UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

NORTH CAROLINA GROWERS' ASSOCIATION, INC., *et al.*	)	
Plaintiffs,	)	
v.	)	Case No. 09 cv 411
	)	**ORAL ARGUMENT REQUESTED**
HILDA L. SOLIS, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs the North Carolina Growers' Association, Inc., the National Christmas Tree Association, the Florida Fruit & Vegetable Association, Inc., the Virginia Agricultural Growers Association, Inc., the Snake River Farmers Association, the National Council of Agricultural Employers, the North Carolina Christmas Tree Association, Inc., the North Carolina Pickle Producers Association, Inc., Florida Citrus Mutual, the North Carolina Agribusiness Council, Inc., the Maine Forest Products Council, ALTA Citrus, LLC, Everglades Harvesting & Hauling, Inc., DeSoto Fruit & Harvesting, Inc., Forest Resources Association, Titan Peach Farms, Inc., H-2A USA, Inc., and Overlook Harvesting Company, LLC, hereby move for a Preliminary Injunction against Defendants Hilda L. Solis, in her official capacity as Secretary of the U.S. Department of Labor ("Solis"); the U.S. Department of Labor ("DOL"); Janet Napolitano, in her official capacity as Secretary of the U.S. Department of Homeland Security ("Napolitano"); and the U.S. Department of Homeland Security ("DHS") to restrain and enjoin the Defendants from giving any effect to *Temporary Employment of H-2A Aliens in the United States,* 74 Fed. Reg.

25972 (May 29, 2009) "the Solis Final Rule") or to *Withdrawal of Interpretation of the Fair Labor Standards Act Concerning Relocation Expenses Incurred by H-2A and H-2B Workers*, 74 Fed. Reg. 13261 (March 26, 2009) ("the Withdrawal"). The Solis Final Rule entirely rewrites a valid H-2A rule promulgated by the DOL under former Secretary Elaine L. Chao, *Temporary Agricultural Employment of H-2A Aliens in the United States: Modernizing the Certification Process and Enforcement Final Rule*, 73 Fed. Reg. 77110 (December 18, 2008) ("the Chao Final Rule"). The Chao Final Rule, which took effect January 17, 2009, in turn replaced an H-2A rule, the major provisions of which were promulgated by the DOL in 1987 ("the 1987 Rule"). The Plaintiffs contend that the Solis Final Rule should be enjoined and declared to be in violation of the Administrative Procedure Act, 5 U.S.C. §701, *et seq.* ("APA"). The Solis Final Rule violates the procedural requirements of the Administrative Procedure Act, 5 U.S.C. §701, *et seq.* ("APA"), and is arbitrary and capricious, both procedurally and substantively. If allowed to take effect, the Solis Final Rule and the Withdrawal will cause the Plaintiffs to suffer irreparable harm because the Plaintiffs will suffer substantial economic damages that will not be recoverable in an action at law. Moreover, upon information and belief, some Plaintiffs entered into binding contracts and took other irreversible actions in reliance on the Chao Final Rule. In support of their Motion, and as discussed in more detail in their accompanying Memorandum of Law in Support of Motion for Preliminary Injunction ("Plaintiffs' Memorandum"), the Plaintiffs state as follows:

1. On March 17, 2009, the DOL issued *Temporary Employment of H-2A Aliens in the United States; Proposed Rule*, 74 Fed. Reg. 11408 (March 17, 2009) ("the Solis NPRM"). Although termed as a "suspension" of the Chao Final Rule, the Solis NPRM was, in effect, a notice of proposed rulemaking ("NPRM") and therefore was subject to the procedural

requirements of the APA. On May 29, 2009, the DOL issued *Temporary Employment of H-2A Aliens in the United States,* 74 Fed. Reg. 25972 ("the Solis Final Rule").

2. The Solis NPRM did not comply with the procedural requirements of the APA. Among other deficiencies, the Solis NPRM

(a) Provided only a 10-day period for notice and comment, during the height of the spring planting season, which deprived many interested parties of an opportunity to be heard on the issue; and

(b) Explicitly stated that comments about the merits (or lack thereof) of the Chao Final Rule and the merits (or lack thereof) of the predecessor to the Chao Final Rule ("the 1987 Rule") would not be considered, effectively foreclosing any meaningful discussion of relevant issues related to the Solis NPRM.

3. The Solis Final Rule does not comply with the procedural requirements of the APA. In addition to being based on the deficiencies cited in Paragraph 2, above, the Solis Final Rule

(a) Upon information and belief, was not based on any serious deliberation and inadequately considered the impact that such a suspension, imposed in mid-season, would have on farmers, who will incur dramatically increased and unplanned-for costs and who had made irrevocable commitments for the 2009 season while the Chao Final Rule was still in effect and in reliance on it;

(b) For the reasons discussed in Paragraphs 4(a) below, has an impermissible retroactive effect on the Plaintiffs to the extent that the Plaintiffs who are farmers or members of

Plaintiff growers' associations had already made business plans and irrevocable commitments (including planting) based on the Chao Final Rule;

(c) For the reasons set forth in more detail in Paragraph 4(b) below, will result in devastating labor shortages for the forest products industry in 2010 and afterward, causing that industry to suffer irreparable harm;

(d) For the reasons set forth in more detail in Paragraph 4(c) below, is an invalid rule as to Christmas tree farmers who are members of Plaintiff growers' associations.

4. The Solis Final Rule is arbitrary and capricious because of all of the procedural and technical deficiencies described above, as well as the following:

(a) The costs of compliance with the Solis Suspension Final Rule, of which labor costs are a significant portion, are substantially greater than under the Chao Final Rule. These costs, primarily in the form of higher mandatory wages and reimbursements to H-2A workers for their transportation expenses, will not be recoverable if the Plaintiffs ultimately prevail in this action. Thus, the Plaintiffs and other farmers will suffer irreparable harm if the Solis Suspension Final Rule is not enjoined.

(b) After the Chao Final Rule was published in December 2008 and in reliance on the Chao Final Rule, upon information and belief, some farmers planned and budgeted for 2009, and entered into binding contracts, including but not limited to lease agreements and promissory notes. Some farmers invested cost savings back into their farms, by (for example) leasing additional acreage. These commitments had already been made and were irrevocable by March

2009, when the DOL issued the Solis NPRM. Moreover, by March 2009, some Plaintiffs had already planted their 2009 crops in reliance on the provisions of the Chao Final Rule.

(c) The Solis Final Rule will cause the U.S. forest products industry to suffer from unacceptable labor shortages in 2010 and afterward. The logging industry in the Northeastern United States depends heavily on Canadian non-immigrant guestworkers. Woefully insufficient numbers of U.S. workers are available or willing to perform this physically demanding work in remote northwoods areas. Historically, foreign logging workers have been classified as H-2B (non-agricultural) workers. H-2B, but not H-2A, workers are subject to a federally-mandated "cap." The Chao Final Rule provided that logging workers would come under the H-2A program, which has no "cap." Under the Solis Final Rule, logging workers will fall under the H-2B program effective June 29, 2009. The forest products industry must apply for H-2B workers in October of the year before their assignment; therefore, H-2B applications for logging workers who will be assigned in the summer of 2010 must be filed in October 2009. Although the forest products industry already has sufficient H-2A workers for 2009, reversion to the H-2B program after June 29, 2009, will result in a dire shortage of logging workers for 2010 and afterward, which will ripple through and devastate the entire U.S. forest products industry, which depends on raw materials supplied by loggers.

(d) The Solis Final Rule provides that Christmas tree workers are not "agricultural" and therefore are not subject to the overtime exemption in §203(f) of the Fair Labor Standards Act ("FLSA") ("the Christmas tree rule"). *See* 74 Fed. Reg. 25982, 26014. The Christmas tree rule directly contradicts the only known decision from a U.S. Court of Appeals on the issue, *U.S. Dep't of Labor v. N.C. Growers' Ass'n, Inc.*, 377 F.3d 334 (4th Cir. 2004) ("*NCGA*" or "the *NCGA* decision") (holding that interpretive guidance from the DOL consistent with the

Christmas tree rule was not entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944)). Moreover, for the reasons set forth in the *NCGA* decision, the Christmas tree rule – even as a regulation rather than an interpretive guidance – contradicts the plain language of the applicable statute and therefore is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984). Finally, the Christmas tree rule will result in geographic inconsistencies: Christmas tree farmers in the Carolinas, Virginia, West Virginia, and Maryland will be governed by the *NCGA* holding, and Christmas tree farmers elsewhere will presumably be governed by the Christmas tree rule. North Carolina Christmas tree farms are generally in the western part of the state, and some are near the borders of Georgia (Eleventh Circuit) and Tennessee (Sixth Circuit). Some Christmas tree growers have some land in a Fourth Circuit state and some land in a non-Fourth Circuit state, and their workers will be governed by different rules regarding compensability of overtime, causing severe confusion and inconsistency.

5. On March 26, 2009, the DOL published *Withdrawal of Interpretation of the Fair Labor Standards Act Concerning Relocation Expenses Incurred by H-2A and H-2B Workers*, 74 Fed. Reg. 13261 (March 26, 2009) ("the Withdrawal"). The Withdrawal revokes a valid interpretation of the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.* ("FLSA"), dealing with the reimbursement of transportation expenses for H-2A workers that was included in the Preamble to the Chao Final Rule after notice and comment. Although the Chao Final Rule included a detailed analysis and was issued only after notice and comment, the Withdrawal contained no legal analysis of this issue and was issued without an opportunity for notice and comment. These procedural defects render the Withdrawal invalid. Moreover, the Plaintiffs will

suffer irreparable harm in the form of substantial unrecoverable economic losses if injunctive relief is not granted.

For all of the foregoing reasons, as well as those included in the Plaintiffs' accompanying Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, the Plaintiffs submit that they will suffer irreparable harm if injunctive relief is not granted, that the balance of harms weighs overwhelmingly in their favor, that they have a substantial likelihood of success on the merits, and that the public interest favors injunctive relief. Accordingly, the Plaintiffs respectfully request that the Defendants be preliminarily enjoined from giving any effect whatsoever to the Solis Final Rule or the Withdrawal until judgment is entered on the merits.

The Plaintiffs also move that oral argument be permitted on this Motion.

This the 9th day of June, 2009.

/s/W. R. Loftis, Jr.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing **PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** was served with the Complaint by certified mail in the United States Mail, postage prepaid, and addressed as follows:

HILDA L. SOLIS,
in her official capacity as
United States Secretary of Labor,
200 Constitution Avenue, NW,
Washington, DC 20210,

THE UNITED STATES DEPARTMENT
OF LABOR, 200 Constitution Avenue, NW,
Washington, DC 20210

JANET NAPOLITANO,
in her official capacity as
United States Secretary of Homeland Security,
Washington, DC 20528,

THE UNITED STATES DEPARTMENT
OF HOMELAND SECURITY,
Washington, DC 20528

This the 9th day of June, 2009.

/s/W. R. Loftis, Jr.
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