

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 REPLY BRIEF

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TABLE OF CONTENTS

I. REPLY SUMMARY STATEMENT 1

II. APPELLANT’S REBUTTAL FACTS AND ARGUMENT2

 A. CLEAN AIR ACT (BFA 20-22)4

 B. NOVEMBER 2002 AND JUNE 2003 LAND SALE EAs AND FONSI’S COMPLIANCE WITH NEPA8

 1. 1990-1998 RMP/EIS (PROPOSED AND FINAL).....8

 2. WHERE IS THE SITE SPECIFIC SIP?.....9

 C. ISSUES WITH THE SOUTHERN NEVADA PUBLIC LAND MANAGEMENT ACT (“SNPLMA”).....12

 D. ENVIRONMENTAL ASSESSMENTS (EAs) (BFA 22-51)15

 E. 42 U.S.C. § 7410 vs. 7406 (BFA 39-40).....17

 F. CLARK COUNTY DATA (BFA 40-43).....17

 G. PUBLIC NOTICE, PUBLIC REVIEW (BFA 44-56).....20

 H. THE WATER ISSUE21

 I. DISPOSAL BOUNDARY22

 J. FONSI22

III. STANDARD OF REVIEW23

IV. CONCLUSION.....23

V. REQUEST FOR ORAL ARGUMENT24

CERTIFICATE OF COMPLIANCE.....25

CERTIFICATE OF SERVICE26

Table of Authorities

Cases

<i>Chem. Mfrs. Ass'n v. Natural Res. Defense Council, Inc.</i> , 470 U.S. 116, 126 (1985)	4
<i>City of Carmel-by-the-Sea v. Dep't of Transp.</i> , 123 F.3d 1142, 1161 (9 th Cir.)	14
<i>Hall v. Abbey</i> , CV-98-01645-RLH (D. Nev.), <i>aff'd</i> , 2002 WL 506108, 32 Fed. Appx. 920 (9 th Cir. 2002)	8
<i>Hall v. EPA</i> , 263 F.2d 926 (9 th Cir. 2001)	20
<i>Hall v. Norton</i> , 266 F.3d 969 (9 th Cir. 2001)	4
<i>Inland Empire Pub. Lands Council v. United States Forest Serv.</i> , 88 F.3d 754, 764	14
<i>Ohio Forestry</i> , 523 U.S. at 732-37	10
<i>Public Employees Ret. Sys. v. Betts</i> , 492 U.S. 158, 171 (1989)	4
<i>Watson v. Proctor</i> (In re Watson), 161 F.3d 593, 598 (9 th Cir. 1998)	4

Statutes

42 U.S.C. § 4332(2)(C)	12
42 U.S.C. § 7406	17
42 U.S.C. § 7410	17
42 U.S.C. § 7410(a)(1)	11
42 U.S.C. § 7410(a)(2)(A)-(M)	11
42 U.S.C. § 7506 (c)(1)	2

42 U.S.C. § 7506(c)	19, 21
Administrative Procedures Act, 5 U.S.C. §§ 701-706	3
Clark County Conservation of Public Land and Natural Resources Act of 2002, Pub. L. 107-282 (2002)	16
Clean Air Act, 42 U.S.C. §§ 7401-7671q	3
National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f	2
Southern Nevada Public Land Management Act, Pub. L. 105-263, 112 Stat. 2343 (1998)	16
Title 23 U.S.C.	4, 5
Urban Mass Transportation Act, 49 U.S.C. §§ 5501-5338	5
Other Authorities	
68 Fed. Reg. 55,991 (Sept. 29, 2003)	9
Rules	
NC 36-3(b)(i)-(ii)	8
Regulations	
40 C.F.R. § 1508.7	13
40 C.F.R. § 51.852	17
40 C.F.R. § 93.100 <i>et. seq.</i>	7
40 C.F.R. § 93.100-101	5
40 C.F.R. § 93.153	7
40 C.F.R. § 93.153(c)(2)(xiv)	4, 5, 6, 8

I. REPLY SUMMARY STATEMENT

The following is Appellant's summary of the court record, comment documents, administrative record documents, excerpts of record, and argument to date. Appellees representing a federal agency have argued that their agency is either exempt from NEPA, CAA or APA compliance despite explicit statutory language to the contrary, or they claim they have complied with all three Acts.

Appellees have also argued that they must dispose of Federal lands by an act of Congress, the Southern Nevada Public Land Management Act ("SNPLMA"). Congress did not exempt the SNPLMA from environmental law compliance.

The key to this review lies in the administrative record ("AR"). There are no finally approved, pollutant specific state implementation plans ("SIPs") in AR that meet the 1990 amendments to the Clean Air Act ("CAA"). They did not exist. There is no evidence of compliance National Environmental Policy Act ("NEPA") EIS not only regarding the 1998 SNPLMA, a major federal action, but none since 1970 when NEPA and the CAA were signed by the President, regarding all of the agency's direct and indirect air pollution actions. There is no evidence of reasonably written public notices informing the public what the Appellees have been doing. For that reason, there is no evidence of NEPA, CAA and APA public notice, public involvement and an if necessary, an opportunity for a judicial review because the Appellees have buried substantial amounts of air pollution in hundreds and hundreds of "little piece" EAs that they do not summarize, tally or notice to the public with a clear, substantive, plain English notice. By hiding their air pollution totals from the public, they have operated since 1970 without significant

proper disclosure that would encourage public involvement. At the same time, the Las Vegas Valley is now and has been in serious non-attainment for PM10, CO and now Ozone (O3) since the designations were established.

Appellees have not answered two very simple questions. How much air pollution is your agency responsible for in the Las Vegas Valley serious non-attainment area? How much Bureau of Land Management (“BLM”) air pollution is too much in the Valley non-attainment area? Appellees have no idea because their answers are not credible. Instead of answering that question, Appellees simply parse and parse and parse while claiming that no matter how much direct and indirect air pollution they are responsible for reporting, it never has been and never will be too much no matter how much. Without credible NEPA compliance, Appellees will always succeed in misleading other governmental agencies and the public until and unless the appeals court realizes what is happening and holds accordingly.

The Las Vegas Valley is the nation’s leader in runaway, urban growth. The Valley is also a national leader regarding lung disease. It is time to slow this environmental runaway down starting with full compliance with 42 U.S.C. § 7506 (c)(1).

II. APPELLANT’S REBUTTAL FACTS AND ARGUMENT

Both the facts and the law of this review remain in dispute. Appellees-Defendants have failed to produce a site specific National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f (“NEPA”) compliant environmental impact statement (“EIS”). By a ruse, Appellees have kept their air pollution actions from

Federal Administrative Procedures Act, 5 U.S.C. §§ 701-706 (“APA”) judicial review. There is no evidence of a Nevada/Clark County finally EPA approved State Implementation Plan (“SIP”) that meets the 1990 amendments to the Clean Air Act, 42 U.S.C. §§ 7401-7671q (“CAA”).¹ Appellees cannot lawfully comply with or conform to a SIP that does not exist. Appellees have parsed land sales in order to evade NEPA compliance. See, Appellant’s Opening Brief (“AOB”), A. NEPA at 2-3 and B. Dispositive Issues in Favor of Appellant, at 3-6; 6, ¶ 10.

This judicial review is a review of the process Appellees used to approve two BLM land disposal sales. An integral part of the process is the comment document Appellant filed as a response to the November 2002 land sale notice on October 15, 2002. The comment document was attached as Exhibit A to the original complaint before the two (November 5, 2002 and June 3, 2003) land sale complaints were consolidated. This review concerns what the extent and quality of Appellants’ comments as well as what the Appellees did and did not do regarding Plaintiff Hall’s comments. [ER 00008-00046].

¹ Nevada/Clark County produced a finally approved SIP in 1979 (amended 1981-82). The EPA approved the 1979 SIP including its State mandated standards that are more stringent than the National Ambient Air Quality Standards (“NAAQS”). Since that time Nevada/Clark County have submitted SIPs for EPA that either the County withdrew under a threat of sanctions, the EPA rejected or this appeals court vacated and remanded. As of the date of this brief, Nevada/Clark County have failed to produce pollutant specific SIPs that are **FINALLY** approved. There is no SIP that meets the 1990 amendments to the CAA much in the Administrative Record (“AR”). The reason is that Clark County’s (“SIP”) submissions are an embarrassment they are so misleading. Any claim of conformity to a SIP that does not lawfully or actually exist is at best misleading. The instant Complaint was filed on November 8, 2002.

A. CLEAN AIR ACT (BFA 20-22)

Brief of the Federal Appellees (“BFA”) at 20-22. Appellant Hall objects to the statement that “this Court held that transfers of land by government agencies are exempt from the Clean Air Act’s conformity requirements.” That is not true.

First, “[a] federal regulation in conflict with a federal statute is invalid as a matter of law.” *Watson v. Proctor* (In re Watson), 161 F.3d 593, 598 (9th Cir. 1998) (citing *Chem. Mfrs. Ass’n v. Natural Res. Defense Council, Inc.*, 470 U.S. 116, 126 (1985) (emphasis in the original)). Consequently, the Supreme Court has held that an agency’s interpretation of a regulation that conflicts with the plain language of the statute is entitled to “no deference.” *Public Employees Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989). The district court did not read the EPA regulation, NEPA or the CAA to preserve their validity. In the present instance, the EPA regulations must be read narrowly to that the claimed exemption applies only to transportation law and then only to the extent that the direct and indirect air pollution from the agency action is in fact de minimis according to the modifying language in the regulation.

Appellees argued that *Hall v. Norton*, 266 F.3d 969 (9th Cir. 2001), an appeals court decision that resulted in a remand to the district court in favor of Hall, discussed 40 C.F.R. § 93.153(c)(2)(xiv). That discussion and the regulation cited are restricted to transportation plans, programs and projects developed, funded or approved under Title 23 U.S.C. or the Urban Mass Transportation Act,

49 U.S.C. §§ 5501-5338.² While carbon monoxide air pollution is an issue herein, there is no evidence of transportation allegations by Appellant Hall regarding Title 23 U.S.C. or the Urban Mass Transportation Act, 49 U.S.C. §§ 5501-5338.

In his opening brief in this action, Appellant clearly stated that the issue argued in the review is a general conformity, not transportation conformity. 40 C.F.R. § 93.153(c)(2)(xiv) is “**a regulation not at issue herein.**” Hall stated, “[t]his action does not involve transportation issues.” See, Pl. Opening Brief at 8. The entire argument in BFA 20-21 involves a regulation that Appellant Hall has consistently disavowed as an issue herein. Appellees failed to rebut the fact that Hall’s facts and argument that involve general conformity issues, not transportation conformity issues.³ Appellant declines to be responsible for a regulation that is not his issue. See, Pl. Opening Brief at 7-9. Appellees failed to raise the general conformity issue and its regulations. For that reason Appellees’ waived their right to do so.

In the alternative and without prejudice regarding conformity to the CAA, Appellees made another misleading statement, “this Court held that transfers of land by government agencies are exempt from the Clean Air Act’s conformity requirements.” 40 C.F.R. § 93.153(c)(2)(xiv). BFA at 20. Appellees waived their general conformity right when they insisted on raising 40 C.F.R. § 93.153(c)(2)(xiv), a transportation conformity issue instead of the general conformity issue. AOB at 7-9, ¶ 6.

² Subpart A is restricted to Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws. See also, 40 C.F.R. § 93.100-101.

³ Interposed without prejudice on the basis that we have never seen a BLM EIS that fully discloses all of the agency’s direct and indirect Valley, serious non-attainment area PM10 and CO air pollution.

Without prejudice and in the alternative, Appellants left out the preceding requirement that,

(c) The requirements of this subpart shall not apply to the following Federal actions. (1) Actions where the total of direct and indirect emissions is below the emissions levels specified in paragraph (b) of this section. (2) Actions which would result in no emissions increase or an increase in emissions that is clearly de minimis. ... (xiv) Transfers of ownership, interest and titles in land, facilities, and real and personal properties, regardless of the form or method of the transfer.

Section (b) sets the de minimis maximum at 100 tons per year for carbon monoxide and 70 tons per year of PM10 (particle matter ten microns or less). The omission of the de minimis requirement was brought to the attention of the district court and the Appellees. AOB 7-9. An act of Congress such as the SNPLMA is not and never has been exempt from NEPA compliance and CAA conformity, the misleading argument of the Appellees notwithstanding.

The actual appeals court statement does not support Appellees' claim. "As the district court noted, Hall's Clean Air Act challenge to the Del Webb land exchange fails **if** this exemption is valid, so Hall's challenge necessarily must be considered as a challenge to the validity of the exemption." The words "if this exemption is valid" are operative.

Appellant Hall did not challenge the validity of the regulation. Defendants said he did as a straw issue and Appellant had to rebut. Hall has not challenged the actual language of the 40 C.F.R. § 93.153(c)(2)(xiv) or its application to the execution or paper transfer of land as long as the regulation is read in the context

of the entire regulation, 40 C.F.R. § 93.100 *et. seq.* and is interpreted in accordance with the entire sub-section.

Appellant is asking this appeals Court to note that Appellees are reading the narrow exemption out of the context to the entire sub-section. Land transfers are paper transactions that are obviously exempt *as long as they are air pollution de minimis and they remain air pollution de minimis*. The site specific actions that result from Appellees' land disposals and transfers are not de minimis and exempt by the language, spirit and intent of the rest of 40 C.F.R. § 93.153. Appellees mislead when only a sliver of a complex regulation is introduced.

Appellees argue a CAA “exemption” with argument that if taken as lawful by this appeals court, would have the effect of nullifying NEPA, CAA and APA by a back door parsing of the law. NEPA, CAA and APA were enacted to work together. A finding that nullifies one statute has the practical effect of nullifying all.

Appellant-Plaintiff Hall objects to Appellees' argument on factual, legal (including jurisdiction) and ethical grounds. Neither the district court nor this appeals court has the jurisdiction to nullify NEPA, CAA and APA. It should be intuitive that Appellees do not have lawful authority to dump 74,000 acres of land intended for development in a small valley without NEPA, CAA and APA consequences. Without compliance, the dust clouds follow. See, AOB at 6, ¶ 11.

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....

Appellant’s Opening Brief at 7-9. Appellant Hall does complain when the entire sub-section is not considered. See *Hall v. Norton*, 266 F.3d 969, 974-75 (9th Cir. 2001).

B. NOVEMBER 2002 AND JUNE 2003 LAND SALE EA’s AND FONSI’s COMPLIANCE WITH NEPA.

1. 1990-1998 RMP/EIS (PROPOSED AND FINAL)

See, AOB 5:8-9; 21-23; 10-13: ¶ 9-10. Defendants’ RMP statements are refuted by this appeals court in the actual text of *Hall v. Abbey*, CV-98-01645-RLH (D. Nev.), *aff’d*, 2002 WL 506108, 32 Fed, Appx. 920 (9th Cir. 2002), Exhibit W, [ER-00272-275]). See, AOB, Addendum.⁴

Appellees chose to merge the RMP and EIS despite the fact they were not required to merge the two documents. In *Abbey*, Appellees argued that there was a long range, programmatic shield that protected the 1990-1998 RMP/EIS from site specific, APA review. This is a site specific review. Appellees are attempting to have it both ways.

Defendants’ argument in *Abbey* denied Appellant Hall an APA review of the

⁴ Cited herein by authority of NC 36-3(b)(i)-(ii) for purposes of impeachment. [ER 272-276].

1990-1998 RMP/EIS. Defendants are again denying Appellant Hall a 1990-1998 RMP/EIS APA judicial review by failing and refusing to include that 1990-1998 RMP/EIS in the administrative record (“AR”) of this action. That is the Appellees’ burden, not the Appellant’s.

Defendants’ acts are a two edged sword. By not filing either the proposed or final 1990-1998 RMP/EIS as a part of the certified AR, they kept the document from APA review. The *Abbey* court was clear regarding that the 1990-1998 RMP/EIS was **not** intended to be a site specific EIS. Appellees are now arguing opposite in this review. By going both ways on the same issue in the same courts Defendants have impeached themselves.

Appellant must deal with the hand he is dealt in the certified AR. Appellees’ have made their choice. They must now live with it. AOB at 20-21, ¶ 20; A. Administrative Record at 28-29.

Appellees also made a point for Appellant Hall. “BLM explained to Hall during the administrative process that “[a] broad, programmatic analysis such as the RMP/EIS allows estimations and generalizations that a site-specific analysis does not.” Exactly. BFA at 38, Fn. 21; 52-54.

2. WHERE IS THE SITE SPECIFIC SIP?

Appellees settled the issues regarding the missing SIP when they published a BLM News release and 68 Fed. Reg. 55,991 (Sept. 29, 2003), Notice of Intent to Prepare an Environmental Impact Statement for the Las Vegas Valley Disposal Area as Expanded by the Clark County Conservation of Public Land and Natural Resources Act of 2002. The text of the Federal Register Notice confirms Appellant

Hall's claims by admitting that 22,000 land disposal acres are a major federal action. Appellees are actually arguing that 52,000 acres of disposal land is not a major federal action but 22,000 acres is. Appellees are arguing both ways on the same issue. AOB 15-16, ¶ 15. [ER 00261-265].

See, AOB at 4, ¶ 4; 6-7: ¶ 2. From 1970 when NEPA and the CAA were signed into law, Appellees had a responsibility not to go ahead with site specific actions until they prepared, lawfully noticed and finally approved an initial NEPA EIS that included all of their agency's Las Vegas Valley direct and indirect air pollution after the EPA's designation of the Las Vegas Valley serious non-attainment area for PM10 and CO. That initial, EIS never happened. Subsequent EISs are supposed to be amendments or revisions to the initial disclosure. None of NEPA's EIS requirements were met.

Appellees cannot lawfully include the 1990-1998 RMP/EIS as support for their site specific, major federal land disposal actions because the 1990-1998 RMP/EIS was protected from APA review.⁵ Appellees have no site specific action environmental support other than a misleading, NEPA insufficient environmental assessment ("EA") and Finding of No Significant Impact ("FONSI"). See, *Ohio Forestry*, 523 U.S. at 732-37.

⁵ This is where the Appellees lost their way. Appellees made a decision to keep everything possible from the public. They now have to face that decision. Appellant is not responsible for the actions Appellees kept from the public and did not include in the AR. It does not matter whether Appellant Hall did or did not manage to obtain a copy of a particular document. If that document is not in the AR it is not before this Court.

Appellees admit, “[t]he Act (CAA) requires each state to adopt and submit to EPA for approval a state implementation plan (“SIP”) that provides for the implementation, maintenance, and enforcement of the NAAQS in designated regions. 42 U.S.C. § 7410(a)(1). A SIP must specify emission limitations and other measures necessary to maintain the NAAQS for each pollutant. (“CAA” insertion added for clarity.) *Id.* 42 U.S.C. § 7410(a)(2)(A)-(M).” BFA at 7. Appellees have not and cannot include CAA SIP emissions limitations when there are no pollution specific, finally approved SIPs. There is no evidence that Appellees attempted to identify emissions limitations or demonstrate how they conformed to them.

The problem for the Appellees is that Clark County has not succeeded in getting PM10 and CO SIP submittals finally approved since 1979. Appellees know that and their failure to admit that fact or at least discuss it is an admission. Without that SIP, Appellees cannot conform to or comply with the CAA or NEPA.⁶ Appellees did not credibly rebut that issue in their BFA.

“Chapter Four of the Final EIS contains an exhaustive analysis of the potential environmental effects of proposed land management actions throughout the entire Las Vegas Valley, including the potential cumulative impacts of land disposals and development on air quality, over a twenty-year period. *See* SER 135-

6. One memorable moment in Nevada environmental law history was December 5, 2000 when the Clark Board of Commissioners withdrew from EPA consideration PM10 SIPs previously submitted on November 15, 1991, December 6, 1994 and August 19, 1997. The withdrawal was done in order to avoid EPA sanctions. The 1999 submittal was vacated and remanded by this appeals court.

94. This analysis includes an examination of potential air quality impacts with particular emphasis on two pollutants: carbon monoxide (“CO”) and particulate matter less than ten microns in size (“PM10”).” BFA at 9 & 23. This is the same 1990-1998 RMP/EIS that Appellees argued that Appellant Hall could look at but not touch regarding APA review.

Appellant had no problem with the *Abbey* decision because it meant that Plaintiff Hall’s claims are true. The 1990-1998 RMP/EIS is not site specific and for that reason Appellees can pass their “we are the government” magic wand over it and make a legally sufficient, site specific, NEPA compliant EIS out of that document. The *Abbey* appeals court agreed and told Hall to wait until a site specific action came up. This is that site specific action.

C. ISSUES WITH THE SOUTHERN NEVADA PUBLIC LAND MANAGEMENT ACT (“SNPLMA”)

There is no evidence that the SNPLMA supersedes, set aside or invalidates NEPA, CAA or the APA. There is no mention of the SNPLMA or the CCCPLNRA in the 1990-1998 RMP/EIS. See, AOB at 3-4; 6: C. Analysis of the District Court’s Order (ER 277-290), ¶ 1.

The SNPLMA (52,000 acres) and its addendum the CCCPLNRA (22,000 acres), individually and collectively (74,000 acres) are major federal actions for NEPA EIS purposes. “Section 102(2)(C) of NEPA requires federal agencies to prepare an Environmental Impact Statement (“EIS”) for all ‘major Federal actions significantly affecting the quality of the human environment.’” 42 U.S.C. § 4332(2)(C).” BFA at 5. AOB at 7, ¶ 4. An EA is insufficient support for “major

federal actions” that “significantly affect the quality of the human environment” as both acts do.

“Cumulative impacts are defined as: the impact on the environment which results from the incremental **impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.**⁷

Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 40 C.F.R. § 1508.7.” (Emphasis added.) BFA at 6. That is the requirement Appellees claim does not exist.

Appellees are arguing with the statute when they ignore the “added to other past ... actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” Appellees argument is an argument in favor of parsing air pollution to the smallest possible pieces in order to evade NEPA, CAA and APA compliance. There is no BLM cumulative impact compliance because the compliance they claim is from heavily parsed, individual land sales instead of all of the acreage of the SNPLMA, a combined 74,000 acres. By using a parsed EA instead of an EIS, Appellees have come to this Court knowing they only accounted for one tiny portion of the SNPLMA. The EAs left out construction and development dust in the PM10 data they did report. With the construction and

⁷ One example of a past action that keeps on giving with regard to air pollution is a BLM owned or leased community gravel pit. Another would be the BLM’s ownership of airport lands. A third would be off road racing. Admitting to all of their current Valley air pollution is not something Appellees are eager to do.

development dust included, Appellees have reported less than 4% of the PM10 they were bound by NEPA to admit and report.

“A cumulative impacts analysis must be ‘meaningful.’” *City of Carmel-by-the-Sea v. Dep’t of Transp.*, 123 F.3d 1142, 1161 (9th Cir.). To meet this standard, an agency must consider the combined effects of the ‘project at issue in conjunction with the environmental effects of other past, present, and reasonably foreseeable future projects.’ *Inland Empire*, 88 F.3d at 764.” BFA Brief at 6. Appellant is not suggesting that a site specific EIS should account for past actions that no longer result in air pollution. Appellant is suggesting that federal agencies must account for all of their current, ongoing Valley air pollution, not simply parsed pieces of the total.

The following is from AOB at 10-11 with quotations from the district court’s order. Appellees’ source documents are also cited.

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].⁸

AOB at 7, ¶ 5; 10, ¶ 8. See, AOB at 4, ¶¶ 2-3; 9, ¶ 7; 10, ¶ 8; 16, ¶ 17.

D. ENVIRONMENTAL ASSESSMENTS (EAs) BFA, 22-51

See, AOB at 4-5, ¶¶ 5-7. Appellees’ are attempting once again to have a court believe that the Southern Nevada Public Land Management Act, Pub. L. 105-

⁸ Quotations from the Appellant’s Opening Brief are submitted for impeachment.

263, 112 Stat. 2343 (1998) (“SNPLMA”) and the Clark County Conservation of Public Land and Natural Resources Act of 2002, Pub. L. 107-282 (2002) (“CCCPLNRA”) are not major federal actions. Appellees’ are attempting once again to have a court believe that low level environmental assessments (“EAs”) are sufficient while they are evading NEPA, CAA and APA compliance by parsing major federal actions into sale by sale environmental assessments without an accompanying legally sufficient site specific EIS.

Appellees are also attempting to have the appeals court believe that EAs are noticed to the public. Appellees do not routinely notice EAs to the public. There is no evidence of a reasonable public notice in the AR. AOB at 19-20, ¶ 18.

There are no **rational connections** between Appellees’ misleading facts. Appellees must produce data within the NEPA framework. BFA at 23. Data borrowed from an unapproved SIP submittal that does not include construction and development data cannot by definition be **extensive, cumulative, thorough** or **sufficient**. BFA at 23. “BLM reasonably concluded that the potential environment impacts of the proposed land sales were not significant, and, consequently, that no EIS was required.” Unwittingly, by including “proposed land sales,” Appellees admit that they parsed that data into a low level EA in order to evade the NEPA required SNPLMA EIS. Not only did the Appellees evade the requirement, they crowned themselves with the edict “no EIS was required.” AOB at 20, ¶ 19. Deference to the government has brought the people of Nevada an epidemic of lung disease.

E. 42 U.S.C. § 7410 vs. 7406 (BFA 39-40)

See, AOB at 13-15, ¶¶ 11-12. This argument is particularly misleading. Appellees are attempting to shift from Las Vegas Valley serious non-attainment area issues to interstate issues while hoping no one noticed. See, 42 U.S.C. § 7410. 42 U.S.C. § 7406 and “regionally significant” apply to INTERSTATE air quality agencies. The issues before this appeals Court involve Las Vegas Valley serious non-attainment area, Hydrographic Area 212 issues. Appellant’s primary focus is on Valley serious non-attainment area issues, not interstate issues. The definition offered by the Appellees from 40 C.F.R. § 51.852 must be read along with the statute. The definition simply means that air pollution becomes regionally, interstate significant when it represents “10 percent or more of a non-attainment or maintenance area’s emissions inventory for that pollutant.” In a split second, Appellees shifted from local to interstate issues in order to claim 10 percent leeway.

F. CLARK COUNTY DATA (BFA 40-43)

Appellant has not claimed that Appellees may not use Clark County emissions data. Appellant has claimed that Appellees may not use Clark County’s bogus data. Recent Clark County data has not been subject to public, APA scrutiny. Appellees may not lawfully use data that was not noticed to the public for NEPA or CAA purposes. Appellees may not use data that Appellees have shielded from public notice, citizen review, and APA review. Appellees may not lawfully use bogus SIP submittals that are not accepted by the EPA or this appeals court. Clark County SIP data have not passed EPA or public scrutiny for twenty-one to

thirty-four years depending on whether the 1979 SIP has any validity in the year 2004. That is some record.

The following statement is not true. “Furthermore, Hall does not identify any specific problem with Clark County’s data.” BFA at 40. Appellant Hall has already described the omitted construction and development dust data that according to Clark County is 96% of the PM10 problem. The same is true for carbon monoxide. Water was not considered at all despite the current drought of a thousand years.

“NEPA procedures including impact statements are not applied retrospectively to completed projects whose status within the program is well beyond change.” BFA at 41. That statement does not deal with agencies who have never complied with NEPA and who have never owned up to ongoing air pollution actions other than land sale actions in a serious non-attainment area. Appellees have kept air pollution information from sources other than land development hidden.

“Moreover, the scope of an EIS is limited to the impacts of “connected actions, cumulative actions, and similar actions.” BFA at 42. Now we get down to the method Appellees have used to evade NEPA compliance. Appellees simply parsed major federal actions such as the SNPLMA and the CCPLNRA into smaller land sale actions as a means of covering up the reality of air pollution data that is 96% deficient. All of the air pollution parts of SNPLMA and the CCPLNRA are connected, cumulative, similar and related. The trick is to find the air pollution total.

Appellees made another substantial admission. In describing the EIS from

the 1990-1998 RMP/EIS Appellees stated, “BLM prepared a **programmatic Final EIS.**” Unwittingly Appellees have made the same programmatic point Appellant Hall has been making all along. The same point was made by this Court in *Abbey*. The document is “programmatic,” long range and not subject to APA review. For exactly that reason, Appellees may not rely on that document in this review.

Appellees are caught in a web of their own making.

Fn. 23 is even worse. BFA at 42. In discussing Clark County serious non-attainment area data, Appellees claim that past action data is in the Clark County data. In making that statement, Appellees lost sight of their NEPA duty to own up to all of the direct and indirect Valley air pollution their federal agency is required to report. Worse Appellees claim that the BLM used the Clark County baseline “to assess the impacts of land disposals in the 1998 Final EIS and of the land sales at issue in this case.” That is the same database that is 96% short. The point is actually moot since without a site specific SIP there is no allowable emissions leeway. 42 U.S.C. § 7506(c).

Appellees claim that they may use data from submitted but unapproved SIPs in EAs that were not noticed to the public. The data have always been shielded from APA review two ways. The EAs are kept hidden from all but the most persistent members of the public such as Appellant Hall. The EAs tier to the 1990-1998 RMP/EIS which the appeals court in *Abbey* shielded from APA review.⁹

⁹ Appellees have tried to justify the absence of the 1990-1998 RMP/EIS in the AR by stating that Appellant Hall has a copy. That is true. It is also true that Appellant has a valid interest in having more people know what is happening. If more people

AOB at 16, ¶ 16.

Fn 24 is another model of obfuscation. BFA at 43. Appellees know very well why the Appellant uses the word “final” when discussing EPA SIP approvals. The reason is that the 1999 PM10 SIP was vacated and remanded in 2001 by this appeals court after EPA approval. *Hall v. EPA*, 263 F.2d 926 (9th Cir. 2001). Appellees noted that two SIPs were EPA approved after this judicial review was filed. At the time they wrote that footnote, they knew that the PM10 SIP was up for judicial review and the time to file a judicial review notice regarding the latest CO submittal has not yet tolled. The point may be moot since the EAs already admit that 96% of the construction and development air pollution data have gone missing.

G. PUBLIC NOTICE, PUBLIC REVIEW (BFA 44-56)

This is not an issue regarding whether land sales were noticed. This is an issue regarding a NEPA compliant public notice that facially and reasonably informs the public regarding what is about to happen and what the public’s rights are that has also gone missing. The land sale portion of the public notices is not the most important issue.

The Appellees failed to produce the actual notices in their supplemental excerpts of record. They do not have NEPA compliant evidence.

Fn. 25 admits that there was no public notice regarding their low level EAs.

knew, Hall would not be standing in court alone. The Hallmark of the BLM’s acts in Nevada has always been that of avoiding public notice and public participation.

The footnote admits that Appellees have no intention of requiring that their EAs be signed by the responsible executive. BFA at 44.

Fn. 29. Appellees discuss alternatives and criticize Hall for allegedly not submitting comments regarding alternatives. The entire review calls for the alternative of shutting down land sales pending NEPA, CAA and APA compliance. That is an alternative. Appellant Hall did comment on water issues. BFA at 48-49. In the alternative, Appellees do not appear to realize that a legally sufficient SIP that includes alternatives is information the public needs in order to comment on alternatives. BFA at 49-51.

Appellees do not appear to understand that 42 U.S.C. § 7506(c) prohibits the land sales until (1) Clark County has finally approved, pollution specific SIPs in place, (2) Appellees have a NEPA compliant EIS in place, (3) Appellees' direct and indirect air pollution does not result in Clark County backsliding on the air pollution limits of their 1979 SIP, (4) Appellees meet the applicable NEPA, CAA and APA requirements, and (5) Appellees can prove the Valley has the water to support the land sales during and after construction and development despite years of runaway growth.

H. THE WATER ISSUE

“In the district court, Hall also challenged the EA’s assessment of potential water quality impacts from the proposed land sales. ER 53; ER 186-88. Hall has not raised this issue in his opening brief and thus has waived it on appeal.” Not so. “The same is true for the CO estimates and water usage in a very serious drought.” See, Appellant’s Opening Brief at 10, ¶ 8, Analysis.

This is a review of a document that did raise the issue. It was the district court that did not discuss the water quality issue in its order. Apparently the district court had no basis for a summary judgment finding on the water issue. Appellant has no other idea why the district court did not deal with the issue. The water issue was a part of Appellant's motion for summary judgment. This is a review of a FONSI and all of its supporting documents that started with the comment document and ended with the district court's order and judgment. See the complaint for judicial review at 6, ¶ 24 [ER 00006]. Appellant did deal with all of the issues the district court failed to deal with in its order in the Appellant's Opening Brief at 1-2, 29, "I. Issues Presented," "III. Introduction," "IV. Factual and Procedural Background" and "B. Contrary to Evidence." There was no finding to argue beyond the cross-motions for summary judgment which Appellant did argue. See the first paragraph, Appellant's Opening Brief at 28. There is no reasoned support for the district court's failure to deal with the water issue.

I. DISPOSAL BOUNDARY

AOB at 7, ¶ 3. Appellees failed to rebut the fact that instead of addressing the air pollution in the Las Vegas Valley serious non-attainment area they addressed a new "disposal boundary" which has the effect of comparing air pollution in two entirely different areas. That is one more way Appellees misled the Court and Appellant. Appellees waived their right to rebut the issue.

J. FONSI.

AOB at 15, ¶ 13; [ER 00086-00087; 00130-00131]. As Appellant pointed out in the AOB regarding the November 15, 2002 and June 3, 2003 land sale

FONSI, the FONSI is misleading since it deals with “regional significant” air pollution impacts without mention of serious non-attainment area impacts. The FONSI for the June 3, 2003 land disposal sale suffers from the same affliction. Appellees failed to rebut the FONSI allegations and waived their right to do so. [ER 00086-87 and 00130-131]

III. STANDARD OF REVIEW

Appellant’s Standard of Review legal argument may be found at AOB 23-28. See, AOB B. Contrary to Evidence and C. Deference at 29.

IV. CONCLUSION

The issues of this review are serious, first impression issues. Appellees have ignored their NEPA, CAA and APA duties since 1970. That is a major reason why the Las Vegas Valley is still in serious non-attainment. By definition a serious non-attainment area is an unhealthy place to live. No one should have to live under non-attainment air pollution conditions.

The district court has echoed Appellees’ claims that everything was done properly despite the fact that each Federal agency NEPA, CAA and APA requirement was ignored, marginalized or misrepresented. The result is a *de facto* dismissal of our nation’s environmental law protections and safeguards by a court without that jurisdiction.

Appellees are continuing a longstanding scheme to evade the environmental will of Congress. Appellant requests the justice he was denied in district court.

V. REQUEST FOR ORAL ARGUMENT

Pursuant to the Federal Rules of Appellate Procedure 34, Appellant Hall requests that oral argument be permitted. Not only are issues of first impression involved, the facts and argument raise serious issues of fact, law and credibility that should be the subject of further oral argument exploration by the appeals Court.

DATED: Las Vegas, Nevada, November 16, 2004.

Respectfully submitted.

/s/ Robert W. Hall

ROBERT W. HALL, Pro Se