

No. 04-16096

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT W. HALL,

Plaintiff and Appellant,

Versus

ROBERT V. ABBEY; GALE A. NORTON; U.S. DEPARTMENT
DEPARTMENT OF INTERIOR,

Defendants and Appellees.

Consolidated Appeal from a Judgment of the
United States District Court for the District of Nevada,
Case No. CV-S-02-1474 (KJD) and CV-S-03-0542-LDG (KJD),
Honorable Kent J. Dawson, United States District Judge

APPELLANT'S OPENING BRIEF

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I. ISSUES PRESENTED

In this environmental law, consolidated appeal of a district court judicial review action arising from a Bureau of Land Management (“BLM”) final decision to schedule and conduct two land sales without regard to Appellees-Defendants’ non-discretionary requirements pursuant to the National Environmental Policy Act (“NEPA”), the Clean Air Act (“CAA”) and the Federal Administrative Procedures Act (“APA”), did the district court enter an order [ER 277-290] and amended judgment [ER 291] that is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law when it granted federal Appellees’ motion for summary judgment? Did the district court enter an Order and amended judgment that is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law when it denied Appellant’s-Appellant’s motion for summary judgment?

II. STATEMENT OF JURISDICTION

Appellant Robert W. Hall is a resident of Clark County, Nevada, City of Las Vegas. The Ninth Circuit Court of Appeals has jurisdiction over all appeals from all final decisions of the United State District Court for the District of Nevada. See 28 U.S.C. § 1291.

III. INTRODUCTION

Appellant commenced this action pursuant to the Administrative Procedures Act (“APA”), 5 U.S.C. § 701 *et seq.*, seeking review of the federal agency’s administrative policies and procedures involving two land sale actions on the grounds that they violate the NEPA, CAA, and APA. Appellant has alleged among other claims that important facts claimed by the Appellees are not facts at all, they

are misleading statements interposed for an improper purpose.

The genesis of this action may be found in the Comments of the Nevada Environmental Coalition, Inc. and Robert W. Hall attached as Exhibit A [ER 008-046] to the Emergency Complaint For Judicial Review and to Enjoin (CV-S-02-1474) [ER 001-007], Rule 15(a) First Amended Complaint (CV-S-02-1474) [ER 047-055] and the Complaint For Judicial Review and to Enjoin (CV-S-03-0542) [ER 056-064].

On subsequent cross-motions for summary judgment, the district court granted summary judgment to the Bureau of Land Management (“BLM”)/Department of Interior (“DOI”) Appellees and denied Appellant’s summary judgment motion. This timely appeal followed. [ER 153-135; 277-290].

IV. FACTUAL AND PROCEDURAL BACKGROUND

The district court review is a consolidated action involving Court Record (“CR”) Docket, CV-S-02-1474-KJD (LRL) as the lead action and CV-S-03-0542-KJD (RJJ). This appeal was timely filed from a final, March 26, 2004 Order Court Record (“CR”), Docket CV-S-02-1474-KJD (LRL), and on March 29, 2004, the Amended Judgment in a Civil Case of the United States District Court for the District of Nevada [ER 291; 277-290; 292; 163:10-20, Fn. 2-4; 164:1-19; Fn. 5-6; 164:20-24, Fn. 7; 165:1-27, Fn. 8; 166:1-17, Fn. 9].

V. ARGUMENT

A. NEPA

(a) ... Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The

President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101. ... (b) NEPA procedures must insure that **environmental information is available to public officials and citizens before decisions are made and before actions are taken**. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.... (Emphasis added.)

40 CFR § 1500.1 (7-1-02). To the extent that environmental information is not available to citizens before decisions are made and before actions are taken, Appellees' information does not involve accurate scientific analysis, expert agency comments and public scrutiny. The contrary decision by the district court errs and abuses its discretion. [ER 166:18-27, Fn. 9; 167:1-28; 168:1-3.]

The appeal issues involve the Las Vegas Valley, CAA serious non-attainment area for particle matter ten microns or less ("PM10") and carbon monoxide ("CO") and federal Appellees' disposal of 74,000 acres of federal lands primarily for development. [ER 169:2-24; 170:1-12].

B. DISPOSITIVE ISSUES IN FAVOR OF APPELLANT

The issue before the district court starts with the NEPA non-discretionary requirements Appellees have failed and refused to accomplish. Each failure to comply is a separate justification for a remand. [ER 162:8-26; Fn. 1 (Errata: NRPA should be NEPA); 163:1-9].

1. Appellees parsed the acreage from the Southern Nevada Public Land Management Act ("SNPLMA") and the Clark County Conservation of Public Land and Natural Resources Act of 2002 ("CCPLNRA") into smaller land disposal actions supported by a low level environmental assessment ("EA) in order to evade

subjecting the entire 74,000 acres of the two Acts to an environmental impact statement (“EIS”), major federal action review. [ER 65-108; 109-152; 003:¶¶ 11 & 12; 280:5-14; 177-199; 212-235].

2. Appellees published a Federal Register Notice of Realty Action (“NORA”) on August 30, 2002 announcing the November 15, 2002 land disposal sale. There was no prior notice of intent to prepare an EA or EIS. The first notice the public had was a vague reference in the NORA to “environmental documents.” There was no NEPA compliance ensuring that environmental information was available to citizens before the Appellees’ decisions were made and before the NORA actions were taken. The land disposal sale was noticed to the public without NEPA compliance. 40 CFR § 1500.1(b) (7-1-02). [ER 003:¶¶ 9-12; 282:19-26].

3. After timely filing adverse comments, Appellant filed his Complaint three days before the November 15, 2002 land sales while still waiting for a comment response from the Appellees. 40 CFR § 1500.1(b) (7-1-02). [ER 004:¶¶ 13-16; 005:¶¶ 17-20; 006:¶¶ 21-28; 008-046].

4. Appellees claim conformance to a state implementation plan (“SIP”). That is very difficult if not impossible to do since there is no EPA finally approved Clark County SIP that meets the 1990 amendments to the Clean Air Act (“CAA”). “All such statements misrepresent.” [ER 006:¶ 29; 007A:¶¶ 30 & 37; 007B; ¶¶39-41; 199-204]. See, 42 U.S.C. § 7506(c).

5. Appellees’ EA was not dated or signed, there is no evidence of scoping or other public involvement; there is no certification of compliance with the National

Ambient Air Quality Standards (“NAAQS”) signed by an executive authorized to do so. The EA claims disclosure of the impacts. “There is no such ‘complete disclosure.’” [ER 007A:¶¶ 31-36; 011:14-25].

6. “The parsed EA and FONSI are part of a knowing, willful evasion of NEPA, [sic] the CAA.” [EA 007B:¶¶ 42].

7. Appellees rely on a low level EA that does not include emissions estimates for bulldozed or graded vacant land or for construction emissions. For that reason alone Appellees should not prevail. The two omissions constitute the Valley’s largest air pollution component. By omitting the air pollution data from bulldozed or graded vacant land and for construction emissions Appellees have excused themselves from dealing with most of their direct and indirect emissions. [ER 015:1-16; 281:10-15; 197-199].

8. NEPA requires impact statements to consider alternatives to the proposed action other than the proposed, single no action alternative. See 42 U.S.C. § 4332(2)(C)(iii). The required statement is not in the AR.

9. NEPA requires that the responsible Federal official,

...shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies which are authorized to develop and enforce environmental standards, shall be made available to the ... public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review procedures. The required compliance was not made public pursuant to 5 U.S.C. § 552 and there is no legally sufficient evidence to the contrary in the AR.

The required statement is not in the AR.

10. There is no site specific EIS in the AR.

11. The district courts have nullified NEPA, CAA and APA by a series of “little piece” BLM review decisions that have the effect of making each Act unenforceable. The district courts in the West do not have jurisdiction to set aside or render NEPA, CAA and APA unenforceable through the legal front door or the back door. To the contrary, they have a duty to protect the intent of Congress regarding all the acts of Congress, not just land disposal acts.

C. ANALYSIS OF THE DISTRICT COURT’S ORDER (ER 277-290)

1. [ER 277-283; 251:13-28; 252:1-7]. **Id. ANALYSIS.** The first 7 pages of the district court’s Order are taken from Appellees’ argument documents. The point is to have the reader believe that the Southern Nevada Public Land Management Act (“SNPLMA”) and a subsequent statute, the Clark County Conservation of Public Land and Natural Resources Act of 2002 (“CCPLNRA”) supersede NEPA. There is no AR evidence that either supersedes NEPA. Both of these Acts combined require that the Appellees dispose of 74,000 acres of government land in the Las Vegas Valley. That duty has nothing to do with the duty to comply with NEPA, CAA and APA requirements. The land disposal Acts are major federal environmental actions that must comply with NEPA.

2. [ER 278:12-13]. **Id.** “Once the land is transferred to private ownership, it is subject to local land use plans.”

ANALYSIS. That has nothing to do with the NEPA requirement to disclose cumulative air pollution impacts before the sale, “before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b). The reference to “local land use

plans” is a diversion that is not relevant herein.

3. [ER 278:16-17]. Id. “Title IV of the Act adopted a new disposal boundary.”

ANALYSIS. That is an admission that Appellees are proceeding on a different area of the Las Vegas Valley than the serious non-attainment area, Hydrographic area 212. The EPA does not recognize a new “disposal boundary” for any NEPA or CAA purpose.

4. [ER 278:18-19]. Id. “... Congress has found that approximately 74,000 acres in the Las Vegas metropolitan area are appropriate for disposal.”

ANALYSIS. That is an admission of a NEPA major federal action.

5. [ER 278:21-22]. Id. “The RMP/EIS was in the process of development while the SNPLMA was being considered by Congress.” [ER 278:6-26; 279:1-26; 280:1-4]. Id. “The RMP/EIS anticipated the enactment of the SNPLMA and identified a disposal boundary containing approximately 52,000 acres of land suitable for disposal.”

ANALYSIS. There is no reference to the SNPLMA or the CCPLNRA in the 1990-1998 RMP/EIS. The district court erred in acknowledging, referencing and using any data from the 1990-1998 RMP/EIS.

6. [ER 288:24-26; 289:1-10]. Id. “The Ninth Circuit previously made it clear to Appellant that land transfers are exempt from the conformity provisions of the Clean Air Act. See *Hall v. Norton*, 266 F.3d 969, 974-75 (9th Cir. 2001).”

ANALYSIS. This is primarily a NEPA action and there is no exemption from NEPA. The Ninth Circuit upheld the exemption for two different reasons.

First, the appeals court construed the claim as a challenge to the validity of 40 C.F.R. § 93.153(c)(2)(xiv), a regulation not at issue herein. Second, Appellant has not complained about “land transfers” that involve compiling paper documents or electronic documents in order to transfer land.

The appeals court found that “... the RMP need not detail compliance because there is an EPA exemption from that requirement. The compliance was land transfer compliance that is not an issue in this review. This action does not involve transportation issues. See 40 C.F.R. § 51.853(c)(2)(xii).” “As the EPA has recognized, the possibility that a plan will itself result in degradation of air quality is so remote as to be *de minimis*. See 40 C.F.R. § 51.853(c)(2)(xii).” See Appellant’s Reply to Federal Appellees’ Response to Appellant’s Motion for Summary Judgment (October 10, 2003), Exhibit W and the Addendum attached hereto. See, *Hall v. Abbey*, 32 Fed. Appx. 920, 922 (9th Cir. 2002)¹.

The “exemption” is very narrow and involves only “(xii) Planning, studies, and provision of technical assistance.” For the exemption to apply, the entire subsection must be read and all of the modifying language must be taken into consideration. “(c) The requirements of this subpart shall not apply to: ... (1) Actions would result in no emissions increase or an increase in emissions that is clearly *de minimis*” which is certainly the case in preparing a paper document. That section also defines *de minimis* as under 50 tons of PM10 per year and under 100 tons of CO per year. If and when Appellees would produce a cumulative impact

¹ Cited by authority of NC 36-3(b)(i)-(ii) [ER 272-276]; See Addendum hereto.

EIS we would see how many thousands of times the *de minimis* limit is exceeded. The disposal of 74,000 acres in a serious non-attainment area is not a *de minimis* action. The data that is available readily admits to more than 70 tpy of PM10 and 100 tpy of CO. See, 40 C.F.R. § 51.853 (7-1-01).

7. [ER 279:6-21]. *Id.* “The BLM also notes that in practice the total acreage would not be developed, thus the actual emission totals may be smaller than estimated.”

ANALYSIS. Appellees requested environmental approval for a total of 74,000 acres, not less. That is the acreage they must deal with. They can lawfully dispose of all 74,000 acres at any time. The issue is not want Appellees may or may not do, the issue is 74,000 acres. [ER 278:20-26; 279:1-26; 280:1-14]. Appellees prepared only an EA but now admit that an additional 22,000 acres beyond the original 52,000 acres triggers another EIS requirement. All of the acreage estimates constitute a major Federal action and all require an EIS.

No matter how thorough, an EA can never substitute for preparation of an EIS, if the proposed action could significantly affect the environment. *See Sierra Club v. Marsh*, 769 F.2d 868, 874-76 (1st Cir. 1985). We stress in this regard that an EIS serves different purposes from an EA. An EA simply assesses whether there will be a significant impact on the environment. An EIS weighs any significant negative impacts of the proposed action against the positive objectives of the project. Preparation of an EIS thus ensures that decision-makers know that there is a risk of significant environmental impact and take that impact into consideration. As such, an EIS is more likely to attract the time and attention of both policymakers and the public. In addition, there is generally a longer time period for the public to comment on an EIS as opposed to an EA, and public hearings are often held....

See *Anderson v. Evans*, 350 F.3d 815, 836 (9th Cir. 2003).

8. [ER 279: 20-21; 279:22-24; 280:1-4]. Id. “The BLM’s RMP also notes that after construction activities are completed on developed parcels PM10 emissions generally diminish.”

ANALYSIS. Without prejudice, the statement omits the fact of direct and indirect air pollution emissions for graded, vacant land, construction, and only later the air pollution that thousands of new residents will cause. The same is true for the CO estimates and water usage in a very serious drought.

9. [ER 280:13-14]. Id. “Each EA tiers, as authorized under NEPA regulations, to the BLM’s RMP.”

ANALYSIS. While it is true that an EA may tier to an RMP, the issue is for what purpose? Under Appellees scenario, Appellees would never prepare a NEPA site specific, cumulative impact EIS determination. Unlike an EA, an EIS must involve the public and must be noticed to the public with specific, unambiguous language regarding the purpose of the EIS. Federal Appellees may start with a low level EA tiered to an RMP or they may eliminate the EA and go directly to a site specific EIS. The fact is the Appellees had no intention of preparing an EIS.

10. [ER 280:15-16, Fn. 2; 280:17-21; 281:1-22, Fn. 3-4]. Id. “In order to use the most current and best available inventory emissions data, **the BLM relied on Clark County’s proposed PM10 State Implementation Plan (“SIP”)**. Fn. 2. The Clean Air Act requires a state to adopt and submit for EPA approval a SIP that **provides for the implementation, maintenance and enforcement of national ambient air quality standards for certain pollutants**, such as PM10 and CO. **The SIP has not yet been finally approved.** However, **each EA merely**

borrowed the emissions data rather than the substantive requirements of the plan. Thus the data is valid despite there existing [sic] no approval for the plan.” ... “Rather than fail to speculate as to the future uses of the land and avoid an impact analysis altogether together, the BLM attempts to project the future use of the land.” (Emphasis added.)

ANALYSIS. This is a stunning admission on the part of the district court. The district court admits that the only cumulative impact analysis in the EA is for the **future use** of the land after development and construction.

The district court allowed the Appellees to take credit for alleged lower PM10 emissions once the land is developed but overlooked the fact that **there is no BLM cumulative air pollution data. The omission allows the Appellees to omit reporting the air pollution for construction, vacant lands, paved roads and unpaved road dust PM10 emissions.** According to the County, **the missing cumulative data for construction, vacant lands, paved roads and unpaved road dust PM10 emissions accounts for 97% of the total PM10 dust in the Valley.** The district court went along with letting the BLM leave out almost all of their portion of the **cumulative construction, vacant lands, paved road and unpaved road dust PM10 emissions.** The data Appellees did present is post development and construction data where post development and post construction data are the only data presented and that is County, not BLM data. Neither the County data nor the BLM data include the PM10 from BLM land disposals development and construction. The Clark County data is stale, incomplete Valley-wide data that does not include BLM, cumulative, NEPA required data. The Clark

County data never anticipated the 74,000 acres of the SNPLMA or the CCPLNRA. “Construction emissions are not included because there is no widely accepted standard emission factor.” Appellees admit they simply did not include the most relevant development and construction air pollution data. The Clark County Valley-wide data Appellees used in place of their own data was produced using EPA methods, formulas and tables. The statement is misleading. [ER 074:¶ E, i; 073-077; 088-108; 118-121; 132-152].

Data from a proposed SIP is legally insufficient for any lawful purpose. The data Appellees used are valley-wide Clark County data.

Sec. 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in Sec. 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

- (1) Have an adverse environmental impact; or
- (2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, **agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:**

- (1) Is justified independently of the program;
- (2) **Is itself accompanied by an adequate environmental impact statement;** and
- (3) **Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program**

when it tends to determine subsequent development or limit alternatives.... (Emphasis added.)

The major federal action that is the issue is the disposal of 74,000 acres of land in both the SNPLMA and/or the CCPLNRA. There is no EIS that meets the test of 40 C.F.R. § 1506.1. Despite Appellees omissions, the program of the disposal of 74,000 acres continues unabated.

Worse, the repeated use of the word “SIP” without the preceding word “proposed” is misleading. NEPA is opposite to everything the Appellees are doing. That is why the Las Vegas Valley has been in serious PM10 and CO non-attainment since 1979.

11. [ER 281:16-22]. Id. “In order to determine whether the cumulative impact of emissions from projected development is **regionally** significant, the BLM relies on the EPA’s definition of a regionally significant air impact. A regionally significant air impact occurs when emissions exceed 10% of the total regional emissions budget for the criteria pollutant.” (Emphasis added.)

ANALYSIS. In a blink of the eye Appellees switched from 42 U.S.C. § 7410, state implementation plan issues to 42 U.S.C. § 7406, regional implementation plan issues. While Federal agencies do have regional responsibilities, the more important issues in this review involve 42 U.S.C. § 7410, state implementation plans. The information provided regarding regional plans is an entirely different issue that the district court did not address except in the confusion of attempting to follow Appellees’ misleading argument. Appellees’ failure to clearly justify the switch between the two entirely separate requirements

was a knowing, willful and thus far successful attempt to mislead the district court into believing that Appellees could lawfully increase their air pollution up to 10% before a significant impact occurred. The primary CAA issue in the district court's Order involves state implementation plans. Without a finally approved SIP, the amount Appellees may increase air pollution in the Las Vegas Valley serious non-attainment area only by an amount determined by the EPA finally approved SIP budgets. See 42 U.S.C. § 7506(c). Appellees cannot conform to a state implementation plan that does not exist. An EPA finally approved SIP sets limits regarding the amount of air pollution sources including Federal agency sources may or may not exceed. By Appellees' own admissions and until there is an EPA finally approved SIP, the CAA is clear that air pollution emissions beyond *de minimis* are unlawful. A 72,000 acre major federal action is clearly not permitted when the only support for the premise is a knowing, willful fast switch in a legal argument. [ER 199-204].

12. [ER 281:19-22]. *Id.* "Using emissions budgets from state implementation plans referenced in the RMP, the BLM concluded that regionally significant thresholds are reached when emissions exceeded 17,800 tons/yr for PM10 and 12,100 tons/yr for CO. The EA then suggested that assuming 4,800 acres of land were to be developed each year that an increase of 3,838 tons of PM10 and 2,993 tons of CO were likely to occur. The BLM concluded that these increases were well below the 10% threshold and therefore were unlikely to become regionally significant."

ANALYSIS. Emissions budgets come from SIPs, not long range planning documents. There is no SIP since 1979. That SIP did not have emissions budgets.

There is no pollution specific SIP that meets the 1990 amendments to the CAA. The district court's finding is legally unsustainable because it relied upon information from a source that is not credible.

13. [ER 282:4-8]. Id. "A Finding of No Significant Impact/Decision Record ("FONSI") was prepared in response to the EAs for the November and June land sales. The FONSI concludes that complete disclosure of impact to the environment was in the EAs, that the would not result in 'regionally significant' air impacts, and that no significant impacts would result from the proposed land sales."

ANALYSIS. There was no complete disclosure. Appellees misled the district court. The district court's Orders memorialize Appellees misleading statements. The result is a FONSI that is facially erroneous while ignoring the on-point issues. The switch from a SIP issue to a regional issue justifies a remand. [ER 163:10-20, Fn. 2-4].

14. [ER 282:15-16]. Id. "The Court heard oral arguments on June 3, 2003."

ANALYSIS. The district court heard oral arguments early in each action on November 14, 2002 in CV-S-02-1474 and on June 3, 2003 in CV-S-03-0542 only on appellant's motions for temporary restraining orders. There were no oral arguments regarding the case in chief despite Appellant's repeated requests.

15. [ER 282:19-26; 283:1-2]. Id. "On September 29, 2003, the BLM caused a notice to be published in the Federal Register announcing **an intention to prepare an EIS** for the Las Vegas Disposal Area as expanded by the Clark County Conservation of Public Land and Natural Resources Act of 2002 ("CCPLNRA") (emphasis added). The CCPLNRA added 22,000 acres to the Las Vegas Disposal

Area as defined by the SNPLMA. ... The BLM decided to revise the LVMRP/EIS [sic]. 1998 by creating a new environmental impact statement that foresees the development associated with the additional acreage approved for disposal by the CCPLNRA.”

ANALYSIS. That would be exciting news except for the fact that the Complaint (CR #1) is dated November 8, 2002 and the Amended Complaint (CR #12) is dated January 14, 2003. In order to be relevant, the intended EIS would have been finally approved prior to November 8, 2002. September 29, 2003 is a bit late to announce an intention to prepare an EIS. An intention to prepare an EIS is an admission that the required EIS is not in the AR. The intention to do something in the future is not legally sufficient support for any Federal agency action already on review.

The BLM recognized that it must “...study the land for potential impacts prior to any sale of *the additional acreage*.” (Emphasis added.)” Appellees have yet to explain the lack of an EIS for the *original* acreage.

16. [ER 285:18-26]. **ANALYSIS.** Appellant is not complaining about tiering. Appellant is complaining about tiering for the purpose of evading compliance with NEPA, CAA and APA in the absence of a site specific EIS.

17. [ER 286:1-26]. **ANALYSIS.** The district court’s Order overlooks missing compliance document requirements such as EPA finally approved 1990 CAA amendment, pollution specific SIPs, a conformity determination, a site specific cumulative impact EIS and all of the other missing documents Appellant has argued. There is no document that credibly and lawfully applies the following

to NEPA regulations.² The following definitions of a “major federal action” and “significant” focus on the depth of Appellees’ misleading “factual” representations and arguments. A “hard look” at any requirement applies only when there is no major disagreement regarding facts and legal argument. In this instance, Appellees’ credibility has fallen to the point where the appeal can only be decided *de novo*. Other NEPA, CAA and APA statutes and regulations also apply that were referenced by the Appellant in previous court record documents, that are referenced herein, that are included herein as excerpts of record and are made a part hereof for all purposes.

Sec. 1508.18 Major Federal action.

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (Sec. 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (Secs. 1506.8, 1508.17). ...

(b) Federal actions tend to fall within one of the following categories:
(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

² There is no list or check list showing that Appellees considered each applicable NEPA statute and regulation.

- (2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.
- (3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.
- (4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

Sec. 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

- (a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.
- (b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:
 - (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
 - (2) The degree to which the proposed action affects public health or safety.
 - (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
 - (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
 - (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
 - (6) The degree to which the action may establish a precedent for

future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

18. [ER 287:1-2; 282:9-18]. Id. “Hall mainly complains that the 1998 RMP/EIS was not properly noticed to the public for comment and is, therefore, invalid.”

ANALYSIS: It is a fact that the 1990-1998 RMP/FEIS was not noticed to the public **for SNPLMA and CCCPLNRA site specific NEPA EIS purposes.** The district court has consistently overlooked this fundamental requirement. The EIS document must actually address the site specific air pollution issues. If the EIS document does not do that it is legally insufficient. This review is not a review regarding a long range planning document. This is an air pollution, site specific, cumulative impact review in the twenty-first century, not the twentieth century.

Regarding what Appellees claim Appellant has said, Appellant argues the best evidence rule; what he actually said, not what Appellees claim he said. An unpublished decision does not determine anything; it simply prolongs the agony.

19. [ER 287:10-12]. Id. “Furthermore, despite Appellant’s assertions that Appellees must produce evidence of a cumulative impact determination involving all of Appellees’ air pollution activities, there is simply no basis in law for this claim.”

ANALYSIS. Cumulative impacts are those impacts that result from the incremental impact of an action, decision, or project in combination with other past, present, and reasonable foreseeable future actions, regardless of the agency (Federal or non-federal) or person undertaking such other actions. Cumulative impacts can result from individually minor but collectively significant actions over a period of time, from similar projects or actions, and from projects or actions which have similar impacts See, 40 CFR Part 1508.7. There is a basis for the claim and the basis is mandatory. [ER 197-199].

20. [ER 288:1-3]. Id. “Appellant actually received the RMP/EIS well in advance of the present litigation. Appellant cannot seriously claim to be prejudiced by the absence of immaterial parts from the administrative record.”

ANALYSIS. Appellees, not the Appellant, certify the AR. Once the AR is certified, Appellant is required by Ninth Circuit rules to deal with it. Appellees did not include the RMP/EIS in the AR because they did not want to expose that stale, long range, programmatic planning document to site specific review. Appellees cited the 1990-1998 RMP/EIS knowing that the information was too old to have any relevance in this action. By not including the document in the AR, Appellees have the best of both worlds. They claim the 1990-1998 RMP/EIS as support for site specific NEPA issues without having to defend it as a site specific EIS. The

public does not have APA EIS review rights until Appellees notice a site specific EIS. Referencing an EIS that has never been exposed to APA site specific scrutiny is fatal to all their claims regarding that document. According to the AR, there is no site specific EIS before the court regarding 74,000 acres of federal disposal land. Appellant alleges Appellees have misled the district court by their knowing and willful use of the 1990-1998 RMP/EIS before and especially after *Hall v. Abbey*, 32 Fed. Appx. 920, 922 (9th Cir. 2002)³.

So far Appellees have successfully turned NEPA on its head. Appellees chip away at small, favorable findings until they add up to a wall around the NEPA, CAA and APA. The result is a back door invalidation by a series of small decisions that have gutted all three Acts. Appellees have thus far succeeded in breaking down major impacts into small pieces to the point where the courts have lost sight of the larger picture. In the end we must ask whether the result is reasonable.

D. 1990-1998 RMP/EIS

Appellees were required to prepare EISs in accordance with 40 C.F.R. § 1502. Appellees were required to file the EISs with the EPA as specified in 40 C.F.R. § 1502.10 and 1506.9. Appellant Hall challenged the 1998 RMP/EIS in *Hall v. Abbey*, 32 Fed. Appx. 920, 922 (9th Cir. 2002)⁴. The result was an unpublished decision after the Appellees claimed that the 1990-1998 RMP/EIS was a long range, programmatic planning document that was protected from site

³ Cited by authority of NC 36-3(b)(i)-(ii) [ER 272-276]; See Addendum hereto.

⁴ Cited by authority of NC 36-3(b)(i)-(ii) [ER 272-276]; See Addendum hereto.

specific, direct and indirect, cumulative air pollution impact EIS determination. In the instant action, Appellees argued exactly the opposite before the district court as they “tiered” to a document they previously protected from site specific APA challenge. The depth of this misleading act is stunning with or without the obvious Rule 11 violation. Appellant requests that all references to the 1990-1998 RMP/EIS be stricken from the record of this action. Appellant objects to each and every reference to the 1990-1998 RMP/EIS herein. See, Plaintiff’s Opposition to Defendants’ Motion to File a Surreply⁵ [ER 268-271]; Plaintiff’s Reply to Federal Defendants’ Response to Plaintiff’s Motion for Summary Judgment [ER 257-259] and Plaintiff’s Response to Federal Appellees’ Motion for Summary Judgment [ER 236-246].

In the alternative and without prejudice, now that Appellees have tiered to this same 1990-1998 RMP/EIS document for site specific, purposes, that opens the 1990-1998 RMP/EIS to APA review for site specific purposes once the Appellees put out a legally sufficient public notice, That is the opportunity Appellant requested in Hall v. Abbey, 32 Fed. Appx. 920, 922 (9th Cir. 2002)⁶. Appellant requests a remand stripping the “long range planning, programmatic” misleading shield from the 1990-1998 RMP/EIS now that the Appellees have used the 1990-1998 RMP/EIS for site specific purposes herein.

The complete 1990-1998 RMP/EIS is not in the AR. Appellant cannot

⁵ Page numbers were omitted in the original in error.

⁶ Cited by authority of NC 36-3(b)(i)-(ii) [ER 272-276]; See Addendum hereto.

challenge a document that is not in the record. Only the federal Appellees can certify and submit the AR. The only EIS Appellees-Defendants have cited as support for a 72,000 acre major federal action is the EIS attached to a 1990-1998 long range, programmatic plan that was never noticed to the public as support for any site specific purpose.

This appeals court did not allow the Appellant to attack the 1990-1998 RMP/EIS on the grounds that he had to wait for a site specific EIS. See *Hall v. Abbey*, 32 Fed. Appx. 920, 922 (9th Cir. 2002)⁷. The site specific actions the appeals court wanted Appellant to wait for are now before this court.

Appellees have however, convinced the district court that the RMP's EIS is legally sufficient without any factual evidence that the EIS was ever noticed to the public as support for 2003-2004 site specific, direct and indirect cumulative impact EIS determination actions. See, Order at [ER 278:20-26; 277:1-26; 280:1-14].

VI. STANDARD OF REVIEW

The district court's decision to grant summary judgment is reviewed de novo with all of the facts read in the light most favorable to the non-moving party. *Covington v. Jefferson County*, 358 F.3d 626, 641 n.22 (9th Cir. 2004). Pursuant to the Federal Administrative Procedures Act ("APA"), the reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or other wise not in accordance with law; contrary to constitutional right, power, privilege or immunity; in excess of

⁷ Cited by authority of NC 36-3(b)(i)-(ii) [ER 272-276]; See Addendum hereto.

statutory jurisdiction, authority, of limitations, or short of statutory right; without observance of procedure required by law; unsupported by substantial evidence in a case ... reviewed on the record of an agency hearing provided by statute; or unwarranted by the facts to the extent the facts are subject to trial de novo by the reviewing court. *Oregon Natural Resources Council v. Marsh*, 52 F.3d 1485, 1488 (9th Cir. 1995). See, U.S.C. § 706(2).

The District Court's judicial review rulings on the grant and denial of cross summary judgment motions are reviewed *de novo*. *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992). The *de novo* standard applies to the order granting summary judgment, the district court's interpretation and application of federal law, as well as the mixed questions of law and found herein. *National Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 587 (9th Cir. 1992). Findings of fact are usually reviewed for clear error.

The reviewing court must determine that agency actions are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Review of agency action to determine its conformity with NEPA and the CAA provisions at issue is governed by the judicial review provisions of the APA, 5 U.S.C. §§ 701-706. *See Hells Canyon Alliance v. United States Forest Serv.*, 227 F.3d 1170, 1176-77 (9th Cir. 2000) (NEPA); *City of Olmsted Falls v. FAA*, 292 F.3d 261, 269 (D.C. Cir. 2002) (CAA); *see also City of S. Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1134-35 (C.D. Cal. 1999) (CAA review uses same standard as NEPA review).

We review an agency's compliance with NEPA under the Administrative

Procedures Act, 5 U.S.C. § 706 (1994) (internal citation omitted), which provides that a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions” that are “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D); *see also Cal. v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (citing *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974) (en banc) (stating that the “without observance of procedure” standard applies when a party claims that an environmental impact statement fails to comply with the requirements of NEPA)).

Initially, it is the moving party's burden to establish that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978). Rule 56(c) requires the moving party to show not only the absence of a disputed issue of fact but also that he is entitled to judgment as a matter of law. Appellees' statements that there are no genuine issues of fact misrepresent.

This court must determine whether the evidence, considered as a whole and viewed in the light most favorable to the nonmoving party, can reasonably support the district court's summary judgment finding for the Appellees. The issues herein involve both questions of law and of fact. Summary judgment should not be granted if as in this instance, there is no record supporting the moving party's claims. See, *Zell v. Intercapital Income Securities, Inc.*, 675 F.2d 1041, 1045 (9th Cir. 1982).

The lack of a record supporting the moving party's claims supports

Appellant's motion for summary judgment. *Jones-Hamilton Co. v. Beazer Materials & Serv.*, 973 F.2d 688, 694-695 (9th Cir. 1992). When the moving party's own evidence shows an undisputed material fact that bars the moving party's claims as a matter of law, the court may *sua sponte* grant summary judgment to the opposing party. In this instance, the moving party had a full and fair opportunity to ventilate the issues involved in the motion. *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311-312 (9th Cir. 1982).

Review of agency action to determine its conformity with NEPA and the CAA provisions at issue are governed by the judicial review provisions of the APA, 5 U.S.C. §§ 701-706. *See Hells Canyon Alliance v. United States Forest Serv.*, 227 F.3d 1170, 1176-77 (9th Cir. 2000) (NEPA); *City of Olmsted Falls v. FAA*, 292 F.3d 261, 269 (D.C. Cir. 2002) (CAA); *see also City of S. Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1134-35 (C.D. Cal. 1999) (CAA review uses same standard as NEPA review).

In a record review case, the reviewing court may direct that summary judgment be granted to either party based on the court's de novo review of the administrative record. *Cf. Sierra Club v. Babbitt*, 65 F.3d 1502, 1507 (9th Cir. 1995) ("De novo review of a district court judgment concerning a decision of an administrative agency means we review the case from the same position as the district court.") The *de novo* standard applies to the order granting summary judgment, the district court's interpretation and application of federal law, as well as the mixed questions of law and found herein. *National Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 587 (9th Cir. 1992).

In considering whether an agency acted in an arbitrary and capricious manner, a court “must determine whether the agency articulated a rational connection between the facts found and the choice made.” *Ariz. Cattle Growers’ Ass’n v. United States Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001).

Furthermore, courts must “carefully review the record to ‘ensure that agency decisions are founded on a reasoned evaluation of the relevant factors,’ ” *id.* (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)). In the context of the procedural environmental requirements imposed by NEPA and CAA, “[t]he arbitrary and capricious standard requires a court to ensure that an agency has taken the requisite hard look at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the agency decision is founded on a reasoned evaluation of the relevant factors.” *Wetlands Action Network v. United States Army Corps of Eng’rs*, 222 F.3d 1105, 1114 (9th Cir. 2000) (internal quotation marks omitted), *cert. denied*, 122 S. Ct. 41 (2001). A reviewing court is not permitted to substitute its judgment for that of the agency, but rather must “‘simply . . . ensure that [the agency]. has adequately considered and disclosed the environmental impact of its actions.’” *Am. Rivers v. FERC*, 201 F.3d 1186, 1194-95 (9th Cir. 2000) (quoting *Ass’n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1183 (9th Cir. 1997)). This means that we “must defer to an agency’s decision that is fully informed and well-considered,” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (internal quotation marks omitted), but “need not forgive a ‘clear error of judgment,’ ” *id.* (citing *Marsh*, 490 U.S. at 378), or credit

“conclusions that do not have a basis in fact,” *Ariz. Cattle*, 273 F.3d 1236. *Public Citizen v. Department of Transportation*, 316 F.3d 1002, 1020-21 (9th Cir. 2003).

While APA does not explicitly require, e.g., findings and reasons for actions taken other than after a trial-type hearing, courts have nevertheless refused to uphold agencies whose decisions lack reasoned support in the record compiled by the agency. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

The reviewing court must determine that agency actions are not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). In considering whether an agency acted in an arbitrary and capricious manner, a court “must determine whether the agency articulated a rational connection between the facts found and the choice made.” *Ariz. Cattle Growers’ Ass’n v. United States Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001). [ER 175-177].

A. ADMINISTRATIVE RECORD

Findings of fact are usually reviewed for clear error. In ruling on the merits of a petition for review the court generally will not consider materials which are not part of the administrative record (AR). *Gomes-Vigil v. I.N.S.*, 990 F.2d 1111, 1113 (9th Cir. 1993). The issues herein involve both law and of fact. Summary judgment should not be granted if there is no record supporting the moving party's claims. *Zell v. Intercapital Income Securities, Inc.*, 675 F.2d 1041, 1045 (9th Cir. 1982).

The lack of a record supports Appellant's motion for summary judgment.

Jones-Hamilton Co. v. Beazer Materials & Serv., 973 F.2d 688, 694-695 (9th Cir. 1992). When the moving party's own evidence shows an undisputed material fact that bars the moving party's claims as a matter of law, the court may *sua sponte* grant summary judgment to the opposing party. *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311-312 (9th Cir. 1982).

B. CONTRARY TO EVIDENCE

An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of a problem, if the agency offers an explanation for the decision that is contrary to the evidence, if the agency's decision that is contrary to the evidence, if the agency's decision is so implausible that it could not be ascribed to a difference in view or be the product of agency expertise, *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983), or if the agency's decision is contrary to the governing law. 5 U.S.C. § 706(2).

C. DEFERENCE

The court will not defer to an agency interpretation of a statute the agency is not charged with administering. *United States v. Corey*, 232 F.3d 1166, 1183 (9th Cir. 2000). Further, when a statute is administered by more than one agency, a particular agency's interpretation is not entitled to deference. Agency interpretations developed informally (i.e., not through formal adjudication for notice and comment rulemaking) do *not* warrant deference. *Scales v. I.N.S.*, 232 F.3d 1159, 1185-1166 (9th Cir. 2000). The court may refuse to defer to an agency's interpretation of a particular statute (even though within the agency's expertise) if the agency has not consistently interpreted the provisions issue. *State of Oregon v.*

BLM, 876 F.2d 1419, 425 (9th Cir., 1989).

VII. CONCLUSION

The district court has echoed Appellees' claims that everything was done properly despite the fact that each Federal agency NEPA, CAA and APA requirement has been ignored, marginalized or misrepresented. The result is a *de facto* dismissal of the nation's environmental law protections and safeguards.

Appellees are continuing a longstanding scheme to evade the environmental will of Congress by either not commencing much less completing the NEPA and CAA requirements cited in this review, while arguing positions they know to be false. "Construction emissions are not included because there is no widely accepted standard emission factor." Appellees EA statement that they did not include their own calculation for "construction emissions" is a misleading statement confirming that their data does not include the direct and indirect emissions their actions cause. They know that EPA approved formulas and tables are available that Clark County has used all along. Without that data, everything else is misleading and legally insufficient. Appellees repeatedly and shamelessly misled the Appellant and the district court in order to continue their agency's contempt for our nation's environmental laws since the laws were first enacted. Appellant requests the justice he has been denied.

DATED: Las Vegas, Nevada, September 20, 2004.

Respectfully submitted.

/s/ Robert W. Hall
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