

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 03-15719

ROBERT W. HALL,

Plaintiff-Appellant,

vs.

GALE NORTON, Secretary, UNITED STATES DEPARTMENT OF THE
INTERIOR; UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Nevada
(Hon. Lloyd D. George)

PLAINTIFF'S OBJECTION TO FEDERAL APPELLEES' REQUEST FOR
PUBLICATION

Pursuant to Federal Rule of Appellate Procedure 36(b) and Ninth Circuit
Rule 36-4, Plaintiff respectfully objects to Federal Appellees request for
publication of the Court's previously unpublished memorandum decision of
February 23, 2004. In support of this objection, Plaintiff states as follows:

1. The decision memorializes the fact that EA supports only a 4,700 acre
project while actually authorizing the development of 57,000 acres.

2. The decision memorializes the fact that the EA does not provide any support for any development beyond 4,700 acres of land.

3. The decision ignores the fact that there is no evidence of federal agency, Administrative Procedures Act (“APA”) compliance public involvement, public notice or public hearing opportunity in the Administrative Record (“AR”).

4. The decision memorializes the fact that the district court denied Plaintiff Hall a requested summary judgment hearing (for the second time).

5. The decision memorializes the fact that the appeals court could not have made the decision it made if it had not allowed the district court to “rely on documents outside the agency’s administrative record¹” “for two discrete purposes.” The document the district court used was a programmatic, long range planning document that is not subject to APA judicial review, the 1998 proposed resource management plan and final environmental impact statement (“PRMP/FEIS”) that was not a part of the record before the BLM when it authorized the Del Webb land exchange.” The proposed RMP was approved in October 1998.

6. Plaintiff Hall challenged this same October 1998 Approved Las Vegas Resource Management Plan and Final Environmental Impact Statement (“RMP/FEIS”) in Hall v. Abbey, No. 01-15157, D.C. No. CV-98-01645

¹ The original complaint was filed on August 27, 1997.

(Unpublished Memorandum, March 28, 2002.)² (See, attached). The Court's Hall I

Memorandum states as follows.

By the same token, the issue is not ripe because Hall will not incur any hardship if he is required to wait until the BLM proposes to take specific action, the courts would surely benefit from the development of a specific record regarding any specific action, and the agency might well refine its approaches when it focuses on a specific problem. See Ohio Forestry, 523 U.S. at 732-37, 118 S. Ct. at 1670-72. Should the BLM pursue some specific action in the future, [Fn. 5] the regulations provide that Hall, and any other person "adversely affected by a specific action being proposed to implement some portion of [the RMP] ... may appeal such acts ... at the time the action is proposed for implementation." 43 C.F.R. § 1610.5-3(b). Thus, any substantive attack dies aborning. Fn. 5, E.g., the specific land transaction that is proposed in Hall I, 266 F.3d 972-74.

Hall II unpublished Memorandum at 4-5.

7. Instead of doing what Defendants say publication will do, publication of this particular Memorandum will simply further reinforce the fact that the BLM has never complied with NEPA, CAA or APA since each of the Acts were first signed into law. The Memorandum if published, will give the Defendants the cover to continue their utter disregard of our nation's environmental laws. The Memorandum conflicts with other decisions of the Court not addressed in the Opinion but cited in Hall's briefs. The Memorandum contains numerous errors in citing or ignoring points of fact and law cited herein.

²Cited herein by the authority and for the reasons listed in N.C. Rule 36-3(b)(i), (ii) and (iii).

8. Hall is caught in a “Catch 22.” In Hall I (1997) (unpublished Memorandum, February 23, 2004) the instant action on appeal, Hall did exactly what he was told to do in Hall II (1998) (unpublished Memorandum, March 28, 2000). In Hall I (1997), the 1998 RMP/FEIS did not yet exist as approved document and for that reason, he could not attack the 1998 RMP/FEIS. That stands as evidence as Hall has argued, Defendants had no programmatic, long range planning document to rely upon in 1997. Despite that, the district court and the appeals court allowed a 1998 PRMP/FEIS to prevail in the 1997 Hall I despite longstanding judicial review policies that freeze the date of the administrative record (“AR”) to the August 27, 1997 complaint filing date. In Hall II, Hall was told that his action was premature. In making that statement, the appeals court specifically cited Hall 1 as a good example of a case where Hall may appeal despite the fact that Hall 1 was a 1997 case and there was no prior or 1997 RMP/FEIS. Mem. at 5.

9. The decision denied Plaintiff the same opportunity Defendants had by failing to announce the startling change in judicial review and administrative record rules beforehand. Defendants were given unrestricted carte blanche to stuff the administrative record with post-complaint documents. Hall filed a timely motion to strike. Unfortunately, the district court failed to notify the Plaintiff of the

rule and procedural change and appeared to favor the Defendants regarding anything the Defendants wanted to do, within the rules or otherwise.

10. The circuit court accepted Defendants' post-complaint documents as NEPA compliant in the face of Plaintiff's opposition and motion to strike.

11. The decision ignores Plaintiff's EA argument in favor of Defendants' post-complaint argument and documents and argument.

12. The decision fails to explain how Plaintiff could have known about documents that did not lawfully exist when Plaintiff filed his complaint and also did not exist when the earlier acts complained of occurred.

13. The decision endorses administrative procedures where a Plaintiff who follows judicial review and administrative record rules is bound to lose against those who can use post-complaint argument and documents with impunity.

14. The decision admits that the district court used the post-complaint and argument "for two discrete purposes." The decision then supports the absurd contention that "[t]he district court also emphasized, however, that '[t]he PRMP/FEIS was not dispositive in the court's ruling on [Hall's] preliminary injunction, and is of no consequence to the ruling on the instant motion [for summary judgment].' The district court did not abuse its discretion in relying on the 1998 PRMP/FEIS for these limited purposes." The purposes were not limited, they were pivotal. When a district court allows the Defendants the special privilege

of hindsight and clairvoyance and the Plaintiff is denied that privilege, claims of “not dispositive” are absurdly biased against the Plaintiff.

15. The decision admits that Plaintiff who is pro se. was denied a summary judgment hearing which he requested. Plaintiff was also denied a hearing on summary judgment hearing which he requested the first time he was before the district court. Among the issues that Plaintiff would have argued would have been the unfairness of a two tier judicial review standard where heads the Defendants win and tails the Plaintiff loses.

16. The “hard look” argument was made without regard to the facts of this action. At the time the complaint was filed, there was no EIS, there was no legally sufficient public notice, there was no legally sufficient NEPA cumulative impact statement EIS, there was no NEPA or CAA decision that was subject to judicial review and there was no finally approved RMP/FEIS. NEPA is a federal agency requirement. The lower level EA Plaintiff complained was not lawfully noticed to the public; there was no public notice involving 57,000 acres or 25,540 acres. Plaintiff never heard of the 25, 540 acre claim until well after he had filed the complaint.

17. The decision ignores Plaintiff’s briefs.

18. The decision does not clarify existing rules of law in the Ninth Circuit, it muddles them.

19. The decision has the practical effect of nullifying the National Environmental Policy Act's ("NEPA") requirement for an environmental impact statement ("EIS") cumulative impact determination. According to the Federal Defendants,

... the decision holds that compliance with NEPA requires only that an agency analyze potential cumulative impact of the challenged project together with all reasonably foreseeable future projects. Mem. Op. 3-5. Second, the decision holds that an agency is required under NEPA to consider the cumulative impacts of likely future projects, not all possible future projects, particularly where the plaintiff fails to point to any proposal to undertake all possible projects. Mem. Op. at 4 & n. 3. Third, the decision gives further support to this Court's rule that the scope of what constitutes a "reasonably foreseeable future action" under NEPA is left to the agency to define. Mem. Op. at 3. If published, the decision would provide meaningful guidance to the district courts and current and future litigants in cases involving challenges to agencies' assessments of cumulative impacts under NEPA, particularly in cases involving land disposals and air quality impacts.

Federal Appellees' Request for Publication, March 5, 2004 at 2-3.

20. The above statement is clear that Defendants are looking for a published decision that will put an end to any practical way to enforce any environmental law in a serious non-attainment area. The idea is to chip away at three Acts that rely on each other, NEPA, CAA and APA.

21. The above statement does not mention a requirement for a NEPA compliant cumulative impact determination. There is no mention of the NEPA requirement for a NEPA cumulative impact determination regarding all of the

agency's projects, not just "the challenged project" but all of the agency's non-attainment area air pollution projects as NEPA requires.

22. The decision fails to explain how citizens can determine what agency projects are "likely" when EAs may, but are not required to be noticed to the public. All the public knows is what the Defendants tell them which is not much. There is no evidence that Defendants noticed anyone as to what was a "reasonably foreseeable future action." If the agency is left to define what is a "reasonably foreseeable future action," there is no way any environmental law can be enforced.

23. It is bad enough to face two unpublished appeals court decisions. It would be worse to have these clearly flawed, arbitrary and capricious decisions become law in the West. Under the instant decision, NEPA is no longer a consideration regarding environmental law enforcement and judicial review administrative records may be packed with literally anything regardless of relevance of a cut-off date.

24. In the alternative, Plaintiff Hall requests that if the Hall I decision is published, the Hall II decision also be published so that all can see the unfairness and bad law that both together represent.

24. The Memorandum memorializes the fact that Defendants were caught red handed in 1997 pulling an environmental fast one on the Las Vegas Valley public without any NEPA, CAA or APA compliance or conformity whatsoever.

Defendants have succeeded in getting busy courts to go along with anything they proposed that they would not have gotten away with if the action before the district and appeals court was brought by anyone other than a pro se litigant.

For the foregoing reasons, the Plaintiff-Appellant respectfully requests that the Hall II unpublished decision not be published, or in the alternative that both unpublished decisions in Hall I and Hall II be published.

Respectfully submitted,

/s/ Robert W. Hall
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