

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

FILED BY 

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CLARENCE MADDOX
CLERK U. S. DIST. CT.
S.D. OF FLA - MIA

JORGE AND SUSAN GARCIA,
NELSON RUIZ AND OSVALDO
E. CUELI,

Plaintiffs,

v.

UNITED STATES OF AMERICA,
U.S. ARMY CORPS OF ENGINEERS,
AND JOSEPH W. WESTPHAL,
ASSISTANT SECRETARY OF THE
ARMY (CIVIL WORKS), in his
official capacity,

Defendants.

CASE NO. 01-111

CIV-KING

MAGISTRATE JUDGE
O SULLIVAN

COMPLAINT

Plaintiffs, JORGE AND SUSAN GARCIA, JUSTINO RODRIGUEZ, and OSVALDO E. CUELI file this Complaint seeking judicial review of agency action pursuant to 5 U.S.C. § 701, *et seq.* and declaratory and injunctive relief, attorneys fees and costs, to set aside Defendants' implementation of an unlawful plan that exceeds their delegated authority and will condemn Plaintiffs' private property within the "Eight and One-Half Square Mile Area" in direct violation of Section 104(c) (16 U.S.C. § 410r-8(c)) of the Everglades National Park Protection and Expansion Act of 1989, as amended ("Expansion Act"), 16 U.S.C. § 410-5 *et seq.* (Public Law 101-229), and in violation of 16 U.S.C. § 410r-8(k) (Public Law 103-219 (1994)) and allege:

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PLAINTIFFS

1. Plaintiffs, JORGE AND SUSAN GARCIA, JUSTINO RODRIGUEZ, and OSVALDO E. CUELI are property owners, and home owners, within the area identified as the “Eight and One-Half Square Mile Area.”

2. Plaintiffs relied on the nondiscretionary duty described in Section 104(c) of the Expansion Act whereby Congress directed the Secretary of the Army to construct a flood protection system for the presently developed land in the Eight and One-Half Square Mile Area in which Plaintiffs own property and reside.

3. Any unlawful policy, agreement, practice or action of Defendants that causes a plan to be implemented that condemns Plaintiffs’ land directly and substantially injures, harms and damages Plaintiffs.

DEFENDANTS

4. The United States of America (“the federal government”) is the government of the United States, which may be named as a defendant and against which declaratory judgment and injunctive relief may be entered, pursuant to 28 U.S.C. §§ 2201 and 2202, 5 U.S.C. § 702, and *Fed. R. Civ. P.* 57, and 65(a). The federal government is responsible for violations of law alleged herein.

5. The U.S. Army Corps of Engineers (“the Corps”) is an agency of the federal government which may be named as a defendant and against which declaratory judgment and injunctive relief may be entered, pursuant to 18 U.S.C. §§ 2201, and 2202, 5 U.S.C. § 702 and *Fed. R. Civ. P.* 57, and 65(a). The Corps is responsible for violations of law alleged herein.

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6. Joseph W. Westphal is the Assistant Secretary of the Army for Civil Works, Department of the Army, and an officer and employee of the United States and its agency, the Department of the Army. In his official capacity, Assistant Secretary Westphal may be named as a defendant against whom declaratory judgment and injunctive relief may be entered, pursuant to 28 U.S.C. 2201 and 2202, 5 U.S.C. § 702 and *Fed. R. Civ. P.* 57, and 65(a). On behalf of the federal government and its agencies, Assistant Secretary Westphal has been directly involved in violations of federal law.

JURISDICTION AND VENUE

7. Plaintiffs seek a declaration of rights under the Everglades National Park Protection and Expansion Act of 1989 ("Expansion Act"), 16 U.S.C. 410-5 *et seq.*, as amended by P.L. 103-219 (1994), to set aside agency action under 5 U.S.C. § 706, and seeks attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A).

8. This Court has jurisdiction over this civil action and requested relief under 28 U.S.C. § 1331 (civil actions arising under the Constitution, laws, or treaties of the United States).

9. The Court may issue declaratory judgments and injunctive relief pursuant to these jurisdiction statutes and 28 U.S.C. §§ 2201 and 2202, as well as *Fed. R. Civ. P.* 57 and 65(a).

10. The Court may award attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A).

11. The Court may hold unlawful and set aside agency action pursuant to 5 U.S.C. § 706(2).

12. Venue in the Southern District of Florida is proper under 28 U.S.C. § 1391(e) because this is a civil action against the United States, an agency thereof, and officers and

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employees of the United States, acting in their official capacity. Moreover, Plaintiffs' property to which the events relate, is within this District, and Plaintiffs reside in the District.

GENERAL ALLEGATIONS

13. In 1989, Congress enacted the Everglades National Park Expansion Act, 16 U.S.C. 410r-5, *et seq.*

14. In one part of the Act (16 U.S.C. § 410r-5), Congress directed the Department of the Interior (DOI) to expand the Park to the east by acquiring 107,600 acres of private property in the East Everglades that were located in a shallow flow way called Northeast Shark River Slough ("Slough"). This authorization did not include the acquisition of a residential area known as the Eight and One-Half Square Mile Area, which is not located in the Slough.

15. In another part of the Act (16 U.S.C. § 410r-8), entitled *Modification of Certain Water Projects*, Congress authorized and directed the Secretary of the Army, upon completion of a final report by the Chief of the Army Corps of Engineers ("Corps"), to construct modifications to the Central and Southern Florida Project (CS&F) to improve water deliveries into the Park and "to the extent practicable" take steps to restore the natural hydrological conditions in the Park.

16. In 16 U.S.C. 410r-8(b), Congress directed the Secretary of the Army, "to make a determination as to whether the residential area within the East Everglades known as the 'Eight and One-Half Square Mile Area' . . . will be adversely affected by project modifications authorized in subsection (a) of this section."

17. Section 104(c) of the Expansion Act (16 U.S.C. § 410-r8(c)) specifically states that "[i]f the Secretary of the Army determines pursuant to [the Final Memorandum] that the "Eight and One-Half Square Mile Area" will be adversely affected, the Secretary of the Army is

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authorized and directed to construct a flood protection system for that portion of presently developed land within such area.”

18. 16 U.S.C. 410r-8(a)(2) of the Expansion Act mandated that the modifications to the CS&F Project be constructed as generally set forth in a General Design Memorandum (GDM) to be prepared by the Army Corps of Engineers Jacksonville District.

19. These modifications to the CS&F Project were specified in the General Design Memorandum (GDM) entitled *Modified Water Deliveries to Everglades National Park* that was completed in 1992. This GDM contained a detailed plan for the construction of a protection levee, interior berm and seepage collection system around the Eight and One-Half Square Mile Area that the Secretary of the Army had determined was necessary. The GDM projected that the entire MWD project could be completed in five years.

20. 16 U.S.C. § 410r-8 of the Act directed the Corps to submit the 1992 General Design Memorandum, which included the plan for the Eight and One-Half Square Mile Area, to designated Congressional Committees for approval.

21. A Record of Decision (ROD) authorizing the Modified Water Deliveries Project detailed in the 1992 GDM, including the Eight and One-Half Square Mile Area levee, seepage canal and pump component, was signed by the Assistant Secretary of the Army for Civil Works on May 13, 1993. Under this plan, none of the Plaintiffs’ property would have been adversely affected.

22. In 1994, Congress amended the Act by adding 16 U.S.C. § 410-r8(k), which authorizes the Secretary to use federal funds “to provide Federal assistance to the State of Florida” for the acquisition of lands adjacent to the park, specifically including the “Eight and

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One-Half Square Mile Area.” However, subsection (k)(2) provides that “the Secretary may provide not more than 25 percent of the total cost of such acquisition,” and subsection (k)(3) requires that such funds be transferred to the State of Florida.

23. The State of Florida has decided not to acquire the Eight and One-Half Square Mile Area.

24. On September 29, 1994, the Corps and their local sponsor, the South Florida Water Management District (“District”) signed a Project Cooperation Agreement (“PCA”) to expeditiously construct the Modified Water Deliveries Project authorized by the Expansion Act, detailed in the 1992 GDM, including the construction of a levee, seepage canal and pump system for the residential area known as the Eight and One-Half Square Mile Area.

25. Colonel Joe Miller, former District Commander of the Army Corps of Engineers Jacksonville District stated at a public meeting in Homestead on or about September 21, 1999, that the Corps still stood by their Congressionally authorized 1992 GDM plan for the Eight and One-Half Square Mile Area.

26. Moreover, in a letter dated February 5, 1999, from Colonel Miller of the Corps to the U.S. Fish and Wildlife Service, it stated in enclosure E that the Corps lacked authority and funding to take over the acquisition of lands within the Eight and One-Half Square Mile Area.

27. On December 6, 2000, Joseph Westphal, Assistant Secretary of the Army for Civil Works, signed a Record of Decision (ROD) approving the implementation of a new plan to replace the 1992 Congressionally-authorized plan for a flood protection levee around the entire Eight and One-Half Square Mile Area.

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28. Defendants' new plan substantially modifies the location of the levee and seepage canal that Congress directed the Corps to construct around the Eight and One-Half Square Mile Area in Section 104(c) of the Expansion Act and seeks flowage easements not provided for in the Act. The new plan will move the levee and seepage canal contained in the Congressionally-authorized 1992 GDM much farther to the east and will create flowage easements, resulting in the condemnation of 2,335 acres of the western part of the Eight and One-Half Square Mile Area and the condemnation of areas in and around the new location of the levee and the seepage canal, including areas developed prior to 1989.

29. Defendants' authorization and implementation of a plan that exercises federal eminent domain authority and creates a federal buffer zone of 2,335 acres outside of the Park, are actions beyond the authority conferred by the Expansion Act and are contrary to the clear intent of Congress.

30. To implement this new plan, Defendants have taken steps to acquire and condemn property that will be adversely affected by the new location of the proposed levy, seepage canal, and flowage easements, including at least 63 residences that include homes owned by Plaintiffs.

- A. The ROD provides that "construction and land acquisition shall be implemented as part of the project."
- B. Defendants informed affected property owners at a public meeting on January 16, 2001, that if an agreement to purchase the property cannot be reached with the landowner, it could be challenged in "condemnation proceedings."

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C. At a meeting held by Defendants on January 31, 2001, Bart Wivell, Chief of the Real Estate Division for the Corps, specifically informed Plaintiff Garcia that the Corps would have to start condemnation proceedings against him if he refused to sell his property.

D. Defendants informed affected landowners, including Plaintiffs, at the January 16th and 31st meetings that they could be given a minimum of 90 days notice before they have to move. Moreover, Defendants distributed booklets to the landowners entitled, *Your Rights and Benefits as a Displaced Person and Acquiring Real Property for Federal and Federal-Aid Programs and Projects*.

31. Plaintiffs all own developed property that Defendants seek to condemn and that will be adversely affected by the new location of the proposed levy, seepage canal, and flowage easements.

32. Plaintiffs are not willing sellers.

33. Plaintiffs have employed the undersigned attorneys, and are obligated to pay them a reasonable fee for their services, which Defendants should be required to pay pursuant to 28 U.S.C. § 2412(d)(1)(A).

COUNT I

**ACTION TO REVIEW AND SET ASIDE
UNLAWFUL AGENCY ACTION**

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34. Plaintiffs have suffered wrong because Defendants' unlawful new plan to substantially modify the location of the proposed levy, seepage canal, and to create flowage easements will result in the condemnation of their property.

35. No special statutory review proceeding applies to the actions taken by Defendants, and there is no rule providing that an action for review is inoperative pending appeal to a superior agency authority.

36. The December 6, 2000 ROD is a final agency action for which there is no other adequate remedy in a court. This ROD is the apparent authority relied upon by Defendants in their subsequent attempts to condemn Plaintiffs' property.

37. The ROD and subsequent actions of Defendants are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law because they are beyond the authority granted by Congress in the Expansion Act in that:

- A. Defendants will fail to protect nearly half of the area that Congress directed them to construct a flood protection system around in section 410r-8(c);
and
- B. Defendants have refused to implement alternative means to achieve the improved water deliveries required by section 410r-8(a) that would not impact Plaintiffs' property (as in the Congressionally-approved May 13, 1993 ROD) and have instead chosen a plan in violation of the Act.

38. The ROD and subsequent actions of Defendants are contrary to constitutional right, power, privilege or immunity because:

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- A. Defendants' actions are arbitrary and wrongful and violate Plaintiffs' right to substantive due process in that they are not only not authorized, but fly in the face of Congress' direction to construct a flood protection system around the Area; and
- B. Defendants' actions are arbitrary and wrongful and violate Plaintiffs' right to substantive due process in that they are contrary to Congress' express decision not to authorize funds or grant federal eminent domain authority to condemn the property except in the form of assistance to the State of Florida.

39. The ROD and subsequent actions of Defendants are in excess of statutory jurisdiction, authority, or limitations, or short of statutory right because:

- A. Defendants do not have the authority under the Expansion Act to construct a substantially modified project that would condemn Plaintiffs' lands; Congress specifically directed the Secretary of the Army to construct a flood protection system around the developed land within the Eight and One-Half Square Mile Area in section 410r-8(c);
- B. Defendants have no statutory authority under the Expansion Act to condemn and acquire Plaintiffs' property and to expend federal funds for this purpose;
- C. Defendants' actions to condemn and acquire Plaintiffs' property are in direct violation of section 410r-8(k) of the Expansion Act; and

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D. Defendants' actions are contrary to the intent of Congress to protect rather than condemn the Area as expressed in its direction to construct a flood protection system around the developed land within the Eight and One-Half Square Mile Area in section 410r-8(c) of the Expansion Act should any project have an adverse impact on that area.

WHEREFORE, Plaintiffs request the Court to review and set aside the actions of Defendant described above, enjoin Defendants from taking further actions to condemn or acquire their property, and to award them their attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

COUNT II

ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF

40. There is an actual controversy between the parties – Defendants are taking actions to acquire or condemn Plaintiffs' property and to construct a project that will adversely impact Plaintiffs' property which Plaintiffs assert are unlawful and unauthorized as alleged in paragraphs 37 through 39, which are re-alleged.

41. By authorizing the implementation of a plan that exercises federal eminent domain authority and creates a federal buffer zone of 2,335 acres outside of the Park, Defendants are exceeding their authority and violating the Expansion Act and the clear intent of Congress.

42. Defendants have no authority to expend federal funds under the Expansion Act to condemn and acquire Plaintiffs' property, and their attempt to do so violates section 410r-8(k).

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43. Defendants have no authority under the Expansion Act to implement a project that will adversely impact Plaintiffs' property without protecting Plaintiffs' property pursuant to section 410r-8(c).

44. Defendants' illegal actions in excess of their delegated authority and in violation of the Expansion Act have, and will, cause irreparable harm to Plaintiffs unless enjoined.

WHEREFORE, Plaintiffs request that the Court:

A. Declare that Defendants are exceeding their delegated authority and violating the Expansion Act by implementing a plan that will condemn Plaintiffs' private property within the Eight and One-Half Square Mile Area;

B. Declare that Defendants are exceeding their delegated authority and violating the Expansion Act by implementing a plan that will condemn Plaintiffs' lands rather than constructing a flood protection system for Plaintiffs' lands as directed by Congress;

C. Declare that Defendants' unlawful actions in excess of their delegated authority are harming Plaintiffs;

D. Declare that Defendants' new plan is unlawful under the Expansion Act and should be set aside;

E. Declare that the Defendants must follow the intent of Congress concerning the Eight and One-Half Square Mile Area, as set forth in the Expansion Act;

F. Enjoin Defendants from exceeding their delegated authority and violating the law by implementing a plan that will condemn Plaintiffs' private property within the Eight and One-Half Square Mile Area;

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G. Grant attorneys fees and costs to Plaintiffs, including fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and

H. Grant such other relief as the Court deems just and appropriate.

DEMAND FOR JURY TRIAL

Plaintiffs demand trial by jury on all issues so triable.

HARDEMAN & SUAREZ, P.A.
Attorneys for Plaintiffs
9130 South Dadeland Boulevard
Datan Two - Suite 1209
Miami, Florida 33156
Tel: 305 670-2013
Fax: 305 670-2097

A handwritten signature in black ink, appearing to read 'Richard J. Suarez', is written over a horizontal line.

RICHARD J. SUAREZ
F.B.N. 331902
RICHARD A. WARREN
F.B.N. 336041

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the clerk of the court for the purpose of initiating the civil docket sheet (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM)

(a) PLAINTIFF GARCIA, JORGE and SUSAN;
RUIZ, Nelson and CUELI, Osvaldo

DEFENDANTS UNITED STATES OF AMERICA; U.S. ARMY
CORPS OF ENGINEERS; ASSISTANT SECRETARY OF THE
ARMY, WESTPHAL, JOSEPH W., IN HIS CAPACITY

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Dade
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
TRACT OF LAND INVOLVED

(c) Hardeman & Suarez, P.A.
9130 So. Dadeland Blvd., Datan 2 - 1209
Miami, Florida 33156

ATTORNEYS: Richard J. Suarez
Richard A. Warren

(d) CIRCLE COUNTY WHERE ACTION AROSE:

DADE, MONROE, BROWARD, PALM BEACH, MARTIN, ST. LUCIE, INDIAN RIVER, OKEECHOBEE, HIGHLANDS

II BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)

☐ 1 U.S. Government Plaintiff

☐ 3 Federal Question
(U.S. Government Not a Party)

☒ 2 U.S. Government Defendant

☐ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES
(For Diversity Cases Only)

PTF DEF

Citizen of This State ☐ 1 ☐ 1 Incorporated or Principal Place
of Business in this State

Citizen of Another State ☐ 2 ☐ 2 Incorporated and Principal Place
of Business in Another State

Citizen or Subject of a ☐ 3 ☐ 3 Foreign Nation
Foreign Country

PLACE AN x IN ONE BOX
FOR PLAINTIFF AND ONE BOX FOR DEFENDANT

PTF DEF

☐ 4 ☐ 4

☐ 5 ☐ 5

☐ 6 ☐ 6

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE
DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

Iva. 5 days estimated (for both sides) to try entire case.

V. NATURE OF SUIT (PLACE AN x IN ONE BOX ONLY)

A CONTRACT

☐ 110 Insurance
☐ 120 Marine
☐ 130 Miller Act
☐ 140 Negotiable Instrument
☐ 150 Recovery of Overpayment
& Enforcement of Judgment
☐ 151 Medicare Act
☐ 152 Recovery of Defaulted
Student Loans (Excl.
Veterans)

☐ 153 Recovery of Overpayment
of Veteran's Benefits
☐ 160 Stockholder's Suits
☐ 190 Other Contract
☐ 195 Contract Product Liability

A

PERSONAL INJURY
☐ 310 Airplane
☐ 315 Airplane Product
Liability
☐ 320 Assault, Libel &
Slander
☐ 330 Federal Employers'
Liability
☐ 340 Marine

☐ 345 Marine Product
Liability
☐ 350 Motor Vehicle
☐ 355 Motor Vehicle
Product Liability
☐ 360 Other Personal
Injury

TORTS

PERSONAL INJURY
☐ 362 Personal Injury-
Med. Malpractice
☐ 365 Personal Injury-
Product Liability
☐ 368 Asbestos Personal
Injury Product
Liability

PERSONAL PROPERTY
☐ 370 Other Fraud
☐ 371 Truth in Lending
☐ 380 Other Personal
Property Damage
☐ 385 Property Damage
Product Liability

B FORFEITURE/PENALTY

☐ 610 Agriculture
☐ 620 Other Food & Drug
☐ 625 Drug Related Seizure
of Property 21 USC 881
☐ 630 Liquor Laws
☐ 640 R.R. & Truck
☐ 650 Airline Regs
☐ 660 Occupational
Safety/Health
☐ 690 Other

A LABOR

☐ 710 Fair Labor Standards
Act
☐ 720 Labor/Mgmt.
Relations
☐ 730 Labor/Mgmt. Reporting
& Disclosure Act

☐ 740 Railway Labor Act
☐ 790 Other Labor Litigation
☐ 791 Empl. Ret. Inc.
Security Act

A BANKRUPTCY

☐ 422 Appeal
28 USC 158
☐ 423 Withdrawal
28 USC 157

A PROPERTY RIGHTS

☐ 820 Copyrights
☐ 830 Patent
☐ 840 Trademark

B SOCIAL SECURITY

☐ 861 HIA (1395f)
☐ 862 Black Lung (923)
☐ 863 DIWC/DIWW (405(g))
☐ 864 SSID Title XVI
☐ 865 RSI (405(g))

A FEDERAL TAX SUITS

☐ 870 Taxes (U.S. Plaintiff
or Defendant)
☐ 871 IRS- Third Party,
26 USC 7609

A OTHER STATUTES

☐ 400 State
Reapportionment
☐ 410 Antitrust
☐ 430 Banks and Banking
☐ 450 Commerce/ICC Rates/et
☐ 460 Deportation
☐ 470 Racketeer Influence
and Corrupt Organization
☐ 810 Selective Service
☐ 850 Securities/Commodities/
Exchange

☐ 875 Customer Challenge
12 USC 3410
☐ 891 Agricultural Acts
☐ 892 Economic Stabilization
Act
☐ 893 Environmental Matters
☐ 894 Energy Allocation Act

☐ 895 Freedom of Info. Act
☐ 900 Appeal of Fee
Determination under
Equal Access to Justice
☐ 950 Constitutionality of State
Statutes * A or B

* Other Statutory Actions

VI. ORIGIN

(PLACE AN x IN ONE BOX ONLY)

☒ 1 Original Processing ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Replied ☐ 5 Transferred from another district ☐ 6 Multi-district Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN Check if this is a CLASS ACTION DEMAND \$

COMPLAINT: ☐ UNDER F.R.C.P. 23

JURY DEMAND: ☒ YES ☐ NO

VII. RELATED CASE(S) (See instructions):

IF ANY: None

JUDGE DOCKET NUMBER

DATE

2/22/01

SIGNATURE OF ATTORNEY OF RECORD

Richard A. Warren

United States District Court

FOR OFFICE USE ONLY: Receipt No. 137202 Amount: 150.00

Date Paid: 2/23/01