

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 6 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

AL OTRO LADO, a California corporation;
et al.,

Plaintiffs-Appellees,

v.

EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW,

Appellant,

and

ALEJANDRO N. MAYORKAS, Secretary
of Homeland Security; et al.,

Defendants-Appellants.

No. 22-55988

D.C. No.

3:17-cv-02366-BAS-KSC
Southern District of California,
San Diego

ORDER

AL OTRO LADO, a California corporation;
et al.,

Plaintiffs-Appellants,

v.

EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW,

Appellee,

ALEJANDRO N. MAYORKAS, Secretary
of Homeland Security; et al.,

No. 22-56036

D.C. No.

3:17-cv-02366-BAS-KSC

Defendants-Appellees.

Before: OWENS, FRIEDLAND, and R. NELSON, Circuit Judges.

The parties are directed to file supplemental briefs of no more than 10,000 words addressing the following questions:

1. What standard should courts use to decide whether to analyze agency conduct as withholding versus delay under 5 U.S.C. § 706(1)?
2. Was the Government's metering policy withholding or delay under that standard?
3. If the Government's metering policy was a delay, was the delay reasonable under the factors announced in *Telecommunications Research & Action Center v. F.C.C.*, 750 F.2d 70, 79-80 (D.C. Cir. 1984) ("TRAC")? See *Indep. Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) ("We look to the so-called TRAC factors in assessing whether relief under the APA is appropriate." (footnote omitted)).
4. Is there any procedural or other reason that this court should not decide the second or third questions in the present appeal?

The parties' briefs are due six weeks from the date of this order.

In addition, this case is referred to the Circuit's Mediation Program. A circuit mediator will contact counsel directly to arrange a conference. The circuit mediator shall provide a status report to the panel within six weeks of the date of

this order. Questions may be directed to Chief Circuit Mediator Stephen Liacouras at (415) 355-7900.