authority. In another, they alleged that these waivers violated the Administrative Procedure Act{{3}} (APA) by failing to conform to various environmental laws, including the National Environmental Policy Act{{4}} (NEPA), and the United States Constitution.{{5}} The cases were consolidated. The Southern District of California entered summary judgment for DHS, and plaintiffs appealed.{{6}} On appeal, the Ninth Circuit affirmed, holding that these actions were within DHS's authority under the statute and that the environmental claims were precluded by the Secretary's waivers.

In 2017 President Trump issued Executive Order 13,767, directing federal agencies to "deploy all lawful means to secure the Nation's southern border."{{7}} Included in the order was a directive to immediately construct a physical wall on the border in accordance with existing law (IIRIRA being one such law). At issue were three projects incorporated into this border wall scheme: the "Prototype Project" to construct a wall in San Diego County, the "San Diego Project" to replace 28 miles of fencing in the San Diego area, and the "Calexico Project" to replace three miles of fencing near Calexico, California. Between August and September 2017, DHS invoked § 102(c) of IIRIRA to waive dozens of relevant statutes, including NEPA, the Coastal Zone Management Act{{8}} (CZMA), and the Endangered Species Act{{9}} (ESA), once for the Prototype and San Diego Projects (the San Diego Waiver) and again for the Calexico Project (the Calexico Waiver).

The Ninth Circuit reviewed the district court's grant of summary judgment de novo. Section 102(c)(1) of IIRIRA authorizes DHS to "waive all legal requirements" that in the "Secretary's sole discretion" are "necessary to ensure expeditious construction of those barriers and roads" DHS deems necessary.{{10}} Additionally, § 102(c)(2)(A) provides a jurisdictional bar, granting exclusive jurisdiction to the federal district courts for all claims arising from actions and decisions by DHS under § 102(c)(1), and limiting litigants to claims alleging constitutional violations. Further, § 102(c)(2)(C) provides that district court decisions regarding § 102(c)(1) determinations may only be reviewed by the Supreme Court, and cannot be reviewed by any other appellate court.

First, to determine the scope of its jurisdiction, the court looked at whether each claim arose from § 102(c)(1) waiver determinations. Some of the *ultra vir*es claims alleged the waivers themselves were not authorized under § 102(c)(1) and thus were barred by § 102(c)(2)(C). Other *ultra vires* claims challenged the scope of DHS' authority to build walls under IIRIRA § 102(a) and (b), on the other hand, and were therefore not barred since they did not arise from waiver determinations. The court held the district court had federal jurisdiction over these claims, and the Ninth Circuit had authority to review. Similarly, the court exercised its jurisdiction to review the environmental claims alleging NEPA and APA violations during the planning and construction of the projects, but held that § 102(c)(2)(C) barred the environmental claims pertaining to the merits of the waivers themselves and to DHS' authority to issue the waivers. Further, though the plaintiffs never appealed their constitutional claims (probably

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[[1]]The plaintiffs include Center for Biological Diversity, Defenders of Wildlife, Sierra Club, Animal Legal Defense Fund, the California Coastal Commission, and the People of California, by and through Attorney General Xavier Becerra.[[1]]

[[2]] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1103) [hereinafter *Section 102*].[[2]]

[[3]] 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521.[[3]]

[[4]] National Environmental Policy Act, 54 U.S.C. §§ 4321–4370h (2012).[[4]]

[[5]] U.S. CONST. amend. V.[[5]]

[[6]] *In re* Border Infrastructure Environmental Liti., 284 F. Supp. 3d. (S.D. Cal. 2018).[[6]]

[[7]] 82 Fed. Reg. 8793 (Jan. 25, 2017).[[7]]

[[8]] Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1466 (2012).[[8]]

[[9]] Endangered Species Act of 1973, 16 U.S.C. §§ 1351–1544 (2012).[[9]]

[[10]] 8 U.S.C. § 102(c)(1) (2012).[[10]]

realizing that they could only be reviewed by the Supreme Court), the court noted that § 102(c)(2)(C) barred review since they arose directly from waiver determinations.

The court then turned to the merits of the reviewable *ultra vires* and environmental claims, each of which relied on the APA. Under the APA, courts ask whether the Agency determinations being challenged are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or in excess of statutory authority. To this point, plaintiffs' *ultra vires* claims alleged that DHS exceeded its statutory authority under IIRIRA § 102(a) and (b) and their environmental claims alleged that the projects were not in accordance with applicable laws.

The court ruled in favor of DHS on the *ultra vires* claims because § 102(a) of IIRIRA vests in the Secretary of DHS authority to "take such actions as may be necessary to install additional physical barriers . . . to deter illegal crossings in areas of high illegal entry into the United States."[{{11}}] Plaintiffs argued that at least some of these border projects were not "additional physical barriers" because they were replacement projects rather than new fence lines;[{{12}}] but the court concluded that the wall projects were "additional physical barriers,"[{{13}}] reasoning that it would be absurd for Congress to authorize DHS to build new border barriers while impliedly prohibiting the maintenance of existing ones. Further, DHS demonstrated that the areas where the projects were located were areas of high illegal entry. The court found plaintiffs' argument that there were other areas of comparably higher illegal entry irrelevant given that there is nothing in the statute suggesting that "high illegal entry" is a comparative determination.

The court then reviewed plaintiffs' argument that the fencing requirements and deadlines in IIRIRA § 102(b) imposed limits on the broad grant of authority in § 102(a). The court dismissed that argument, holding that reading § 102(b) to define the scope of DHS's authority to build border infrastructure projects would render § 102(a) superfluous.

Because the court determined that § 102(a) of IIRIRA authorized the challenged DHS actions, and actions under § 102(a) are subject to the waiver provision in § 102(c)(1), the court concluded that the environmental claims were also properly dismissed. But again, the court could not review any waiver determinations under the environmental statutes given the jurisdictional bar in § 102(c)(2)(C). Though plaintiffs alleged violations of environmental statutes regarding secondary fencing to be added under the San Diego project because the San Diego waiver (by DHS' admission) did not cover such fencing, the court deferred ruling on those claims because DHS' plans regarding the secondary fencing were not final agency actions under the APA.

Judge Callahan concurred in part and dissented in part. He concurred with the majority's rulings on the merits of the *ultra vires* and environmental claims, but dissented in part because he determined that IIRIRA § 102 limited review of the district court's decisions thereupon to the Supreme Court. Even if the district court had jurisdiction to review those *ultra vires* and environmental claims brought under § 102(a) and (b) of IIRIRA, he argued that the Ninth Circuit lacked jurisdiction to review the district court's decisions related to those claims.

[[11]] *Id.* § 102(a).[[11]]
[[12]] *Id.*[[12]]
[[13]] *Id.*[[13]]