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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

ROBERT W. HALL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
UNITED STATES DEPARTMENT OF TRANSPORTATION an Agency of the United States, NORMAN Y. MINETA, as Secretary of Transportation, WILLIAM H. KAPPUS, as Acting Administrator Nevada Division, Federal Highway Administration, RANDY J. BELLARD, as FHWA Planning and Research Engineer, and LESLIE T. ROGERS, as Regional Transit Administrator, Nevada Division, Federal Transit Administration,	)	CV-S-03-0477-RLH-RJJ
	)	
Defendants	)	
	)	

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56 and LR 7-2, Plaintiff Robert W. Hall respectfully requests that this Court enter judgment in his favor on Count V, the remaining cause of action alleged in Plaintiff's First Amended Complaint ("Complaint") (#2). Plaintiff requests that all eight relief points in his Complaint be granted. This motion is supported by the administrative record ("AR") filed by the Federal Defendants, the accompanying memorandum of points and authorities, and all the documents, exhibits, and affidavits Plaintiff Hall has filed in this action.

Respectfully submitted this 10th day of March, 2004.

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ROBERT W. HALL
Plaintiff, Pro Se

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
I. INTRODUCTION

Plaintiff Hall has challenged Federal Defendants' acts as enumerated in his First Amended Complaint ("Complaint") by judicial review. 5 U.S.C. §§ 702-706. "This is an action by a resident of a Clean Air Act serious non-attainment area to compel Federal Defendants to comply and to conform to the environmental laws of this country in order to protect and retain his quality of life." See Complaint (#2) at 1. Defendants have filed their Administrative Record ("AR") (#20-22). Count V, the remaining count herein includes all of the allegations of the Complaint from paragraphs 1 to 51. See Complaint (#2) at 9. This action raises issues of first impression in this jurisdiction.

II. BACKGROUND

The Las Vegas Valley is in CAA serious non-attainment for both particle matter ten microns or less ("PM10") and carbon monoxide ("CO"). Plaintiff's Complaint involves allegations regarding both serious non-attainment air pollutants plus maintenance air pollutants.

Defendants held back key documents when certifying their AR. As one example, copies of all of the Federal Defendants' conformity determinations to date are not in the AR. Federal Defendants kept information from the public that would have detected misrepresentations earlier.

Federal Defendants claim they comply and conform to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f and 40 C.F.R. §§ 1500.1 *et seq.* ("NEPA"), the Clean Air Act, 42 U.S.C.A. § 7601 *et seq.* ("CAA") and the Administrative Procedures Act, 5 U.S.C.A. § 702-706 ("APA") despite the fact that Clark County and Nevada have not successfully amended Clark County's only EPA approved, 1979/81 State Implementation Plan ("SIP") in twenty-two years, or in the thirteen years since the 1990 amendments to the Clean Air Act.

Almost all of Federal Defendants' Motion for Summary Judgment is an argument of a straw complaint that Plaintiff Hall did not file. There is no legally sufficient AR evidence and there are no references to the Plaintiff's Complaint to the contrary. It is a fact that only Federal defendants are named in this action. The Complaint is focused on the responsibilities

placed upon federal agencies by Congress that the agencies cannot delegate to others. Federal Defendants did not file a declaration or an affidavit with their motion for summary judgment. Plaintiff Hall does not waive any right including but not limited to the right to any hearing.

III. STANDARD OF REVIEW

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

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

Furthermore, courts must "carefully review the record to 'ensure that agency decisions are founded on a reasoned evaluation of the relevant factors,' " *id.* (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)). In the context of the procedural environmental requirements imposed by NEPA and CAA, "[t]he arbitrary and capricious standard requires a court to ensure that an agency has taken the requisite hard look at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the agency decision is founded on a reasoned evaluation of the relevant factors." *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1114 (9th Cir. 2000) (internal quotation marks omitted), *cert. denied*, 122 S. Ct. 41 (2001). A reviewing court is not permitted to substitute its judgment for that of the agency, but rather must "'simply . . . ensure that [the agency] has adequately considered and disclosed the environmental impact of its actions.'" *Am. Rivers v. FERC*, 201 F.3d 1186, 1194-95 (9th Cir. 2000) (quoting *Ass'n of Pub. Agency*

Customers, Inc. v. Bonneville Power Admin., 126 F.3d 1158, 1183 (9th Cir. 1997)). This means that we "must defer to an agency's decision that is fully informed and well-considered," *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (internal quotation marks omitted), but "need not forgive a 'clear error of judgment,'" *id.* (citing *Marsh*, 490 U.S. at 378), or credit "conclusions that do not have a basis in fact," *Ariz. Cattle*, 273 F.3d at 1236. See, Public Citizen v. Department of Transportation, 316 F.3d 1002, 1020-21.

When NEPA, CAA and APA were written, no one anticipated that federal agencies in the fastest growing urban area in the country would go twenty-two years without federal NEPA cumulative impact statement EIS, without an EPA finally approved SIP, without a legally sufficient FHWA public notice or that the local jurisdiction would withdraw all prior PM10 SIP submittal in order to evade stiff sanctions.

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

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

IV. PLAINTIFF'S STATEMENT OF FACTS NOT IN DISPUTE

Pursuant to Local Rule 56-1, Plaintiff submits the following undisputed facts with references to the part of the record where those facts may be found.

1. Plaintiff Hall's August 3, 2002 Comments re: Proposed FY 2003-2005 Regional Transportation Improvement Program (TIP) and the FY 2003-2025 Regional Transportation Plan. (#22) EA 795-841.

2. The March 3, 2003 Las Vegas Transportation Improvement Program/Transportation Plan – Conformity Finding letter signed by Leslie T. Rogers, FTA Administrator and Randy J. Bellard, Planning and Research Engineer, Federal Highway Administration. (#21) AR 1.

3. Federal Defendants have not included any **other** FHWA conformity findings in the AR. (#21-22).

4. The Certification of Administrative Record dated December 30, 2003 signed by William H. Kappus (#21) is the AR for the 2003-2025 Las Vegas Regional Transportation Plan/Transportation Improvement Program (RTP/TIP).

5. No other FHWA certifications were filed in the AR. (#21-22).

V. FEDERAL REGISTER CITATIONS

The following citations to the Federal Register are relevant herein.

1. The April 1996 Clark County Air Pollution Control State Implementation Plan submitted in 1979 was finally approved in 1981/82. 46 Fed. Reg. 21768, 47 Fed. Reg. 26621, 46 Fed. Reg. 43142, and 47 Fed. Reg. 26387. See also AR 795-841.

2. The Ninth Circuit Court of Appeals decision in Hall v. EPA, 273 F.3d 1146 (9th Cir. 2001) ("Hall 2001") resulted from a petition for review of final action by the United States Environmental Protection Agency ("EPA") published at 64 Fed. Reg. 25,210 (May 11, 1999). 273 F.3d at 1154.

3. Approval and Promulgation of Implementation Plans; Nevada – Las Vegas Valley PM10 Nonattainment Area; Serious Area Plan for Attainment of the Annual and 24-Hour PM10 Standards, January 22. 2003. 68 FR 2954.

VI. ADMINISTRATIVE RECORD ("AR")

The following August 3 [2], 2002 document is adopted herein and made a part hereof for all purposes, "Re: Comments re: Proposed FY 2003-2005 Regional Transportation Improvement Program (TIP) and the FY 2003-2025 Regional Transportation Plan [RTP]." AR 795-841. There is no evidence that the Federal Defendants considered or responded to Plaintiff's comments in its conformity finding(s).

VII. ARGUMENT

(a) DUAL TRACKS

The issues of PM10 and CO conformity are separate but related issues. Plaintiff may prevail regarding herein regarding either or both conformity issues.

> With regard to PM10, Clark County submitted a plan to EPA in 1997 that was withdrawn after EPA proposed to disapprove it. See 68 Fed. 2954, 2955 (Jan. 22, 2003). A revised plan was submitted in July 2001. Id. EPA found the motor-vehicle emissions budgets in the revised PM10 plan to be adequate for conformity in January 2002. 67 Fed. Reg. 1461 (Jan. 11, 2002) (AR 28). Mr. Hall petitioned the Ninth Circuit for review of the PM10 conformity determination. Hall v. EPA, No. 02-70225 (9th. Cir.). That action was voluntarily dismissed by stipulation. In January 2003, EPA proposed to approve the revised PM10 plan. 68 Fed. Reg. 2954. EPA has not yet taken final action on either of the proposed SIP approvals.
>
> Def. Mot. S. J. 7-8.

(b) WHERE'S THE EIS?

There is no AR evidence of a NEPA compliant EIS. For that reason, it cannot be denied that the missing EIS is inadequate. There is a lack of any NEPA EIS analysis regarding PM10, CO or any other air pollutant in the instant AR. There is no evidence of a "hard look" or a discussion of mitigation measures in significant detail to ensure that environmental consequences have been fairly evaluated. Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998). See, Pl. Cr. Mot. S. J. (#7) 2-4.

(c) WHERE ARE THE FHWA PUBLIC NOTICES?

There are no legally sufficient FHWA, federally compliant public notices in the AR.

(d) WHERE'S THE RELEVANT ADMINISTRATIVE RECORD?

Without relevant, on-point AR documentary support that is missing from the AR, there is no genuine issue of material fact regarding the allegations of Plaintiff Hall's Complaint. Celotex v. Catrett (1986) 477 U.S. 317, 325, 106 S.Ct. 2548, 2554. Plaintiff Hall is entitled to summary judgment. Fed. R. Civ. P. Rule 56(c). Federal Defendants admit there must be a "pre-existing administrative record" in order for them to prevail on a summary judgment motion. Def. Mot. for S.J. (#24) at 13. There is no Complaint responsive, pre-existing administrative record in the AR.

Federal Defendants have failed and refused to file the "pre-existing administrative

record." Federal Defendants have denied Plaintiff Hall and the Court an AR that is responsive to Plaintiff's Complaint. The issues therein go back to the enactment of NEPA and the CAA in 1970 and more recently, the 1990 amendments to the CAA.

The Certification of Administrative Record dated December 30, 2003, signed by William H. Kappus (#21) admits that only AR for the 2003-2025 Las Vegas Regional Transportation Plan/Transportation Improvement Program (RTP/TIP) was certified and filed.

Plaintiff Hall is prejudiced by Federal Defendants' failure to file a relevant administrative record regarding all of the allegations of the Complaint. As a proximate result, Plaintiff Hall is entitled to a default judgment pursuant to Fed. R. Civ. P. 55(e) on the basis of Federal Defendants' failure to credibly defend against the allegations of the Complaint.

Federal Defendants cannot claim they were not warned, not only by the Complaint but also by the Declaration in Support of Plaintiff Robert W. Hall's Cross-Motion for Summary Judgment, or in the Alternative for Summary Adjudication of Defenses and in Opposition to Defendants' Motion to Dismiss filed August 4, 2003 attached to that motion. The Declaration is a check list for the documents they failed to certify and file in the instant AR.[1]

Federal Defendants have waived their right to file the "pre-existing administrative record." Federal Defendants have failed to mount a legally sufficient defense at the proper time. The silence of the Federal Defendants regarding the actual issues alleged in the four corners of the Complaint has triggered estoppel by laches. Federal Defendants are continuing to mislead the public and this Court to their detriment, exactly the issues of the Complaint. Federal Defendants have defaulted. By repeating the same misleading statements over and over again, Federal Defendants demonstrate once again affirm their lack of credibility regarding the issues Plaintiff Hall has complained about.

(e) THE OHENE AFFAIR

See, Pl. Cr. Mot. S. J. (#7) 11 and Exhibit H. The referenced argument and exhibit are

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[1] Errata. Item 19 of the Declaration includes a harmless error. The phrase "Department of Interior's Federal Highway Administration" should be corrected from Department of the Interior to Department of Transportation in two instances.

adopted herein and made a part hereof for all purposes.

(f) PLAINTIFF HALL'S RTP/TIP COMMENTS

See, Pl. Cr. Mot. S. J. (#7) 4-19. Without prejudice, Plaintiff Robert W. Hall submitted comments dated August 3 [2], 2002, entitled Re: Comments re: Proposed FY 2003-2005 Regional Transportation Improvement Program (TIP) and the FY 2003-2025 Regional Transportation Plan. EA 795-841. The comment document includes the following excerpts. (#22) See, EA 797-798. "This comment notice letter includes the following statutes and regulations: … (10) Common tort law which includes but is not limited to misrepresentation, i.e., fraud." Id. 797-798. Plaintiff Hall requests that the Court take notice of the fact of the comment document.

The following relates to language in the 2003 RTP/TIP. "'The preparation of this document was financed, in part, by a grant from the United States Department of Transportation, Federal Transit Administration under Section 8 of the Urban Mass Transportation Act of 1964, as amended, and the Federal Highway Administration under Title 23, Section 134 of the United States Code.'" Id. 799-800.

Thus, the statements made in both documents are from a federally funded project that seeks additional federal funding. After funding the RTP/TIP, Federal Defendants used the two documents in order to evade compliance with NEPA, CAA and APA. Federal Defendants did that by using the RTP/TIP in place of a CAA SIP and a NEPA compliant, cumulative impact EIS. Id. 800. Plaintiff Hall requests that the Court take notice of the fact that his comments were not recognized or dealt with in the Conformity Finding dated March 3, 2002. AR 1. The local agency included a brief, prior answer to Hall's comments in the AR with the RTP/TIP. Federal Defendants ignored Hall's comments, and other public comments in preparing the conformity finding. (#22). AR 769-846.

> The premise on which PM10 modeling assumptions were made is in error. When Clark County's serious non-attainment PM10 State Implementation Plan was submitted to the EPA in August 1997, Clark County was already subject to a statutory conformity freeze by that date. As the RTP notes, a conformity freeze means that a new SIP must be approved prior to the RTC advancing amendments or transportation plans. AR 804.
>
> The same is true for CO modeling assumptions. Clark County is and has been in a

SIP lapse for years. Extensions of time granted by the EPA have no lawful foundation whatsoever…. AR 804-05.

(g) THE SCHEME

Clark County Commission adopted a resolution on December 5, 2000 requesting the State to withdraw all of the PM10 plans previously submitted. There is no question that only projects identified in the existing TIP that existed on the day when the conformity freeze first became effective may be advanced. In order to lift the freeze, a new PM10 SIP must be finally approved by the EPA prior to the RTC advancing amendments or new transportation plans. EPA final approval is also subject to Ninth Circuit Court of Appeals review. AR 805.

B. *Previous Actions on Clark County PM10 Plans.* Clark County prepared and submitted a serious area PM10 plan in 1997 that EPA proposed to disapprove, along with previously submitted plans. 65 FR 37324, June 14, 2000. On December 5, 2000, prior to EPA taking final action on its proposed disapproval, the State of Nevada withdrew the moderate and serious area plans for Clark County…. 68 FR 2955.

With that and other communications, the FHWA was on notice that it was dealing with a State that had withdrawn all of the moderate and serious area PM10 plans it had ever submitted for Clark County, Nevada. None of the plans were ever finally approved. Throughout all those years, the FHWA approved and funded the transportation projects on the basis of submitted SIPs, all of which were later withdrawn. Before that they either failed to gain approval or were vacated. Without prejudice to the many other reasons in the Complaint, the act of withdrawing all of the moderate and serious area PM10 plans created an immediate requirement for the FHWA to roll-back and demand every federal cent back. The reason is that every claim for FHWA funds that Clark County and the State of Nevada submitted is fraudulent and false. The issue highlights extraordinary bad faith on the part of the Federal Defendants regarding multiple and successive schemes to defraud Hall, his wife, the public and the federal government. Federal Defendants allowed Clark County and the State of Nevada to gain approvals and funding and keep the funding while knowing there was no legally sufficient basis for their actions. Federal Defendants did not do that only once, but again and again. The idea of submitting SIPs to get approvals and funding that were not finally approved was an obvious scheme to defraud.

Worse, Federal Defendants either knew or should have known that the December 5, 2000 act of withdrawal was solely for the purpose of evading EPA sanctions, another fraud. Instead of approving and funding the projects listed in the TIP, Federal Defendants had a duty to stop the fraudulent chain of causation.

This scheme highlights the risk local, state and federal agencies take when they go ahead with approvals and funding on the basis of submitted but not finally approved SIP submittals. The laws that allow local, state and federal agencies to move ahead preliminarily on the basis of submitted but not finally approved SIPs are only the benefit side of the issue. Federal Defendants only looked at the beneficial side despite knowing Clark County's incredible record of SIP approval failure. Federal Defendants ignored the down side and the huge risk of making preliminary approvals and authorizing highway funding when Clark County came up short on final approvals without prejudice to the fact they withdrew all their prior PM10 SIP submittals. The downside is payback time, a roll-back that the Federal Defendants overlooked. They overlooked the fact there were dealing with fraud and the False Claims Act. Conservative legal advice would have urged caution. There is no evidence of caution or conservative thinking related to the scheme.[2]

Federal Defendants got the idea that they could simply approve successive SIP submittals that were interposed not only for the fraudulent purpose of evading sanctions, but also for the purpose justifying approvals and funding. Apparently Federal Defendants were so caught up in their scheme they forgot about SIP freezes, SIP lapses and the down side. Like the well known home economics maven, they clearly do not see themselves as co-conspirators in a scheme to evade EPA sanctions and defraud the federal government through approvals and funding based on nothing but fraudulent assumptions. In the process of all this, issues like public health, safety and serious air pollution were not considerations.

> The recent history of CO attainment demonstrations is that one was found inadequate on May 5, 1999 and a second was found inadequate on February 17,

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[2] It is not difficult to imagine what would happen to a commercial source of air pollution that pulled a stunt like this.

> 2000…. AR 805.
>
> SIP budgets have been approved on a temporary basis subject to final EPA SIP approval. The only EPA approved SIP is the 1979 SIP which has never been successfully amended since the 1990 amendments to the Clean Air Act. Any attempt to go forward with approved CO and PM10 emissions budgets or build vs. no-build tests for PM10, misrepresent. There is no lawful way to mix and match a 1979 SIP with temporary emissions budgets. The course the RTC is taking will expose the RTC to substantial, risky, expensive litigation. There are no citations to statutes supporting the premise that the RTC may advance plans prior to the final EPA approval (and appeals court review) of a new CO and PM10 SIP and during the current conformity freeze and SIP lapse. AR 805.
>
> In addition to the above, the RTC has a duty to cite the statutes it [sic] now relies upon to advance the current RTP/TIP. AR 805.

Federal Defendants were on notice that the Regional Transportation Commission ("RTC"), Clark County and Nevada were operating outside of virtually any applicable law. Numerous citations to law and the Federal Register are included in Hall's comments.[3] Nothing of substance has changed. The allegations and factual information in Hall's 46 page comment document require more briefing space than allowed by the local rules. For that reason, Plaintiff Hall adopts his August 3 [2], 2002 comment document herein and makes it a part hereof for all purposes. See AR 795-841.

(h) PLAINTIFF HALL'S COMPLAINT

Assuming without prejudice and in the alternative there was no fraud involved, the allegations of the Complaint are not limited to the most recent conformity finding. The FHWA does not routinely place notices in the local newspapers regarding conformity findings. Part of the scheme is to not awaken a sleeping public. When asked about making conformity findings public, the reply was that there was no EIS. For that reason, there was no finding of no significant impact ("FONSI") and no Notice of Record ("NR"). For that reason, no public notice was required. Federal Defendants do not have a long history of preparing EIS, FONSI or NR documents.

Plaintiff's Complaint addressed the issue directly. "20. NEPA requires that an

[3] Plaintiff Hall has filed many comment documents with the RTC and the FHWA but only one wound up in the certified AR.

environmental analysis for a major and/or significant federal agency air pollution causing project **must consider the cumulative impacts of that project together with all past, present and reasonably foreseeable future actions**. NEPA is designed to publicly consider the environmental impacts of federal agency air pollution actions and any other environmental issues **before going forward**. 40 C.F.R. §§ 1508.7, 1508.27(b)(7) (2001), Hall v. Norton, 266 F.3d 969, 978 (9th Cir. 2001).” (First emphasis added.) NEPA in this instance means an EIS. There is no “environmental analysis EA or EIS. There is no evidence that Federal Defendants considered **the cumulative impacts of that project together with all past, present and reasonably foreseeable future actions**.

(i) WHERE ARE THE EAs?

There is no AR evidence that Federal Defendants ever published a legally insufficient public notice much less a public notice that spells out in plain English what the federal agency is doing, why they are doing it and the reasons why the public may be interested in what they are doing.

That highlights one the FHWA’s benefits of substituting RTP/TIPs for EISs and SIPs. Without legally sufficient public notices regarding federal agency NEPA, CAA and APA compliance, the public (including Hall) has no practical way of knowing what Federal Defendants are doing. One thing is known. When Federal Defendants unlawfully delegate their responsibilities to local and state agencies, they neatly evade the federal agency requirements of NEPA, CAA and APA. Whatever the public does not know does not go to APA judicial review. The entire process is unlawful because Federal Defendants have found a way to keep the public out of it.

The parsing of federal highway projects in order to evade NEPA cumulative impact EIS requirements is another way Federal Defendants keep what they are doing under the public’s radar. When the Federal Defendants allow local agencies such as the RTC to ignore the parsing of TIP projects into “little-piece” environmental assessments that “may,” but are not required to be noticed to the public, the public is frozen out of the NEPA, CAA and APA processes.

The necessity for a FONSI, NOR and public notice is eliminated by the misleading use of

project by project air pollution parsing resulting in occasional low level EAs that "may" but are not noticed to the public and are routinely tossed into a drawer or a filing cabinet out of the public's sight. There are no EAs in the AR. The issue regarding the March 3, 2003 conformity finding is that it is a classic example of a misleading process on issues other than adequacy determinations and emissions budgets which are not relevant herein.

(j) WHAT SIP?

The history of SIP compliance in Clark County may be found in Hall's comments at AR 818-20. Federal Defendants did not certify and include a copy of the twenty-two year old, 1979/81 SIP or any part of that SIP in the EA. There is no basis for Federal Defendants' sweeping statements such as their statement that vacatur "meant that Clark County's previous new source review rules continue to apply." Id. 17. The instant action is similar in some respects to the issues in Hall 2001. See, Hall v. EPA, 273 F.3d 1146 (9th Cir. 2001) ("Hall 2001")

> In sum, in the administrative record before us, we find no analysis that connects the non-relaxation of the 1981 Rules to Clark County's prospects for meeting the current attainment requirements. "If the decision of the agency is not sustainable on the administrative record made, then the … decision must be vacated and the matter remanded … for further consideration." F.P.C. v. Transcon. Gas Pipe Line Corp., 312 U.S. 326, 331, 96 S.Ct. 579, 46 L.Ed.2d 533 (1976) (internal quotation marks and citation omitted).

Id. 1161. There are four 1979/81 SIP conformity problems. The first is Plaintiff Hall's claim that the 1979/81 SIP has lapsed. The second is that Federal Defendants did not include a copy of the SIP in the AR. Third, Federal Defendants did not cite any part of the 1979/81 SIP in support of their claim that their adequacy determinations and motor vehicle budgets somehow jump like a magnet to the much older SIP. Fourth, regardless of all of the above, it is a fact that there has not been a complete, final SIP amendment approval of the 1979/81 SIP in twenty-two years. The 1979/81 SIP is broader than just new source review and the SIP is much more stringent than the now vacated 1999 submitted SIP rules. The claim of conformity to the twenty-two year old 1979/81 SIP in is not supported by anything in the AR.

Conformity findings are supposed to be based on a comparison of emissions from the RTP/TIP and the estimates of motor vehicle emissions from the RTP/TIP and the estimates of

motor vehicle emissions in the SIP. 42 U.S.C. § 7506(c)(2)(A). Federal Defendants have not identified what the estimates of motor vehicles emissions were in the 1979/81 SIP, or provided any evidence that emissions from the projects in the RTP/TIP would comply.

The only AR document that Federal Defendants have referenced in defense of the allegations of the Complaint is a four sentence conformity finding letter. The March 3, 2003 letter reference involves only the most recent conformity finding at the time the Complaint was filed. AR-1. The Complaint is much broader than that.

(k) THE CONFORMITY FINDING

Incredibly, the conformity finding does not claim conformance to any SIP. The following is the text from the 2003 Conformity Finding.

> In accordance with the Clean Air Act Amendments of 1990, a conformity finding for transportation plans and program in non-attainment areas is required of the U.S. Department of Transportation. [40 C.F.R. §§ 93.102(a); 93.109(d) and (e)] (citation added).
>
> Based on our evaluation of the Metropolitan Planning Organization's finding of conformity and related documentation, and coordination with the Environmental Protection Agency, we have determined that the Las Vegas urbanized area has met the requirements of the conformity regulations. A finding of conformity is hereby made with respect to the Transportation Improvement Program & Plan approved by the RTC on January 9, 2003 and by NDOT on January 15, 2003.

AR-1. That "conformity" finding does not cite any CAA section or regulation. The statement is an admission that that local planning documents that are not subject to judicial review or APA compliance were used to make the "conformity" determination instead a SIP and without a NEPA EIS. Federal Defendants did not name any SIP. Anyone reading that document has no idea what SIP is involved. The "conformity finding" is legally insufficient for any lawful purpose.

The last sentence is applicable herein. "This conformity determination is in effect until such time as **a new determination** is required either by new regulatory requirements, major revisions of transportation plans or programs, **or a State Implementation Plan**." (Emphasis added.) All three of those events have occurred. The "new regulatory requirement" is that Clark County has run out of statutory time to amend the 1979/81 SIP. The SIP has lapsed. The RTC

has revised it transportation plans and programs. A new determination is required since Federal Defendants have not named a SIP and if they had named a SIP, it has either disappeared, lapsed or has not been finally approved by the EPA. The "conformity determination" is misleading.

In the alternative, the issues are moot since the conformity determination depends upon a SIP that is not named. The public has absolutely no idea what the Federal Defendants' are doing. Taken in its four corners, Federal Defendants have relied on long range, programmatic plans. The "conformity determination" is an admission that Federal Defendants have certified conformity without complying with any of the federal agency requirements of NEPA, CAA and APA. By certifying "conformity" to long range, programmatic plans that are not subject to federal agency judicial review, Federal Defendants ignored the public's APA rights, another facet of the scheme. The complete omission of any reference to an EIS or any SIP is astonishing.

It appears that Federal Defendants were trying to unlawfully shift their NEPA, CAA and APA burden to the local MPO. What they wound up doing is making a false claim for the purpose of federal approval and subsequent federal funding. We now see why the certification was signed by Randy J. Bellard, Planning and Research Engineer for the FHWA. Those above Mr. Bellard were not about to sign the conformity finding document. Apparently Leslie T. Rogers, FTA Regional Administrator did not get the word.

(l) THE COMPLAINT WAS FILED AGAINST ALL OF THE FEDERAL DEFENDANTS' MISLEADING ACTIONS.

The Complaint's time frame allegations were limited only by the "outset of NEPA" or 1970 when the President signed the Act into law. See Complaint (#2) at 4, ¶ 18. The Clean Air Act was also adopted in 1970.

The Complaint issues involve "misleading" issues. Examples of some of the Plaintiff Hall's Complaint allegations include the following. "29. Hall alleges that the DOT has **never** complied with NEPA, CAA or APA regarding **any** of its Las Vegas Valley air pollution activities since the federal agency requirements were first mandated. 30. Hall alleges that **all** Conformity Findings the DOT has issued in Nevada and Clark County are misleading and are legally insufficient for any lawful purpose." … "34. Plaintiff alleges that the DOT has failed and

refused to determine and disclose all of its foreseeable direct and indirect environmental impacts caused directly and indirectly by its Las Vegas Valley air pollution actions **including but not limited to** those in the January 9 and 15, 2003 Transportation Improvement Program. 35. Plaintiff alleges that the DOT has failed and refused to consider the increased air pollution that has resulted and will continue to result not only from the 2003 TIP, but cumulatively from **all** of DOT's ongoing air pollution activities in the Las Vegas Valley non-attainment area from **previous** Conformity Findings." (Emphasis added.) See Complaint (#2) at 6-7.

(m) PLAINTIFF HALL'S FIFTH CLAIM FOR RELIEF

The Fifth Claim for Relief at 9, ¶ 45 states in part, "The Plaintiff alleges that from May 11, 1999, Defendants approved and funded projects in Nevada and the Las Vegas Valley serious non-attainment area on the basis of a submitted but not finally approved SIP submittals. See the three letters attached hereto, one dated March 6, 2003 (P. Exhibit "C") and two dated March 17, 2003 (P. Exhibits "D" and "E"). 46. Plaintiff alleges that at least from August 29, 2001, Defendants knew (because Hall told them) and should have known that the May 11, 1999 submitted SIP approval was vacated and remanded to the EPA by the Ninth Circuit Court of Appeals in Hall v. EPA, 273 F.3d 1146 (9th Cir. 2001)." The rest of Plaintiff's roll-back request and demand repeated the May 11, 1999 date. See Complaint at 9-10. The Relief Requested at 10-11 does not limit the relief sought to the latest conformity finding which Plaintiff Hall had difficulty obtaining.

The inclusion of the reference to the March 3, 2003 "Conformity Finding" was the latest finding Plaintiff Hall knew about as of the date the Complaint was filed. Nothing therein limited the complaint to any specific conformity finding. Beyond their most recent conformity finding, Federal Defendants have not included their conformity determinations in the AR. The word **all** means just that. The March 3, 2003 Conformity Determination triggered the Complaint without limiting the Complaint in any way. AR 1. The Relief Sought at 11, ¶ 3 states, "Find the above-named federal agency air pollution actions that were authorized by misleading Conformity Finding**s** be found to be null and void for any lawful purpose." (Emphasis added.) The word in the relief prayer was Conformity "Findings" not "Finding."

(n) CONFORMITY

> No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title. No metropolitan planning organization designated under section 134 of Title 23, shall give its approval to any project, program, or plan approved or promulgated under section 7410 of this title. The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency or instrumentality.

42 U.S.C. § 7506(c)(1). See, 42 U.S.C. § 7506.

(o) REMAINING COMPLAINT ISSUES

The remaining major issues regarding SIPs may be summarized as seven sets of issues from the Complaint. They involve the legal sufficiency of, a) conformity determinations before the 1990 amendments to the CAA, b) conformity determinations after the 1990 amendments to the CAA, c) conformity determinations after the 1999 PM10 SIP submittal was vacated and remanded, d) conformity determinations that claim conformance in a SIP gap, lapse and freeze, e) conformity determinations that allegedly conform to a 1979/81 SIP that Federal Defendants did not specify by name or otherwise identify specifically in their conformity determinations, f) the issue of Federal Defendants' misleading statements, approvals and funding in connection with claims of conformity to submitted SIPs that are misleading and g) conformity determinations to all PM10 SIPs submittals withdrawn by the State and Clark County on December 5, 2000.

"8. I have searched the documents, files and records of this action and have not found evidence of citations to statutes or regulations supporting the premise that the EPA approved 1979/81 SIP is not in a SIP lapse." See, Declaration in Support of Plaintiff Robert W. Hall's Cross-Motion for Summary Judgment, or in the Alternative for Summary Adjudication of Defenses and in Opposition to Defendants' Motion to Dismiss filed August 4, 2003.

The local and state agencies have had twenty-two years to get the 1979/81 SIP amended to comply with the 1990 amendments to the CAA. They have failed miserably. The 1979/81 SIP ran out of lawful extensions of time to conform to the 1990 amendments of the Clean Air Act.

There is no evidence of final EPA review and/or survival after judicial review in the AR. The 1979/81 SIP is in a gap, lapse and SIP freeze. There are no more lawful extensions of time to amend the 1979/81 SIP. Federal Defendants have not cited any. In the alternative, Federal Defendants' statements regarding the 1979/81 SIP are misleading since that SIP is a very stringent SIP and there are no CAA 116 circumstances offered by Federal Defendants or not that support any claim they could conform to it. Nevada SIP amendment submittals are notorious for being less stringent than the original 1979/81 SIP. That is the major reason why attempts to amend that SIP have not survived over 21 years. See, Hall v. EPA, 273 F.3d at 1158-59 (9th Cir. 2001) ("Hall 2001"); CAA § 116.

The burden has not yet shifted to Hall. Federal Defendants may not lawfully withhold evidence from their certified AR and then claim that Hall has an evidence burden.

(p) Hall v. EPA, 273 F.3d 1146 (9th Cir. 2001) ("Hall 2001")

Hall 2001 was a review of the EPA's May 11, 1999 approval of the following:

> … Robert Hall raises procedural and substantive challenges to the Environmental Protection Agency's ("EPA") approval of a revision to the air quality plan adopted by Clark County, Nevada, which modifies existing rules for new stationary sources seeking permits to emit pollutants in Clark County. The most significant issue that Hall raises is whether the EPA adequately assessed Clark County's prospects under its revised air quality plan, of meeting the Clean Air Act's requirements concerning attainment of federally-established air quality standards. The statutory basis for this claim is the Act's requirement that the EPA determine whether air quality plan revisions will "interfere' with attainment requirements. See CAA § 110(f), 42 U.S.C. § 7410(f).
>
> … we conclude that the EPA's interpretation of its review responsibility under § 110(f) is not consistent with the Act. The EPA argues that, so long as a revision to an air quality plan does not relax existing pollution control measures, there necessarily will be no interference with attainment requirements. The EPA concluded that the revisions at issue here did not relax the preexisting rules; and so, without further inquiry, the EPA made a determination of "non-interference." This truncated analysis-which, as the EPA admits, at most assures that the rules as revised will not "exacerbate the existing situation"–does not fulfill the EPA's responsibility under § 110(f). That provision requires the EPA to evaluate whether the plan as revised will achieve the pollution reductions required under the Act, and the absence of exacerbation of the existing situation does not assure this result. We therefore remand this matter to the EPA for further consideration.

See, Hall v. EPA, 273 F.3d 1146, 1152 (9th Cir. 2001) ("Hall 2001"); 64 Fed. Reg. 25,210 (May 11, 1999).

(q) FEDERAL DEFENDANTS CLAIM OF CONFORMANCE TO A 1979/81 SIP

"The result of the decision in Hall 2001 is that Clark County must continue to comply with its previously approved new source review permitting regulations until EPA approves revised regulations." Fed. Def. Mot. S. J. 20. There is no Federal Register notice supporting that claim.

"EPA's approval of the revised permitting regulations was based on the Agency's conclusion that the revised regulations were no less stringent than the preexisting regulations." Fed. Def. Mot. S. J. 20. See, 273 F.3d 1155. The words "less stringent" are not at 1155. There is no definition of "preexisting regulations."

> The Ninth Circuit did not overturn this determination, but held that, given that the Las Vegas area had failed to achieve attainment using the preexisting regulations, a determination that the revised regulations were equivalent to the old ones was not sufficient for EPA to meet its statutory obligation to determine that a proposed SIP revision would not interfere with achieving attainment. 273 F.3d at 1160-61. Mr. Hall contends that the revised permit regulations are less stringent than the preexisting regulations, Addendum to Exhibit C to First Amended Complaint at paragraph 6 (page 2), a question that the Court did not reach.

Fed. Def. Mot. S. J. 21. The Court did reach that question. 273 F.3d at 1152 (Opinion). See, legal quote from 273 F.3d at 1152 *supra*. The first sentence in the above paragraph is misleading. It is contradicted by the Opinion quote, *supra*. Federal Defendants are attempting to claim that emissions budgets and adequacy determinations that are part of a vacated SIP somehow survive the vacatur. Worse, there is no evidence that the EPA ever approved any emissions budgets or any adequacy determination in connection with the 1979/81 SIP.

"Because the 1981 permitting rules are at least as stringent as the revised rules, requiring the continued use of the 1981 permitting rules (which is the result of the Hall 2001 decision) does not undermine EPA's determination that the submitted motor vehicle emissions budgets are adequate for conformity." Fed. Def. Mot. S. J. 21. This king crowns himself. There is no supporting evidence for that claim in law or the AR.

Federal Defendants have failed to produce more than empty claims that the demise of the

1999 submitted SIP is an act “requiring the continued use of the 1981 permitting rules.” There must be evidence that is so. There is none. For that reason alone Federal Defendants’ claims of “requiring the continued use of the 1981 permitting rules” rings hollow.

“Because the stationary source budget in the submitted attainment demonstration does not change, and because the submitted attainment demonstration shows that compliance with the budgets (including the motor vehicle emissions budget) results in attainment, nothing in the Hall 2001 decision undermines EPA’s conclusion that the motor vehicle emissions budget can be used for conformity.” (#24) Def. Mot. S. J. 21. There is no reference to a statute or regulation supporting that statement. The basis for that statement is entirely circular without legally sufficient support. Federal Defendants may use preliminary motor vehicle emissions budgets that are a part of a SIP until and unless that SIP is not approved, vacated or withdrawn.

Federal Defendants have not carried their initial burden of certifying and filing a complete AR record. There is no 1979/81 SIP in the AR. There is no AR evidence regarding anything in the 1979/81 SIP. There is no document that claims compliance with and conformity to the 1979/81 SIP.

Federal Defendants have not provided any evidence or citations to law that “previous review rules” support the claim that “Vacatur of EPA’s approval meant that Clark County’s previous review rules continue to apply.” (#24) Def. Mot. S. J. 17. The issue of whether Clark County’s twenty-two year old EPA approved 1979/81 SIP rules continues to apply without amendments after the 1990 amendments to the CAA. That issue was not an issue before the Ninth Circuit Court of Appeals in Hall 2001. Instead of falling on their sword a long time ago, Federal Defendants are now trying to sell the idea that the very old, 1979/81 SIP rules apply after the 1999 SIP submittal was vacated on them and all PM10 SIP submittal date prior to December 5, 2000. That is an absurd argument.

By the terms of the four sentence conformity determination, the conformity finding is no longer in effect if there is a “state implementation plan revision.” Federal Defendants issued their conformity finding on the basis of a submitted SIP. After that SIP was vacated and all submitted PM10 SIPs prior to December 5, 2000 were withdrawn in a successful attempt to evade stiff

EPA sanctions, Federal Defendants now claim that another SIP, the original, EPA approved 1979/81 SIP is the correct SIP. That constitutes a revision from the now vacated SIP and by the terms of the conformity finding, the conformity determination is no longer in effect. AR 1.

Federal Defendants do not seem to realize that they have discussed two entirely different SIPs that are not lawfully interchangeable. There is no AR evidence of public involvement, public notice, hearing or EPA approval of adequacy determinations and motor vehicle emissions budgets that specify the 1979/81 SIP.

Clearly, whoever wrote that claim has never seen the 1979/81 rules. They did not cite any of them. With their “vacatur” statement at 17, Federal Defendants admit they proceeded on the basis of a SIP that is quite different from the EPA preliminarily approved, 1999 submitted SIP. Federal Defendants are arguing the legal status of the vacated SIP opposite ways. First they argue conformity on the basis of one SIP and now they claim conformity on the basis of another SIP without the benefit of a Federal Register citation.

Plaintiff Hall has raised issues of misleading conformity determinations. When the PM10 SIP was vacated or withdrawn, Federal Defendants’ had a legal obligation to notify the agencies involved, the public and other agencies with full disclosure that the basis for their prior approvals and funding was gone. That did not happen. That did not happen after Plaintiff Hall sent certified letters requesting an approval and funding roll-back. Federal Defendants crow when they approve and fund highway projects. They cowered when they knew the basis for prior approvals and funding was vacated or withdrawn. Federal Defendants know their prior conformity determinations are worthless. They are knowing and willful false claims for approvals and funding.

As Federal Defendants have argued, they may go ahead with approvals and funding on the basis of preliminarily approved adequacy determinations and motor vehicle emissions budgets that rely on specific, submitted SIPs. Plaintiff Hall has raised the issue that even where adequacy determinations and motor vehicle emissions budget approvals are preliminarily approved, Federal Defendants must understand they are on shaky legal and false claims ground if they proceed prior to final approval. The continued legal sufficiency for any preliminary

approval depends upon the reality of a finally approved SIP. There is no reason to bother with finally approving or not approving any SIP if the arguments Federal Defendants raise are legally sufficient. Plaintiff Hall's greatest concern is that he and other members of the public were misled in the process to the detriment of their quality of life and their pulmonary health. It should also be noted that a preliminary process neatly evades APA compliance.

(r) THE CLEAN AIR ACT AND STATE IMPLEMENTATION PLANS

The following statement misleads. "Section 110 of the CAA, 42 U.S.C. § 7410, contemplates that the measures necessary to attain the NAAQS will be applied to **individual sources** through a SIP, which are developed by the States and submitted to EPA for approval. Id. § 7410(a)(l), (k)." (Emphasis added.) See Def. Mot. S. J. 4-5. The words "**individual sources**" are not in the sections of the statute cited. For that reason they mislead.[4] Plaintiff Hall objects to the misleading reference since the statement masks the unlawful parsing of federal agency actions to evade NEPA requirements.

Federal Defendants' list of requirements from 42 U.S.C. § 7410(a)(2) misleads. There is no requirement for anything in "schematic form" in the statute. The list Federal Defendants provided is not a reasonable reading of § 7410(a)(2).

(s) DEFENDANTS' ARGUMENT SUMMARY

"The sole remaining count in this action is Mr. Hall's Fifth Claim for Relief in which Mr. Hall claims that the conformity determination is based on a 'May 11, 1999 submitted SIP approval' that was vacated by the Ninth Circuit in Hall 2001. See Complaint ¶ 46."[5] Once again Federal Defendants have set up a straw issue to knock down. The following is what Plaintiff Hall actually said in his Complaint. "46. Plaintiff alleges that at least from August 29, 2001, Defendants approved and funded projects in Nevada and the Las Vegas Valley serious non-attainment area on the basis of a submitted but not finally approved SIP submittal. See the three letters attached hereto, one dated March 6, 2003 (P. Exhibit "C") and two dated March 17, 2003

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[4] The use of the words "individual sources" begins the misleading argument that it is acceptable to parse federal highway projects in order to evade compliance and conformity with NEPA, CAA and APA.

[5] This is the only reference to the Complaint in Federal Defendants' entire Argument.

(P. Exhibits “D” and “E”).”

Plaintiff Hall did not claim that the unspecified “conformity determination” was based on a “May 11, 1999 SIP submittal.” Federal Defendants failed to identify which “conformity determination” they were discussing. When Federal Defendants discuss conformity determinations in connection with any specific SIP they engage in a bureaucratic shell game.

“This claim is meritless because the challenged conformity determination was not based on the EPA action vacated in <u>May 2001</u>, but rather on EPA’s November 2000 finding that the motor vehicle emissions budgets in the submitted carbon monoxide SIP is adequate for conformity and on EPA’s January 2002 finding that the motor vehicle emissions budgets in the submitted PM10 SIP is adequate for conformity.” Def. Mot. S. J. at 15. Federal Defendants are saying that the 2003 emissions budgets are based upon submitted SIPs that were submitted after the May 11, 1999 PM10 SIP was preliminarily approved. They have also ignored the State’s December 5, 2000 withdrawal of all prior moderate and serious area plans (SIPs) for Clark County. 68 FR 2955.

There is no citation to the Complaint that places that argument at Plaintiff Hall’s doorstep. In the case of the March 3, 2003 conformity finding, the issue is that the conformity finding fails to specify any EPA approved SIP approved, vacated or withdrawn. As a result the conformity finding is misleading. The public has no practical way of knowing what the Federal Defendants are doing regarding conformity finding approvals much less when they are doing them. Plaintiff Hall’s Complaint at 46 and elsewhere, *supra*, is clear that Hall’s primary concern is not just the March 3, 2003 conformity determination, but all of the Federal Defendants’ conformity determinations. Hall does claim that the March 3, 2003 conformity finding is misleading regardless of adequate budgets or MVEBs.

The argument goes back to the seven points of issue that include a reference to the now pending submittal PM10 and CO SIPs that were submitted after the May 11, 1999 PM10 SIP submittal. In the case of the 2003 RTP/TIP, the emissions budgets are subject to a SIP gap, lapse and freeze along with vacated and withdrawn submitted SIPs.

(t) SUMMARY JUDGMENT ON JUDICIAL REVIEW

Plaintiff received a July 17, 2003 Minute Order from the Court citing Rule 56-1 of the Local Rules of the United States District Court for the District of Nevada requiring a statement of facts which Plaintiff contends are or are not genuinely in issue for summary judgment. Local Rule 56-1 requires in part that Plaintiff cite the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other upon which the party relies. The text of the Minute Order and Rule 56-1 conflict. The language in Rule 56-1 is more stringent.

Defendants have the duty to certify and file the Administrative Record ("AR") without input from the Plaintiff. The documents now on file in the AR are limited to mostly 2003 letters, email messages, a long range, programmatic, a 2003-2035 Regional Transportation Plan ("RTP"), a 2003-2005 Transportation Improvement Plan ("TIP") and not much else. Federal Defendants have failed to submit a legally sufficient AR.

The long range, programmatic plans were **not** prepared by the Federal Defendants. For that reason the RTP/TIP is not subject to federal APA review since it was not prepared by a federal agency. As a result, RTP/TIP documents are not substantive issues in the Complaint. The scheme that Hall describes in his Complaint is one where the acts of the Federal Defendants are not real, they are not credible and they mislead. Federal Defendants' have always been vague and ambiguous where it comes to describing SIPs.

Federal Defendants' conformity determination statements all become misleading no later than point when the EPA declines to approve submitted SIPs, the Ninth Circuit Court of Appeals vacates and remands submitted SIPs or when the State withdraws all submitted SIPs. Federal Defendants had an opportunity to submit the documents necessary to support their defense of each paragraph and each count of the Complaint. They have failed to do so. There are no affidavits accompanying the motion.[6] There are no NEPA, CAA or APA documents supporting Federal Defendants decision regarding the March 3, 2003 conformity finding <u>or any other prior</u>

[6] It is difficult to ignore the fact that the 2003 conformity determination was not signed by the Nevada Director or an assistant director but by an environmental specialist. Without prejudice, RTC executives did not sign the certifications of the 2003 plans in the AR. The chairman of the RTC Board signed them.

conformity finding.

(u) FEDERAL DEFENDANTS CLAIMS OF ADEQUACY DETERMINATION AND MVEBS

Plaintiff Hall has not brought an adequacy determination or a motor vehicle emissions budgets complaint. Federal Defendants' discussion regarding emissions budgets and motor vehicle emissions budgets starts at Id. 5. Their argument at 15-24 is all about adequacy determinations and motor vehicle emissions budgets. Federal Defendants' claim that the Fifth Claim "is based on a 'May 11, 1999 submitted SIP" regarding adequacy determinations or emissions budgets is misleading. The issues remain the issues in the Complaint and the comment document, not what Federal Defendants wish was in the Complaint.

Federal Defendants have cited from the Code of Federal Regulations in support of their discussion. Without prejudice, there are no emissions budget or motor vehicle emissions budget issues in the Complaint. The issue is a straw issue. Federal Defendants have not referenced any part of the Complaint that names the Environmental Protection Agency ("EPA") as a defendant, another straw issue. Federal Defendants have not referred to any part of the Complaint regarding adequacy determinations or emissions budgets because there is nothing to reference. Those issues are not relevant to the issues of the submitted SIP issues.

In the alternative, Federal Defendants state the following. "When EPA has determined that motor vehicle emissions budgets in a submitted SIP are adequate for conformity, the local transportation agency and USDOT are required by regulation to use those budgets in determining conformity." 40 C.F.R. § 93.118(e)(1) (p. 561) The regulation cited states otherwise.

> (e) *Motor vehicle emissions budgets in submitted control strategy implementation plan revisions and submitted maintenance plans.*
>
> (1) Consistency with the motor vehicle emissions budgets in submitted control strategy implementation plan revisions or maintenance plans must be demonstrated if EPA has declared the motor vehicle emissions budget adequate for transportation purposes, or beginning 45 days after the control strategy implementation plan revision or maintenance plan has been submitted (unless EPA has declared the motor vehicle emissions budget(s) inadequate for transportation control purposes). However, submitted implementation plans do not supercede plans do not supercede the motor vehicle emissions budgets in

> approved implementation plans for the period of years addressed by the approved implementation plan.
>
> (2) If EPA has declared an implementation plan submission's motor vehicle emissions budget(s) inadequate for transportation conformity purposes, the inadequate budget(s) shall not be used to satisfy the requirements of this section. Consistency with the previously established motor vehicle budget(s) must be demonstrated. If there are no previous approved implementation plan submissions with motor vehicle emissions budgets, the emission reduction tests required by § 93.119 must be satisfied.

40 C.F.R. § 93.118(e) (1) & (2) (7-1-00 Ed. 561). When the Ninth Circuit Court vacates or the State withdraws a submitted SIP, that amounts to an inadequacy finding since the motor vehicle emissions budgets are a part of a submitted SIP and they do not stand alone. There is no evidence of an EPA approved, 1990 amendments CAA SIP in the AR, period. There is no evidence of submitted SIPs since the 1990 amendments to the CAA. The result is a SIP gap, lapse and freeze. There is no control strategy implementation plan in the AR. There is no evidence of compliance or conformity with reasonable further progress without an approved SIP. Without an approved SIP since 1990, the entire discussion is moot. 40 C.F.R. § 93.118(e) (4)(iv) (7-1-00 Ed. 562).

> When the motor vehicle emissions budget(s) used to satisfy the requirements of this section are established by an implementation plan submittal that has not yet been approved or disapproved by the EPA, the MPO and **DOT's conformity determination will be deemed to be a statement that the MPO and DOT are not aware of any information that would indicate that emissions consistent with the motor vehicle emissions budget will cause or contribute to any new violation of any standard; or delay timely attainment of any standard or any required interim emissions reductions or other milestones**. (Emphasis added.)

40 C.F.R. § 93.118(e) (6) (7-1-00 Ed. 562). When a submitted SIP is found inadequate by the EPA, the State withdraws it or the Ninth Circuit Court of Appeals vacates it, Federal Defendants have a decision to make regarding whether they are aware or not "of any information that would indicate that emissions consistent with the motor vehicle emissions budget will cause or contribute to any new violation of any standard; or delay timely attainment of any standard or any required interim emissions reductions or other milestones." At any time after they receive contrary information, they have a clear duty to make that information public and take appropriate

mitigating action regarding conformity determinations, approvals and funding.

Federal Defendants' preliminary adequacy determinations and motor vehicle emissions budgets disappeared when the SIP was vacated. Regarding the instant Complaint, the conformity determination was legally insufficient for the many reasons cited therein, this reason being just one of them.

(v) METROPOLITAN PLANNING ORGANIZATIONS (MPO'S)

Without prejudice, the instant Complaint does not name MPO's or in this instance the RTC. The Complaint names federal defendants. The instant complaint is limited to federal agency actions. Hall agrees that the TIP "identifies the projects to be carried out over the subsequent three-year period." That is about as useful as the TIP gets for the purposes of the instant Complaint.

(w) FED. R. CIV. P. 11 AND NINTH CIRCUIT RULE 36-3

Defendants have violated Fed. R. Civ. P. 11 and Ninth Circuit Rule 36-3 in making their arguments. Def. Mot. S. J. at 22-23, D. Federal Defendants set up a straw issue to knock down and then interposed a Hall v. EPA, No. 00-70257 and 00-71676 (9th Cir.) Memorandum clearly labeled "Not for Publication," "This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3." There is no evidence of a NC Rule 36-4 request for publication. The Memorandum involves the EPA as the sole Defendant. The EPA is not a party herein. The Memorandum involves Part 70, Title V issues that are not issues herein. There are no grounds for citing the Memorandum where no published decision was reached. The acts alleged by Federal Defendants regarding Plaintiff Hall such as "[t]o the extent Mr. Hall is attempting to argue…" did not happen. Def. Mot. S. J. 22. No permission was granted to publish the Memorandum. Federal Defendants did not reference any citation to law that permitted them to publish the Memorandum. The documents were interposed simply to further complicate the case while prejudicing Plaintiff Hall to the maximum extent possible.

VIII. SUMMARY

See, Pl. Cr. Mot. S. J. (#7) 2-4. The Court made the following statement in its October 8,

2003 Order re: "[t]he party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view all facts and draw all inferences in the light most favorable to the responding party." This is a judicial review action where the initial burden is on the Federal Defendants to file the certified administrative record ("AR") in good faith. That has not happened and for that reason alone, the burden has not yet shifted to Plaintiff Hall. Plaintiff cannot prove a negative particularly where Federal Defendants' duty to certify and file the AR is evaded.

Summary judgment against a plaintiff is not favored where issues of intent, negligence, causation and misrepresentation are involved as they are in this action. This is an action where there are allegations of "misleading" abound. There is a total lack of federal agency NEPA, CAA and APA public involvement and public notice evidence in the AR. At the time the Court's October 8, 2003 Order was filed, Federal Defendants held on to the entire AR to Hall's prejudice. Judicial reviews are the place to decide cases that involve a combination of facts and law with one exception, the obvious fraud that abounds herein.

The burden in judicial review lies squarely with the Federal Defendants to produce all of the certified documents a litigant would ordinarily be entitled to have through a discovery process. Plaintiff Hall alleged what he believed was missing in his Complaint. Plaintiff Hall could not have known whether the administrative record ("AR") would be produced by the Federal Defendants or not until it was certified, filed and he was served with a copy. The tactic of holding back on the AR pending the filing of an order on a motion to dismiss is and was highly prejudicial on judicial review. The Complaint alleges a combination of law and fact that cannot be separated without the substantial prejudice Plaintiff Hall received. To the extent that Defendants hid evidence pending a motion to dismiss, they unlawfully held on to a substantial, unfair advantage over Plaintiff Hall. Hall objects to the tactics Federal Defendants used.

Plaintiff is entitled to summary judgment because the Federal Defendants have failed to file an AR that includes any EPA approved state implementation plan ("SIP") or any National Environmental Policy Act ("NEPA") cumulative impact determination as a part of an environmental impact statement ("EIS") that is also missing.

The conformity determination is clearly misleading whether a submitted SIP was found inadequate, vacated, withdrawn or not. With that failure, there is no documentary evidence supporting Federal Defendants' SIP claims or argument.[7] Federal Defendants have failed to file conformity findings other than the March 3, 2003 document which is insufficient for any lawful purpose.

The Court and the Plaintiff must now deal with the AR on file. The AR burden is the Federal Defendants' burden on judicial review. Plaintiff Hall has no burden other than the Complaint until a legally sufficient AR is filed. Plaintiff Hall requests that the Court take judicial review of the legally insufficient AR and its misleading certification.

On the basis of the AR on file, the Court must find that there are no legally sufficient conformity determinations, no legally sufficient SIPs, no NEPA cumulative impact determinations, and no federal agency public notices before this Court. Federal Defendants cannot lawfully have it both ways. The AR is limited to the documents Defendants' have filed. They either took a chance, or they knew that Plaintiff Hall's claims of "misleading" would be proven if they filed the entire AR. Federal Defendants must now live with their choice.

On the basis of the AR alone, the Court has sufficient evidence to find that Plaintiff Hall has met his burden and find for summary judgment in his favor. The AR indicates that Federal Defendants did not and either cannot or refuse to produce responsive documents necessary to defend against Plaintiff Hall's Complaint. In the alternative, Plaintiff Hall requests that the Court order a hearing and also grant Plaintiff Hall the right all of the discovery allowed by the Fed. R. Civ. P. Any other decision is not reasonable or just as long as Federal Defendants' continue to hold on to the evidence that will prove the fraud Hall has alleged. In the second alternative, Federal Defendants could also admit the obvious. They forgot all about the public.

Respectfully submitted this 10th day of March, 2004 at Las Vegas, Nevada.

/s/ Robert W. Hall____________________
ROBERT W. HALL, Plaintiff, Pro Se

[7] Without prejudice to the actual text of the First Amended Complaint.

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Las Vegas, Nevada 89134
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

ROBERT W. HALL,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF TRANSPORTATION an Agency of the United States, NORMAN Y. MINETA, as Secretary of Transportation, WILLIAM H. KAPPUS, as Acting Administrator Nevada Division, Federal Highway Administration, RANDY J. BELLARD, as FHWA Planning and Research Engineer, and LESLIE T. ROGERS, as Regional Transit Administrator, Nevada Division, Federal Transit Administration,

Defendants

CV-S-03-0477-RLH-RJJ

ROBERT W. HALL'S DECLARATION IN SUPPORT OF PLAINTIFF's
CROSS-MOTION FOR SUMMARY JUDGMENT

I, Robert W. Hall, declare as follows:

1. I am pro se in this action.

2. I have searched the administrative record ("AR") of this action and I have not found evidence of federal agency National Environmental Policy Act ("NEPA") compliance.

3. I have searched the AR and have not found evidence of an Environmental Protection Agency "EPA" finally approved state implementation plan ("SIP") applicable to all of the issues

in the Complaint.

4. I have searched the AR and have not found evidence of Federal Defendants' answers to Hall's August 4, 2003 Plaintiff Robert W. Hall's Cross-Motion for Summary Judgment or in the Alternative for Summary Adjudication of Defenses Exhibits "C" – "E" letters and attachments.

5. I have searched the AR and have not found evidence that Defendants used current, NEPA compliant, cumulative impact data in producing their March 3, 2003 conformity determination or any other document.

6. I have searched the AR of this action and have not found evidence as to what EPA finally approved SIP Federal Defendants claim conformity with.

7. I have searched the AR of this action and have not found evidence showing how the Defendants conform to a 1979/81 SIP.

8. I have searched the AR of this action and have not found evidence of citations to statutes or regulations supporting the premise that the Federal Defendants may rely on an EPA approved 1979/81 SIP that is in a SIP gap, lapse and freeze.

9. I have searched the AR of this action and have not found evidence of citations to statutes or regulations or any other evidence regarding how a federal agency operating in the Las Vegas Valley serious non-attainment area for PM10 and CO can lawfully conform to a SIP that is so old PM10 there was no National Ambient Air Quality Standard for PM10 in 1979/81.

10. I have searched the AR of this action and have not found evidence that Federal Defendants ever considered the legal significance in relation to approvals and funding of the December 5, 2000 State of Nevada and Clark County withdrawal of all prior PM10 SIP submittals.

11. I have searched the AR of this action and have not found evidence that Federal Defendants rescinded their approval and rolled back their funding of Clark County highway projects listed in any Transportation Improvement Plan ("TIP") after the Ninth Circuit Court of Appeals vacated Clark County's May 11, 1999 SIP on August 29, 2001, and remanded the SIP submittal to the EPA.

12. I have searched the AR of this action and have not found evidence, statutory or regulatory support for the premise that Defendants may lawfully proceed to approve and fund highway projects in the Las Vegas Valley without an EPA approved SIP in twenty-two years or without an EPA finally approved SIP in the thirteen years since the 1990 amendments to the Clean Air Act ("CAA")

13. I have searched the AR of this action and have not found any evidence that Federal Defendants ever considered the impeaching impact of Exhibit H, the RTC memorandum statement signed by Fred Ohene, the second highest executive in the RTC, the Clark County agency responsible for the TIP, where Mr. Ohene admits by his statements that the submitted motor vehicle emissions budget data are not real, quantifiable or credible.

14. I have searched the AR of this action and have not found evidence that the Federal Defendants ever cancelled any conformity determination approval, or required the State of Nevada or Clark County to pay back federal highway funding after a submitted SIP was finally found to be inadequate by the EPA, was vacated by the Ninth Circuit Court of Appeals or was withdrawn by the State and/or Clark County.

15. I have searched the AR of this action and have not found evidence or citations to law that would indicate that the federal highway approvals and funding Federal Defendants have made have ever been anything other that an knowing and willful fraud upon the people of the

Las Vegas Valley, other local, state and federal agencies, and the United States.

16. I have searched the AR of this action and I believe that Federal Defendants' certification of the AR is yet another fraud because of the absence of any serious attempt to comply with the requirement to certify and file the actual AR of this action.

17. I have searched the AR of this action and have not found evidence of any conformity determinations other than the March 3, 2003 conformity determination.

18. I have searched the AR of this action and have not found evidence that the Federal Defendants ever seriously considered the health and safety issues of the air pollution their Las Vegas Valley approvals and funding cause.

19. I have searched the AR of this action and that search confirms my earlier suspicion that Federal Defendants have used locally prepared Regional Transportation Plan ("RTP") and Transportation Improvement Plan ("TIP") documents as a legally insufficient substitute for NEPA EIS and CAA SIP documents in order to evade public involvement, public oversight and all other federal Administrative Procedure Act ("APA") compliance requirements.

20. I have searched the AR of this action and have not found evidence that is subject to APA review, of federal agency public notices that clearly and unambiguously notice the public regarding the process Federal Defendants used in order to issue any conformity finding.

21. I hereby certify that Exhibits "A" and "B" attached to the First Amended Complaint (#2) are true and correct copies of a two page telefax transmittal of a March 3, 2003 Conformity Finding I received from the Federal Highway Administration on March 21, 2003. I hereby certify that Exhibits "C" through "E" are true and correct copies of similar letters with addenda attached that I sent to those listed on the cover of each letter with one exception. Page 3 was originally missing from Exhibit "C" and I have since transmitted that page to the court and to Mr. Rave

with a covering letter.

22. I hereby certify that Exhibit "F" – Consideration of Cumulative Impacts in EPA Review of NEPA Documents Exhibit "G" – National Environmental Policy Act (NEPA) are true and correct copies if Environmental Protection Agency Documents I pulled off the EPA Web site. I hereby certify that Exhibit "H" – Regional Transportation Commission of Southern Nevada, May 14, 2002, Agenda Item, Item 7, signed for Fred Ohene is a true and correct copy of the document served upon me by the Regional Transportation Commission, Clark County, Nevada. The above-named exhibits are attached to Plaintiff's August 4, 2003, Plaintiff Robert W. Hall's Cross-Motion for Summary Judgment or in the Alternative for Summary Adjudication of Defenses (#7).

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Las Vegas, Nevada, this 10th day of March, 2004.

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