

No. 03-15719

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT W. HALL,

Plaintiff and Appellant,

Versus

GALE A. NORTON; 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 (CORRECTED) REPLY BRIEF

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INTRODUCTORY STATEMENT

1. Appellees' Brief is an improper re-argument of their case in chief instead of district court remand issues. (District Court Record "CR"-82:00056, See Appellant's Excerpts of Record at i-ii.)

2. Appellees' disregard for the judicial review requirement that the Administrative Record is limited to the events leading up to the date the original complaint was filed, August 27, 1997. (Appellees' AR, Vol. 1, 17:615:008192-008209 at 64 [SER 80A].) Appellees did not limit their Excerpts of Record to the District Court Record, the record on appeal.

4. Appellees did not limit their Administrative Record to the events leading up to the date the original complaint was filed on August 27, 1997 regarding the issues involved in Hall's previous challenge to the 1998 RMP/FEIS in *Hall v. Babbitt*, 2002 WL 506108 (9th Cir. 2002, Unpublished) (No. 01-15157) (CV-98-1645-RLH). The district court allowed Appellants' to argue and cite excerpts from *Babbitt* despite Appellant Hall's timely and substantive objections. Appellant Hall claims the right to cite and impeach Appellees' excerpts and argument in that same case pursuant to Ninth Circuit Rule 36-3(b)(i), (ii) and Federal Evidence Rules 607-608.

APPELLANT HALL'S IMPEACHMENT ARGUMENT

Plaintiff Hall hereby impeaches the Appellees pursuant to Ninth Circuit Rule

36-3(b)(i), (ii) and Federal Evidence Rules 607 and 608 on the grounds of the doctrine of law in the case, collateral estoppel, res judicata, for the factual purpose of showing sanctionable conduct, notice, the existence of the related case, self contradiction and prior inconsistent statements.

At various times, Appellees have argued they are categorically exempt from having to prepare a site specific, NEPA compliant, environmental impact statement, cumulative impact determination. At other times they claim they did comply NEPA by and through their 1998 RMP/FEIS.

See, Plaintiff Robert W. Hall's Reply to Federal Defendants' Opposition to Plaintiff's Motion for Emergency Preliminary Injunction filed May 28, 2002 (CR-82:00062-00066), Plaintiff's Supplemental Memorandum of Points and Authorities in Support of the Plaintiff's Cross Motion for Summary Judgment and, Opposition to Federal Defendants' Renewed Motion for Summary Judgment dated September 14, 2003 (CR-92:00186-00187), Plaintiff's Reply Memorandum of Points and Authorities in Support of the Plaintiff's Cross Motion for Summary Judgment and in Opposition to Federal Defendants' Renewed Motion for Summary Judgment dated October 7, 2002 (CR-96:00198-00207) and Appellants' Opening Brief at 11-24.

The absence of a NEPA compliant, site specific cumulative impact determination EIS is the reason this case has been in the United States District

Court for the District of Nevada since August 27, 1997. All along, Appellees have made a continuing series of false statements in an attempt to prevail over this pro se Appellant. During the last six years, Appellees have disposed of as many acres of federal land as possible without regard to the air pollution their actions cause and without regard to NEPA or any other environmental law compliance. NEPA requires that federal agencies to prepare an EIS **prior** to taking major federal actions significantly affecting the quality of the human environment. Id. at CR-82:00059. (The cover page, first page and signature page from Federal Defendants' Opposition to Plaintiff's Motion for an Emergency Preliminary Injunction dated May 23, 2002 were inserted as CR-80:00059A-C immediately after CR-82:00059 for ease in locating the statement referenced.) See, 42 U.S.C.S. § 4332 (2) (C) and 40 C.F.R. § 1506.1.

Appellees' RMP/FEIS is not the missing NEPA compliant, site specific cumulative impact determination EIS. That combined RMP/FEIS twenty-year, programmatic planning document is misleading as presented and is always misleading when interposed in any site specific litigation,

Federal Appellees are once again taking opposite positions whenever it is convenient to do so without fear of federal court sanctions. This action is on its second appeal to the Ninth Circuit Court of Appeals. For six years Appellees have taken the valuable time of the federal courts and have denied Appellant Hall justice

while refusing to admit the obvious.

Appellees have not yet prepared any NEPA complaint EIS covering their direct and indirect emissions from all their Las Vegas Valley serious non-attainment area activities since NEPA was first promulgated. There is no evidence in the record of this action to the contrary. Since 1970, Appellees have claimed they did not have to comply with NEPA. Under litigation pressure, Appellees now admit they have to comply with NEPA after they have sold at least 18,042 acres of air polluting, development land. Appellees briefs and district court argument are now impeached by their own admission that what Appellant Hall has been saying all along is true; **an EIS is and always was required.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Appellees Brief is a re-argument of *Hall v. Norton I*, 266 v. 969 (9th Cir. 2001). (CR-75-76:00015-00029). See, Pl. Supp. Mem. P&A at CR-96:00201.

That decision is both collaterally estopped and res judicata. Appellees' issues are moot on remand. (CR-82:00056). The issue now is the decision of the U.S. District Court for the District of Nevada to grant summary judgment without a hearing and without compliance with this Court's remand. See the April 1, 2003 Order and Summary Judgment in CV-S-97-1146-LDG (RJJ). See, CR-77-78:00013-00014, 98-99:00213-00218.

DUE PROCESS, EQUAL PROTECTION and SUMMARY JUDGMENT

See, Pl. Supp. Mem. P&A at CR-92:00187. Once again the district court has granted summary judgment without a hearing much less the “proceedings” ordered by this Court on remand. At the preliminary injunction hearing, the district court admitted that it did not have the records from the Ninth Circuit Court of Appeals. The district court had only the Opinion. It did not make any difference to the district court whether it had the record or not. The district court went on to say, “Well, I am not going to consider anything other than what you present today, but - -.” Hall then said, “Well, I assumed that the record was before the court. If it isn’t we’ve got a problem and we’re going to have to correct it.” The district court admitted that it did not have the briefs but that it was going to “hear the matter today....” (CR-00:00095-00097, 00099-00100.)

There is no evidence of a serious attempt to comply with the remand. See *Hall v. Norton I*, 266 F.3d 969, 978-979 (9th Cir. 2001). The actions of the district court on remand or the lack thereof is the issue before this Court. This appeal is not the place to re-argue a decision of the Ninth Circuit Court of Appeals that Appellees did not protest or appeal. See, Appellees’ Brief at 3-20, 25-52.

Appellees Brief argument at 3-20, 25-52 is their argument from the res judicata *Hall v. Norton I*, 266 v. 969 (9th Cir. 2001). The issue before the district court in *Norton I* was NEPA compliance regarding **57,000** acres of disposal lands. On remand, the district court refused to discuss NEPA compliance in connection

with **57,000** acres.

The district court did not grant Plaintiff Hall “further proceedings” on the issue of NEPA compliance regarding **57,000** acres of disposal lands according to the mandate of this Court. There wasn’t even a summary judgment hearing on the remand NEPA issue much less “proceedings.” The district court held a summary judgment hearing that was noticed as a preliminary injunction hearing. The district court proceeded without bothering to tell Hall what it was doing. (CR-82:00060-00061.)

PLAINTIFF’S N.C. RULE 17-2 REQUEST TO STRIKE FEDERAL APPELLEES’ SUPPLEMENTAL EXCERPTS OF RECORD, VOLUMES I – II.

See, Pl. Supp. Mem. P&A at CR-92:00180-00182. Federal Appellees “supplemental excerpts of record” include documents that should not be in the Administrative Record. Examples of these legally insufficient documents follow:

AR Certification #1. A “Declaration of James W. Abbott Certifying Administrative Record” is from cases other than this action that Plaintiff Hall has not seen before. The case is *Del Webb Conservation Holding Corp. v. Ronald Tolman, et al.* and *Berge Dadourian et al., v. Del Webb Conservation Holding Corp.; and Bruce Babbitt, et al.*, CV-S-98-00638-PMP (LRL), signed January 26, **1999** by James W. Abbott.

AR Certification #2. Following that document is another “Declaration of

James W. Abbott Certifying Administrative Record as to Phases 1A, 1B, and 1C of Land Exchange.” The case is *Hall v. Bruce Babbitt, et al.*, CV-S-97-01146-LDG (RJJ), *Nevada Lands, Inc., et al. v. Bruce Babbitt, et al.*, CV-S-97-1429-LDG (RJJ), *City of Fallon, v. Bruce Babbitt, et al.*, CV-S-1503-LDG (RJJ) and Churchill County v. Bruce Babbitt, et al., signed January 26, **1999** by James W. Abbott.

AR Certification #3. Appellees filed a third document entitled “Notice of Filing of Administrative Record Index.” The case is *Hall v. Babbitt, et al.*, CV-S-97-01146-LDG (RJJ), signed February 27, 1998 by a person for Stephen M. Macfarlane. Plaintiff Hall filed his action on August 27, **1997**. Plaintiff has consistently objected to the inclusion of any document in the Administrative Record dated on or after August 27, **1997**. Plaintiff objects the inclusion of AR Certification #1 for the reason that the document involves another action where Plaintiff Hall is not a party. Plaintiff Hall does not know anything about that case or the reason the document was interposed herein.

Appellees released a Del Webb Land Exchange Proposal, Environmental Assessment on March 5, 1997. (AR-9:352:004538.) Appellant Hall timely submitted comments objecting to the Environmental Assessment. (AR-9:355:004707.) See the discussion in the original Complaint starting at (Appellees’ AR, Vol. 1, 17:615:008199 at 64 [SER 80H]).

In this second appeal, Appellees included a copy of the May 9, 1997

Environmental Assessment (“EA”), NV-050-97-028, “Del Webb Land Exchange Proposal” in Volume II, Federal Appellees’ Supplemental Excerpts of Record. (AR-10:422:005133 [SER081].) By 05/21/97, Appellees had completed a Finding of No Significant Impact for the Del Webb/BLM land exchange – Phase I, Environmental Assessment NV-050-97-028. (AR-11:438:005374 [SER055].)

In the May 9, 1997 EA Executive Summary, there us a discussion of Northern Nevada Phase I lands and Southern Nevada Phase II lands. (AR-005139-005141.) There is no EA NV-050-97-028 discussion of 57,000 acres of land disposals in plan that includes “Phases I-A, I-B or I-C.”

The May 9, 1997 EA admits (AR-005144 [SER092]),

Portions of these lands have been identified in the Clark County Management Framework Plan (MFP; USDI BLM 1983) for disposal. The draft Las Vegas District Resources Management Plan/Environmental Impact Statement (RMP) identifies the remaining lands for disposal (USDI BLM 1992). However, **these remaining lands would not be transferred unless and until they are designated as suitable for disposal in the approved RMP.**

See, Pl. Supp. Mem. P&A at 92:00187. “These remaining lands” were not the subject of a very important part of the process, a site specific, NEPA compliant environmental impact statement (“EIS”). This is one of many admissions by the Appellants. The May 9, 1997 EA describes an entirely different plan than the plan actually implemented.

First the lands designated for disposal have to be a part of a long range,

programmatic planning document. Then the agency must comply with NEPA regarding full disclosure by means of a **cumulative impact** determination, environmental impact statement for all of the direct and indirect all of their Las Valley actions cause or are likely to cause, not just land disposals. They have had this duty since 1970 of having to prepare an initial NEPA **cumulative impact** statement and then amend it as significant or major federal actions are proposed. They then have to prepare a Clean Air Act **conformity** determination that includes the data generated in the NEPA process.

What actually happened was that Appellees had and have the cart well before the horse. They did the Del Webb land exchange deal first, and then they generated the supporting documents as they designated lands for exchange afterward. On August 27, 1997, Appellees did not know the designation of important lands to be exchanged. Their MFP had lapsed in the absence of five year reviews. They did not have a current RMP which must not be confused with a NEPA site specific, cumulative impact determination, and environmental impact statement.

Perhaps more important, Appellees attempted to approve an EA that would authorize the environmental impact 57,000 acres instead of the 4,756 acres they were ostensibly approving. Since EAs are rarely noticed the public, Appellees were in the position of doctors who bury their mistakes. NEPA is a disclosure process.

Appellees do not want to disclose anything they are not forced to disclose. In they process, compliance with Fed. R. Civ. P. 11 is not a high priority. See Pl. Supp. Mem. P&A at CR-92:00182-00184.

The plan actually implemented was not the subject of a NEPA compliant EIS, cumulative impact determination. Appellees have failed to cite any NEPA compliant, site specific environmental impact statement dated before or after August 27, **1997**. That includes a long range planning document or a NEPA cumulative impact determination that includes all three Phases I-A, I-B and I-C in conjunction with 57,000 acres of disposal lands.

Appellees included “Excerpts of Proposed Las Vegas Resource Management Plan and Final Environmental Impact Statement (May **1998**)” despite the administrative record cut-off date of August 27, **1997**.

Plaintiff Hall objects to the inclusion of AR Certifications #2 and #3 which include references to “phases” of “the land exchange” that were not noticed to the public. There was no Phase I-B noticed to public. The alleged 10/10/**97** patent was not the subject of a legally sufficient public notice that meets the requirements of the federal Administrative Procedures Act (“APA”). There were no “phases I-B or I-C” lawfully noticed to the public and included in a legally sufficient EA Finding of No Significant Impact (“FONSI”) and Decision Record (“DR”) when the complaint was filed. Appellees documents provide some of the proof of Plaintiff’s

allegation. AR Certification #3 is dated February 27, **1998** and includes Phases I (a) and I (b). Certification #2 is dated January 26, **1999** and includes Phases IA, IB and IC. **None of these documents certify the AR as of August 27, 1997. None of these documents dealt with the issue of 57,000 acres of Valley disposal land.**

Plaintiff Hall objects to any discussion or documents involving Phases I-A, I-B or I-C where there is no lawful AR evidence that Phases I-A, I-B or I-C were a part of a current resource management plan on August 27, **1997**. Plans dated **1998** or thereafter do not count. Hall also objects to any discussion or documents involving Phases I-A, I-B or I-C where there is no lawful AR evidence of full NEPA compliance and approval prior to August 27, **1997**. Full NEPA compliance starts with public notice and public involvement through to final approval. There is no citation to a lawful AR, APA compliant public notice. The AR is in serious disarray as a result of documents dated after August 27, 1997. The Appellees are responsible for that mess.

APPELLEES MANAGED TO GET THE DISTRICT COURT INTO DIFFICULTY

Appellees propensity for dressing up ARs they feel are a little shy on evidence got the district court into trouble. Despite Hall's objections, Appellees introduced a portion of the May **1998** Proposed Resource Management Plan ("PRMP") into the record at a motion for a preliminary injunction and the district court relied on the document. When Hall objected as strenuously as possible that

the introduction of a May **1998** document into the record of an October **1997** judicial review was outrageous, the district court was forced to backtrack. “**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 Web EA. **The PRMP/FEIS was not dispositive in the court’s ruling on the preliminary injunction, and of no consequence to the ruling on the instant motion.**” (Emphasis added.) (Pl. Excerpts, CR-100:00224.)

Earlier the court found as follows. “As Hall contends, **and as the federal defendants concede, this study was not a 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-82:00062-00066; 00223.) (Emphasis added.) The district court then claimed that Hall had not been prejudiced. Incredible!

What did the Appellees do after that? They filed the same partial document herein despite the fact that it is not a part of the Administrative Record. It could not be a part of the Administrative Record since it did not exist on August 27, **1997**. Appellees keep packing the AR with prohibited documents and they re-argue *Hall v. Norton I*, 266 v. 969 (9th Cir. 2001) over and over again. See, Pl. Excerpts, CR-00:00113-00118; 00125-00131. See, Pl. Supp. Mem. P&A at CR-92:00188-00197.

See, Plaintiff's August 26, 2002 Memorandum of Points and Authorities in Support of Plaintiff's Cross Motion for Summary Judgment CR-88:00163-00166 as additional impeachment of Appellants' RMP/FEIS discussion.

SCOPE OF THE CASE

Appellees claimed that “[o]n remand, Hall attempted to expand the scope of the case (without amending his complaint) by filing a motion for a preliminary injunction to restrain BLM from proceeding with an unrelated competitive land sale action in May 2002 under the Southern Nevada Public Land Management Act, Pub. L. 105-263, 112 Stat. 2343 (Oct. 19, 1998). See ER 30-31.” Appellees failed to note that the land sale action they describe was a part of the 57,000 acres at issue on remand, a **1997** issue. On a NEPA remand involving 57,000 acres of Las Vegas Valley land that included the land sale noted by the Appellees, Appellees are actually claiming Plaintiff Hall attempted to “expand the scope of his case (without amending his complaint) regarding an “unrelated land sale action” without saying a word about the parts of the 57,000 acres they are selling while stalling Plaintiff Hall for the last six years without any attempt to complete the NEPA cumulative impact statement they never started. Id. 19-20. On remand, the district court refused to acknowledge that the 57,000 acres are a major federal action subject to NEPA while it knew from reading the local papers if nothing else, that Appellees are selling and auctioning substantial portions of the 57,000 acres as fast as they

can.

Appellant's timely filed Opening Brief covers most of the remand issues. Appellant objects to the attempt to re-argue the case from its inception. Appellant Hall again objects to the attempt to introduce evidence and supporting documents that are not in the administrative record.

The underlying action is a **1997** judicial review where Appellant Hall prevailed on the key issue and obtained a National Environmental Policy Act "NEPA") remand from this Court in *Hall v. Norton I*, 266 v. 969 (9th Cir. 2001). Appellant Hall has timely filed his opening brief herein with the claim that the U.S. District Court for the District of Nevada ignored this Court's remand mandate while again granting summary judgment to the Appellees without a hearing.

Plaintiff has protested EA "misrepresentations" since the outset of this action in the original complaint. (Ap. Supp. Excerpts, Volume I, AR 008199-008203 [SER80H-SER80L].)

The primary issue before this appeals Court is this Court's remand and what the U.S. District Court did in response to that remand. Appellees raised the following issues in their brief.

- I. Whether the Bureau of Land Management ("BLM") adequately considered the potential cumulative impacts of a proposed land exchange and reasonably determined they were not significant.
- II. Whether this Court may properly consider Hall arguments that the Del Webb EA is inadequate under NEPA when he did not raise them below and they are beyond the scope of this Court's remand, and

whether, every if they are considered, they have any merit.

III. Whether the district court abused its discretion in considering the 1998 Proposed Las Vegas Resource Management Plan/Final Environmental Impact Statement, a document that is not a part of the administrative record.

IV. Whether the district court abused its discretion in granting summary judgment to BLM without holding an oral hearing.

Issues I and II are res judicata and are not appropriate on this second appeal.

Appellees are attempting to argue the issues in this Court on remand for the purpose of prolonging the current six years of delay.

Issue III is moot to the issues herein. Appellees admit that the document described therein is not a part of the AR. Despite their admission that the document “is not a part of the administrative record” Appellees included that document in their Excerpts of Record herein (Volume II).

The reason they do this is that their previous management plan had long since lapsed and they had no new plan. The requirement to include land disposals in their management plan is a twenty-year, long range planning requirement which is not the same as a site specific environmental impact statement (“EIS”). After land disposals are included in a long range plan, the environmental compliance process begins with NEPA. Appellees are attempting to cover-up the fact that the 57,000 acres at issue are not were not a part of a current management plan in 1997.

In the alternative, Appellees’ statement in their “Nature of the case” in the next paragraph of their brief at 2-3, Appellees state,

Hall alleged that BLM's approval was arbitrary and capricious because it violated the National Environmental Policy Act, 42 U.S.C. § 4321-4370f, for failure to adequately consider, *inter alia*, the **cumulative impacts** on air quality of the proposed land exchange (specifically, the proposed development of the public lands by the exchange proponent). On remand from the Court's decision in *Hall v. Norton I*, 266 F.3d 1073 [sic, should be 969], the district court upheld approval of the land exchange, ruling that its **cumulative impacts** analysis was adequate. This second appeal followed. (Emphasis and correction added.)

Appellees' statement is misleading. Appellees' statement confused the Clean Air Act **conformity** requirement with the NEPA **cumulative impact** requirement. The *Norton I* at 974 where the section the district court discussed Clean Air Act issues was titled "II. Clean Air Act." The district court misapprehended that Plaintiff was challenging an EPA regulation and declined jurisdiction on that basis, a moot issue. Plaintiff was not challenging the regulation. The issue in that instance involved the facts of the case, not the legality of the regulation. By its own act of declining jurisdiction, the district court had no jurisdiction to find the facts regarding any Clean Air Act issues. For that reason, the district court could not lawfully decide any Clean Air Act issue in relation to the facts of the action. The district court first had to take jurisdiction in order to do that. The district court did not find that its "cumulative impacts analysis" was adequate. Appellees Brief at 2-3.

The NEPA precedes the Clean Air Act issue in order of importance. Data from NEPA compliance are critical input for CAA conformity determinations.

This appeals Court did remand on the NEPA issues. NEPA issues include environmental impact statement and cumulative impact determinations involving 57,000 acres of disposal land. NEPA cumulative impact issues are not the same as Clean Air Act conformity issues. See, Pl. Supp. Mem. P&A at CR-96:00198-00200-00203.

JUDICIAL NOTICE

Appellant Hall requests the Court take judicial notice of the points and authorities documents from his Appellant's Excerpts of Record. Appellant Hall dealt with every issue Appellees have raised therein and herein. Appellant's Excerpts of Record are the best evidence regarding the issues from the district court.

DATED: Las Vegas, Nevada, October 7, 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 Reply Brief is proportionately spaced, has a Times New Roman typeface of 14 points. Including footnotes and endnotes and excluding the this Certificate of Compliance and Statement of Related Cases, this opening brief contains 3887 words.

Dated: Las Vegas, Nevada, October 7, 2003.

ROBERT W. HALL, Pro Se

PROOF OF SERVICE

Case Name: Hall v. Babbitt, *et al.*

Case No.: No. 03-15719

I certify that one copy each of Plaintiff-Appellant's (Corrected) Reply Brief was served by First Class Mail to the persons listed below on October 7, 2003.

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