

No. 03-15719

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT W. HALL,

Plaintiff and Appellant,

Versus

BRUCE BABBITT; UNITED STATES DEPARTMENT
DEPARTMENT OF INTERIOR,

Defendants and Appellees.

Second Appeal from a Judgment of the
United States District Court for the District of Nevada,
Case No. CV-97-01146-LDG (RJJ)
Honorable Lloyd D. George, United States District Judge

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

Re: Hall v. Norton, 266 F.3d 969 (9th Cir. 2001), (Opinion, No. 99-16153, (CV-S-97-1146-LDG (RJJ)), (CR-75-76:00015-00029). The case involves Hall's National Environmental Policy Act ("NEPA"), Clean Air Act ("CAA") and Administrative Procedures Act ("APA") claims. The Ninth Circuit Court of Appeals previously initially assumed jurisdiction over the issues herein.

The Ninth Circuit Court of Appeals found that the "district court correctly concluded that it lacked subject matter jurisdiction and properly dismissed Hall's Clean Air Act claim." (CR-75-76:00022) "We reverse the district court's determination that Hall lacked standing." (CR-75-76:00026) "We thus reverse the district court's grant of summary judgment in favor of the Secretary on Hall's NEPA and remand for further proceedings on that claim." (CR-75-76:00029)

II. STATEMENT OF ISSUES

In this environmental law, judicial review action arising from a Bureau of Land Management ("BLM") land exchange, did the district court err or abuse its discretion in failing to comply with the Ninth Circuit Court of Appeals remand mandate that required the district court to fully consider Hall's cumulative impacts argument and "for further proceedings on that claim." (CR-75:00028-00029)

Did the district court err or abuse its discretion when it effectively reversed the appeals court's NEPA remand by granting summary judgment to the federal

defendants for a second time without a hearing.

III. STATEMENT OF THE CASE

This is a remand appeal from the district court. (CR-100-00219-00225) The issues all along have involved the insufficiency of the National Environmental Policy Act (“NEPA”) 57,000 acre environmental assessment supporting a Nevada division of the Bureau of Land Management (“BLM”) exchange of Nevada lands, and the consequences of that insufficiency. See, *Hall v. Norton*, 266 F.3d 969 (99-16153, DC # CV-97-97-01146-LDG (RJJ) (Base File)). (CR-00:00001-00012).

On September 12, 2001, the Ninth Circuit Court of Appeals reversed a district court summary judgment in favor of the Secretary on Hall’s NEPA claim and remanded for further proceedings on that claim. (CR-00:00001-00012; CR-75-76:00015-00029; CR-77:00013; CR-78:00014)

On remand and after Hall’s preliminary injunction (“PI”) motion hearing, the district court declined to grant Hall’s motion for a preliminary injunction. (CR-79:00030-00052; CR-82:00053-00090; CR-00:00091-00132; CR-85:00133-000138) The district court then granted the federal defendants summary judgment for the second time without a Fourteenth Amendment, equal protection and due process hearing. (CR-88:00146; CR-88:00139-00175; CR-92:00176-00197; CR-96:00198-00212) On remand the district court declined to do what the court of appeals’ remand mandate required. (CR-98:00213-00217; CR-99:00218) “Because

we reverse the district court’s grant of summary judgment, we need not address whether Hall’s due process rights were violated when the district court granted summary judgment without holding a hearing.” (CR-75-76:00017)

IV. STATEMENT OF FACTS

The case now centers on the appeals court’s remand mandate and the facts surrounding what the district court did or did not do to implement the remand. (CR 75-76:00028-00029)

We review for abuse of discretion the BLM’s decision not to prepare an EIS. ...

As the district court concluded, the BLM’s analysis of the emissions from Del Webb’s development of the exchanged land was “fully informed and well-considered.” *Id.* (internal quotation marks and citations omitted). We perceive no “clear error of judgment” in the BLM’s conclusion that project-specific emissions would not, considered alone, be significant.” *Id.*

The district court, however, failed to address a separate argument that Hall raised in his opposition to the government’s summary judgment motion. In his opposition, Hall argued:

Defendants[‘] cumulative effects data are supposed to consist of the total of all BLM Valley emissions. [] Defendants blithely listed all air pollution sources instead of accounting for and totaling their own emissions from all BLM Valley activities as NEPA requires. That is real chutzpah. This is one of the many ways Defendants ... evade NEPA.

Elsewhere, Hall’s opposition expressed concern that the BLM’s land exchanges cumulatively are contributing to the Las Vegas Valley’s air pollution problems.

Although Hall’s pro se briefs before the district court are not pellucid,

it is sufficiently clear that Hall's argument pertained to the fact that the EA acknowledged that an additional 57,000 acres of BLM land in the Las Vegas Valley had been "identified for disposal," but the EA did not attempt to quantify emissions from potential development on these lands. NEPA requires that an agency consider cumulative impacts of an action and of foreseeable related actions. See 40 C.F.R. §§ 1508.7, 1508.27(b)(7).

In its order granting summary judgment, the district court ostensibly addresses "cumulative impacts." In concluding that the BLM's assessment of cumulative impacts was adequate, however, the district court cites the EA's conclusion that carbon monoxide and particular matter emissions from lands exchanged to Del Webb would constitute only a small proportion of the Las Vegas Valley's overall emissions. There is no discussion by the district court of the potential emissions from the other 57,000 acres of land "identified for disposal" or the adequacy of the BLM's analysis of those emissions. Given the procedural posture of this case, we are not convinced that the district court fully considered Hall's cumulative impacts argument.

We thus reverse the district court's grant of summary judgment in favor of the Secretary on Hall's NEPA claim and remand for further proceedings on that claim. ...

The dismissal of Hall's Clean Air Act claim is AFFIRMED, and summary judgment in favor of the Secretary on the NEPA claim is REVERSED. We REMAND to the district court for further proceedings consistent with this opinion.

The Excerpts of Record include two Orders of the district court. One Order involves the district court's decision to deny Hall's June 12, 2002 motion for preliminary injunction (CR-85:00133-00138). The April 1, 2003 Order grants summary judgment to federal defendants without holding a hearing (CR-98:00213-00217). Plaintiff has also included transcript of the June 6, 2002 hearing held for the PI motion the year before (CR-00:00091-00132). These three documents

memorialize the decision of the district court to decline the mandate of the appeals court and the grant of summary judgment once again in favor of federal defendants without an equal protection and due process hearing.

Federal defendants admit they have ignored and intend to continue to ignore the Ninth Circuit's NEPA remand in Hall v. Norton, 266 F.3d 969 (9th Cir. 2001). They also claim to have "analyzed" a mining operation under NEPA that is not in the May 9, 1997 EA and was not noticed to Hall despite these proceedings.

The BLM neither contemplates nor is taking further action under the Environmental Assessment (EA) prepared for the Del Webb land exchange, which was the subject of Hall's claim under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. Put simply, there is no federal activity in this case that the Court could enjoin, and Hall points to none. Fn. 1. As we explain below, BLM is presently considering whether to approve a contract for the removal of mineral materials excavated during development from the Phase II lands. The potential environmental effects of removal activities under this contract have been analyzed under NEPA. (Emphasis added.)

(CR-80:00059A-C) (CR-82:00059 & 00066) (CR-88-00160)

V. SUMMARY OF THE ARGUMENT

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 to implementing NEPA....” 40 C.F.R. § 1500.1(b). “...The NEPA process is intended

to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the direction to achieve this purpose.” 40 C.F.R. § 1500.1(c).

A recent Ninth Circuit case regarding NEPA, CAA and APA issues is on point herein. See, Public Citizen v. Department of Transportation, 316 F.3d 1002 (9th Cir. 2003). Public Citizen cites Hall v. Norton, 266 F.3d 969, 976 (9th Cir. 2001).

The district court has once again denied Hall his Fourteenth Amendment equal protection and due process right to a summary judgment hearing. There is no legally sufficient evidence in the administrative record of this action that the federal defendants have ever complied or conformed to initial and subsequent NEPA, CAA¹ or APA cumulative impact and conformity requirements. It is past time for decisive appeals court action.

VI. STANDARD OF REVIEW

Review of an agency action to determine its compliance and 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

¹ By definition, federal agency CAA conformity determinations are difficult if not impossible without the data from prior, NEPA, cumulative impact compliance.

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 the same standard as NEPA review). The reviewing court must determine that 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)), and may not “ ‘rubber-stamp ... administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute,’ ” id. (quoting NLRB v. Brown, 380 U.S. 278, 291-92 (1965)) (omission in original).

In the context of the procedural environmental requirements imposed by the EPA and the CAA as the NEPA information becomes available, “[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.’ ” (Emphasis added.) 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 at 1236.

There is no requirement to defer to an agency’s decision process that by design misleads the public. A district court’s judicial review Order and compliance with the appeals court remand are reviewed *de novo*. Gillette v. Delmore, 979 F.2d 1342, 1346 (9th Cir. 1992) The *de novo* standard applies to dismissal orders, the order granting summary judgment, the district court’s interpretation and application of federal law, and the mixed questions of law and fact 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 district court’s admissions that it allowed post-administrative record references into the hearings

and summary judgment motion documents are subject to abuse of discretion review. Eaglesmith v. Ward, 73 F.3d 857, 860 (9th Cir. 1996).

This court must determine whether the evidence, considered as a whole and viewed in the light most favorable to the nonmoving party, is legally sufficient to support summary judgment in favor of the federal defendants and against Hall. The issues involve both questions of law and of fact. Summary judgment should not have been granted if there are relevant facts yet to be discovered as there are in this remand, missing EIS case. Zell v. Intercapital Income Securities, Inc., 675 F.2d 1041, 1045 (9th Cir. 1982)

VII. ARGUMENT

1. The district court erred and abused its discretion by granting federal defendant's motion for summary judgment while ignoring the remand mandate.

The court of appeals remanded the EA issue because it “was not convinced that the district court fully considered Hall’s cumulative impact argument.” relating to “the potential emissions from the other 57,000 acres of land ‘identified for disposal’ or the adequacy of the BLM’s analysis of those emissions.”

There is no remand evidence that once again, “the district court fully considered Hall’s cumulative impact argument.” relating to “the potential emissions from the other 57,000 acres of land ‘identified for disposal’ or the adequacy of the BLM’s analysis of those emissions.” The district court simply

misconstrued or ignored the remand mandate.

2. The district court erred and abused its discretion by granting federal defendant's motion for summary judgment on the basis of testimony and documents outside of the administrative record and over Hall's objections.

Judicial review of an agency action is based on the "whole record." The "whole record" includes **everything that was before the agency pertaining to the merits of its decision at the time the decision was made.** (Emphasis added.)

Thompson v. United States Dept. of Labor, 885 F.2d 551, 555-556 (9th Cir. 1989).

As with appeals, in ruling on the merits of a petition for review, the court generally will not consider materials not presented to the agency and which are not part of the administrative record. Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp, 423 U.S. 326, 331, 96 S.Ct. 579, 582 (1976); Gomez-Vigil v. I.N.S., 990 F.2d 1111, 1113 (9th Cir. 1993). The court will deny the parties' request to have it consider documents containing reports, analyses and comments by federal agencies there were not considered below. Rybachek v. EPA, 904 F.2d 1276, 1296, fn. 25 (9th Cir. 1990).

The inclusion of documents and argument regarding a 1998 twenty-year, programmatic planning document, the BLM's Resource Management Plan ("RMP"), is error and abuse of discretion. Hall alleges that including references and argument involving the 1998 RMP in a 1997 judicial review is a clear F.R.C.P. Rule 11 violation interposed for an improper purpose, that of delay and

obfuscation. (CR-82:0062-00066) (CR88:00147, 00153, 00163-00166, 00173-00174) (CR-92:00186-00188, 00191) (CR96:00205-00208)

3. The district court erred and abused its discretion in granting federal defendants' motion for summary judgment.

Absent a NEPA, cumulative impact determination that is kept current, there is nothing in the record of this judicial review that restricts federal defendants from disposing of one acre or all 57,000 acres at one time, in one month or one year. Once the land is designated for disposal and the NEPA EA process is found to be lawful, the agency's direct and indirect cumulative air pollution actually begins to flow throughout the Las Vegas Valley. The health effects of that air pollution are immediate and irreversible once in the lungs of Hall and the other residents of the Valley. (CR-88:00153-00155)

4. District court issues

The federal defendants' discussion and documentation carefully hides the fact that NEPA compliance means compliance regarding all of an agency's direct and indirect air pollution activities in the Las Vegas Valley serious non-attainment area, not just the activities federal defendants choose to list in their parsed EAs.

The district court coached counsel for statements such as,

...talk about possible – close to 57,000 square acres of public land, but you're not proposing the selling of that. ... And that certainly at this point there's no intention of disposing of the entire – I'm going to call it 57,000 acres, but something in the vicinity or perhaps half as much at most and doing so on the basis of 1200, 1300, 2000 acres a

year. You're talking about a 20-year period, aren't you?... You don't intend to at this point ever dispose of that –.

(CR-00:00110) Counsel for the federal defendants carefully avoided answering that question. Federal defendants chose to produce a 57,000 acre, land disposal EA. They chose the scope of the EA. (CR-00:00110-00111) Federal defendants admitted that, “The Del Webb EA was prepared under the management direction of a now superseded land management plan known as the Clark County Management Framework Plan.” (“CCMFP”) The CCMFP was a lapsed plan in 1997. The 57,000 disposal acres listed in the May 9, 1997 EA cannot be reconciled and were not reconciled with disposal acreage in the old and lapsed CCMFP. In order to lawfully dispose of federal lands, the BLM must designate them site by site in a management plan. The BLM cannot lawfully dispose of lands not designated for that purpose in a then current management plan. (CR-00:00111-00112)

Federal defendants admit as much while improperly discussing the RMP. “In the preparation of this document, the new – what I'll call the RMP, BLM revised its estimate of the lands designated as available for disposal.” (CR-00:00112) That is an admission that most if not all of the May 9, 1997 EA lands were not listed in the CCMFP in 1997. Federal defendants were in a planning document lapse that precluded the sale of disposal lands not listed in the CCMFP. Federal defendants are also required to show that the CCMFP was lawfully reviewed every five years.

(CR-00:00114) The CCMFP was not reviewed every five years. Federal defendants did not include a land disposal, CCMFP/EA reconciliation in the administrative record.

Federal defendants started the “1998” RMP in 1989, noticed the public in 1992, made subsequent amendments while expressly prohibiting a second, global comment period, prohibited any appeal from amendment comments and then published the RMP in 1998.

Federal defendants were very concerned that the courts would find that out that the May 9, 1997 EA lands were not a part of any legally sufficient twenty-year long range management plan in 1997. That is the reason that they started talking about a 1998 Resource Management Plan (“RMP”) during a 1997 review.

Federal defendants appear to have convinced the district court into believing that a broad, twenty-year, programmatic, planning document is the same as a site specific, cumulative impact NEPA determination. The two are not the same and the federal defendants knew that when the misleading information was interposed.

Your Honor, that the government has issued that environmental impact statement; it is the environmental impact statement on the resource management plan that was issued in final form in 19 – October of 1998. That is -- we have cited the relevant excerpts of that document as Exhibit 2 to Mr. Steinmetz’s declaration, and you will find in those excerpts at pages 4-3 and 4-55, the 1277 figure, BLM’s projection of what the –

(CR-00:00118)

Federal defendants admit they interposed argument and data that was not in the administrative record. “Therefore, the EA concludes (even though the calculation was not expressly made) that the contribution to public lands disposals to the PM10 emissions estimate would be approximately 243 tons per year, or a total of 4860 tons over 20 years.” (CR-85:00135)

The district court admitted that the BLM and the court relied on these “not expressly made” data. These data were not in the EA that was designated by the federal defendants as the administrative record EA and for that reason were not a part of the administrative record, “This led to a finding of no significant impact.” (CR-85:00135)

In its summary judgment Order, the district court prematurely shifted the summary judgment burden to Hall. The district court erred and exceeded its authority by finding that Hall had not made the record that was federal defendants’ responsibility to make. “Therefore, Hall has failed to raise a genuine dispute that BLM has proposed a major federal action that would trigger the need to prepare an EIS on the cumulative impacts of the disposal of 57,000 acres of public land.” (CR-98:00216)

“Nor does the court accept Hall’s argument that the scope of this action extends beyond the project at issue—the proposal to exchange 4,756 acres of public land--to include a disposal of 57,000 acres and, as discussed above, neither

should have the cumulative impacts assessment.” (CR-98:00216)

The district court then made another administrative record admission.

Finally, Hall makes much of the fact that the federal defendants had introduced into the litigation the findings of the RMP/FEIS completed in May 1998 in which the BLM revised the gross total of land available for disposal to 52,021 acres, clarified the 1,277 acre per year estimated rate of disposal, and calculated cumulative impacts bases on that estimate. As Hall contends, and as the federal defendants concede, this study was not part of the administrative record of the proposed action that was originally challenged by Hall, and may not be used to support in determining whether the BLM properly considered the cumulative impacts of the Del Webb land exchange.

(CR-98:00216) The district court then went on to admit that over Hall’s objections, the court allowed federal defendants to rebut from the 1998 PRMP/FEIS in this 1997 judicial review. There is no order granting leave to introduce matters outside the administrative record. The court then found that “[i]n any event, the court finds that Hall has not been prejudiced by the introduction of the PRMP/FEIS in this litigation.” (CR-98:00216) Of course Hall was prejudiced by the introduction of the PRMP/FEIS in this litigation.

Each day the district court withholds unbiased consideration, the more cumulative, irreversible, air pollution, pulmonary distress hardship there is in the Las Vegas Valley. Hall has waited for six years for justice withheld by the district court. State of Calif. ex rel. State Water Resources Control Bd. v. F.E.R.C., 966 F.2d 1541, 1562 (9th Cir. 1992).

Not satisfied with the above admissions, the district made yet another

admission. “Even though this court included discussion of the PRMP/FEIS in its denial of Hall’s motion for preliminary injunction, such reference was made to further clarify the assessment made in the Del Webb EA.” The district court then claimed,

The PRMP/FEIS was not dispositive in the court’s ruling on the preliminary injunction, and is of no consequence to the ruling on the instant motion. Based on the above, The court hereby ORDERS that the federal defendants’ renewed motion for summary judgment (#86) is GRANTED, and that Hall’s cross-motion for summary judgment (#88) is DENIED.

(CR-98:00216) The Order is not clear as to what legally sufficient facts and legal argument **were** dispositive. There is no legally sufficient evidentiary or legal support for summary judgment in favor of the federal defendants on remand.

The district court’s bias in allowing federal defendants to introduce and argue matters and issues not in the administrative record is evident where the district court had to back track and deny that the information was dispositive. The Order is evidence of a denial of Hall’s Fourteenth Amendment equal protection and due process.

That left Hall in a position where he was limited to the administrative record while federal defendants had no restrictions regarding post administrative record documents. The district court’s discussion is moot to the remand. The court did not do what the remand mandate required.

5. Background re: the National Environmental Policy Act of 1969 (“NEPA”)

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4321. To accomplish these ends, Congress imposed extensive procedural requirements on government actions affecting the environment.

Paramount among these was the requirement that all federal agencies shall, “to the fullest extent possible”:

- (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment;
- (B) identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
- (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
 - (i) the environmental impact of the proposed action,
 - (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
 - (iii) alternatives to the proposed action,
 - (iv) the relationship between local short term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
 - (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id. § 4332(2). Congress further directed that, again “to the fullest extent possible,” “the policies, regulations, and public laws of the United States shall be

interpreted and administered in accordance with the policies set forth in this chapter.” Id. § 4332(1). This unequivocal command has guided the United States’ environmental policy for more than thirty years, and pervades every aspect of government decision-making.

6. Environmental analysis under NEPA.

a. Defendants’ Decision Not to Prepare an EIS

By its own terms, NEPA intended to reorganize the priorities of the federal government, to integrate “environmental amenities and values” alongside more traditional “economic and technical considerations.” 42 U.S.C. § 4332(2)(B). Congress directed that the statute and its implementing regulations be used toward this end in government decision-making “to the fullest extent possible.” Id. § 4332.

To achieve its goal of including environmental concerns in government decision-making, NEPA requires that an EIS be prepared for all “major Federal actions significantly affecting the ... human environment.” Id. § 4332(2)(C). In certain circumstances, agencies may first prepare an EA as the agency did in this instance, in order to make a preliminary determination whether the proposed action will have a significant environmental effect. See Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001) (citing 40 C.F.R. § 1501.4), cert. denied, 122 S. Ct. 903 (2002). “If the EA establishes that the agency’s action ‘may have a significant effect upon the ... environment, an EIS must be prepared.’ ” Id.

(quoting Found. for N. Am. Wild Sheep v. United States Dep't of Agric., 681 F.2d 1172, 1178 (9th Cir. 1982)) (emphasis and alteration in original). “If not, the agency must issue a Finding of No Significant Impact (FONSI), accompanied by ‘a convincing statement of reasons to explain why a project’s impacts are insignificant.’ ” Id. (quoting Blue Mountains, 161 F.3d at 1212) (internal citations and quotation marks omitted). (Emphasis added.)

Subsequent NEPA cumulative impact EISs are required each time a major federal air pollution action is proposed. Defendants’ own admissions make it clear that the action could involve as much as 57,000 acres of Valley and CAA serious non-attainment area land.²

Interposing Clark County data for defendants’ data is misleading. References in the EA are not reliable or relevant to defendants’ NEPA compliance issues for an obvious reason. NEPA federal agency cumulative impact requirements must precede Clark County data since defendants’ data is critical to

² Defendants have argued that the average of land sold, exchanged and developed is less than 57,000 acres. Defendants have failed to produce any convincing evidence that they are restricted by law to an average per month. Once a cumulative impact document is approved and withstands any challenge, defendants know they can sell 57,000 acres of land in one month or one year if that were their choice and there are willing buyers. An environmental document must take facts, not conjecture into consideration.

the accuracy of Clark County's data, not the other way around. That same issue also impacts CAA compliance.

b. "Major" Federal Action

To decide whether an EIS is required, the court must determine: (1) whether the challenged actions constitute "major" federal actions; and (2) whether the actions may significantly affect the environment. With the development acreage disclosure alone, the May 9, 1997 EA describes a major federal action that significantly affect the environment.

The Council on Environmental Quality ("CEQ"), a body established by NEPA, 42 U.S.C. §§ 4342-4347, has issued regulations implementing NEPA. A court must rely on these regulations to "guide our review of an agency's compliance with NEPA," Native Ecosystems Council v. Dombeck, 304 F.3d 886, 894 n.1 (9th Cir. 2002). The Supreme Court has held that NEPA regulations are entitled to substantial deference, Marsh, 490 U.S. at 372.

Defendants' parsing of the federal agency's "little-piece," air pollution EA actions fails to meet NEPA cumulative impact standards. Defendants' past arguments echo their earlier causation argument. It is equally unavailing here for a similar reason. The CEQ regulations make clear that the "effects" of federal actions include "[i]ndirect effects, which are caused by the action and are later in time ... but are still reasonably foreseeable," *id.* § 1508.8(b), as well as

[c]umulative impact ... which results from the incremental impact of the action when added to other ... reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions,” id. § 1508.7.

The connection between 57,000 disposal acres and the development air pollution was “reasonably foreseeable” at the time the EA was prepared and the decision not to prepare an EIS was made. Cf. Native Ecosystems, 304 F.3d at 896 (holding that a memorandum that “evidences a decision to consider ... seriously” taking certain actions renders those actions “reasonably foreseeable”). To restrict consideration of the actions’ “effects” in the way defendants’ argue would contravene not only the plain language of the CEQ regulations, but also the statutory command of NEPA, that environmental effects of government action be considered “to the fullest extent possible.” 42 U.S.C. § 4332. In this instance, defendants’ have considered the environmental effects of their actions to the least extent possible.

As for the requirement that the federal action be “major,” CEQ regulations tell us that “[m]ajor reinforces but does not have a meaning independent of significantly,” 40 C.F.R. § 1508.18, meaning that a federal action is “major” whenever it has “significant” environmental effects. See City of Davis v. Coleman, 521 F.2d 661, 673 n.15 (9th Cir. 1975).

c. “Significantly Affecting the Human Environment”

The CEQ regulations also define the crucial term “significantly,” to clarify the situations in which an agency must prepare an EIS: “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. ... The following should be considered in evaluating intensity:

(2) The degree to which the proposed action affects public health or safety.

...

(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. ...

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

40 C.F.R. § 1508.27. If defendants’ action is environmentally “significant” according to any of these criteria, then defendants erred in failing to prepare an EIS. See Nat’l Parks, 241 F.3d at 731. An examination of these criteria reveals that the challenged regulations are environmentally “significant,” and an EIS should have been prepared.

d. Context

The CEQ regulations explain that the proposed federal action must be

analyzed regarding several contexts—national, regional, and local—as well as by looking at the short- and long-term effects of the proposed action. Measured against this standard, defendants’ EA is woefully inadequate. Defendants do not conduct any analysis at all much less whether these increases may be localized in regionally significant areas like the Grand Canyon National Park, the Lake Mead Recreation Area, or in the nearby states of Arizona, Utah and California.

Regardless of the law’s “reasonableness” (a question properly addressed by Congress—not the petitioner), this is precisely what NEPA and the CEQ regulations require. The law requires defendants consider the most likely localities to be affected by increased development dust, increases in vehicular traffic and the various forms of air pollution that defendants’ activities generate. The calculations apply to all defendants’ Valley activities and are not limited to land sales. Hall’s argument has emphasized the EA’s lack of relevant global, agency analysis, cumulative impact information, legally sufficient conformity determinations or credibility. Defendants’ failure to meet even minimum requirements reveals a pattern of refusal to comply or conform, much less take a “hard look” at the environmental effects of their actions or seriously consider Hall’s declaration, affidavit and several points and authorities. (DR-79:00030-00052; CR-82:00053-00090; CR-88:00139-00175; CR-92:00176-00197; CR-96:00198-00212)

The public was not informed of the existence of the EA, FONSI or DR much

less the fact that 57,000 acres are involved. Defendants make absurd statements that the EAs are available at their office as though each member of the public is supposed to trudge in and out of their offices every working day of the year in order to know what the defendants are doing. That is unreasonable.

e. Intensity

i. Effect on Public Health and Safety.

Petitioner contends that defendants must prepare an EIS, in part due to the potential effect of the cumulative impact air pollution on his (the public's) health and safety. In addition to Hall v. Norton, 266 F.3d 969, other courts have considered “even [the] marginal degradation of drinking water” to be environmentally significant for purposes of this regulation. See United States v. 27.09 Acres of Land, 760 F. Supp. 345, 353 (S.D.N.Y. 1991). The same could easily be said of a “marginal degradation” of the quality of the air we all must breathe. In fact, we have both problems in the Valley.

The EA fails to discuss the impact of the cumulative total of all defendants' Valley air pollution will have on the Valley as the land sales continue to accelerate runaway growth. Air pollution is emitted into the air as part of the exhaust fumes of automotive traffic, and dust from development and construction. Defendants are not excused from their failure to consider whether any negative air pollution health effects could be associated from their cumulative impact air pollution emissions.

ii. Uncertainty

If the environmental effects of a proposed agency action are uncertain, the agency must usually prepare an EIS:

Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent “speculation on potential ... effects. The purpose of an EIS is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action.”

Nat’l Parks, 241 F.3d at 732 (quoting Sierra Club v. United States Forest Serv., 843 F.2d 1190, 1195 (9th Cir. 1988)) (internal citation omitted) (omission in original). Defendants must discuss whether, and to what extent the defendants’ their ever increasing air pollution has kept and will continue to keep the Valley from reaching cleaner air attainment.

iii. Threat of Illegality

Plaintiff asserts that defendants failed to conform to Nevada’s 1979/81 EPA approved SIP regulations with or without land exchange or land sale air pollution. The EPA approved 1979/81 SIP standards are more stringent than federal standards. While Nevada has submitted subsequent SIP submittals, none have been finally approved either by the EPA or the Ninth Circuit Court of Appeals. The Valley is currently in a SIP lapse.

In its determination of whether its proposed action is significant, an agency must consider “[w]hether the action threatens a violation of Federal, State, or local

law or requirements imposed for the protection of the environment.” 40 C.F.R. § 1508.27(b)(10); accord Sierra Club, 843 F.2d at 1195. In Sierra Club, the court faulted the Forest Service’s EA for its failure to consider, or even mention, California’s water quality standards, which might have been threatened by proposed timber sales. See Sierra Club, 843 F.2d at 1195. Defendants had an obligation to consider whether their regulations might violate local, state and federal rules and failed to do so. Plaintiff points out that defendants’ actions could violate NEPA, the CAA and the APA thus further triggering the illegality prong of the significance analysis, see *infra*. This further strengthens Hall’s claim that defendants’ actions are environmentally significant for NEPA purposes.

iv. Controversy

“Controversy” sufficient to require preparation of an EIS occurs “when substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor, or there is a substantial dispute [about] the size, nature, or effect of the major Federal action.” Nat’l Parks, 241 F.3d at 736 (internal citations omitted and alterations in original). The evidence establishing such a controversy must be brought to the agency’s attention while the agency is conducting its deliberations, not *post hoc*. See *id.* Thus, the controversy requirement is two-fold: Petitioner must show that there was a “substantial dispute” about defendants’ actions and that this dispute raised “substantial

questions” about their validity. The burden then shifts to defendants to provide a “convincing” explanation why no controversy exists. See *id.*

A controversy exists where the public was not informed about a 57,000 acre EA. The Valley’s runaway growth is the number one controversy in the Valley. Runaway Valley growth has created a public protest fire that 57,000 acres of disposal, development land can and does fuel. Defendants’ Runaway growth is also a controversial issue connected with the current drought of the century and the increasing shortage of water in the Las Vegas Valley.

f. Convincing Statement of Reasons

Petitioner has successfully demonstrated that defendants’ Valley air pollution activities may have a “significant” environmental impact, mandating the preparation of an EIS. Defendants have failed to demonstrate that their EA contains anything close to the statutorily required “convincing statement of reasons” sufficient to support a decision not to prepare an EIS.

Defendants’ argument ignores NEPA which requires that “all agencies of the Federal Government shall ... include in every ... major Federal action significantly affecting the quality of the human environment, a detailed statement by the responsible official on ... the environmental impact of the proposed action.” 42 U.S.C. § 4332(2). By not considering additional alternatives (such as, for example, curtailing some Valley air pollution activities or proposing a slower schedule of

land sale disposals), defendants further failed to abide by NEPA’s statutory command to prepare a “detailed statement . . . on . . . alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C); see also 40 C.F.R. § 1508.25(b)(2) (defining “[a]lternatives” to include “[o]ther reasonable courses of actions [sic]”). Indeed, the CEQ regulations state that consideration of alternatives “is the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. “The rule of reason guides ‘both the choice of alternatives as well as the extent to which the Environmental Impact Statement must discuss each alternative.’ ” Am. Rivers, 201 F.3d at 1200 (quoting City of Carmel-by-the-Sea v. United States Dep’t of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997)). “ ‘[F]or alternatives which were eliminated from detailed study, [an agency must] briefly discuss the reasons for their having been eliminated.’ ” Id. (quoting 40 C.F.R. § 1502.14(a)) (emphasis omitted). Thus, in preparing their EIS, defendants should explore a wider range of alternatives.

VIII. CONCLUSION

In a recent Ninth Circuit case, a citizen’s challenge to the Federal Highway Administration’s decision to exclude a two-stage highway interchange project from NEPA review was not moot despite completion of the first stage of the project. The court retained sufficient remedial power to “undo” the project if it was found to be in violation of NEPA (e.g. the interchange could be removed or closed, or reasonable mitigation efforts short of removal could be ordered). West v. Secretary

of Dept. of Transp., 206 F.3d 920, 925-926, fn. 5 (9th Cir. 2000). It is past the time when the appeals court should “undo” the May 9, 1997 EA by vacating it.

Regardless of what the district court did or did not do, there is no evidence of NEPA cumulative impact compliance in the administrative record. The case presents an issue that is capable of repetition, and has evaded compliance for the last six years. Miller for & on Behalf of NLRB v. California Pac. Med. Ctr., 19 F.3d 449, 453-454 (9th Cir. 1994). The issue that is capable of repetition is the result of federal defendants’ unilateral action designed to obfuscate and delay. Public Util. Comm’n of State of Calif. v. F.E.R.C., 100 F.3d 1451, 1461 (9th Cir. 1996). “It would certainly be a strange doctrine that would permit a [party] to obtain a favorable judgment, take voluntary action [that] moot[s] the dispute, and then retain the [benefits of the] judgment.” Arizonans for Official English v. Arizona, 520 U.S. 43, 74-75, 117 S.Ct. 1055, 1072 (1997) (brackets added).

The district court’s decisions in this action have the practical effect of sanctioning BLM’s clearly stated intent to observe only its interpretation of NEPA compliance regardless of how much air pollution the agency’s Valley activities cause. Time is of the essence.

Plaintiff-Appellant Hall requests:

A. A de novo decision reversing summary judgment, its underlying orders and vacating the May 9, 1997 EA.

B. A mandatory injunction requiring federal defendants to comply with all of the laws cited herein and specifically ordering the federal defendants to terminate, cancel, rescind or otherwise halt the decisions, land transfers and approvals either completed or contemplated herein by the BLM. (CR-82:00077)

C. Any combination of the above that is just.

D. A remedy fashioned by the court that is just and fair in the premises.

E. Reimburse Hall for his costs to date in this and the underlying action.

DATED: Las Vegas, Nevada, June 11, 2003.

Respectfully submitted,

/s/ Robert W. Hall
ROBERT W. HALL, Pro Se

CERTIFICATE OF COMPLIANCE

CIRCUIT RULE 32 (E)(4)

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the opening brief is proportionately spaced, has a Times New Roman typeface of 14 points and, including this Certificate of Compliance and Statement of Related Cases, contains 7,240 words.

Dated: Las Vegas, Nevada, May 11, 2003.

/s/ Robert W. Hall
ROBERT W. HALL, Pro Se

Statement of Related Cases

[Circuit Rule 28-2.6]

Hall v. Babbitt, 2002 WL 506108 (9th Cir. 2002, Unpublished) (No. 01-15157)
(CV-98-1645-RLH)