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# The Conservative Voice of Arizona

# SONORAN NEWS

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## Ninth Circuit grants SOS temporary injunction

*Previous panel of judges retains jurisdiction of case*

BY LINDA BENTLEY

SAN FRANCISCO – On July 24, the Ninth Circuit Court of Appeals granted Save Our Sonoran Inc.'s (SOS) motion for a temporary injunction, once again halting development of the 794-home gated community proposed for the 608-acre parcel known as Section 16, located at the northwest corner of 56th Street and Lone Mountain Road.

SOS Attorney Howard Shanker of The Shanker Law Firm, PLC, filed for emergency relief after U.S. District Court Judge Susan Bolton denied the organization's motion for a preliminary injunction.

The original complaint, filed in April 2002, claimed the U.S. Army Corps of Engineers' Environmental Assessment (EA), Finding of No Significant Impact (FONSI) and resulting Section 404 permit issued to 56th and Lone Mountain, LLC, for a 794-home gated community on 608 acres, failed to satisfy the requirements of the National Environmental Policy Act (NEPA).

In May 2002, U.S. District Judge Frederick Martone agreed with SOS and issued a preliminary injunction prohibiting all on-site development-related activities and suggested the Corps complete an EA on the entire parcel.

Lone Mountain appealed to the Ninth Circuit Court of Appeals, which upheld Martone's order in 2004, reaffirming it again May 25, 2005.

In direct response to those rulings, the Corps completed what it called an expanded environmental assessment (EEA) of the entire 608 acres, resulting in the issuance of another FONSI in October 2005, along with a letter modifying the permit for Lone Mountain's project.

SOS President Ferrell Anderson said the new EEA appears to be just as inadequate and claims it



Photo by Linda Bentley  
The Ninth Circuit Court of Appeals granted Save Our Sonoran, Inc. a temporary injunction on July 24, halting work on Section 16, pending an appeal of the district court's decision to deny a preliminary injunction against the U.S. Army Corps of Engineers permit.

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is neither expanded nor does it meet NEPA requirements. He said the EEA contains the same reports and uses the same methods to reach a FONSI conclusion as the original EA.

In February 2006, Bolton dissolved the preliminary injunction rendered moot by completion of the EEA.

She then granted a temporary restraining order (TRO) while taking SOS's motion for a preliminary injunction under advisement. However, the scope of her TRO was far more limited than the injunction upheld by Ninth Circuit, allowing work to proceed on Section 16.

On June 30, Bolton denied SOS's motion and said, in the court's view, the balance of hardships tipped sharply in Lone Mountain's favor, which Shanker said is "wrong as a matter of law and is directly counter to the prior determination of the Ninth Circuit," adding, "... SOS is asserting the same harm, caused by the same project and same parties, as was previously asserted and found, by this court, to be irreparable." In her order denying SOS's request for a preliminary injunction, Bolton wrote, "Plaintiff's hardship and major contention appears to be with any development on Section 16. This the Court cannot enjoin, and Plaintiff has not demonstrated that the balance of hardships tips sharply in its favor." Anderson said, "SOS's position is, and always has been, to advocate responsible development that is sensitive to the Sonoran Desert, its wildlife and compatible with the surrounding community.

A 794-home gated development is not only grossly incompatible with the desert and topography of Section 16, but with the surrounding rural neighborhood as well." Last week, when the Ninth Circuit granted SOS a temporary injunction, Justices Betty Fletcher and Sidney Thomas threw a curve ball by requesting the parties simultaneously file briefs "limited to the issue of federal jurisdiction in light of Rapanos v.

United States," involving a controversial June 19, 2006 Supreme Court decision.

The Rapanos decision was not unanimous and has turned the issue of the Corps' jurisdiction along with the definition of "waters of the United States" on its head.

In his opinion, Supreme Court Justice Antonin Scalia, joined by Justices Clarence Thomas and Samuel Alito, Jr., wrote, "The burden of federal regulation on those who would deposit fill material in locations denominated waters of the United States is not trivial. In deciding whether to grant or deny a permit, the U. S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as economics, aesthetics, recreation, and in general, the needs and welfare of the people ... The average applicant for an individual permit spends 788 days and \$271,596 in completing the process ... These costs cannot be avoided, because the Clean Water Act impose[s] criminal liability, as well as steep civil fines, on a broad range of ordinary industrial and commercial activities ... In this litigation, for example, for backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines." Scalia cited how the lower courts have continued to uphold the Corps' "sweeping assertions of jurisdiction over ephemeral channels and drains as 'tributaries,'" as he discussed

numerous cases that included irrigation ditches and drains that “intermittently connect to covered waters.” Referencing the SOS case, Scalia wrote, “... and (most implausibly of all) the ‘washes and arroyos’ of an ‘arid development site,’ located in the middle of the desert, through which ‘water courses ... during periods of heavy rain,’” which he footnoted, “We are indebted to the Sonoran court for a famous exchange, from the movie Casablanca (Warner Bros. 1942), which portrays most vividly the absurdity of finding the desert filled with waters ...” Being from New Jersey, Scalia could easily have envisioned a Sahara-like desert with its vast expanse of sand as the North African setting of the movie “Casablanca” suggests rather than the lush, diverse ecosystem of the Sonoran Desert that is not found anywhere else on earth and which supports an abundance of flora and fauna.

The washes are an integral part of the area’s biodiversity that can morph from dormant dry riverbeds into trickling streams or raging rapids with little notice, unlike Rapanos, which deals with an isolated freestanding body of water.

The washes that cross Section 16 can neither be isolated from their uplands nor from their terminus at Cave Creek Wash, which flows perennially.

SOS members point out that Lone Mountain recently staked straw bales across the upstream sections of all the washes traversing Section 16 from the east in order to ease the flow of water as it crosses the parcel.

SOS is seeking donations to help fund this ongoing litigation, which can be sent to SOS, PO Box 4348, Care Creek, AZ 85327.

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