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United States District Court,
C.D. California.

CITY OF SANTA CLARITA, Plaintiff,
v.
U.S. DEPARTMENT OF INTERIOR BOARD OF LAND APPEALS; Bureau of Land Management, Kathleen Clarke, in her official capacity as Director of Bureau of Land Management; Bureau of Land Management California State Office, Mike Pool, in his official capacity as California Director of the Bureau of Land Management; Bureau of Land Management, California Desert District Office; and Linda Hansen, in her official capacity as District Manager of the Bureau of Land Management's California Desert District Office, Defendants.
CEMEX, Inc., a Louisiana Corporation, Defendant-In-Intervention.

No. CV04-1572 DT (FMOx). | Feb. 8, 2006.

Attorneys and Law Firms

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

DICKRAN TEVRIZIAN, Judge.

I. *FINDINGS OF FACT*

A. *Nature of the Case*

***1** 1. This case presents Plaintiff City of Santa Clarita's ("City") challenge of the alleged failure by Federal Defendants U.S. Department of Interior Board of Land Appeals ("IBLA"), U.S. Bureau of Land Management ("BLM"), Kathleen Clarke, in her official capacity as Director of BLM, BLM California State Office, Mike Pool, in his official capacity as California Director of the BLM, BLM California Desert District Office, and Linda Hansen, in her official capacity as District Manager of the BLM's California Desert District Office (collectively, "Federal Defendants"), to comply with the requirements of various federal statutes in their review and approval of the Soledad Canyon Sand and Gravel Mining Project ("Project"), including the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4231 *et seq.*, the Clean Water Act, 33 U .S.C. §§ 1251 *et seq.*, the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.*, the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.*, the Materials Act of 1947 ("Materials Act"), 30 U.S.C. §§ 601 *et seq* ., and the Administrative Procedures Act ("APA"), 5 U.S.C. § 706.

2. CEMEX, Inc. ("CEMEX") was granted intervention as a defendant.

3. The alleged violations purportedly arise from the BLM's Final Environmental Impact Statement ("FEIS") and Record of Decision ("ROD") approving the Project. The City also challenges the IBLA's decision, on administrative appeal, upholding the validity of the FEIS and ROD.

B. *Other Actions*

4. This is the fourth legal challenge to the Project at issue. The City has appealed to the Ninth Circuit this Court's entry of a Consent Decree between CEMEX, the United States, and the County of Los Angeles settling various claims against the County ("Consent Decree Appeal"). The underlying action in this Court was *CEMEX v.. County of Los Angeles*, Case No. CV 02-747 DT. The City also has two other cases: (1) *City of Santa Clarita v. Los Angeles County Board of Supervisors, et al.*, CV 04-7355 DT, alleging various deficiencies in the County's environmental review of the Project under the California Environmental Quality Act ("CEQA Action"); and (2) *City of Santa Clarita v. U.S. Fish and Wildlife Service*, CV 02-697 DT, alleging various deficiencies in the actions and decisions taken by BLM and the U.S. Fish and Wildlife Service, relating to the Project made pursuant to the federal Endangered Species Act ("ESA Action"). The CEQA Action is stayed due to the Consent Decree appeal. This Court

decided Cross-Motions for Summary Judgment in the ESA Action in favor of Federal Defendants and CEMEX.

C. *Factual Summary*

1. *The Soledad Canyon Sand and Gravel Mining Project*

5. This action involves "split estate" lands adjacent to the Santa Clara River in the lower Soledad Canyon area of Los Angeles County. (Administrative Record ("AR") 5657.) The BLM manages the mineral estate at Soledad Canyon pursuant to its "multiple use" land-use authority under FLPMA. The BLM's land management plan for this area, the 1994 "South Coast Resource Management Plan," finalized in 1994, expressly provides that aggregate mining is an appropriate land-use activity in the Soledad Canyon area. (AR 1734.)

***2** 6. Gravel is a mineral reserved to the United States under the Stock Raising Homestead Act ("SRHA").*Watt v. Western Nuclear*, 462 U.S. 36, 1035 S.Ct. 2218, 76 L.Ed.2d 400 (1983). In the 1980's, a mining operator, Curtis Sand and Gravel ("Curtis"), had been mining gravel at the project site pursuant to a County-issued conditional use permit, without federal authorization. (AR 13108.) Based on the *Western Nuclear* decision, the United States sued Curtis for mineral trespass and related claims. In 1988, the trespass action resulted in a settlement between the United States and Curtis. (*Id.*) Under the terms of the 1988 settlement, the BLM agreed to open to competitive bidding a bulk sale of sand and gravel from the Soledad Canyon mineral estate.

7. In 1989, the BLM prepared an Environmental Assessment ("EA") in accordance with NEPA to determine whether a competitive sale of resources at the Soledad Canyon site would have significant environmental impacts. (AR 1685.) In issuing a Finding of No Significant Impact ("FONSI") (*see* AR 13107), the BLM committed to further NEPA analysis to determine the impacts of the successful bidder's mining and reclamation plan at a later date. (AR 1722, 13109.) Transit Mixed Concrete ("TMC") [1] and Curtis both submitted bids and, at $.50 per ton, TMC's bid prevailed. In March 1990, the BLM awarded TMC two consecutive contracts that collectively allow TMC to produce up to 56.1 million tons of sand and gravel over a 20-year period. (AR 1690.) The contracts are worth at least $28 million in royalties to the federal government. (*Id.*)

8. Because the contracts required CEMEX to comply with California's State Mining and Reclamation Act ("SMARA"), Cal. Pub. Res.Code § 2770, in 1991 CEMEX filed a proposed mining and reclamation plan with the County and submitted environmental data to the County that could serve as a foundation for both a draft environmental impact report ("EIR") under the California Environmental Quality Act ("CEQA"), and a draft environmental impact statement ("EIS") under NEPA. The BLM did not initiate a formal NEPA review process at that time, but submitted comments on several occasions concerning a preliminary draft EIR, in anticipation of joining with the County in a combined NEPA/CEQA environmental review.

9. When the draft EIR was almost completed in mid-1995, the BLM and CEMEX asked the County on more than one occasion to participate with the BLM in a joint EIS and EIR pursuant to NEPA and CEQA. The County refused all such requests. This unexpected development required the BLM to initiate a separate NEPA EIS process in October 1995. (AR 14183, 14241.)

10. The BLM's environmental review included a careful study of the Project and its impacts on plant and animal species. After conducting a biological assessment concerning potential effects of the project on listed species, the BLM initiated consultation with the U.S. Fish and Wildlife Service ("FWS") pursuant to Section 7 of the Endangered Species Act ("ESA") regarding potential effects on the unarmored threespine stickleback ("stickleback"), an endangered species of fish. The BLM's consultation culminated in a 1998 "no-jeopardy" Biological Opinion from the FWS concerning the stickleback.

***3** 11. In May 1999, BLM issued a Draft EIS for public comment. (AR 1.) In November 1999, BLM issued a supplement to the Draft EIS to reflect that it had adopted the "Reduced North Fines Storage Area" ("RNFSA") as its preferred alternative and to address new air quality information. (AR 1440.) Under this alternative, excess fines (fine grained particles of silt and clay not usable for construction aggregate) and other-mining overburden would only be stored on the north side of the ridge for the last five years of the contract period, as opposed to storing fines in that area throughout the life of the Project (AR 5658).

2. *The BLM's FEIS*

12. In June 2000, the BLM released its final EIS ("FEIS") for the Project. The FEIS evaluated all salient environmental effects of the Project. As the FEIS stated, the Project will involve mining of sand and gravel on a ridge which rises 700 feet in elevation above Soledad Canyon Road. (AR 1753-58.)

The mining would be conducted in two phases that could last up to ten years each. (AR 1771.) Between 1.4 to 2.15 million tons of product per year would be produced during the first phase of the Project, and approximately 4.2 million tons of product per year would be produced during the second phase of the Project.(*Id.*) The actual rate of excavation in any given year would depend on market demand as well as other factors, and could vary by twenty percent. (*Id.*)

13. As the FEIS explained, the Project, which is adjacent to the Santa Clara River, would use one existing production well and two proposed production wells to pump water out of subsurface water storage in the alluvial aquifer. (AR 1904.) Water resources were also anticipated to be developed in Area B. (AR 1741.) Water would be used for aggregate production, dust suppression, compaction of fines, ready-mixed production, and truck washing. (AR 1773.)

14. The FEIS also catalogued the environmental monitoring and mitigation measures that will reduce the Project's impacts on a myriad of environmental resources and values. (AR 21870-2205.) The FEIS states that the CEMEX project will be subject to reclamation requirements after CEMEX's contracts with BLM expire, and evaluates at length the far-ranging reclamation measures that CEMEX will undertake, including bonding to ensure compliance with reclamation requirements. (AR 1779-1817.)

15. The BLM's FEIS and ROD also acknowledged that the Project was potentially subject to a host of environmental regulation and permitting requirements implemented by other federal and state agencies. (AR 1723-24; 5561-62.) The FEIS noted that Los Angeles County ("the County") and the BLM were both responsible for analyzing and approving CEMEX's mining and reclamation plan, and that the County had chosen to conduct its environmental reviews pursuant to state law separately from BLM's NEPA review. (AR 1723.)

3. ***The BLM's Record of Decision***

16. In August 2000, the BLM issued a record of decision ("ROD") approving the Project subject to CEMEX's compliance with a myriad of mitigation, monitoring, and bonding requirements. (AR 5655.) The BLM also conditioned its approval on CEMEX consulting with and obtaining approval from regulatory agencies specified in Table 1 of the ROD, including the U.S. Army Corps of Engineers, the California State Water Quality Control Board, the South Coast Air Quality Management District, the County, and the FWS. (AR 5657, 5662.) The ROD specifically recognized the possibility that these agencies could impose additional mitigation measures on the Project. (AR 5657.)

4. ***The Interior Board of Land Appeals' Decision Affirming the ROD***

***4** 17. The City and 21 other parties filed administrative appeals of BLM's ROD to the IBLA raising NHPA, NEPA and ESA issues. After considering and finding no merit in each City NEPA objection, the IBLA concluded: "[The] record before us supports a finding that BLM has taken a hard look at the environmental consequences of the Project, reasonable alternatives (including the no-action alternative), and relevant mitigation measures. Accordingly, the challenge to BLM compliance with NEPA is properly rejected."(AR 33635.)

18. On January 8, 2002, the IBLA issued a decision rejecting the appeals and affirming the ROD. (*See*156 IBLA 144 (2002), AR 33619.)

19. In light of BLM's consultation with the FWS to address potential impacts to the arroyo toad not previously considered, the IBLA recognized that, after issuance of a biological opinion for the arroyo toad, BLM would apply any further mitigation measures found to be necessary to mitigate impacts to the arroyo toad and would determine whether any further NEPA analysis and decision were required. (AR 33643.)

5. ***New Information and Circumstances Arising After the ROD***

20. On November 8, 2000, after the FEIS and the ROD were issued, the State of California Department of Fish and Game ("CDFG") raised supplemental concerns about the Project's potential effects on various endangered or threatened species, including the Arroyo Toad, Red-legged Frog, Gnatcatcher, Vireo, Flycatcher and Spineflower. (AR 19718-25.) In light of this and the discovery of an Arroyo Toad tadpole on the Project site by the City's paid consultants, the BLM undertook a supplemental biological review of the Project's effects on the foregoing species and determined that the Project would have no effect on the Arroyo Toad, Red-legged Frog, Vireo and Flycatcher. (AR 19709.) It also determined that the Project "may affect, but is not likely to adversely affect" the Gnatcatcher and Spineflower and requested the FWS's concurrence in these conclusions. (AR 19709-10.)

21. On June 5, 2001, the FWS concurred with the BLM's determinations about the effects of the Project on all of the foregoing species, except for the Arroyo Toad. (AR 26942-44.) It withheld any conclusions with regard to the Arroyo Toad pending the BLM's evaluation of the new information that came to light by virtue of the City's discovery of the tadpole. (AR 26943.) On August 6, 2001, after considering the City's supplemental input, the BLM prepared and submitted to the FWS a supplement to the Biological Assessment (AR 27466-93) and requested reinitiation of consultation under Section 7 of the ESA concerning the Arroyo Toad. (AR 19860-20097.)

22. On October 25, 2001, the FWS issued a biological opinion examining the potential effects of the Project on the Arroyo Toad. It concluded that the BLM's "proposed approval of the Transit Mixed Concrete's mining project is not likely to jeopardize the continued existence of the species."(AR 20155.)

6. *The BLM's Determination of NEPA Adequacy*

***5** 23. In accordance with its policy directives, the BLM on March 3, 2004 prepared a Determination of Land Use Plan Conformance and NEPA Adequacy ("DNA") to determine whether new information and circumstances relating to the Project required that the BLM prepare a supplemental NEPA analysis. (AR 34674.) Specifically, the FWS had issued a Supplemental Biological Opinion ("SBO") and non-jeopardy opinion in October 2001 which imposed additional mitigation measures on the Project. In addition, the BLM, CEMEX and the County of Los Angeles had agreed in a Consent Decree-entered by this Court in *CEMEX, Inc. v. County of Los Angeles*, CV 02-747 DT (FMOx)-to make changes to the project to reflect County-imposed mitigation conditions, including eliminating entirely the north fines storage area from CEMEX's mining plan and limiting the number of trucks to and from the project site during the a.m. and p.m. peak hours. (AR 34673.) The BLM concluded that the existing NEPA documentation fully covered the approved action inclusive of the new project conditions and additional mitigation imposed by the Consent Decree and the SBO, and that new information, circumstances, and conditions imposed by the SBO and the Consent Decree were not substantial changes nor significant new circumstances or information relevant to environmental concerns so that a supplemental EIS was not warranted. (AR.34686.)

II. *CONCLUSIONS OF LAW*

A. *Standard of Review*

1. *Standard of judicial review under the Administrative Procedure Act*

24. Judicial review on summary judgment of agency decisions involving the ESA and NEPA is governed by section 706 of the Administrative Procedure Act ("APA").5 U.S.C. § 706; *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of the Navy*, 898 F.2d 1410, 1414 (9th Cir.1990). Under Section 706, "[t]he question is not whether there is a genuine issue of material fact, but rather whether the agency action was arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence on the record taken as a whole."*Environment Now! v. Espy*, 877 F.Supp. 1397, 1421 (E.D.Cal.1994) (*citing Good Samaritan Hospital, Corvallis v. Mathews*, 609 F.2d 949, 951 (9th Cir.1979)). Agency decisions should be set aside "if the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."*Sierra Club v. Marsh*, 816 F.2d 1376, 1384 (9th Cir.1987).

25. Under the APA, a reviewing court's role is to "ask whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made."*Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir.2001). However, the court is not empowered to substitute its judgment for that of the agency.*Citizens to Preserve Overton Park. Inc. v. Volpe*, 401 U.S. 402, 416 (1971). As long as the agency decision was based on a consideration of relevant factors and there is no clear error of judgment, the reviewing court may not overturn the agency's action as arbitrary and capricious. *Id.* Reviewing courts are deferential to the agency's expertise where "resolution of this dispute involves primarily issues of fact."*Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377(1989). As the Ninth Circuit has recently made clear, "[p]articularly when the analysis 'requires a high level of technical expertise,' this Court 'must defer to the informed discretion of the responsible federal agencies.' " *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 954 (9th Cir.2003) (citation omitted).

2. *NEPA Standard of Review*

***6** 26. NEPA requires federal agencies to consider the consequences of their actions on the environment. NEPA's mandate to federal agencies is "essentially procedural ....

It is to insure a fully informed and well considered decision ..."*Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 558 (1978) (internal citations omitted)."NEPA itself does not mandate particular results, but simply prescribes the necessary process."*Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989).

27. Under NEPA, an EIS is required for "major federal actions significantly affecting the quality of the human environment."42 U.S.C. § 4332(c)."A properly prepared EIS ensures that federal agencies have sufficiently detailed information to decide whether to proceed with an action in light of potential environmental consequences ...." *Oregon Environmental Counsel v. Kunzman,* 817 F.2d 484, 492 (9th Cir.1986). Not every federal action or proposal requires preparation of an EIS. Where the environmental impacts of an action are less than significant, an agency may comply with NEPA through preparation of an environmental assessment ("EA") and a finding of no significant impact ("FONSI").*See*40 C.F.R. §§ 1501.3; 1501.4(c), (e); and 1508.9.

28. When the adequacy of an EIS is challenged in court, the relevant inquiry is whether the EIS takes a "hard look" at all potentially significant environmental effects. A court may not substitute its judgment for that of the Federal agency: "The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken."*Kleppe v. Sierra Club,* 427 U.S. 390, 410 n. 21, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976) (citation omitted).

29. In this Circuit, a challenge to an EIS's evaluation of environmental effects based on the agency's failure to take a "hard look" is subject to deferential review, with due consideration given to the agency's expertise.*Salmon River Concerned Citizens v. Robertson,* 32 F.3d 1346 (9th Cir.1994). A court should apply a "rule of reason" and determine only whether the EIS "contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences."*Half Moon Bay Fishermans' Ass'n v. Carlucci,* 857 F.2d 505, 508 (9th Cir.1988).

B. ***The Defendants are Entitled to Summary Judgment on the City's First Claim for Relief Regarding Section 401 of the Clean Water Act***

30. Section 401 of the federal Clean Water Act ("CWA") requires that "[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in a discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State ...." 33 U.S.C. § 1341(a)(1). The certification must state that any discharges will comply with the applicable effluent limitations and water quality standards. *Id.* Finally, "no license or permit shall be granted until the certification required by this section has been obtained ...." *Id.*

***7** 31. Section 401 has no applicability to this case at the present time because the BLM has not, by its mineral materials contracts or its ROD, issued a "federal license" or "permit" to CEMEX authorizing CEMEX to conduct an activity that may result in a discharge into waters of the U.S. The contracts and ROD expressly withhold authorization from CEMEX to commence operations on its mining and reclamation plan until CEMEX consults with and obtains Section 401 water quality certification from the Regional Water Quality Control Board ("RWQCB"), if found to be required for the Project. (AR 5661-62; AR 5696, 5702.)

32. Here, the Project will be reviewed by the Army Corps of Engineers ("Corps") to determine whether a Section 404 permit is required: "If the streams are found to be jurisdictional waters, TMC will be required to obtain a permit from the [Corps] for the discharge of 'dredged or fill materials' into these streams."(AR 2082.) If so, then prior to issuance of the Section 404 permit (not the ROD), Section 401 certification from the RWQCB will be required.

33. Plaintiff has failed to establish a violation of CWA § 401. Because the BLM's contracts and the ROD do not authorize CEMEX to conduct any activities that may result in a discharge into waters of the U.S., and the ROD itself is not a license or permit that authorizes such discharge. As such, Defendants are entitled to summary judgment as to the First Claim as a matter of law.

C. ***Defendants are Entitled to Summary Judgment on the City's Fourth and Eighth Claims***

1. ***The City's Challenges to the EA are Barred by the APA's Six Year Statute of Limitations and Laches***

34. The Fourth and Eighth claims are barred by the statute of limitations. The EA-related challenges in the Fourth and Eighth Claims are subject to the general six-year statute of

limitations applicable to actions brought pursuant to the APA. *Sierra Club v. Penfold,* 857 F.2d 1307, 1315 (9th Cir.1988) (holding that six-year statute of limitations under 28 U.S.C. § 2401(a) applies to NEPA challenges brought under the APA). When the BLM issued its EA, FONSI, and Decision Record in 1989, the City was on notice that the environmental analysis for the proposed sale would utilize an EA, with an EIS being prepared for any subsequent, specific project. (AR 13107-20.) The City had six years from that time to bring an action challenging the adequacy of the EA, FONSI or Decision Record (i.e., 1995). Instead, it waited fifteen years to raise these challenges. The City raised these identical claims in its 2000 appeal of the ROD to the IBLA, which concluded that these claims were untimely: "To the extent that appellants challenge the scope of the EIS on the ground that BLM improperly segmented the scope of the Project when it failed to prepare an EIS at the time the mineral material sale contracts were entered into, this objection is properly dismissed as untimely."(AR 33627.)

35. Even if the City's Fourth and Eighth Claims were not time-barred, they certainly would be precluded under laches. The first element of laches is delay: "the relevant delay is the period from when the plaintiff knew (or should have known) of the allegedly infringing conduct, until the initiation of the lawsuit in which the defendant seeks to counterpose the laches defense."*Danjaq LLC v.. Sony Corp.,* 263 F.3d 942, 952 (9th Cir.2001). Under the second element, the court must look "to the cause of the delay"; and where there is no sufficient justification, the delay is unreasonable. *Id.* at 954-55.The third element is that the plaintiff must be prejudiced by the plaintiff's delay. *Id.* at 955.A lawsuit filed under NEPA may be barred by laches if there is (a) a lack of diligence by the party against whom the defense is asserted, and (b) prejudice to the party asserting the defense.*Coalition for Canyon Preservation v. Bowers,* 632 F.2d 774, 779 (9th Cir.1980).

***8** 36. The City unreasonably delayed bringing the Fourth and Eighth Claims. The Project has undergone many years of environmental review since the 1989 EA, much of it in response to the City, yet the City waited until 2000-after completion of the FEIS and issuance of the ROD-to raise these challenges. It then waited until nearly three years after the IBLA's 2002 decision and two years after filing its ESA Action to file this lawsuit. The City does not offer any explanation as to why these stale claims should be considered fifteen years after the EA was prepared. CEMEX and the BLM would be prejudiced if the Court allowed the City to prosecute these claims, given that since 1989, extensive environmental studies have been undertaken, and the FEIS and ROD were issued in 2000 (AR 1-1439), all based on the EA and resulting Federal Contracts.

37. Thus, on statute of limitations and laches grounds alone, summary judgment in favor of Defendants is warranted.

2. *The City's EA Challenges Fail on Substantive Grounds*

38. The City's EA challenge also fails on substantive grounds, because the scope of the 1989 EA was properly limited to the analysis of foreseeable impacts from the competitive sale. In this case, the BLM reasonably concluded that additional environmental analysis of the proposed mining plan could not have been completed at the time of the competitive sale because the successful bidder was not yet known, and therefore, no mining plan existed on which to conduct an analysis. *Inland Empire Public Lands Council v. U.S. Forest Serv.,* 88 F.3d 754, 764 (9th Cir.1996) ("NEPA does not require the government to do the impractical").

The mineral materials sale was independent from any specific Project proposal. The mineral materials sale did not obligate the BLM to accept any specific bid, let alone CEMEX's bid, and only when a bid was accepted, and a specific project was proposed, would that project be subject to a separate, independent set of permitting approvals. (AR 13109.) The EA specifically stated that "the exact mining and processing methods will be detailed in a mining plan which would be submitted by the permittee, subject to the approval of the authorized officer."(AR 13109.)

39. Moreover, it is not true that the deferral of additional environmental analysis foreclosed the BLM's opportunity to consider reasonable alternatives to the proposed action. The FEIS shows that the BLM's alternatives analysis was more than adequate. Specifically, the FEIS recognized that the Proposed Action would have more impact than the No Action Alternative with respect to water resources, noise, public services, site-specific air emissions, biota, visual resources and traffic (AR 1819), but the FEIS also concluded that the No Action Alternative would result in greater impacts with respect to geotechnical resources, flooding, and water quality. The City's only criticism of the No Action Alternative is that it did not recognize the possibility that a local, state or federal government may at some point act to reclaim the Project site. As the IBLA properly decided, however, the City's "speculation that reclamation may be accomplished by

other actions does not render the discussion of the no-action alternative unreasonable."(AR 33628.)

***9** 40. Further, the City ignores the history of the *Curtis* litigation. The proposed mineral sale analyzed in the EA was a result of a court-ordered settlement in the *Curtis* Action, directing that a competitive sale of mineral materials be conducted. (AR 3355; 12955-63.) The NEPA regulations clarify that when an agency is under a court order or legislative command to act, the "no action" alternative must be considered, but serves the purpose of "providing a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives."Forty Most Asked Questions Concerning CEQ's Nat'l Environmental Policy Act Regs., 48 Fed.Reg. At 18027.

41. Similarly, the City has failed to carry its burden of showing that the BLM's consideration of the Reduced Quantity Mining Concept Alternative ("RQMCA") was improperly "constrained" by the 1990 mining contracts. While noting that the 1990 contracts had been issued for the sale of 56.1 million tons of product, the BLM explained that its selection of the RNFSA over the RQMCA was based on environmental, economic and technical factors. (AR 1829.) Specifically, the BLM recognized that a lesser quantity of material mined would not be economically feasible given the similar overhead and operating costs for both the RQMCA and RNFSA, and would leave a substantial quantity of future reserves in place despite growing demand in the greater Los Angeles area for aggregate product. (AR 1830-31.) Moreover, while the RQMCA would result in less environmental impacts than the Proposed Action with regard to visual resources, air quality and traffic, the FEIS noted that other impacts would remain essentially the same as in the Proposed Action. (AR 1823.)

42. Thus, even if this Court were to reach the merits of the City's claims, the City has not shown that the BLM improperly piecemealed the Project's environmental review. As such, summary judgment as to the Fourth and Eighth Claims in favor of Defendants is warranted on these additional bases.

D. *Defendants Are Entitled to Summary Judgment on the City's Second, Third, Ninth, Tenth, Eleventh and Twelfth Claims for Relief*

43. The City's Second, Third, Ninth, Tenth, Eleventh, and Twelfth Claims have no substantive merit. It is clear from the record that the BLM has taken a "hard look" at all environmental consequences. More specifically, the BLM thoroughly examined water resources, water quality, air quality, biological resources, economic effects, local general plans, and cumulative impacts. It is clear that the EIS "contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences."*Half Moon Bay Fishermans' Ass'n,* 857 F.2d at 508.Given such a review, contrary to the City's implications, the Court may not interject itself within the area of discretion of the agency as to the action taken. Thus, the City is not entitled to summary judgment on its claims regarding the adequacy of the FEIS.

1. The BLM took a hard look at the Project's impacts on water resources

***10** 44. In the FEIS, the BLM observed that the primary sources of water for, the Project would be subsurface groundwater of the alluvial aquifer (i.e., the underflow of the Santa Clara River), which is fed by annual precipitation and runoff from the higher mountainous terrain of the Acton Valley subunit. (AR 1895, 1904.) The Santa Clara River in the western portion of the Acton Valley subunit is a narrow alluvium filled channel underlain by impermeable bedrock. (*Id.*) The alluvium filled channel creates underground storage capacity and facilitates groundwater pumping. (*Id.*) The BLM noted that based on a very conservative estimate of water availability in the Acton Valley subunit by a registered professional hydrologist, further groundwater development through "additional high production wells" in the vicinity of the Project site is "feasible," suggesting that even with such additional new wells, the Acton Basin has neither been in nor is anticipated to be in an overdraft situation. (AR 1888-90.)

45. With regard to existing and historic conditions, the BLM's FEIS thoroughly examined available data showing the annual and seasonal fluctuations in precipitation, water availability and past river flows in the vicinity of the Project (AR 1884-85, 1895-1900), the seasonal wetting/drying cycle of the surface flows of the Santa Clara River downstream of the Old Lang Gaging Station (AR 1895-96) and the relationship between surface flows and groundwater storage in the vicinity of the Project. (AR 1904-09.) This data revealed that there has been "a continuously high level of subsurface flow throughout the entire period of record."(AR 1895-97.) The FEIS also applied a "hard look" at the potential effects of CEMEX's water withdrawals on downstream surface and subsurface flows during both the wet and dry seasons. The BLM determined that "there should be no significant reduction of available water in storage in the alluvial aquifer during

the wet season."(AR 1907.) It also concluded that CEMEX's "water use during the dry portion of an average rainfall year will not exceed the storage capacity of the aquifer," and, therefore, "sufficient storage is available to maintain downstream surface flows."(AR 1909.)

46. The City's claims that the Project's water usage would exceed the purported 25% threshold needed for the stickleback is incorrect. The 25% figure is an action level, not a threshold. The 25% action level for the stickleback that the City relies upon has no relation to the 9% and 16% figures. The 25% action level compares monthly changes in the flow rate from one month to the next at the Soledad Canyon Campground monitoring station upstream of the Project site, and at the permanently flowing stickleback habitat downstream of the Project site. (AR 14903.) When there is a 25% or greater change in flow rate at the downstream habitat that is statistically different from the change in flow rate upstream at Soledad Campground, the action level will be triggered. (*Id.*) The 9% and 16% estimates in the FEIS, in contrast, relate to the approximate percentage reductions in surface flow at Old Lang Gaging Station during Phase 1 and Phase 2 Project operations. (AR 1907.) Also, the City's arguments challenging the accuracy of the 9% and 16% estimates are wrong because these estimates only were calculated for the wet season (November through April), and the first three months of the dry season (May through July). (AR 1907-08.) For the dry season months, a different analysis was conducted which assessed the relationship between water withdrawal and aquifer storage (not downstream surface flow). (AR 1908.)

***11** 47. To minimize potential impacts of the Project on local sensitive ecological habitats, the BLM required CEMEX to implement a monitoring program and a habitat protection program. The former consists of establishing four monitoring wells to assess water levels of the Santa Clara River underflow during the life of the Project, which monitor surface flow of the Santa Clara River during the life of the Project at various locations in the vicinity of the site. (AR 1911.) The habitat protection plan contains "actions levels" that will "trigger adjustments to mining operations to reduce Project water consumption to avoid significant degradation of ecologically sensitive habitats attributable to the Project."(*Id.*)

48. The City's argument that a significant "loophole" renders the supplemental monitoring measures ineffective, because MW6 may be placed at the Old Lang Gaging Station where the surface flow is perennial despite the fact that other portions of the river are seasonally dry, is without merit because the City's objections are grounded solely on its erroneous assumption that MW6 will be placed at the Old Lang Gaging Station. The SBO specifies that MW6 should be placed in the vicinity of monitoring stations P2 and P3, which are upstream of the Old Lang Gaging Station. (AR 20142.) That vicinity is "seasonally dry." (AR 21268.) Thus, the City's "loophole" claim is belied by the record. Also, because the seasonal drying of the River begins at the Old Lang Gaging Station and proceeds upstream, the placement of MW6 upstream of the Old Lang Gaging Station ensures that action levels will be triggered if groundwater levels are dropping too quickly. Pumping will be restricted when the relationship between groundwater levels at MW4 and MW6 indicate that pumping effects may become detrimental to riparian and aquatic habitat downstream of Pole Canyon Fault near well P2. (AR 20143.) Furthermore, other action levels require reduction or cessation of pumping to protect stickleback habitat regardless of whether there is surface flow at MW6. (AR 20139.)

49. The City also fails to explain how Condition 9aa of the Project Conditions rendered BLM's analysis in the FEIS arbitrary. The Project Conditions on which the City relies were not entered until June 22, 2004-four years after the date of the ROD. (AR 34694 .) Condition 9aa, therefore, is post-decisional and has no bearing on whether the FEIS or ROD were reasonable when they were issued on June 2, 2000 and August 1, 2000, respectively.

50. Nonetheless, Condition 9aa does not allow an "acceleration" of the Project. The FEIS specifically contemplated that the actual production volumes of the Project could vary on an annual basis by up to 20% due to market conditions and other factors. (AR 2293.) Condition 9aa simply placed a ceiling on that variability by ensuring that no one year would yield a production volume of more than 5 million tons, despite the absence of any such limitation in the contracts.

***12** 51. Further, the City's interpretation of Condition 9aa as an "acceleration clause" is foreclosed by the preclusive effect of the decision in *CEMEX, Inc v. County of Los Angeles*, Case No. CV-02-747 DT, where this Court rejected the same argument by the City.

2. The BLM took a hard look at the Project's impacts on biological resources

52. Because the City fails to cite any record evidence in support of its argument that BLM did not take a hard look at the Project's impacts on biological resources, the City's claim is deemed waived.

53. Nonetheless, the BLM's analysis of impacts to biological resources in the FEIS was more than adequate. The FEIS catalogued the endangered, threatened and sensitive plant species and found that some could have potential to occur at the Project site and neighboring sites but concluded that "[n]o federal- or state-listed species were observed on the Project site."(AR 2060-62, 2059.) It also catalogued the endangered, threatened and sensitive wildlife species having potential to occur on the Project site or in neighboring offsite habitats. (AR 2065-68.)

54. Because of the potential for impact from the Project on the Stickleback, the BLM prepared a biological assessment (AR 10736-10970), consulted with the FWS, and incorporated the results of the FWS non-jeopardy Biological Opinion for the Stickleback into the BLM's ROD. (AR 5661.) The FEIS reasonably concluded that the Habitat Protection Plan and action levels will mitigate the potential impacts on the Stickleback to levels that are less than significant. (AR 2083-84.)

55. In the FEIS, the BLM also examined the potential effects of the Project on the endangered Arroyo Toad. (AR 2071.) Based on surveys of the area and known habitat for the toad, the FEIS reasonably found that the "project site has no potential habitat for this species."(*Id.*)

3. The BLM took a hard look at the Project's impacts on air resources

56. In a 45-page analysis, the FEIS examined in great detail the potential impacts of project construction and operation on air quality, as well as mitigation measures to protect air quality. (AR 1996-2041). In analyzing the air quality impacts of the Project, the BLM reasonably considered both the impacts of construction of the facilities (AR 2010-13) and of operating the plant (AR 2014-23.) The BLM's NEPA analysis also closely scrutinized the likely effects of CEMEX's proposed air quality mitigation measures.

57. The BLM's air quality impact analysis also examined "dispersion modeling" to determine the potential for significant impacts on offsite residential areas. (AR 2035.) The modeling reasonably predicts that national ambient air quality standards ("NAAQS") will not be exceeded at or beyond the Project boundaries during either of the Project's operational phases. (AR 2036.)

58. The City's argument that the BLM misapplied an urban air model in a rural setting has no merit. The City erroneously asserts that the BLM's decision to rely on an urban model was arbitrary because the EPA questioned its use in comments on the Draft EIS. Contrary to the City's assertions, the BLM considered and responded to the EPA's comments and the EPA was ultimately satisfied with the BLM's analysis. (AR 3509, 3513, 16198.) The BLM articulated several reasons why the urban model was used, including: (1) it was, and still is, standard South Coast Air Quality Management District ("SCAQMD") practice to use the urban model; (2) the urban model was chosen in part based on communications with staff of the California Air Resources Board; (3) the urban model was determined to be more appropriate given the Project site's topography and terrain; and (4) EPA's *"Suggested Guidance for Selecting Models for Urban v. Rural Atmospheres"* (Irwin, 1978) referred to in 40 C .F.R. Part 51, Appx. W, § 8.3.2, supports the use of the urban model because of the Project site's proximity to urban areas. (AR 3356.) The BLM explained that while an urban classification was not a "perfect fit," it was nonetheless more representative of the Project site than a rural classification. (AR 3356.)

***13** 59. The City's argument that BLM understated air impacts by underestimating aggregate production levels is also without merit. The air impacts analysis was based on the assumption that the Project would produce between 1.4 and 2.15 million tons of aggregate per year for Phase 1 and 4.2 million tons of aggregate per year for Phase 2. (AR 1722.) But the FEIS also recognized that actual production volumes could change on an annual basis because of market conditions and other factors. (AR 2293.) The City's argument focuses only on the fact that production may at times exceed the forecasted rate, but ignores evidence in the record showing that production at times is also expected to be lower than the forecasted rate. Moreover, the FEIS clearly anticipated that actual production could vary with market demand, and that market demand may vary by 20%. (AR 1733.).

4. The BLM adequately analyzed the Project's impacts on the local economy

60. NEPA requires an agency to discuss the direct and indirect effects of a proposed action and the significance thereof, including impacts on the local economy. 40 C.F.R. § 1508.8; 40 C.F.R. § 1502.16(a) and (b).

61. The BLM's NEPA analysis of the Project reflects careful and detailed scrutiny of the potential economic effects of the Project. See 40 C.F.R. § 1508.8. With respect to the direct economic interests involved in the mineral materials sale, the BLM recognized that, through the contracts between the United States and CEMEX, CEMEX has agreed

> to pay the Federal Government $28,000,000 in royalties ... 76 percent of these royalties ($21,280,000) will go to a Federal Land and Water Reclamation Fund for projects such as enhancement of wildlife habitats/ preserves and recreation. In addition, 4 percent of the royalties will go to the State of California, and half of those receipts ($560,000) will be refunded to [Los Angeles] County.

(AR 1690.)

62. The FEIS also reasonably considered the economic significance of the Project to Southern California. As the BLM recognized:

> [D]ue to the rapid rate of growth and urban expansion within the South Coast planning area, there is also an increasing demand for sand and gravel for use as construction aggregate material. As existing sources are depleted and other potential supply areas are covered by development, new sources will be needed.

(AR 1743.) The BLM's conclusions regarding limited supplies of aggregates were based on official reports published by the State of California's Division of Mines and Geology ("CDMG"), which is tasked with identifying key aggregate resources, market demand, and related issues. (AR 1690.) The reliance by the BLM on this expert agency's data was reasonable.

63. The BLM's FEIS also reasonably evaluates the economic significance of the Project to the greater Los Angeles region. As the FEIS recognizes, the availability of the Soledad Canyon reserves for mining is of great economic importance to the region.

***14** 64. While the BLM has an obligation to consider economic impacts, it was not required to conduct the extensive analysis that the City suggests. Nonetheless, the City's insistence that the BLM inaccurately forecasted aggregate reserves is without merit given the BLM's reliance on detailed information from the State's expert agency, the CDMG. (AR 1726-34.)

65. The City's analysis of the Project's impacts on the local economy is also without merit. First, the City bases its claims on the Rose Report, which was produced by the City's consultants after the date of the ROD and attached as an exhibit to the City's Statement of Reasons before the IBLA. The Report, therefore, is post-decisional and not relevant to this Court's review of the FEIS or ROD. Second, other evidence before the IBLA showed that the Rose Report's findings were based on flawed calculations and methodology. For example, with regard to traffic costs, the estimate of social costs is not supported by any reference to traffic models, as would normally be used to assess impacts on a freeway's travel flows and travel times. (AR 19082.) With regard to housing prices, the Rose Report gives no explanation or justification for its estimated price impacts, relying instead on case studies that apply poorly, if at all, to the case of Soledad Canyon. (AR 19084-85.)

66. The City's claims regarding aggregate "resources" versus "reserves" is also without merit. The City properly identifies the difference between the two terms: "resources" include all theoretically available minerals, while "reserves" are those resources that are authorized for extraction. However, its discussion of available resources is not germane, given that many resources in the region cannot be mined due to environmental or other restrictions. (AR 19046.) The City's discussion of reserves is also wrong, as its claim of a "positive" forecast for reserves in the region is in direct contradiction of the State's own expert agency, the CDMG, on which the BLM relied in the FEIS. (AR 1726-34.)

5. The BLM took a hard look at the Project's inconsistency with local general plans

67. Regulations implementing NEPA mandate that every EIS shall discuss any inconsistencies between the proposed action and an approved state or local plan or law. 40 C.F.R. § 1506.2(d). If an inconsistency exists between the proposed action and a local plan, the agency is required to describe the extent to which it would reconcile the inconsistency. (*Id.*)

68. The BLM reasonably examined the Project for possible conflicts with Federal land use planning and reasonably concluded that there were no such conflicts. Pursuant to its statutory obligations, the BLM identified the areas within the South Coast Planning Area that possess significant mineral resources. As the BLM explained in the FEIS, the proposed CEMEX Project site is designated in the South Coast Resource Management Plan ("SCRMP") as within an area of BLM split-estate acreage "with high potential for sand and gravel resources including a major known deposit of sand and gravel in the Soledad Canyon area."(AR 1744.) The FEIS also recognizes that the Project site is a "potential production site" which is "available for mineral leasing" under the terms of the SCRMP. (*Id.*)

***15** 69. The BLM's FEIS and ROD also examined the Project for possible conflicts with State land use planning and reasonably concluded that there were no such conflicts. As the BLM recognized, the "land use" of the proposed Project site as an aggregate mining facility "is consistent with State and County plans."(AR 5668.)

70. Finally, the BLM's review reasonably examined potential conflicts between the Project and local land use plans. (AR 1746.) "Local" in this instance meant the County-level, because the Project is located in an unincorporated area of Los Angeles County. The BLM recognized that the Project was consistent with County land-use plans because the County has zoned the area in which the Project will be located as "M-2" for "heavy manufacturing." (*Id.*) As the BLM correctly found, "mineral extraction is a permitted use for sites zoned M-2."(AR 5668.)

71. The City argues that the Project is inconsistent with the 1990 update to the Area Plan because that plan allowed for the consideration of a mobile home park in Bee Canyon. This argument is without merit. As the FEIS explains, the same Area Plan contemplates the location of mobile home parks in residential areas where permitted by zoning, and specifically excludes them from industrial areas such as the Project site, which is zoned M-2 for "heavy manufacturing." (AR 1749.)

72. The City's arguments that the Project is incompatible with the City's General Plan are also meritless-the Project site is outside the City's jurisdiction and therefore clearly beyond the scope of the City's plan.(*Id.*) After completion of its General Plan in 1991, the City attempted to expand its sphere of influence to include BLM lands and areas zoned M-2 by the County, but the Local Agency Formation Committee denied the request. (AR 1750.) As determined by the IBLA, the record contradicts the City's assertions that the BLM failed to consider the consistency of the Project with the State and local plans and laws, or that the BLM ignored the City's; concerns. (AR 33626.)

6. The BLM took a hard look at the Project's cumulative impacts

73. Under NEPA, a cumulative impact:

> [I]s the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7.

74. The Ninth Circuit has held that an agency's cumulative impacts inquiry does not require perfection or boundless speculation, but instead "a reasonably thorough discussion of the significant aspects of the probable environmental consequences."*Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343 (9th Cir.1996). Here, the BLM's "hard look" at the potential effects of the Project in light of potential cumulative impacts from other projects and activities planned for the region easily satisfies this requirement. (AR 2173-84.)

***16** 75. In addition to the proposed Project and other potential mining projects in the region, the BLM reasonably considered a "substantial number of other proposed projects, primarily residential and commercial" that, for the most part would be located "northwest and northeast of the Project site."In the FEIS, the BLM analyzed at length the cumulative impacts on geotechnical concerns, water resources, flood, water quality, noise, public services, air quality, and biota. (AR 2176-84.) The BLM's cumulative impacts analysis also included a careful study of the cumulative effects on cultural resources, visual qualities, traffic, land-use, and public health and safety. (AR 2126, 28, 31-32, 82-86), and discussed how the Project's contribution to these cumulative effects would be mitigated. (AR 2187-2205.)

76. The City argues that the FEIS contains inadequate discussion of cumulative impacts to water resources flowing from the proposed Project and the 240 million ton CalMat project proposed for a site adjacent to the Project location, and that it contains no analysis at all of cumulative impacts to air quality, traffic, noise or biota. These allegations are contrary to the evidence in the record. The FEIS clearly acknowledged that the addition of the proposed CalMat extractions could result in significant cumulative impacts on habitat for endangered stickleback. (AR 2177.) However, CEMEX has committed to a Water Shortage Contingency Plan and water mitigation measures which will prevent any decrease in surface flow that could place the stickleback in jeopardy. Moreover, given its earlier water permit application, CEMEX would have a priority of water rights over CalMat and any other potential future water rights applicant. (AR 2177-78.) Finally, contrary to the City's assertions, the BLM's cumulative impacts analysis of the CalMat project was not limited to water resource impacts. The FEIS fully addressed impacts arising out of the cumulative operation of the two mining projects with respect to air quality, biota, noise and traffic in combination with the impacts of all other cumulative projects listed in Table 3.1.15-1. (AR 2174.)

77. The City's attack on the FEIS' analysis of cumulative impacts to air quality and public health are also contrary to record evidence. Valley Fever is caused by a fungus which occurs primarily four to twelve inches below the surface of undisturbed desert soil. (AR 2166.) These fungal spores become airborne when the soil is disturbed by wind, construction, farming and other activities. (*Id.*) The FEIS noted, however, that over the life of the Project the average annual surface area disturbance would be in the range of fifteen acres, which is significantly less than the projections for surface disturbance corresponding to individual area-wide residential developments. (AR 2170.) With respect to the increased N02 and PM-10 emissions, the FEIS duly acknowledged that cumulative impacts are likely to be significant and that the proposed mitigation measures would not fully reduce the overall air quality burden. (AR 2181.) It is well established that a plaintiff cannot find relief in the form of a NEPA claim where, as here, the agency has made a reasonably thorough analysis of a proposed project's cumulative impacts. *See Inland Empire Pub. Lands Council,* 88 F.3d at 758 ("NEPA's goal is satisfied once ... information is properly disclosed; thus, NEPA exists to ensure a process, not to ensure any result.").

***17** 78. Finally, the City's claim that the BLM should have analyzed cumulative impacts resulting from the potential "production" of 100 million tons is without merit. First, there is no "proposal" to produce more than 56.1 million tons of materials. Thus, while the 1989 EA prepared for the competitive mineral sale analyzed potential future production of up to 100 million tons at the Project site, the EA analysis was limited to the one-time competitive bid process and sale that resulted in the 56 million ton Federal Contracts between the BLM and TMC. (AR 5691-5703.) Second, any future mining at the Project site is speculative. Even if factors favored future mining, the BLM would have to issue an additional contract to any operator that proposed to mine the site, requiring full NEPA review. (AR 1753, 1758.) Thus, the BLM was not legally required to analyze theoretical future mining at the site due to its highly speculative nature.

7. In addition to failing on substantive grounds, summary judgment as to the Second, Third, Ninth, Tenth, Eleventh and Twelfth Claims is warranted in favor of Defendants based on procedural grounds

79. In addition to being barred on substantive grounds, the City's Second, Third, Ninth, Tenth, Eleventh, and Twelfth claims are barred procedurally. The arguments made in the Second Claim regarding water availability and historic flows were raised by the City in the ESA Action, and the City is barred from relitigating those arguments here. The Third, Ninth, Tenth Eleventh and Twelfth Claims are barred by laches. These claims should have been brought in the ESA Action because the claims had accrued at that time, and they involved the same set of facts. The City unreasonably delayed in bringing these claims, which has resulted in prejudice to the Federal Defendants and CEMEX. As such, summary judgment as to these claims is warranted in favor of Defendants.

E. Defendants are Entitled to Judgment on the Fifth and Sixth Claims for Relief Because the BLM Had No Duty to Supplement the FEIS

80. The City claims that several changes to the Project and sources of new information required preparation of a supplemental EIS. Portions of the City's Fifth and Sixth Claims are barred by res judicata, collateral estoppel, or other procedural bases. "In order to bar a later suit under the doctrine of res judicata, an adjudication must (1) involve the same 'claim' as the later suit, (2) have reached a final judgment on the merits, and (3) involve the same parties or their privies."*Nordhorn v. Ladish Co., Inc.,* 9 F.3d 1402,

1404 (9th Cir.1993) (citation omitted). The arguments raised here were raised in the Consent Decree Opposition, Consent Decree Appeal or ESA Action. (CEMEX RJN, Exhs. J and K.) Portions of these claims are also barred because they are duplicative of pending claims. Principles of federal comity allow a district court to "transfer, stay or dismiss" an action whenever it is duplicative of a parallel action already pending in another federal court." *M.C. Products, Inc. v. American Telephone & Telegraph Company,* 205 F.3d 1351 (9th Cir.2000). With respect to the remaining FEIS supplementation claims, they should have been raised in the Consent Decree Opposition under the compulsory counterclaim standard of Rule 13(a). FRCP 13(a) required the City to raise any counterclaims "aris[ing] out of the transaction or occurrence that is the subject matter of the opposing party's claim[.]" At the time of its intervention, the City intervened for purposes of challenging the proposed Consent Decree, and thus was required to raise any such challenge at that time. Any claims it now raises challenging the Consent Decree are barred by FRCP 13(a).

***18** 81. Even on the merits, these claims cannot survive. NEPA regulations require supplementation of an EIS when there are "substantial changes" or "significant new circumstances or information" that are relevant to an action's environmental impacts ." 40 C.F.R. § 1502.9(c). However, "[a]n agency need not start the environmental assessment process anew with every change in the project" or every time new information comes to light. *Price Road Neighborhood Ass'n, Inc. v. United States Dept. of Transportation,* 113 F.3d 1505, 1509 (9th Cir.1997). An agency is not required to supplement an EIS unless "the new information provides a seriously different picture of the environmental landscape such that another hard look is necessary."*State of Wisconsin v. Weinberger,* 745 F.2d 412, 418 (7th Cir.1984). As the Ninth Circuit held, "a supplemental EIS is not required for every change; it is not uncommon for changes to be made in a FEIS after receipt of comments on a DEIS and further concurrent study."*Kootenai Tribe of Idaho v. Veneman,* 313 F.3d 1094, 1118 (9th Cir2002).

82. On March 3, 2004, the BLM prepared a DNA in order to determine whether new information and new circumstances relevant to the CEMEX Project and occurring after the date of the ROD had changed the Project in a significant manner or to a significant extent not already considered in existing NEPA documents. (AR 34672-86.) The BLM concluded that the addition of three monitoring wells did not change the proposed action, but instead served as a mechanism to determine whether re-initiation of consultation with the FWS would be required at a later date. (AR 34676.)

83. Additionally, the City's claims regarding the elimination of the NFSA are ironic, incorrect, and in no way required supplementation. They are ironic because the City itself argued for elimination of the NFSA. (AR 34681-83.) As the DNA correctly explains, the options for handling of fines were detailed in the FEIS, and that elimination of the NFSA was analyzed in the context of the "No Action Alternative." (*Id.*) The DNA also discusses how elimination of the NFSA actually reduces Project impacts, including air quality impacts due to PM-10 and possible dust impacts on the spineflower. (*Id.*) Thus, the BLM considered these issues in the DNA and reasonably concluded that no supplementation was required. (AR 34674-84.)

84. The City also fails to provide any support for its claim that the SBO allows installation of five new production wells or the corresponding disturbance of five acres of arroyo toad habitat. While the City correctly noted that mitigation measures proposed by the BLM (in its 2001 Supplemental Biological Assessment, or "SBA") and CEMEX were incorporated into the 2001 Supplemental Biological Opinion ("SBO") under the heading of "Reasonable and Prudent Measures," it does not point to a single measure authorizing five new production wells, nor could it. To the contrary, the BLM as authorizing agency has clearly stated that the potential well locations depicted in the SBA "are contemplated only to substitute for wells discussed in the FEIS to reduce impacts to arroyo toads ...." (AR 34675.)

***19** 85. The City's reliance on letters from state and federal agencies as sources of "new information" is similarly flawed. The November 21, 2003 South Coast SCAQMD letter addresses only the DEIR which was produced in the course of the State's environmental review under CEQA, and the SCAQMD has yet to approach the BLM with the "new methodology" described in its letter or any other related concerns. To the extent that the agency letter may have affected the adequacy of the BLM's environmental analysis under NEPA, this Court has already addressed this issue, concluding that "the AQMD's asserted concerns about the cancer risk do not require further BLM NEPA evaluation or supplemental NEPA review."(City RJN, Exh. B, pp. 30-31.) Finally, the concerns raised in the November 5, 2001 U.S. Forest Service letter, and elaborated upon in a subsequent letter on January 24, 2002 (*see* AR 33698) were ultimately withdrawn. (AR 35124.)

86. With regard to discovery of the Arroyo Toad, the BLM responded to the November 8, 2000 CDFG letter (and other comments received after the date of the ROD) by preparing a supplemental biological review of the Project's effects on the Arroyo Toad and slender-horned spineflower, among others. The BLM concluded that the Project would not affect the Arroyo Toad and was not likely to affect the slender-horned spineflower. (AR 19709.) The FWS concurred with the BLM's conclusion about the effects of the Project on the spineflower and, after further biological review, issued a no-jeopardy opinion with respect to the Arroyo Toad. (AR 20155.) Moreover, the BLM determined in the DNA that "all new information and all new circumstances regarding the arroyo toad are insignificant relative to the analysis of the approved action" and that "the existing analysis and conclusions in the FEIS are adequate in light of the new information regarding the arroyo toad."AR 34676.

87. In sum, the City has failed to show that supplementation of the FEIS was required. Summary judgment in favor of Defendants as to the Fifth and Sixth Claims is therefore warranted as a matter of law.

F. ***Defendants Are Entitled to Summary Judgment on the City's Seventh Claim for Relief Because the BLM Adequately Considered Impacts From Mitigation Measures Imposed in the BO and SBO***

88. As the City concedes, the SBO was not issued until after the date of the ROD. Therefore, challenges to the adequacy of mitigation measures in the SBO cannot be considered in the context of a challenge to the ROD. Accordingly, this argument can only be read as an extension of the City's "supplemental EIS" argument, which has already been addressed above.

89. Moreover, federal courts have held that mitigation measures may require supplementation of an EIS if those mitigation measures change the project significantly and will have a significant environmental effect. *National Wildlife Fed. v. Marsh,* 721 F.2d 767, 783 (11th Cir.1983). Here, the BLM considered in detail the potential impacts of the additional monitoring wells, and concluded that they did not change the Project substantially. Rather, "the wells provide a mechanism for collection of additional information to determine at a later date if reinitiation is again required."(AR 34676.)

***20** 90. As to the mitigation measures imposed by the 1998 Biological Opinion ("BO"), the City erroneously relies on *Northwest Indian Cemetery Protective Ass'n v. Peterson,* 795 F.2d 688, 697 (9th Cir.1984), for the asserted proposition that a "mere listing" of mitigation measures does not satisfy NEPA's requirement for reasoned discussion. That case is inapposite, however, because the mitigation measures imposed by the BO were thoroughly examined in the FEIS. (AR 1911, 3007-31.) The BO, which was incorporated into the FEIS, concludes that the Project is not likely to jeopardize the continued existence of the Stickleback and that successful implementation of the proposed monitoring program will prevent mortality of Stickleback downstream of the Old Lang Gaging Station. (AR 14897-98.)

91. The City fails to show that the mitigation measures required supplementation of the EIS. The BLM considered the potential impacts of the additional monitoring wells and concluded that they did not change the Project substantially. Thus, summary judgment in favor of Defendants is warranted.

G. ***Defendants Are Entitled to Summary Judgment on the City's Thirteenth Claim for Relief Because the BLM Complied With the NHPA***

92. The NHPA requires that BLM make a reasonable and good faith effort to identify cultural resource sites within the Project area. 36 C.F.R. § 800.4. To that end, an archival records search was conducted at the Archaeological Information Center at University of California-Los Angeles. (AR 2086.) The results of that search disclosed that the Project area had been surveyed on two prior occasions, first by Dr. Chester King in 1974, and then by Dr. Louis Tartaglia in 1989. Neither of those surveys indicated that any cultural resource sites existed within the Project area. (*Id.*) In addition, CEMEX's archaeological consultant conducted a pedestrian survey, resulting in the identification of one historic archaeological site on the Project site. (AR 2086.) The BLM, however, ultimately determined that the site was not eligible for the National Register of Historic Places and that no historic properties would be affected by the Project within the meaning of the NHPA. (AR 2089.) The record therefore shows that the BLM complied with the NHPA.

93. The City's argument, i.e., that a study by Dr. Chester King commissioned by the City after the ROD's issuance, somehow renders the BLM's analysis deficient, is without merit. (AR 33624.) Upon receipt of the City's findings, Russell Kaldenberg, the Deputy Preservation Officer of the

BLM, reviewed the three new "sites" and determined that none of them qualified for listing in the National Register of Historic Places. (AR 16957.) Dr. King's inability to locate a single cultural or historic site eligible for inclusion in the National Register confirms the reasonableness of the BLM's efforts. As such, Defendants are entitled to summary judgment with respect to this claim.

H. ***Analysis Regarding the City's Contention that Defendants' Mineral Sale Was Not Authorized by the Material Act***

***21** 94. The City claims that the mineral materials sale between CEMEX and the United States is null and void because it was not authorized by the Materials Act. Alternatively, the City argues that the sand and gravel involved here is subject to disposition only through "location" pursuant to the General Mining Laws. As a threshold matter, the City's challenge to the validity of the mineral materials sale, based on the Materials Act of 1947 and the General Mining Laws, is barred by 28 U.S.C. § 2401(a), the six-year statute of limitations applicable to claims against the United States. The cause of action on both claims accrued in March 1990, when both BLM-CEMEX contracts were executed after competitive bidding. (AR 5695, 5701.) Accordingly, the statute of limitations for challenges to these sales expired in March 1996. The instant action was filed in December 2004, more than eight years after the limitations period expired.

95. The City's Materials Act and General Mining Law claims are also barred by laches. CEMEX and BLM here expended significant resources over the past sixteen years and the City's delay in raising these claims is highly prejudicial and inexcusable.

96. Beyond this, the City's Fifteenth Claim is barred by the judgments in the *Curtis* litigations. The City's effort to go back in time and unravel the 1990 sale is improper, based in part on the preclusive effect of judgments in the prior *Curtis* litigations before this Court and affirmed on appeal by the Ninth Circuit. It is well-established that where a parcel of property is the subject of an adjudication, any final judgment has preclusive effect not only on the litigants who own the property at the time of the judgment, but also on successors in interest to that property. *See Postal Telegraph Cable Co. v. City of Newport. Ky*, 247 U.S. 464, 474-75 (1918). Federal courts have held that privity exists between a transferor and transferee of property following a judgment affecting that property sufficient to satisfy the requirements of res judicata. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1081 (9th Cir.2003) (citations omitted).

97. Here, this Court and the Ninth Circuit in the *Curtis* litigation established that (1) the minerals at the Project site are "public lands" appropriate for disposal; (2) such sale is proper under the Materials Act; (3) the mineral estate is dominant over the surface estate under the SRHA; and (4) the owner of the surface estate cannot interfere with or restrict access by CEMEX to the minerals. (CEMEX RJN, Exh. A.)

98. Even if the Court were to entertain the merits of the City's Materials Act claim, the claim has no merit. The City's argument that the Project is not on "public lands" because it involves only a federal mineral estate cannot be sustained. The Interior Board of Land Appeals has already determined that the term "public lands," as used in the Materials Act, includes mineral deposits reserved in split-estates under the Stock-Raising Homestead Act. *Texaco, Inc.*, 59 IBLA 155, 155 (1981) and *Mobil Oil Corp.*, 79 IBLA 76, 78 (1984).

***22** 99. The City nonetheless seeks to rely on the Tenth Circuit's decision in *Poverty Flats v. United States*, 788 F.2d 676 (10th Cir.1986), for the proposition that common variety minerals (including sand and gravel) are excluded from the Materials Act unless the United States owns both the surface and the minerals of the lands involved. This arguments must be rejected because it is at odds with the Supreme Court's holding in *Watt v. Western Nuclear*, 462 U.S. 36 (1983).

100. In addition, the City's claim that the *Western Nuclear* decision mandates that reserved minerals are "disposable by the United States, if at all, under the SRHA[ ]" is untenable. *Western Nuclear*, in fact, held the opposite, namely that the SRHA reserved sand and gravel to the United States as part of the reserved mineral estate, subject to disposition under the public land laws. The SRHA provides that "disposal is pursuant to the mineral land laws in force at the time of the disposal."The Materials Act was the "mineral land law" in force at the time of the disposal, i.e., 1990. Moreover, the SRHA expressly provides that its specific provisions regarding mining do not apply to minerals subject to disposition under the Materials Act, i.e., "common varieties" such as sand and gravel. 43 U.S.C. § 299(p) (3). In any event, the continued validity of *Poverty Flats* has been called into question by a subsequent Tenth Circuit Case, *Hughes v. MWCA, Inc.*, 12 Fed. Appx. 875 (10th Cir.2001), in which that court specifically rejected an argument, based

on *Poverty Flats*, that a common variety mineral "underlying an SRHA estate should be classified as a locatable mineral, on the theory that § 611 applies only to public lands: that is, lands entirely owned by the government, and not to the split estate resulting from an SRHA patent."*Hughes*, 12 Fed. Appx. at 878.Thus, the City is patently wrong in asserting that the mineral materials sales under the Materials Act are void *ab initio.*

101. Finally, the City's Fifteenth Claim is barred by exhaustion principles. The City belatedly raises this challenge even though it never raised it to the IBLA, thus depriving the IBLA, the designated administrative appellate branch of the Department of Interior, the opportunity of developing a factual record and applying its expertise to these issues. This attempt to "backdoor" these issues contradicts well-established judicial precedent and frustrates the entire purpose of the IBLA.

102. The key inquiry regarding whether the exhaustion doctrine should apply is the "degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding."*Sims v. Apfel*, 530 U.S. 103, 108-09 (2000). Thus, "[w]here the parties are expected to develop the issues in an adversarial administrative proceeding, it seems to us that the rationale for requiring issue exhaustion is at its greatest."*Id* . at 110.Here, there can be little doubt that the IBLA process was an "adversarial proceeding" in the full sense of that term. The City filed multiple briefs with the IBLA, far more than the single "statement of reasons" contemplated by the Office of Hearing and Appeals regulations. *See*43 C.F.R. § 4.412.

***23** 103. Thus, Defendants are entitled to summary judgment with respect to this Fifteenth Claim.

J. Analysis Regarding the City's Contention that It Is Entitled to Judgment on Its Fourteenth and Fifteenth Claims for Relief Because the BLM and IBLA Failed to Comply with FLPMA

104. This claim is likewise barred by res judicata and collateral estoppel because it could have, and should have been raised in the opposition to the Consent Decree and/or the ESA Action, as discussed below. Indeed, the City previously raised the argument that the Consent Decree violates the FLPMA. Further, to the extent the City challenges BLM's entry into the Consent Decree and its effect on the BLM's compliance with FLPMA, the City should have raised these arguments at the time it intervened in the Consent Decree action.

105. In any event, the City's arguments based on 43 C.F.R. §§ 3809.3 and 3809.5 are without merit because those regulations apply only to hardrock mining operations governed by the General Mining Law, 30 U.S.C. §§ 22 *et seq.,* and expressly do not apply to "salable" mineral materials governed by the Materials Act. *See*43 C.F.R. § 3809.2. "Salable materials" include "common varieties" such as sand and gravel, which are regulated pursuant to 43 C.F.R. Subpart 3600. Moreover, although the materials sales contracts contain stipulations requiring TMC's mining and reclamation plan to include measures to prevent unnecessary or undue degradation, CEMEX's mining and reclamation plan, as approved by the BLM in the ROD with substantial mitigation, monitoring and reclamation requirements, satisfies the requirements to avoid unnecessary or undue degradation under the contracts and FLPMA.

106. Defendants are therefore entitled to summary judgment as to the Fourteenth and Fifteenth Claims for Relief.

III. JUDGMENT

Accordingly, after an extensive and exhaustive review of all documents and oral presentations and arguments by all parties, this Court **denies** the City of Santa Clarita's Motion for Summary Judgment on all grounds raised and **grants** the Federal Defendants' and CEMEX's Cross-Motions for Summary Judgment on all grounds presented as a matter of law. This Court specifically concludes that judicial review on summary judgment of agency decisions involving the NEPA are governed by Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706. Under Section 706, "[t]he question is not whether there is a genuine issue of material fact, but rather whether the agency action was arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence on the record taken as a whole."On the facts presented in the record before this Court, this Court concludes as a matter of law that the Federal Defendants involved fully considered all of the relevant factors and articulated a rational connection between the facts found and the choice made.

IT IS SO ORDERED.

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All Citations

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Footnotes

1 Transit Mixed Conerete is the former corporate name of CEMEX. The two names are used interchangeably herein.