2005 WL 520387 (C.A.9) (Appellate Brief)
United States Court of Appeals,
Ninth Circuit.

CEMEX, INC., Plaintiff - Appellee,
and
United States of America, Plaintiff-in-Intervention - Appellee,
v.
COUNTY OF LOS ANGELES, California, Defendant,
and
City of Santa Clarita, California Defendant-in-Intervention - Appellant.

No. 04-56050.
January 11, 2005.

On Appeal from the United States District Court for the Central District of California

Answering Brief of Appellee United States

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I. FEDERAL CASES

STATEMENT OF JURISDICTION

The United States agrees with the appellant's statement that this Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

ISSUES PRESENTED

The issues in this case are:

1. Whether the terms of the Consent Decree negotiated by CEMEX, Inc. (“CEMEX”), the United States, and the County of Los Angeles (“original parties”) are fundamentally fair, adequate and reasonable.

2. Whether the appellant City of Santa Clarita, California (“City”) (a) may properly raise challenges to the merits of CEMEX's and the United States' preemption claims under facial preemption and conflict preemption theories held in reserve when the original parties negotiated the final terms of the Consent Decree; and (b) if the City is entitled to raise those challenges in this appeal, whether the State of California's Surface Mining and Reclamation Act (“SMARA”), the law under which Los Angeles County purports to exercise licensing authority over mining-related rights granted by the U.S. Bureau of Land Management's (“BLM”) in two mineral materials sales contracts with CEMEX, is preempted by the Materials Act of 1947 (“Materials Act”), 30 U.S.C. § 601 et seq.

3. Whether the district court's decision to take the City's motion for summary judgment off-calendar until after it decided the original parties' motion for ***2** entry of the Consent Decree was a reasonable exercise of that court's broad discretion over docket management, calendaring, and scheduling, given the limitations on the City's participation specified in this Court's February 24, 2004 order granting the City's intervention.

4. Whether (a) the City is precluded by this Court's February 24, 2004 order from raising an abstention claim under Younger v. Harris, 401 U.S. 37 (1971), given the limits on the City's intervention established by that order; and (b) if the City is not precluded from raising its Younger abstention claim, whether the district court properly declined to abstain in light of the United States' status as a plaintiff here.

STATEMENT

A. Nature of Case. Course of Proceedings, and Disposition Below

On January 25, 2002, CEMEX filed a complaint against the County seeking declaratory and injunctive relief alleging that a decade-long County review of CEMEX's local surface mining permit application was thwarting the implementation of a federal sale of sand and gravel from a federally owned mineral estate. [1] CEMEX's complaint, as amended, also sought money damages from the County ***3** under 42 U.S.C. § 1983 for alleged violations of CEMEX's constitutional rights to procedural and substantive due process, and just compensation for the County's alleged taking, and/or inverse condemnation, of its alleged property interests established by its sand-and-gravel contracts with the BLM.

In September 2002, the United States applied for, and was granted, intervention as a plaintiff holding a $ 28 million minimum royalty interest in two sand-and-gravel contracts executed between BLM and CEMEX. The United States' complaint-in-intervention presented similar allegations that the County had unreasonably delayed its review of the mining and reclamation aspects of those contracts, and sought declaratory relief decreeing that the County is preempted by the Materials Act and FLPMA from further review of the CEMEX project. The United States' complaint also sought injunctive relief prohibiting the County from further interference with BLM's sand-and-gravel sale to CEMEX.

By the time the United States' intervention was granted, the City had already moved twice to intervene as a defendant, and was denied intervention on both occasions. In the fall of 2002, the City appealed the second denial of intervention to this Court. CEMEX v. County of Los Angeles, 9th Cir. No. 02-56364.

While the City's intervention appeal was pending, the original parties proceeded with discovery and other pretrial procedures. After CEMEX and the ***4** County engaged in document discovery, but before the deposition process was allowed to commence, the district court ordered the original parties to engage in a minimum of 24 hours of private mediation, and selected retired U.S. District Judge Layn Phillips to conduct the mediation. After eight full days of mediation spanning most of 2003, the original parties agreed to settle this case by means of a Consent Decree. The proposed Decree would allow the County to exercise a reasonable degree of regulatory control over the project through the County's own set of conditions on CEMEX's project, while also requiring the County to conclude its environmental review process and issue CEMEX a permit within sixty days of district court approval of the Consent Decree.

On February 23,2004, CEMEX filed a motion for entry of the Consent Decree as a judgment of the district court, in which the County and the United States joined. On February 24, this Court issued an order reversing the district court's denial of the City's intervention and establishing limitations on the scope of the City's intervention rights. While it allowed the City to challenge the Consent Decree, and appeal any district court approval of the Decree, it specified that it was not requiring the district court to "turn back the clock or to rescind the consent decree," and was not entitling the City "to reopen any issues already decided in this case." 2004 WL 363354 (9th Cir. Feb. 24, 2004). Thereafter, the City filed both an opposition to the Consent ***5** Decree, and a separate motion for summary judgment urging rejection of the plaintiffs' preemption claims on the merits and raising an abstention claim under Younger v. Harris. Subsequently, the district court granted the original parties' request to take the City's motion for summary judgment off-calendar, and to defer addressing that motion until after the court ruled on the original parties' Consent Decree motion, unless the court's ruling on the Consent Decree motion were to moot the City's summary judgment motion.

On May 3,2004, the district court held a hearing on the motion for entry of the Consent Decree. At that hearing, the court informed the parties that it would approve the Consent Decree and deny the City's summary judgment motion as moot. On May 5, that court issued an opinion and order formalizing its approval of the Decree. On May 20, 2004, the district court formally entered the Decree as a judgment of the court. The City then filed this appeal.

B. Statement of Facts [2]

This case involves the federal government's authority to market and sell, free ***6** from local government interference, federally owned natural resource commodities such as sand and gravel from a parcel of federally owned mineral estate in Soledad Canyon, an unincorporated area in Los Angeles County, approximately 30 miles north of downtown Los Angeles. [3] BLM manages the mineral estate at Soledad Canyon pursuant to its "multiple use" land-use authority under FLPMA. See 43 U.S.C. § 1702(c). BLM's land management plan for this area, i.e., the "South Coast Resource Management Plan," expressly provides that aggregate mining is an appropriate land-use activity in the Soledad Canyon area. SER2511-12. The same area has been used for aggregate mining since the early 1960s, and was designated by the State of California as late as 1987 as a "regionally significant construction •aggregate resource area." SER520-36. The County is required to recognize this resource and incorporate it into the General Plan for Los Angeles County. SER541.

***7** 1. BLM's Contract Awards And CEMEX's Early Coordination With The County (1991 -1995)

BLM's decision to offer aggregate materials in the sale at issue here arose from the U.S. Supreme Court's ruling, in Watt v. Western Nuclear, 462 U.S. 36 (1983), that gravel is a mineral reserved to the Federal "mineral estate" under the Stock Raising Homestead Act ("SRHA"). SER311-12. At the time, an existing mining operator, Curtis Sand and Gravel ("Curtis"), had been mining gravel at the project site pursuant to a County-issued conditional use permit. SER309. Based on the Watt decision, the United States sued Curtis for mineral trespass and related claims. SER264-67,312.

In 1988, the trespass action resulted in a settlement between the United States and Curtis. SER273. Under the terms of the 1988 settlement, BLM agreed to open to competitive bidding a bulk sale of sand and gravel from the Soledad Canyon mineral estate.

SER274,313. In September 1989, CEMEX and Curtis both submitted bids. SER315. CEMEX's bid prevailed. SER2020. In March 1990, BLM awarded CEMEX two contracts to purchase up to 56 million tons of sand and gravel over a 20-year period. SER2495-2506. The contracts are worth a minimum of $28 million in royalties to the federal government. SER318. Among other things, the contracts required CEMEX to comply with California's State Mining and Reclamation Act ***8** ("SMARA"), Cal. Pub. Res. Code § 2770. SER2566.

Pursuant to SMARA, CEMEX in 1991 filed a proposed 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 the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. SER2371. 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. Id.

When the draft EIR was almost completed in mid-1995, BLM and CEMEX asked the County on more than one occasion to participate with BLM in a joint environmental impact statement ("EIS") and environmental impact report ("EIR") pursuant to NEPA and CEQA. SER2120, 2371. The County refused all such requests. SER124. This unexpected development required BLM to initiate a separate NEPA EIS process in 1995, and compile an environmental record virtually from scratch. SER2372.

***9 2. BLM's NEPA Review Of CEMEX's Mining Operations (1995 - 2002)**

In October 1995, after BLM officials recognized that the County would not allow BLM to participate in a joint environmental review, BLM initiated the process for preparing a federal EIS under NEPA to analyze the potential environmental impacts of the proposed action. SER2372. After consulting with the U.S. Fish and Wildlife Service ("USFWS") about potential effects of the project on endangered species (which culminated in a 1998 "no-jeopardy" Biological Opinion), BLM in May 1999 issued a draft EIS for public comment. SER701. In June 2000, BLM released its final EIS for the project. SER1959. In August 2000, BLM issued a record of decision ("ROD") approving the project subject to CEMEX's compliance withamyriad of mitigation and monitoring conditions. SER2508-2587. The City and 21 other parties filed administrative appeals of BLM's ROD to the Interior Board of Land Appeals ("IBLA"). SER744-779. On January 8, 2002, the IBLA issued a decision rejecting the appeals and affirming the ROD. SER1738-1763. To date, the legal adequacy of BLM's NEPA analysis has not been challenged in the courts. [4]

***10 3. The County's Administrative Processes (1995 - 2002)**

After the County in mid-1995 had made clear that it would not conduct joint environmental reviews with BLM, CEMEX continued pursuing County approval of its reclamation plan from the County on a separate track. In 1995, the County's Planning Staff completed a review of an internal draft EIR. SER989. This included a review by the County's traffic specialists, the Department of Public Works ("DPW"), of traffic impacts in the vicinity of the project. SER1831.

The County's progress toward circulating a draft EIR for public comment was slowed by other matters that diverted the County's attention from the CEMEX project. From 1994 through 1998, the County entertained at least two proposals for the construction of manufactured homes (known as the "Bee Canyon" proposals) in an area that partially overlapped CEMEX's project site and BLM's mineral estate. SER 552, 981, 2090-2119. Concerned about the County's priorities and the County's determination to allow public comment and hearing processes for the Bee Canyon proposals, BLM and CEMEX filed comments and participated in County meetings ***11** to express opposition to the residential development projects as encroaching upon the CEMEX project and incompatible with CEMEX's mineral materials contracts. SER407-631. The County ultimately took both manufactured home proposals off-calendar, but to date has not formally rejected them.

In 1998, the County conducted a second review of a draft EIR during which its Planning Staff modified the traffic impact study to conform the traffic analysis to revised guidelines and assessment methodologies for traffic. SER1832. In February 1999, the County circulated the draft EIR for public review and comment. SER1003.

Under the County's procedures implementing SMARA, CEMEX's permit application was subject to review initially by the County's Regional Planning Commission, the County's land-use planning arm, with a right of appeal to the County Board of Supervisors. The Planning Commission scheduled its first hearing on the project in April 1999. SER1041. At the April 1999 meeting, the Commission voted to continue its hearing on the project, and subsequently extended the period for public comment on the draft EIR six times during the next eight months. SER1062-1238. In late 1999, the Planning Commission voted to deny CEMEX's permit application, finding, among other things, that CEMEX failed to establish that: l)"the proposed site for surface mining operations is consistent with the General Plan for Los Angeles County" (SER1274) and 2) "the proposed project does not conflict with ***12** established community land-use and circulation patterns in the vicinity of the subject property...." SER1273. CEMEX then appealed the Planning Commission's order denying its permit application to the Los Angeles County Board of Supervisors. SER1291.

While that appeal was pending, Planning Staff made changes to the project proposal and recirculated for public comment a new draft EIR that incorporated the modifications. SER1296. In early 2001, the County Supervisors held a hearing to consider CEMEX's appeal. SER1353-1392. Due to constituent opposition to the project, the County Supervisors asked a CEMEX representative whether CEMEX would be willing to meet with the community to discuss further mitigation measures. SER1376-1379. After CEMEX agreed to do so, the County Supervisors continued the hearing on CEMEX's appeal until April 2001, and directed Planning Staff to complete a final EIR that incorporated public comments on the revised draft EIR. Although CEMEX met with project opponents and made concessions to them, it ultimately was unable to reach any sort of compromise in light of significant reductions in the size and scope of the Project demanded by opponents. SER1407.

In April 2001, the County Supervisors resumed the hearing on CEMEX's appeal. Professing continued concern about health, air quality, water quality, biotic resources, visual impacts, impacts on school children, and traffic, the Board of ***13** Supervisors voted to deny CEMEX's permit application. SER1479-1536. The Supervisors concluded that, even with the additional mitigation measures recommended by Planning Staff and/or agreed to by CEMEX, the project posed unacceptable risks and that more, yet unspecified, mitigation measures would have to be identified. See Id.

The County postponed a hearing scheduled for June 2001 until August 28, 2001, because a biologist hired by the City discovered the presence of Arroyo Toad tadpoles, an endangered species, in a stretch of the Santa Clara River traversing a corner of the project site. SER1540, 1544, 1551. Based on the reported discovery, BLM reinitiated consultation with the USFWS seeking a Biological Opinion concerning the project's effect on the Arroyo Toad. SER812. The hearing was continued for another 90 days, until late November 2001, to allow the County to analyze the USFWS's anticipated opinion. SER1557, 1582. In October 2001, the FWS issued a Supplemental Biological Opinion ("SBO") concluding that, with eight additional mitigation measures proposed by BLM and CEMEX, the project was not likely to jeopardize the continued existence of the Arroyo Toad. SER1672,2661. BLM subsequently directed CEMEX to adopt the mitigation measures referenced in the SBO. See SER2356.

In a November 2001 report, the County's planning staff recommended that the ***14** County supervisors approve the project subject to certain mitigation conditions. SER1764-1723.[5] At approximately the same time, BLM advised the County that some of the recommended mitigation measures (which would have imposed operating hour restrictions, annual production restrictions, and a 24-hour monitoring program) were economically infeasible, unduly burdensome and unnecessary, and contrary to the federal contracts and federal law. SER2227-31. In late November 2001, the County Supervisors met to vote on the project. On the eve of the hearing, County staff informed the Supervisors that a traffic impact analysis for the Project that had already been reviewed twice in the past (in 1995 and again in 1998), and subjected to public comment in two iterations of a draft EIR, was potentially deficient because it was based on an allegedly flawed methodology for measuring traffic-related effects. SER1631. Based on these eleventh-hour concerns, the County Supervisors declined to vote on the project, and postponed the hearing until February 26,2002. SER1661 -69, 1769-1780.

In the meantime, the County demanded that CEMEX provide County staff with ***15** a revised traffic study. SER1805. CEMEX declined, taking the position that there was nothing wrong with the previous traffic studies (or the methodology used therein), both of which had concluded that, with mitigation, the impacts of the project on traffic would not be environmentally significant within the meaning of CEQA. SER1822-1842. CEMEX nonetheless provide the County funding for such a study. SER1827. The County insisted that in light of its change in the traffic methodology, and call for additional mitigation measures would, CEQA required another (third) circulation of the draft EIR for public comment. SER1802.

4. The Filing of this Lawsuit And The County's Third Denial of CEMEX's Permit Application

In January 2002, in the midst of the traffic-related controversy, CEMEX filed the instant action seeking to have further County review of the project declared preempted by the Materials Act of 1947. Partially in response to CEMEX's filing of this lawsuit, the County in February 2002 voted to deny CEMEX's permit application a third time. SER1844-45. In April 2002, the County Board issued findings to support its vote to deny the permit. SER 1916-1946. The County based its denial, in part, on CEEX's alleged failure to show that its sand-and-gravel project was consistent with the General Plan for Los Angeles County, i.e. the County's land-use and zoning regime. SER1946.

***16** On May 8,2002, CEMEX appealed the County's denial of its surface mining permit application to the State Mining & Geology Board ("SMGB"), alleging that the County had exceeded its authority in denying the permit, and that the County had failed to make a substantive ruling on the merits of its permit application. SER50. On May 22,2002, the SMGB denied CEMEX's appeal for lack of jurisdiction given the pendency of the preemption action in federal district court. SER68. The SMGB's May 22 order nonetheless went on to express dissatisfaction with the County's handling of CEMEX's permit application, stating:

> Although the SMGB cannot conduct an evidentiary review pursuant to PRC § 2775, the [SMGB] Chairman also concludes that the public record demonstrates delay and indecision by Los Angeles County in its processing of this surface mining application. The County's conduct in this area is surprising given the surface mining infrastructure already developed and surface mining history of the mineral lands in question.

SER75-76. (Emphasis added.)

In orders entered March 26, 2002 and July 10, 2002, the district court denied two motions to intervene filed by the City. The City appealed the July 10 order to this Court. Given BLM's interest in the efficient administration of its Materials Act program, and the United States' $28 million royalty interest in BLM's contracts with CEMEX, the United States in August 2002 filed a motion to intervene as a plaintiff ***17** raising a similar preemption challenge to the County's processes. The district court granted the United States' intervention by order entered September 10, 2002.

Before discovery was completed, the district court ordered the original parties to engage in private mediation before retired federal judge Layn Phillips. After eight days of mediation, and numerous conference calls with the mediator, the original parties agreed to settle the case through a Consent Decree. SER2426.

5. The Consent Decree And This Court's Order Granting The City's Intervention For Purposes of Challenging the Decree

The Consent Decree declares that any further review procedures undertaken by the County with respect to CEMEX's permit application would amount to unreasonable local regulation of a federally approved project on public land, and thus is preempted by the Materials Act of 1947. ser2475. Central to this determination are the Decree's findings that:
On multiple occasions before 1996, the County was invited to join with BLM to conduct a coordinated federal-state environmental review, and the County declined all such invitations. In this case, the County has already conducted lengthy

review of the Project pursuant to the requirements of CEQA and SMARA that has acted as a supplement to the environmental review of the Federally-Approved Project already conducted and concluded by the BLM pursuant to NEPA. There have been over thirteen months of public review and comment on the Project, and nineteen County public hearing sessions on the Project. The County's environmental review has spanned a decade, ***18** including an EIR process that generated a 2000+ page, eight-volume proposed Final EIR, no less than two public circulations for comment of different iterations of the EIR, substantial delay, and extraordinary costs for CEMEX, all in addition to the United States' approved Final EIS issued in June 2000.

[A]ll Parties, including the County, acknowledge that further environmental review by the County, above and beyond that already conducted, would exceed reasonable environmental regulation and thus would be preempted.

SER 2474-75 (emphasis added).

Notwithstanding these preemption findings, the Consent Decree allows the County to impose conditions and mitigation measures on the project pursuant to SMARA (negotiated during the mediation) that are distinct from BLM-imposed conditions and mitigation measures. SER2809-2827. In addition, the Decree stipulates that "the County may complete the CEQA EIR process under the conditions and limitations" set forth in the decree. SER2475. Specifically, the Decree requires the County, within sixty days after court approval of the Decree, to: 1) certify the November 2001 EIR without further public review or comment (SER2481); 2) acknowledge the adequacy of the traffic methodology used in the County' s November 2001 draft final EIR(SER2476-78,2483-84); 3) prepare CEQA Findings detailing the County's environmental determinations relating to the project (including new County-imposed project conditions) ***19** (SER2483); 4) prepare a statement of overriding considerations under CEQA (SER2484-86); and 5) adopt a Mining and Reclamation Plan. SER2487088. The Decree also requires the County, within 60 days, to rescind both its February 26, 2002 vote of intent to deny CEMEX a local permit for the federally approved project, and its April 23,2002 findings and order supporting that denial, and to issue CEMEX a local surface [6] mining permit. SER2479.

On February 23,2004, CEMEX filed a motion for entry of the Consent Decree as a judgment of the district court, in which the County and the United States both joined. On February 24,2004, this Court issued an order reversing the district court's ***20** denial of the City's intervention, while clarifying that this order

> does not require the district court to turn back the clock or to rescind the consent decree.... Thus, the City shall be entitled to be heard concerning the court's approval of any consent decree between the original parties, and to appeal the approval of any such decree, but shall not be entitled to reopen any issues already decided in this case.

CEMEX v. County of Los Angeles, No. 02-56354, 2004 WL 363354 (9th Cir. Feb. 24, 2004). ER644.

Thereafter, the City filed both an opposition to the Consent Decree, and a motion for summary judgment urging rejection of the plaintiffs' preemption claims on the merits, and raising an abstention argument under Younger v. Harris. The district court subsequently granted the original parties' joint motion to take the City's motion for summary judgment off its calendar, and thus to defer addressing the City's summary judgment motion until after it ruled on the original parties' consent decree motion (unless the consent decree ruling rendered moot the motion for summary judgment). ER683-84.

On May 3, 2004, the district court held a "fairness hearing" on the Consent Decree. At the conclusion of that hearing, the court ruled from the bench that it would adopt the Consent Decree motion and deny the City's summary judgment ***21** motion as moot. [7] On May 5, the court issued an opinion articulating its reasons for approving the Decree. See ER692-727. In its May 5 opinion, the court determined that the Consent Decree is "fair, reasonable, and equitable" and "does not violate the law or public policy" because it "allows the United States to complete its mineral sale and regulatory approval process for

the Project while accommodating local authority by the County in a manner that does not prejudice the federal mineral sales program." ER700, 703. The court also recognized that the Consent Decree "allows CEMEX finally to move forward with its Project," ER703, while acknowledging that CEMEX may need to secure other state regulatory approvals, including further CEQA environmental review, before the project may become operational. ER724. The May 5 opinion went on to determine that the Consent Decree was not the product of duress or overreaching, and that its provisions prohibiting certain County employees from taking actions intended to interfere with or thwart the implementation did not ***22** constitute a "prior restraint" on any of the County employees' free speech rights. ER 705-09, 725-26.

The May 5 opinion went on to reject the City's assertions that the County process to date violated the City's CEQA consultation rights. The court found that "the Consent Decree sets forth a project that complies with all substantive requirements of CEQA, fully identifies significant environmental effects and feasible mitigations, and..., in fact, provides additional environmental and other benefits to the County as a whole and the City in particular." ER711. The court alternatively found that, even if the County's full compliance with CEQA were subject to question, the City's CEQA-related objections would not affect the court's decision to approve the Consent Decree because "further environmental review of the Project by the County" would "frustrate the grant of federal mining contracts to CEMEX" and thus be preempted by federal law. ER712.

The May 5 opinion also repudiated the City's claim that the Consent Decree unfairly truncated the City's CEQA consultation rights. Citing the City's extensive involvement in the County's CEQA process (which included five comment letters on the draft EIR, four additional comment letters on an addition to the Draft EIR, and two comment letters on the final EIR, and at least nine City appearances before the County at public hearings on the Project, see ER726), the Court found that the City ***23** "actively participated throughout the framing, analysis, and development of this Project." ER714. Given the history of the City's unrelenting opposition to this Project, the court below determined the City's true objective was to use CEQA as a tool to derail or delay the Project, declaring:

> [Ujnsatisfied with its role as a commenting party, it appears now that the City has adopted a no-holds barred approach to do whatever is in the City's power to either stop the Project or continue with this never ending review process. The Court will not allow the City to usurp the County's CEQA process simply to stop or further delay the Project.

ER 714.

The district court's May 5 opinion also rejected the City's more substantive CEQA objections to the Consent Decree. The City had urged the court below to find that CEQA required another recirculation of the EIR based on allegedly new information derived from: 1) a USFWS' October 2001 "no jeopardy" biological opinion for the arroyo toad allegedly requiring the drilling of groundwater wells in new locations; 2) a provision (negotiated during the mediation of this case) capping CEMEX's rate of sand and gravel production at 5 million tons annually; and 3) a November 2003 letter to the City from the South Coast Air Quality Management District ("SCAQMD") agreeing with the City that the air quality impacts of the project should be reevaluated and become the subject of public comment in a revised EIR. The court determined that none of the documents contained environmentally ***24** significant new information requiring another circulation of a revised EIR for public comment. ER715-722. Finally, the district court rejected the City's argument that its findings of preemption would in any way limit or compromise the CEQA processes incidental to other (air and water quality) permits that CEMEX may still need from state agencies before it may lawfully commence performance under its sand and gravel contracts with BLM. ER724. As the Court explained:

> [N]othing in the Decree purports to affect any CEQA processes that may be ancillary to Federal Clean Air Act or Federal Clean Water Act permits that CEMEX needs to operate the project. Thus, nothing in the Consent Decree restrains the AQMD or the State Water Resources Control Board from conducting such CEQA procedures as may be required by law.

Id.

On May 20,2004, the district court formally entered the Consent Decree as a judgment of the court. ER748-49. This appeal followed.

*25 SUMMARY OF ARGUMENT

In approving the Consent Decree, the district court acted well within its broad discretion. The Consent Decree is fair, adequate, and reasonable to all parties. As the court below recognized, the Decree allows the United States to complete its mineral sale for the Project while accommodating local authority by the County to exercise a reasonable measure of regulatory control over the project through County-imposed project conditions.

The Decree does not impair the City's right to consult with the County about the project pursuant to CEQA. Although the Decree calls for the County to conclude its CEQA review of the project without further recirculation of the EIR for public comment, the City has, over a 10-year period, already availed itself fully of the myriad of CEQA consultation opportunities afforded by the County, by filing of at least ten comment letters addressing various CEQA-related aspects of the project, and participating in at least nine of nineteen County public hearings concerning CEMEX's project application.

The City's arguments that recent letters from the California Department of Fish & Game and the South Coast Air Quality Management District suggest a need for further recirculation of the County's EIR are without merit, because both documents were premised on each agency's erroneous assumption that there had been changes ***26** to the Project since each agency (years earlier) had filed comments in the County's CEQA review process for the project. The City's argument that a new County-imposed project condition accelerates the rate at which CEMEX may remove sand and gravel *from* the site and constitutes significant new information is baseless because the condition did not change project operation, but simply imposed an annual production limit where none was expressly stated in BLM's contracts with CEMEX.

This Court should not address the merits of the City's and amici arguments that the County is not preempted from further SMARA and CEQA review of the CEMEX project. The City and amici specifically argue that: 1) the Materials Act does not occupy the field of BLM mineral materials sales; 2) there is no inherent conflict between SMARA and the Materials Act; and 3) Granite Rock's preemption analysis authorizes the County to continue its review of the BLM-CEMEX mineral materials sale. It is not appropriate to address the merits of these arguments in this appeal because they were held in reserve by the original parties to the Consent Decree. Confronting those questions here would turn the City's appeal into a trial on the merits of the original parties' litigation positions, which is directly contrary to this Court's standards for reviewing consent decrees. It is not necessary for this Court to reach these preemption arguments, given the ample record support for the district ***27** court's findings that further County environmental review of the project would be unreasonable (and thus preempted) even if the preemption principles of California Coastal Comm'n v. Granite Rock Co. 480 U.S. 572 (1987), were applicable here.

If the Court chooses to address the merits of the City's arguments against facial preemption and conflict preemption here, those arguments should be rejected. BLM's pervasive regulation of federal mineral materials sales arguably leaves no room for duplicative state regulation of even the environmental aspects of mineral materials sales operations. The City's argument that there is no inherent conflict between SMARA and the Materials Act is equally unpersuasive, given that SMARA prohibits the implementation of BLM contracts expressly authorized by the Materials Act unless BLM's contractor obtains a local government's permission. In addition, there is nothing in BLM's regulations, a BLM rulemaking preamble, a 1992 Memorandum of Understanding between BLM and the State of California, BLM's contracts, and the NEPA record of decision for the project, that supports the City's and amici arguments against federal preemption.

Nothing in the Supreme Court's Granite Rock opinion remotely suggests that states have authority to prohibit the operation of federal proprietary natural resource programs unless the federal government's purchaser, lessee, or contractor first obtains state or local government permission. Even if the Granite Rock approach to ***28** preemption were extended beyond the confines of

the hardrock mining regime in which it was applied to BLM's mineral materials program under the Materials Act, and states are deemed to have licensing authority to impose reasonable environmental regulation on the sale of federally owned natural resources, the County's review procedures for the BLM-CEMEX sand-and-gravel sale were so unreasonable that the County is preempted from further review even under a Granite Rock analysis.

The district court's decision to take the City's motion for summary judgment off-calendar was a reasonable exercise of its discretion to calendar and manage its docket, given that (1) the City's motion was filed at a time when the original parties' consent decree motion was already pending; (2) this Court had already declared the City could not turn the clock back to reopen matters already settled; and (3) the City's summary judgment motion was filed before discovery ended, and thus before it could be determined whether there were genuine issues of material fact that could defeat the City's motion. Finally, there is no basis for the City's argument that the district court should have abstained from exercising jurisdiction over this case pursuant to Younger v. Harris. It is well-established that Younger abstention principles do not apply in cases where, as here, the United States is a party litigating against a state or local government.

***29 ARGUMENT**

I. Standards Of Review Applicable To Consent Decrees

Citing Phoenix Engineering & Supply v. Universal Electric, 104 F.3d 113 7 (9th Cir. 2002), and Kern Oil & Refining Co. v. Tenneco Oil Co. 792 F.2d 1380, 1385 (9th Cir. 1986), the City argues that the district court's decision to enter a consent decree must be reviewed by this Court under the “clearly erroneous” standard, and that this Court must apply a “close scrutiny” of the record in its review of the Decree. (Br.20.) These are not the correct standards of review applicable to Consent Decrees in this Court. [8] Rather, when reviewing a consent decree, courts “need only be satisfied that the decree represents a reasonable factual and legal determination.” United States v. Oregon, 913 F.2d 576, 581 (9th Cir. 1990), cert. denied, 501 U.S. 1250(1991).

In defining the appropriate scope of review of consent decrees, this Court explained, the “universally applied standard in assessing consent decrees is whether it is fundamentally fair, adequate and reasonable.” ***30** Officers for Justice v. Civil Service Comm'n of City and County of San Francisco, 688 F.2d 615, 625 (9th Cir. 1982) (emphasis added): see also Sierra Club. Inc. v. Electronic Controls Design, 909 F.2d 1350,1355 (9th Cir. 1990). This necessarily requires the district court to balance a number of factors, including: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the extent of discovery completed; the stage of the proceedings; the experience and views of counsel; and the presence of a governmental participant. Officers for Justice. 688 F.2d at 625.
As this Court has stated, a district court's

intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by. or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Hanlon v. Chrysler Corp. 150 F.3d 1011, 1027 (9th Cir. 1998) (citations omitted; emphasis added). Indeed, a district court's “settlement or fairness hearing” on a proposed consent decree may not be “turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute.” Officers for Justice. 688 F.2d at 625 (citations omitted; emphasis added).

In assessing its own role in reviewing challenges to consent decrees, this Court has declared that its own “task on appeal is even more limited,” because the ***31** initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge. Great weight is accorded his views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the

action accordingly. We are not to substitute our notions of fairness for those of the district judge and the parties to the agreement. Consequently, we will reverse only upon a strong showing that the district court's decision was a clear abuse of discretion.

Id. at 625-26 (citations omitted; emphasis added).

Applying the foregoing standards of review to this case, the Consent Decree must be affirmed because the City has shown no "clear abuse of discretion" on the part of the district court. Given the great deference owed the district court's decision to approve the original parties' settlement under this Court's review standards applicable to consent decrees, there is no basis for overturning the Decree in this case.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE CONSENT DECREE IS FAIR, ADEQUATE, AND REASONABLE

There is abundant record support for the district court's determination that the Consent Decree is "fair, reasonable, and equitable" to all parties, and that it "does not violate the law or public policy." ER700. As the court observed, the Decree "allows the United States to complete its mineral sale and regulatory approval process for the Project while accommodating local authority by the County in a manner that does not prejudice the federal mineral sales program." ER703. The court further recognized ***32** that the Consent Decree also "allows CEMEX finally to move forward with its Project," id, while acknowledging that CEMEX may need to other state regulatory approvals, i.e., state air quality and water quality permits (including further CEQA environmental review ancillary to those permits), before the project may become operational. ER723-24. The court also found that the Consent Decree is beneficial to all parties because it "not only results in a much more environmentally friendly Project than originally proposed or that would have resulted from the completion of the litigation, but also resolves this complex and contentious litigation in a lawful and reasonable manner." ER727.

In addition, the district court reasonably concluded that the Consent Decree is fair, adequate, and reasonable to the City. As this Court's February 24,2004 opinion (granting the City's intervention) makes clear, the City's sole interest in this action is limited to its right to consult with the County about the project pursuant to CEQA. ER639. And, as the district court correctly observed, the City has already availed itself fully of the myriad of CEQA consultation opportunities afforded by the County. Indeed, the district court specifically found that between 1991 and 2001 the City submitted no less than ten comment letters addressing various CEQA-related aspects of the project, and participated in at least nine of nineteen County public hearings concerning CEMEX's project application. ER726.

***33** The district court also reasonably rejected the City's allegations that environmentally significant new information required yet a third circulation of an EIR for public comment. ER713-723. The court correctly concluded that the City's alleged concerns about the environmental effects of the potential mitigation measures to protect the Arroyo Toad, as suggested in the USFWS' October 2001 no-jeopardy opinion for the toad, were groundless and did not trigger CEQA's EIR recirculation requirement. The City incorrectly asserted that the no-jeopardy opinion requires drilling of new groundwater wells at different sites than previously analyzed. As the court below correctly observed, however, "nothing in the Consent Decree changes the federally approved project" with respect to wells involved in the Project. ER718. The no-jeopardy opinion only contemplated the possibility of additional well sites "in the event that monitoring data showed that existing wells were affecting the Arroyo Toad and the habitat provided by the Santa Clara River." Id. [9]

The court likewise reasonably rejected the City's argument that a so-called "project acceleration" clause, negotiated by the original parties in court-ordered ***34** mediation, and imposed by the County as one of its own separate project conditions, required recirculation of the EIR. ER 718-19. As the district court correctly found, this County project condition did not accelerate the rate at which CEMEX was authorized to produce concrete at the site, but, in fact, was a limitation on the maximum annual production rate. ER 719. This production cap does not change the schedule of production analyzed in the EIS/EIR. Because the condition was a production "cap" (i.e., an environmentally beneficial measure), not an "accelerator" as

mischaracterized by the City, the Court rationally concluded that it would not afford a basis for requiring further recirculation of the EIR under CEQA. Id.

The court below likewise correctly determined that a letter transmitted by the SCAQMD to the City (not the County) in November 2003 did not trigger a need for recirculation of the EIR pursuant to CEQA. ER719-722. In October 2003, the City asked the SCAQMD to conduct a revised air quality analysis of the impacts of the project based on a new "Health Risk Guidance For Analyzing Cancer Risks From Mobile Source Idling Emissions for CEQA Air Quality Analysis." ER599-615. The Guidance was initially developed in December 2002, long after the SCAQMD had completed its review of the draft EIR and filed comments concerning the project with the County in September 1999 and December 2000. See ER599,604. The SCAQMD responded in its November 2003 letter to the City that "the AQMD staff's review ***35** believes that the significant new information provided in the attached comments meet the criteria for re-circulating the DEIR pursuant to CEQA... should the county reconsider the proposed project." ER 599.

The court below correctly found that the SCAQMD's November 2003 letter and attachments did not trigger renewed CEQA consultation rights in the City. As the court observed, the SCAQMD's transmission of its November 2003 letter was prompted by a City request at a very late date.[10] In any event, as the court reasonably found, even if the SCAQMD letter had been transmitted directly to the County, the substance of that letter would not, under CEQA, constitute environmentally significant new information requiring recirculation of the EIR for public comment. The new SCAQMD air quality cancer risk criteria were developed two years after the SCAQMD last commented on the draft EIR in December 2000 (see ER604), and there were no changes in the project between the time of those comments and SCAQMD's re-analysis of the project in November 2003. Even though the County was not ***36** required by CEQA to consider late comments from the SCAQMD, as the district court observed (ER721), the County in its CEQA findings independently analyzed the project in light of the SCAQMD's new guidance document and, based on that evaluation, concluded that the cancer risk for on-road diesel truck travel for the Project resulted in less than the threshold of significance of 10 parts per million of diesel particulate emissions. See SER2691-2693.

In the final analysis, as the district court rationally determined based on a voluminous environmental record compiled by the County, the Consent Decree is fair, adequate and reasonable to the City's interest in CEQA consultation because it was entered after the City availed itself of an extraordinary number of comment and hearing opportunities, and because the Decree itself complies with all substantive requirements of CEQA. Indeed, the Decree ensures that all of the exhaustive CEQA reviews of the Project that the County has conducted to date will not go to waste by requiring the County to certify the final EIR, issue CEQA findings, issue a statement of overriding considerations (where project impacts could not be mitigated to a level less than significant), and impose mitigation measures on the project. SER2481-2487.

But even assuming that there were still some perceived shortcoming or potential flaw in the County's CEQA analysis for the project, the district court also ***37** reasonably concluded that further County environmental reviews would frustrate BLM's contracts with CEMEX, and are thus preempted by federal law. ER712. The record establishes that the County had been reviewing the project for 11 years by the time it ultimately denied CEMEX a permit for the project in April 2002. ER2371. If that length of time were not per se unreasonable, the County further abused the opportunity afforded it by BLM to review the environmental aspects of the CEMEX project by refusing to conduct a joint or coordinated NEPA-CEQA review of the project, contrary to a 1992 memorandum of understanding between the State of California and BLM's California State Office. Sec ER 652 (paras. 3&4). The unreasonableness of the County's process is further demonstrated by the County's cavalier treatment of the CEMEX application, as illustrated by the County's time-consuming consideration, from 1994 through 1998, of two incompatible land-use proposals (both manufactured housing applications) overlapping the CEMEX project site and encroaching on the federal mineral estate, even though the County was clearly preempted by federal law from approving the incompatible proposals. See SER407-646; 981-987.

The unreasonableness of the County's review of the project was exacerbated by the County's three separate votes to deny CEMEX's permit application, at least two of which were due to the County's judgment that CEMEX had failed to "carry ***38** its burden" under SMARA to establish that its project is consistent with the County's land-use laws, i.e. a local Zoning Ordinance

and the County's General Plan. SER1273,1479-1536,1844-45,1946. Finally, on the very eve of its final vote on the Project in November 2001, the County decided to change the methodology for assessing the traffic impacts even though its staff had endorsed the previous traffic methodology on two prior occasions. SER1822-1842. Given the unreasonableness of the County's environmental review process, and given the County's demonstrated insensitivity to the federal law constraints on its discretion to do anything other than impose reasonable environmental conditions on the project in a timely manner (despite warnings from its staff, see SER1629-30,1677-78), there is more than ample record support for the district court's conclusion that "further environmental review of the Project by the County is preempted, because it would frustrate the grant of federal mining contracts to CEMEX." ER712. [11]

***39** Finally, the district court reasonably found that the Decree was not the product of duress and/or overreaching, and did not constitute an unlawful "prior restraint" on County employees. ER705-709; 725. The Decree provides for dissolution of the Decree and reactivation of the litigation if County "official policymakers" commit a material breach of the Decree "which arises out of an intentional effort... to materially delay, frustrate or prevent the timely and successful implementation" of the project. ER766. The Decree also provides for potential remedies for certain past intentional conduct of County employees if such conduct, viewed retrospectively, had set in motion events which [12] further materially delay or prevent the project's implementation. ER767-68.12 Before CEMEX and/or the United States can seek ***40** remedies for these kinds of material breaches, they must first meet and confer in good faith with the County to resolve differences. ER770-71. Next, they must seek a non-binding determination from the mediator, former Judge Phillips as to whether there has been an intentional material breach and whether the Decree should be dissolved. ER770. Only then may the plaintiffs seek dissolution and reactivation of the litigation, or contempt remedies, in the district court. ER771.

The district court reasonably rejected the City's characterization of these Decree provisions as "duress conditions." ER707-08. As the court below correctly recognized, these provisions did not reflect coercion of the County by the Plaintiffs, or otherwise undermine the County's authority to enforce all County-imposed conditions concerning the Project. ER708. As the lower court explained, the County agreed to these provisions to settle the broader preemption lawsuit, not because the plaintiffs "had 'something big' on the County." ER708. And, as the court observed, although the Decree provides that intentional violations of the retroactive and ***41** prospective "misconduct" provisions of the Decree may afford the plaintiffs grounds for seeking reactivation of the litigation, and to seek potential contempt sanctions against the County, the Decree also provides the County multi-layered safeguards against capricious enforcement (annual guidance instructions to policymakers, meet-and-confer requirements, a non-binding advisory procedure before a neutral [former Judge Phillips]) to ensure that reactivation of the litigation and/or contempt-related remedies are not invoked without substantial justification. ER709. [13]

***42** In sum, the district court's determination to approve the Consent Decree was a reasonable exercise of its broad discretion to determine the fairness, reasonableness, and adequacy of the settlement among the original parties to this action. Accordingly, the decision to approve the Decree should be affirmed.

***43 III. THE CITY AND AMICI CHALLENGES TO THE CONSENT DECREE ARE WITHOUT MERIT**

The City and the amici [14] raise a myriad of challenges to the Consent Decree. Initially, they challenge the legal underpinnings of the district court's preemption findings and conclusions. Some also assert that the Decree is unconstitutionally vague and thus constitutes a constitutionally prohibited "prior restraint" on the County employees' free speech rights. The City and some amici further challenge the district court's findings that the Decree was not the product of duress and overreaching. The City also argues that the District Court erred by taking its motion ***44** for summary judgment off-calendar (before denying it as moot), and that the district court should have abstained from exercising jurisdiction. Assuming that the court's preemption findings are invalid, the City and the amici further contend that the CEQA documents issued by the County pursuant to the Decree do not comply with CEQA because new information has come to light requiring recirculation of an EIR.

Due to space limitations on the government's brief, and the need to prioritize issues in terms of the federal interests in this case, the United States opposes but does not separately address the "prior restraint," "duress," and CEQA-based arguments in the City and the amici briefs. The United States agrees with the rebuttals of those arguments set forth in CEMEX's and the County's briefs. The remainder of this brief is devoted to the City's federal preemption arguments, as well as the City's arguments that the district court should not have taken the City's summary judgment motion off-• calendar, and that the district court should have abstained from exercising jurisdiction per Younger v. Harris. As we now explain, these arguments are without merit.

A. This Court Should Not Address The City and Amici Claims That Federal Law Does Not Preempt The County From Conducting Further Environmental Reviews Of The Project

In its brief, the City challenges the authority of the district court to make even the limited preemption findings that appear in the Decree, i.e., that further County environmental review of the Project would amount to unreasonable environmental ***45** regulation that is preempted by the Materials Act. The City argues that neither.the Materials Act nor FLPMA preempt the County from exercising further licensing authority over the CEMEX project. City Br.21-23. According to the City, the Materials Act does not occupy the field of BLM mineral materials sales regulation., and there is no conflict between that Act and SMARA. Id at 21 -25. The City also argues that there can be no federal preemption here because BLM's regulations, a BLM "memorandum of understanding" ("MOU"), BLM's contracts with CEMEX, and BLM's record of decision (approving CEMEX's operating and reclamation plans) assertedly contemplate state regulation of BLM's mineral materials sale to CEMEX, and require CEMEX to obtain a surface mining permit from the County before it may lawfully commence performance of its mining contracts. City Br.25-27.

As a threshold matter, it is important to point out that it is improper for the City and the amici to raise the foregoing issues in the context of their challenge to the Consent Decree. Under this Court's review standards applicable to consent decrees, challenged decrees are to be assessed in terms of fairness, adequacy, and reasonableness, and for the presence or absence of fraud, duress, or overreaching. Challenges to consent decrees may not be transformed into a "trial or rehearsal for trial on the merits." Officers for Justice. 688 F.2d at 625. Indeed, "[n]either the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact ***46** and law which underlie the merits of the dispute." Id By inviting the Court to address their arguments against facial preemption and conflict preemption of SMARA by the Materials Act and FLPMA, the City and the amici run afoul of these constraints.

The Consent Decree does not resolve whether facial or conflict preemption principles should be applied to the County's attempt to regulate the CEMEX project, and/or the manner in which the County processed CEMEX's permit application. In the court-ordered mediation, the original parties could not agree on a precise set of preemption principles that would govern this case in the absence of a settlement. As reflected in the Consent Decree, the County is of the view that it possesses the authority to license the CEMEX project at least to the extent of exercising the reasonable environmental state regulatory authority deemed not facially preempted in the hardrock mining context in California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572(1987).

In the Decree, CEMEX and the United States did not agree that the Granite Rock preemption analysis was applicable to whether states have licensing authority over BLM's mineral materials sales program, and specifically reserved the right to argue "in any subsequent litigation involving the Project (including this Consent Decree)" that alternative Supremacy Clause doctrines curtail state authority to ***47** regulate the same subject matter that BLM already regulates pursuant to the Materials Act. [15] SER2473, For that reason, the Consent Decree concludes that it is unnecessary for the court to decide whether the preemption analysis of Granite Rock applies to this case, because "all [original] Parties agree that, at a minimum, any County regulation of the Project that goes beyond the imposition of reasonable environmental conditions in a timely manner thereon is preempted by federal law under any applicable standard." SER2473. By challenging the legal merits of CEMEX's and the United States' underlying preemption claims, and by asking this Court to rule on reserved issues such as whether County licensing of the CEMEX project is preempted on the basis of field preemption or inherent conflict preemption principles, the City is turning this appeal into the "trial on the merits" that this Court warned against, in Officers for Justice. 688 F.2d at 625. Accordingly, while it is appropriate for this Court to examine the record to review the overall reasonableness ***48** of the district court's finding that further County

environmental review would be preempted even under a Granite Rock analysis, the City is not entitled to obtain what would amount to declaratory relief from this Court decreeing that SMARA is not facially preempted by the Materials Act, or that there is no inherent conflict between the Materials Act and SMARA's prohibition of mining pursuant to BLM's mineral materials contracts, unless and until BLM's contractor obtains state permission.

In outlining below the potential rebuttals to the City's field preemption and conflict preemption arguments, we are not suggesting that it is appropriate for the Court to address these issues. Our purpose in responding is simply to give the Court some idea of what the counter-arguments to the City's "no field preemption" and "no conflict preemption" arguments might be if these issues had not been held in reserve by the original parties, so that the City's arguments are not left completely unchallenged. If the Court believes that these issues must be decided, it should remand the case to the district court for briefing on the merits. Officers for Justice. 688 F.2d at 630 ("Our only alternatives on appeal are to vacate and remand upon a determination that the district court abused its discretion, or to affirm its judgment. In short, the settlement must stand or fall as a whole").

***49 B. In Any Event, The City's and Amici' Various Claims Against Federal Preemption Lack Substance**

If the Court addresses the merits of the City's various arguments against federal preemption, they should all be rejected for the reasons set forth below.

1. The City's Argument That The Materials Act Does Not Occupy The Field Of Federal Mineral Materials Sales Regulation Is Meritless

In its brief, the City suggests that the Consent Decree's preemption findings are legally infirm because the Materials Act does not occupy the field of regulation of BLM mineral materials sales. City Br. 22-23. A contrary view is that BLM's authority in the mineral materials sales arena is so comprehensive that it cannot be said that Congress has left any room for states to supplement it through overlapping and duplicative operating and reclamation requirements.

Although there is no language in the Materials Act, or in BLM's regulations implementing that Act, expressly preempting state law, state law is nonetheless preempted even "[i]n the absence of an express congressional command" if federal law "so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.'" Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1995)(citing Pacific Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n, 461 U.S. 190, 204, (1983); and Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982)).

***50** In carrying out its mineral materials sales authority, BLM could be said to be performing an all-encompassing series of proprietary and regulatory functions that leaves no gaps for states to fill. Thus, under the Materials Act and FLPMA, BLM: 1) designates tracts of public land from which a sale of mineral materials is to be made, 43 C.F.R. § 3602.12(a); [16] 2) enters into negotiations or offers minerals for sale under competitive bidding procedures (depending on the volume of material to be sold), id at § 3602.41-44; 3) issues contracts, id at § 3602.45-46; 4) conducts environmental review of the proposed extraction and removal operations, id. at §§ 3601.11, 3601.40; 5) determines the mining and reclamation requirements to be imposed on its contractors, id at § 3601.43; 6) inspects mining operations, id. at § 3601.51; 7) requires performance bonds to guarantee the financial security of its mineral materials contractors, id at § 3602.14; 8) verifies volumes of materials extracted and removed pursuant to a sale, id at §§ 3602.28-3602.29; 9) collects payments for mineral materials removed, id at § 3602.21; 10) determines whether to approve assignments of mineral materials contracts by the contractor, id. at § 3602.24; and 11) requires contractors to maintain records relating to mineral materials ***51** extraction for up to six years to enable BLM to determine the contractor's compliance with the contracts and relevant federal law, id at § 3602.28. Under the Materials Act, BLM alone determines whether a proposed sale or disposition of federally owned minerals is "detrimental to the public interest." 30 U.S.C. § 601. In short, the Act and BLM's pervasive control over federal mineral materials sales operations so completely occupies this field of regulation that states arguably have no authority to supplant it with state law. [17]

2. The City's Argument That SMARA Does Not Inherently Conflict With The Materials Act Is Equally Invalid

Assuming that the Materials Act does not "occupy the field" of regulation of the sale and/or disposal of federally owned mineral materials, the City goes on to claim that SMARA does not inherently conflict with the Materials Act. City Br. 22-23. According to the City, it is possible for a BLM contractor such as CEMEX to ***52** comply with the Materials Act, SMARA, and CEQA, because all three share minimization of environmental damage. as a common goal, and thus may be harmonized in their application. Id. at 23.

Cutting against the City's argument that SMARA does not inherently conflict with the Materials Act would be the legal significance of congressional enactments, such as the Materials Act, authorizing the federal government to conduct sales of its natural resources removed from property (including mineral estates) owned by the United States, and their effect on state laws that prohibit the implementation of those sales without state permission. As this Court has acknowledged:
"Absent consent or cession, a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. 'A different rule would place the public domain of the United States completely at the mercy of state legislation."'

Venture County v. Gulf Oil Corp., 601 F.2d 1080, 1083 (9th Cir. 1979) (emphasis added) (quoting Kleppe v. New Mexico, 426 U.S. 529, 543 (1976) (internal citations omitted)). In the Materials Act, Congress has so acted with respect to the federal government's sale of sand and gravel from public lands.

The City misses the point in arguing that there is no inherent conflict between SMARA and the Materials Act because it is possible for a BLM contractor such as ***53** CEMEX to comply with the Materials Act, SMARA, and CEQA, and because all three share minimization of environmental damage as a common goal. It is not the goals of SMARA and the Materials Act, or the impossibility of harmonizing the administration of these federal and state laws, that creates an inherent conflict. Rather, it is the state licensing requirement of SMARA that imposes a potentially crippling obstacle in the path of BLM's efficient administration of the Materials Act. Under California law, all mining activities on federally owned land (or mineral estates) are governed by SMARA, regardless of whether the mining activity is incident to BLM mineral materials contracts. [18]

Under SMARA, "no person shall conduct surface mining operations unless a permit is obtained from, a reclamation plan has been submitted to and approved by, and financial assurances for reclamation ***54** have been approved by, the lead agency...." Cal. Pub. Res. Code § 2770. Given its broad sweep, SMARA is susceptible to an interpretation that BLM is prohibited from implementing a necessary incident of its Materials Act sales program - allowing the removal of sand and gravel by its contractor from the project site - unless the state or local government grants its permission.

It is well-established that state laws that prohibit the implementation or performance of federal contracts or federally authorized activity, unless a state grants its permission, conflict with federal law and thus violate the Supremacy Clause. See Hancock v. Train, 426 U.S. 167, 178 (1976); EPA v. State Water Res. Control Bd., 426 U.S. 200 (1976); First Iowa Hydro-Electric Coop. v. Federal Power Comm'n., 328 U.S. 152 (1946); Federal Power Commission v. Oregon 349 U.S. 435 (1955); State of Montana v. Johnson, 738 F.2d 1074, 1978 (9th Cir. 1982); Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F. 2d 585, 598-601 (9th Cir. 1980); and Citizens and Landowners Against the Miles City/New Underwood Powerline v. USDOE, 683 F.2d 1171 (8th Cir. 1982).

It does not matter whether the federal function is implemented through a private contractor instead of by the federal government itself; either way, the federal function is immune from state licensing requirements. See ***55** Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 179 (1988). [19] / Because SMARA appears to prohibit the fulfillment of federal mineral materials contracts unless

BLM's contractor obtains a license from the state or local government, and because SMARA imposes no time limit on the County's authority to review a BLM contractor's mining and reclamation plan, there is a strong case to be made that SMARA inherently conflicts with BLM's authority to conduct its mineral materials sales program, and to that extent is preempted by the Materials Act. See Ventura County v. Gulf Oil Corp., 601 F.2d 1080, 1083 (9th Cir. 1979) (deeming local ordinance requiring a County permit to be preempted by the federal Mineral Leasing Act because licensing requirement vested control over federally authorized oil development in the County.); see also Burbank-GIendale-Pasadena Airport Authority v. City of Los Angeles, 979 F.2d 1338, 1341 (City of Los Angeles' exercise of police power regulation to require prior City approval, and thus delay, of construction of runways and taxi ways was a direct interference with the movements and operations of aircraft, and is therefore preempted by federal law.); cf. South Dakota Mining Ass'n. Inc. v. Lawrence County, 155 F.3d 1005, 1011 (8th Cir. 1998) ("A local government cannot prohibit a lawful ***56** use of the sovereign's land that the superior sovereign itself permits and encourages. To do so offends both the Property Clause and the Supremacy Clause of the federal Constitution.").

a. The City's arguments that BLM's regulations eliminate potential conflict between the Materials Act and SMARA are insubstantial

The City and the amici nonetheless assert that certain of BLM's regulations eliminate any inherent conflict between the County's asserted licensing authority under SMARA, and the Materials Act. Sec City Br. at 22-23 (citing 43 C.F.R. § 3809.3), SCVCC Br. 6 (citing 43 C.F.R. § 3809.420(a)(6)). But those regulations do not help the City because they 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 ("This subpart does not apply to leasable and salable minerals"). [20]

***57 b. The City.errs in arguing that BLM's 2001 preamble to revisions to its Materials Act regulations rebuts preemption**

Amicus SCVCC further argues that when BLM adopted the current version of 43 C.F.R. § 3601.6(d) in 2001, re-codifying BLM's policy to protect the environment and minimize damage to public health and safety from mineral materials sales operations, it specified that this regulation "does not preempt state law." SCVCC Br. 6. Nothing could be further from reality. The provisions of 43 C.F.R. § 3601.6(d) quoted by the SCVCC have been part of BLM's regulations since at least 1983. See 43 C.F.R. § 3600.0-4 (1984); 48 Fed. Reg. 27008, 27011 (1983); see also 66 Fed. Reg. 58892, 58897 (2001) (stating that current 43 C.F.R. § 3601.6 is simply a recodification of former 43 C.F.R. § 3600.0-4 (1984)). And when it adopted 43 C.F.R. § 3600.0-4 (1984) in 1983, BLM made no reference to the rule as not preempting state law. See 48 Fed. Reg. 27008 (1983).

In any event, the statement in the 2001 preamble to BLM's revisions to the mineral materials regulation - i.e., that the "rule does not preempt state law" - was made simply to satisfy a requirement of Executive Order No. 13132, which specifies ***58** that federal agencies must consider federalism issues when they issue amendments to regulations. Thus, in making the "no preemption" statement in the 2001 preamble, the BLM was certifying, pursuant to E.O. 13132, that the 2001 revisions to its mineral materials regulations - which pertained to BLM's "inspection of mineral materials operations, production verification, contract renewal, procedures for cancellation, bonding, and appeals" (none of which is subject to state regulation) - did not raise federalism concerns. See 66 Fed. Reg. 58892 (2001), see also Addendum to City's Brief, Doc. 21, at p. 16. More specifically, because the 2001 revisions did not purport to affect the rights of state and local governments, under a different subpart of BLM's mineral materials regulations (see 43 C.F.R. Subpart 3604), to make "free use" of mineral materials, BLM concluded that nothing in its rule revisions preempted state law. [21]

***59 c. The City's argument that a 1992 Memorandum of Understanding establishes County licensing authority over CEMEX's project does not withstand analysis**

The City next maintains that a "Memorandum of Understanding" ("MOU") executed in 1992 between the State of California, BLM's California State Office, and the Forest Service, negates a finding of preemption of state law. See City Br. 25. This assertion, too, is without substance.

It is evident from the face of the MOU that its primary focus is coordination of shared federal-state responsibility of hardrock mining, not BLM mineral materials sales. But hardrock mining and BLM's mineral materials sales regime are governed by entirely separate statutory and regulatory frameworks. Compare 30 U.S.C. §§ 22-46, with 30 U.S.C. § 601, 602: compare also 43 U.S.C. § 299(1)(b) through (o), with 43 U.S.C. § 299(p)(3); compare 43 C.F.R. Part 3600 with 43 C.F.R. Part 3800 (and, in particular, Subpart 3809).

In any event, even assuming BLM was authorized to extend the MOU to ***60** mineral materials sales, nothing in the MOU establishes a licensing role for the State over BLM mineral materials contracts. To the contrary, the few minor provisions in the MOU that explicitly reference the mineral materials laws, regulations, and contractors, suggest that states do not have permitting authority over BLM mineral materials contracts. Thus, as it pertains to BLM mineral materials sales, the MOU states, in paragraph 17, that "where a Federal agency contractor will be the operator for surface mining activities on Federal lands that are not exempt from SMARA, requirements for reclamation and any other necessary environmental documentation will be prepared and approved in accordance with paragraphs 8 and 9 of this MOU." ER 654. Paragraphs (8) and (9) of the MOU provide as follows:
(8) For mining operations requiring a Plan of Operations for projects solely on Federal land, that are not exempt from SMARA, BLM... will provide lead agencies notice and the opportunity for early participation, consultation, and submission of information and recommendations for the development of environmental recommendations and reclamation plans;

(9) Within 30 days of receipt of notification under paragraph (8) above and copies of relevant informational documents, lead agencies will provide comments and recommendations to the. BLM so that they may be considered and incorporated, as appropriate, as part of the environmental review and proposed BLM decision.

ER 653 (emphasis added). Thus, far from authorizing the state or local agencies to exercise a licensing power over mineral materials sales, the MOU suggests that the ***61** State's authority is limited to providing input (comments and recommendations) as to conditions that BLM, in its discretion, may attach to its contractor's operating and reclamation plans.

d. The City's argument that the County may impose licensing requirements on operations incident to BLM's Materials Act contracts based on provisions in those contracts and in BLM's Record of Decision is without merit

The City also seeks to overcome the Supremacy Clause by calling attention to provisions in BLM contracts with CEMEX, and BLM's record of decision ("ROD"), as suggesting a licensing role for the County pursuant to SMARA. Br. 26. While the contracts and ROD suggest that the County would have authority to review the reclamation aspects of CEMEX's project, see SER2499,2505,2516, nothing in those documents amounts to a BLM concession that the County itself may prohibit the implementation of BLM' s contracts unless and until the County grants its permission.

In any event, there are no legal citations in the contracts or the ROD identifying the source of BLM's authority to insert these provisions. It is possible that BLM's California State Office may have believed, when it inserted these clauses in the contracts and ROD, that the state permitting authority over environmental aspects of hardrock mining under General Law, deemed not facially preempted in California Coastal Comm'n v. Granite Rock Co. 480 U.S. 572 (1987), applied ***62** equally to its mineral materials program; however, there is no statutory basis, regulation, or case law support for such a proposition. [22]

In their amici briefs, the CBD, Palmdale, and the League of CC raise arguments that suggest that it is a foregone conclusion that Granite Rock is dispositive of this case even though Granite Rock arose under the General Mining Law, not the Materials Act. See CBD Br. 21; Palmdale Br. 9; CC League Br. 19. Notwithstanding these arguments, the United States believes that

there are critical distinctions between the Mining Law and the Materials Act that militate against uncritically applying the ***63** rationale of Granite Rock, which was developed in a hardrock mining case under the General Mining Law, to justify judicial recognition of state authority to license sand and gravel operations authorized pursuant to Materials Act contracts.

In Granite Rock, the Court held that the General Mining Law, FLPMA, the National Forest Management Act, and the Coastal Zone Management Act ("CZMA") did not evince a congressional intent to occupy the field of environmental regulation of hardrock mining on public lands. Finding that the California Coastal Act (i.e., California's statute implementing the CZMA) authorized the State, through a permit system, to regulate only the environmental (but not the land-use) aspects of hardrock mining operations, the Court rejected the plaintiffs facial preemption challenge as premature in light of a possibility that the state could exercise its permit system to impose only reasonable environmental regulation on the hardrock mining operator. 480 U.S. at 588-89.

The United States submits that there are fundamental differences between the Materials Act and the federal statutes at issue in Granite Rock. The General Mining Law, 30 U.S.C. § 22 et seq., is a public land grant statute that authorizes the public to enter upon public lands for the purpose of prospecting and mining subject to BLM regulatory oversight. The remainder of the federal statutes examined in Granite Rock for potentially preemptive impact all involved federal land-use management in one ***64** form or another. Federal agency regulations implementing some of those statutes examined in Granite Rock expressly acknowledged the authority of states to impose environmental conditions on hardrock mining activities. [23]

Here, the federal statute at issue, the Materials Act, is not a public land grant statute. As explained above (see p. 49-50, supra), it establishes a comprehensive (regulatory and proprietary) marketing program authorizing an agency of the United States, BLM, to sell U.S.-owned natural resource commodities - sand and gravel - to private interests, in transactions that potentially implicate substantial revenues ($28 million in this case) for the United States. This program arguably leaves no room for state permitting authority.

In this sense, the mineral materials marketing program established by the Materials Act can be likened to the oil and gas marketing programs established by the Mineral Leasing Act, 30 U.S.C. §§ 181, 226(b), 226(k)(1)(2), and the Outer Continental Shelf Leasing Act, 43 U.S.C. §§ 1331, 1337(a)(1)(A), (C) & (G); the ***65** grazing fees program established by the Taylor Grazing Act, 43 U.S.C. § 315b, and the timber sales programs established by the National Forest Management Act, 16 U.S.C. § 472a. We are not aware of any state restrictions on the exercise of federal authority under any of these other statutory federal resource marketing programs.

In 1994, Congress itself placed BLM's mineral materials sales under the Materials Act together with oil and gas leasing under the Mineral Leasing Act in one category, and distinguished them from BLM's regulatory oversight over hardrock mining under the General Mining Law. In the 1994 amendments to the SRHA, Congress provided that nothing in the SRHA shall affect state authority over reclamation plans in a provision clearly (and possibly solely) applicable to locatable hardrock mining activities under the General Mining Law, but then went on to specifically exclude from this provision minerals subject to disposition under both the Mineral Leasing Act and the Materials Act of 1947. Compare 43 U.S.C. § 299(p) with 43 U.S.C. § 299(i)(1). By excluding oil and gas leasing and mineral materials sales from 43 U.S. C. § 299(i)(1), Congress expressly negated any implication that states have reclamation plan authority over oil, gas, and mineral materials sales operations on federally owned mineral estate.

Finally, nothing in Granite Rock remotely acknowledges that the effect of its decision would be to transfer to the states the power to prohibit the operation of these ***66** proprietary federal resource programs unless the purchaser, lessee, or contractor first obtains state permission. Indeed, this Court has already concluded that local governments have no authority to impose licensing requirements on BLM's oil leases on public lands. Ventura County v. Gulf Oil Corp. 601 F.2d 1080 (9th Cir. 1979) (The issue is whether the County has the power of ultimate control over the Government's lessee, and this issue persists whether or not a use permit would eventually be granted.) [24]

3. Even If The County's Authority To License Operations Incident To BLM's Mineral Materials Sales Is Governed By A Granite Rock Preemption Analysis, The County's Documented Abuse Of That Authority Amounts To Unreasonable Environmental Regulation That Is Preempted By Federal Law

As explained previously (see p. 47n. 16, supra), the original parties could not agree on the precise preemption standard but were able to at least agree that further environmental review by the County would amount to unreasonable state regulation of a federally authorized project that is preempted by the Materials Act, even under ***67** a Granite Rock standard. The City attempts to overcome the overwhelming record establishing the unreasonableness of the length of the County's environmental review by indulging in creative timekeeping - suggesting that the United States' environmental review took 12 years, while the County's review took just nine. Br. 29-30. Not only is this argument contrary to the record, see SER2372-73, it does not take into account the unreasonable County procedures CEMEX had to endure just to • bring its project to an initial vote by the County Planning Commission. During that nine-year period (1990 to 1999), the County staff refused BLM's and CEMEX's reasonable requests to conduct coordinated NEPA-CEQA reviews causing BLM's own review process to be delayed five years. SER 23 71 -72. Coordination of NEPA-CEQA review was expressly authorized by the 1992 MOU, ER652, and thus, the County's refusal to coordinate was directly contrary to the MOU. Such a coordinated environmental review would likely have synchronized the completion of environmental reviews of both governments much earlier than what transpired. ER2371-72.

During this nine-year period, BLM and CEMEX also had to stand by while the County boldly entertained manufactured housing proposals overlapping the project site even though the proposals were incompatible with CEMEX's mineral materials contracts (see SER407-646; 981 -987), and even though the County, by its own staff's ***68** admission (see SER1629-30, 1677-78), was preempted from denying CEMEX's permit application. The first vote denying the permit (SER1273-74), after a nine-year period of substantial delays, was not the only evidence of unreasonable County process.

Over the course of an additional three years (1999 to 2002), CEMEX had to wait and watch as the County postponed hearing after hearing, extended comment period after comment period, subjected CEMEX to an ever-changing series of County demands, pressured CEMEX to negotiate with local opponents of the project, and revisited traffic studies that had long been completed, until the County ultimately voted two more times to deny the project. SER1479-1536; 1844-1845. The County's unreasonable processing of CEMEX's SMARA application prompted the SMGB, California's appellate agency for administrative appeals from County SMARA decisions, to issue an extraordinary statement publicly criticizing the County for its indecision and delay. SER75-76.

In short, the County's permitting process here abused the presumption of good faith that the Granite Rock Court applied to States when it postulated that

> if reasonable state environmental regulation is not pre-empted, then the use of a permit requirement to impose the state regulation does not create a conflict with federal law where none previously existed. The, permit requirement itself is not talismanic. ***69** 470 U.S. at589. When it determined that "reasonable" state environmental regulation (of hardrock mining under the General Mining Law) could theoretically pass muster under the Supremacy Clause, the Granite Rock Court could not have had in mind, as "reasonable environmental regulation," a permitting process riddled with delay, indecision, and ever-changing demands by a local government, such as the County has visited upon CEMEX and BLM's mineral material sale in this case. [25]

B. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY TAKING THE CITY'S SUMMARY JUDGMENT MOTION OFF-CALENDAR

The City argues that the district court erred in taking its summary judgment motion off-calendar because it was necessary for that court to decide the merits of the preemption claims in this case "before considering a Consent Decree premised on ***70**

preemption," City Br. 28. The district court's order taking the City's summary judgment motion off calendar was a reasonable exercise of that court's inherent discretion over the control of its calendar, see CMAX v. Hall, 300 F.2d 265,288 (9th Cir. 1962), given that the City's motion was filed after the original parties' motion for entry of the Consent Decree was already filed and awaiting a ruling. Indeed, the hearing on the Consent Decree would have pre-dated the City's proposed summary judgment hearing date but for the fact that the City requested and obtained from the district court a seven-week extension of time to file an opposition to the Decree, without ever mentioning to the Court or the original parties that it intended to use the additional time secured by the extension to prepare and file a summary judgment motion.

The City's filing of the motion for summary judgment was also premature because it was based on the City's position that there were no disputed facts. In fact, discovery had been frozen in mid-stream pending the completion of the mediation, and was never allowed to resume given the culmination of the mediation in a settlement of all issues by the original parties. This, coupled with the clarification by this Court that the district court was not required to turn the "clock back" (ER644), amply supports the district court's reasonable exercise of discretion to take the City's summary judgment motion off calendar, and ultimately deny it as moot.

***71 C. THE CITY'S ARGUMENT THAT THE DISTRICT COURT SHOULD HAVE ABSTAINED FROM EXERCISING JURISDICTION OVER THIS CASE UNDER YOUNGER v. HARRIS DOES NOT SURVIVE SCRUTINY**

Finally, the City argues that the district court should have abstained pursuant to Younger v. Harris, 401 U.S. 37 (1971), from exercising jurisdiction over CEMEX's and the United States' preemption claims. The City contends that this case meets all the criteria for Younger abstention insofar as (according to the City): 1) there was an ongoing state proceeding when CEMEX filed this action (the County had postponed the November 2001 vote to February 2002 to consider a last-minute change in the traffic analysis); 2) the state had an important interest at stake in the state proceeding (SMARA compliance and protection of the City's CEQA consultation rights); and 3) CEMEX is able to raise all of its federal claims in a state court challenge of the County's denials of its permit application.

As a threshold matter, the City should not be allowed to present ins Younger claim in this appeal, because it was raised only in its motion for summary judgment. that motion was taken off calendar before it was ever briefed by the original parties. Because the City is precluded by this Court's February 24 order from "turning the clock back," and because, as shown above, the district court reasonably exercised its discretion to take the City's motion off calendar, the City is not entitled to raise its ***72** Younger claim for the first time in this appeal.

In any event, the City's Younger arguments are without merit. The City ignores the significance of the United States as a plaintiff in this action, and how the presence of the United States as a party in this action must defeat its Younger abstention claim. In U.S. v. Morros, 268 F.3d 695 (9th Cir. 2001), this Court ruled that Younger abstention principles are inoperative in cases where the United States is a party:

We hold that Younger is inapplicable here for an even more basic reason. "Whether it is labeled 'comity,' 'federalism,' or some other term," the policy objective behind Younger abstention is to "avoid unnecessary conflict between state and federal governments." Like the Third, Fifth, and Eleventh Circuits, we believe this policy lacks force where the United States is a litigant.

Id. at 707 (quoting United States v. Composite State Bd. of Med. Examiners, 656, F.2d 131, 136 (5th Cir. 1981). Thus, as this Court recognized in Morros,

> in a case in which the United States seeks relief against a state or its agency, the state and federal governments are in direct conflict before they arrive at the federal courthouse. By the time the United States brings suit in federal court against a state, any attempt to avoid a federal-state conflict would be futile.... Since it is impossible to avoid federal-state conflict when the United States is a party, the determination of

> forum depends upon choosing the proper forum for resolution of the conflict. When asserting a superior federal interest against a state, the forum of choice for the federal government is the federal court.

Id at 708. In this case, as in Morros. it is impossible to avoid a federal-state conflict ***73** because the United States is asserting a superior federal interest against the state, i.e., BLM's paramount federal right to implement its mineral materials sales contracts with CEMEX free from further interference and delay from the County's administrative permit proceedings in the state system, and the County and the City have resisted the United States' assertion of that right. As Morros recognizes, where these circumstances exist, "the forum of choice for the federal government is the federal court." For this reason alone, the City's Younger abstention claim should be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

STATEMENT OF RELATED CASES

Pursuant to the requirements of Circuit Rule 28-2.6, the United States of America hereby states that following related case is pending in this Court: Center for Biological Diversity, et al. v. U.S. Fish and Wildlife Service. No. 04-55084 (9th Cir.). In addition, this case was previously before the Court, on an intervention issue only,in CEMEX, Inc. v. County of Los Angeles, No. 02-56364, 2004 WL 363354 (9th Cir.Feb. 24, 2004).

Footnotes

1 Throughout most of the history of this case, CEMEX conducted business and interacted with federal and state agencies under its former corporate name, "Transit Mixed Concrete" ("TMC"). For ease and simplicity, we refer to the company as "CEMEX," even though at particular times actions attributed to CEMEX were actually performed under the name TMC.

2 The following statement of facts is derived from the original parties' "Stipulated Factual Background" as contained in the Consent Decree that was approved by the district court, as supplemented by exhibits submitted in support of the Decree filed by the original parties. All references to documents that are included in the City's Excerpt of Record are denoted by "ER," while all documents that are included in the appellees' Supplemental Excerpts of Record are denoted by "SER."

3 The CEMEX project site is a "split estate" in which the mineral estate is owned by the United States. The surface estate, throughout most of the history of this *case*, was in private ownership. Although the United States was the original owner of the surface estate, it transferred that estate to a private owner in 1934 pursuant to the Stock Raising Homestead Act ("SRHA"), 43 U.S.C. § 299 et seq. SER307. There have been news media reports that, within the past year, the City has purchased the surface estate of the CEMEX project site from a private owner. 2004 WL 58341437 (May 4, 2004). Under the SRHA, BLM's mineral estate is dominant over the surface estate.

4 On March 8, 2004, BLM completed an analysis of changes that occurred in the project since the FEIS was issues in June 2000 in a document styled "Worksheet Documentation of Land Use Conformance and NEPA Adequacy (DNA)" ("DNA"). SER2352-2366. The DNA focused specifically on the "no jeopardy" opinion for the arroyo toad issued by the USFWS in October 2002, and the County-imposed project conditions agreed upon by the original parties in the consent decree negotiations. BLM's DNA concluded that BLM's existing NEPA documentation fully covers the approved action, and that the USFWS "no-jeopardy opinion for the arroyo toad and the consent decree project conditions are not significant changes in the action nor significant circumstances or information.... No supplement to the existing FEIS is warranted." SER2366.

5 In the same report, and at a subsequent hearing, County staff advised the Board of Supervisors that "the field of mining by the Federal government of its mineral resources is subject to partial Federal preemption" and that "[a]ny substantial revision to the project, as already approved by the Federal government, runs the risk of being overturned by a court if challenged" SER1677-78; see also SER1629-30.

6 The County permit has since been issued to CEMEX. As of this writing, CEMEX still appears to need permits from state air and water quality agencies pursuant to the federal Clean Air Act and Clean Water Act before it may commence operating the project.

In addition to this appeal, and an Endangered Species Act lawsuit filed by the City challenging the USFWS's two "no jeopardy" biological opinions for species potentially affected by the project (City of Santa Clarita v. U.S. Department of the Interior, No. 02-00697 RMT (PJWx)(C.D. Cal.)), the City has filed a petition for a writ of mandate in Los Angeles Superior Court seeking to enjoin the project, naming the County as a respondent, and naming CEMEX and the U.S. Department of the Interior ("USDOI") as "real parties in interest." The County, CEMEX and Interior subsequently removed the City's writ of mandate petition to federal district court. City of Santa Clarita v. Los Angeles County Board of Supervisors, No. CV 04-7355 DT (FMOx) (C.D. Cal.). At a hearing held on November 15, 2004, the district court in the writ of mandate action informed the parties that it would deny the City's motion to remand the action to state court, and grant a motion by CEMEX, the County, and the USDOI to stay the writ of mandate action until this Court decides this appeal.

7 Because the City's arguments (raised here) that the Materials Act does not "occupy the field" of regulating federal mineral materials sales operations, that there is no inherent conflict between SMARA and the Materials Act, and that the district court should have abstained from exercising jurisdiction in this case per Younger v. Harris were raised in the City's summary judgment motion (that was subsequently denied as moot), but were not also raised in the City's opposition to the Consent Decree, the district court had no occasion to address them in its May 5 order approving the Consent Decree. The issues raised by the City in this appeal include most, if not all, of the arguments raised by the City in both its opposition to the Consent Decree and its motion for summary judgment (that was taken off-calendar), and thus include issues not addressed by the district court below.

8 Contrary to the City's suggestion (Br. 20), neither Phoenix Engineering nor Kern Oil involved this Court's review of a decision approving a Consent Decree. Both cases involved this Court's review of a fully litigated judgment, not a Consent Decree. Neither case purports to address standards or review applicable to consent decrees.

9 As the district court also recognized, the City already has an ongoing Endangered Species Act ("ESA") lawsuit against USFWS and BLM pending... in City of Santa Clarita v. U.S. Department of the Interior, No. 02-00697 RMT (PJWx)(C.D. Cal.), challenging the two no-jeopardy opinions. Thus, the City's concerns about the USFWS October 2001 "no jeopardy" opinion concerning the alleged effects on the Arroyo Toad will be fully adjudicated in a separate lawsuit currently pending in the Central District of California.

10 The City's request for the SCAQMD to revisit air quality issues was made in October 2003. see ER599, i.e., long after the CEQA consultation process had ended, and after there had already been a public disclosure by the original parties (in a June 2003 status hearing in the lower court) that a settlement of this case was likely imminent. Given the questionable timing of this exchange of correspondence, the court rationally concluded that this letter was simply part of the City's effort "to interfere with the County's right to settle this litigation on lawful and reasonable grounds." ER 720 n.6.

11 In any event, the City's and the amicis' concerns that the district court's preemption findings have compromised CEQA by allegedly truncating the CEQA process are overblown. The CEQA process at the County was complete and the final EIR ready for certification in November 2001, but for the County's denial of the permit in February 2002, after attempting to revisit traffic issues yet a third time. No new significant environmental information was received by the County to require additional rounds of public comment.
Furthermore, despite the Consent Decree's findings of preemption, the CEMEX project will be subject to further CEQA review as necessary. As the Court acknowledged, CEMEX may yet need to obtain air quality and water qualitypermits from state agencies before it can commence operating the project. The district court made clear in its May 5 opinion that CEQA processes in connection with those other permits are not preempted by the Consent Decree:nothing in the Decree purports to affect any CEQA processes that may be ancillary to Federal Clean Air Act or Federal Clean water Act permits that CEMEX needs to operate the project. Thus,
nothing in the Consent Decree restrains the AQMD or the State Water Resources Control Board from conducting such CEQA procedures as may be required by law.
ER724.

12 The court-ordered mediation in this case commenced formally in February 2003. The Consent Decree contains a "retroactive conduct" provision allowingplaintiffs a limited opportunity to seek dissolution of the Decree and the reactivation of this litigation, if County conduct inconsistent with the negotiations of the parties that occurred before October 1, 2003 were to contribute to a material breach of the Decree, i.e. if is deemed part of a further County effort designed to further delay, frustrate, or prevent the implementation of the project. SER2444. The opportunity to rely on retroactive conduct as a basis for seeking dissolution of the Decree expires 24 months after start-up of the Project. Id.

13 At Br. 7, Amicus Cal.A.G. argues that the Consent Decree is unconstitutionally vague because "it is virtually impossible for the affected County officials to determine which of their actions could be held to be a violation of the order." This Court should decline to address these arguments because they were not raised in the district court, and therefore may not be raised for the first time on appeal. See Swan v. Peterson, 6 F.3d 1373, 1383 (9th Cir. 1993)(Generally, we do not consider on appeal an issue raised only by an amicus.) Sanchez-Trujillo v. INS, 801 F.2d 1571, 1581 n. 9 (9th Cir. 1986) (amicus may not frame the issues for appeal); Preservation Coalition. Inc. v. Pierce, 667 F.2d 851, 862 (9th Cir. 1982) (same). The Attorney General's office was well aware of the filing of

the Consent Decree, yet made no effort to participate as an amicus in the district court, even though it had a right to file an amicus brief in that court.

In any event, the obligations and restrictions on the County are not vague within the context and meaning of First Amendments rights of any County employee. The Decree specifically preserves the police power of the County to protect public health, safely and welfare and to take "lawful enforcement action predicated on the same." ER777. The Consent Decree also specifically authorizes the County to impose its own regulatory conditions on the Project. ER773; ER807. Under the Decree, the County must not knowingly assist or induce any administrative or judicial challenge to the Consent Decree or the CEMEX project, or take actions "before any other body, agency or official" that challengeCEMEX's and the United States' rights relating to the project. ER 778. The County must certify the November 2001 EIR without recirculation for further public comment. The County must prepare and adopt CEQA findings (including revised findings on the appropriate methodology for assessing traffic impacts), a CEQA statement of overriding considerations, and issue CEMEX all required entitlements under SMARA, including a County surface mining permit (supported by County project findings), a County-approved reclamation, and County approval of CEMEX's financial assurances. ER805-813. All of these particularized authorizations, restrictions and obligations set the parameters for the Decree's injunction against County interference with the Project. None is unconstitutionally vague.

Finally, even if there were a lack of clarity in the Decree about the type of County activity that could conceivably run afoul of the Decree's prohibition against County interference with the project, as explained above, the Decree itself provides for a meet-and-confer procedure and an opportunity for the County to cure, and a neutral evaluation of the problem by Judge Phillips, before any party may petition the district court for relief against alleged improper County interference with the Project. ER770-771

14 The California Attorney General's Office ("Cal.A.G.") has filed an amicus brief in support of the City, as a matter of right. Seven other entities or groups have filed motions for leave to file to separate amicus briefs: 1) Center for Biological Diversity ("CBD"); 2) Cities of Palmdale and Lancaster ("Palmdale"); 3) League of California Cities (League of CC"); 4) California Board of Realtors ("CBR"); 5) the Hart Union School District ("Hart"); 6) the Newhall County Water District ("Newhall"); and 7) the Santa Clarita Valley Chamber of Commerce ("SCVCC"). CEMEX and the County opposed all seven motions. The United States opposed the motions of six of seven proposed amici. and requested leave to file either a supplemental briefer an appellee's brief with an enlarged (4,000) word limit in the vent the motions were granted. The motions panel referred the seven amici participation motions to the merits panel, without addressing the United States' request in the alternative to file an enlarged brief. Because it was unclear whether the merits panel will grant the seven amici motions when the United States was required to file this brief, out of necessity, we have responded to the amici briefs under the assumption that their motions will be granted by the merits panel. Due to the need to respond to these briefs, we have filed an appellee's brief that is 3,899 words above the limit set by the FRAP 31, along with a motion for leave to file an over-sized brief.

15 Indeed, as the district court correctly recognized, the"United States and CEMEX believe that there may be differences between the statutes and regulations applicable to hardrock mining activities at issue in Granite Rock, and those governing the United States' proprietary mineral disposition regime involved here, that militate against uncritically applying Granite Rock's analysis as the sole basis for preemption here." ER710n.3. "For this reason, the parties, as part of their settlement, did not specify Granite Rock as the controlling legal standard, but simply agreed that the facts of this case under any legal standard (including Granite Rock) would satisfy a finding of preemption at least with respect to any further regulation of the Project by the County except as outlined in the Consent Decree." ER710-711n.3.

16 "When BLM designates tracts for competitive or noncompetitive sale of mineral materials, and notes the designation in the public land records, it creates a right to remove the materials superior to any subsequent claim, entry, or other conflicting use of the land, including subsequent mining claim locations." Id.

17 At Br. 23, the City argues that there can be no preemption of the County's licensing authority over BLM's Materials Act sale to CEMEX project because the Stock Raising Homestead Act ("SRHA"), 43 U.S.C. § 299, contains a provision expressly stating that nothing in the SRHA shall affect any reclamation or other requirement of state law. Id. (citing 43 U.S.C. § 299(i)(1)). This argument has no merit because, as 43 U.S.C. § 299(p) demonstrates, the "nothing... shall affect" language of § 299(i)(1) does not apply to mineral materials such as sand and gravel. Indeed, the SRHA explicitly states that "[s]ubsections (b) through (o) of this section apply only to minerals not subject to disposition under the Act of July 31, 1947, commonly known as the Materials Act of 1947 (30 U.S.C. 601 and following)." 43 U.S.C. § 299(p)(3)(emphasis added).

18 See 1977 WL 24872, *5 (Cal. A.G.) ("that the Legislature intended the SMARA to apply to mining operations on federal land" is clear from Public Resources Code section 2714 which "exempts surface mining operations conducted solely to protect a federal mining claim. Since one can only stake a federal mining claim on federal land, the inference is clear that the [SMARA] is intended to reach mining operations on federal land other than those minor activities conducted solely to protect federal mining claims.")

19 In Goodyear, the Court stated, “Hancock... establishes that a federally owned facility performing a federal function is shielded from direct state regulation, even though the federal function is carried out by a private contractor, unless Congress clearly authorizes such regulation.” Id. at 179.

20 Amicus League of CC argues that 43 C.F.R. §§ 3601.6(d) and 3601.11 “leave room for the parallel operation of state laws requiring permits before BLM's contractors may implement mineral materials contracts with BLM. Br. 13-14. These arguments cannot be sustained. Section 3601.6(d) of 43 C.F.R. does not confer a licensing authority on the State. It merely provides that it is “BLM's policy” to “protect public land resources and the environment and minimize damage to public health and safety during the exploration for and the removal of such minerals.” Likewise, 43 C.F.R. § 3601.11 provides that BLM will not dispose of mineral materials if [it] determine[s] that the aggregate damage to public lands and resources would exceed the public benefits.” Neither regulation confers licensing authority upon the states, or authorizes states to override BLM'sdeterminations under 43 C.F.R. §§ 3601.6(d) and 3601.11 that public benefits exceed aggregate damage to public lands from a mineral materials sale, and the environment and public safety are adequately protected by a BLM-approved mining and reclamation plan.

21 Executive Order No. 13132 requires federal agencies, when they issue regulations or amendments, to state whether the rules or amendments have sufficient federalism implications to warrant the preparation of a “federalism summary impact statement.” 64 Fed. Reg. 43255 (1999), 1999 WL 594172. In the 2001 preamble to revisions to its mineral materials regulations, BLM explained that “[t]he main connection the mineral materials program regulations have with other levels of government is in the context of free use of these resources. The rule does not place any new burdens on this use. The rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The rule does not preempt State law.” 66 Fed. Reg. at 58,900 (emphasis added). Understood incontext, the statement in the preamble to the 2001 regulations that “[t]he rule does not preempt state law” means nothing more than that BLM's amendments to its preexisting mineral materials sales regulations were not designed to affect or impair the right of state and local governments to “free use” of mineral materials (or state laws regulating such “free use”), see 43 C.F.R. Subpart 3604, not that BLM was suddenly bestowing on state and local governments the authority to impose licensing requirements on BLM's mineral material sales, and thus prohibit mineral materials sales operations absent state permission.

22 BLM's statement in the ROD that CEMEX needs to obtain a surface mining permit before implementing mineral material contracts may have been based on a failure to recognize the legal distinctions between BLM's proprietary authority under the Materials Act and its regulatory authority under the General Mining Law (discussed supra), and thus may have been grounded in an assumption that the rationale of Granite Rock applies equally to BLM's mineral materials sales program. Were that the case, BLM's legal assumption would not bind the federal government. “[T]here is always a risk that... agency employees may err in interpreting statutes and regulations,” but such events do not estop the government from applying the law correctly. Wagner v. Director, Fed. Emergency Management Agency, 847 F.2d 515,519 (9th Cir. 1988); see also S & M Inv. Co. v. Tahoe Regional Planning Agency, 911 F.2d 324, 330 (9th Cir. 1990). Thus, even if BLM made an unsupported legal assumption that Granite Rock establishes that states and local governments may license BLM's mineral materials sales operations, and if that assumption were the motivating factor behind BLM's inclusion of the provisions in the contract and ROD requiring CEMEX to comply with SMARA, such an assumption would not estop the federal government from arguing that the Supremacy Clause compels a contrary result, or bind the United States to enforce those provisions against CEMEX and in favor of the County.

23 See Granite Rock. 480 U.S. at 584 (36 C.F.R. § 228.8(h), a Forest Service regulation establishing requirements for environmental protection for hardrock mining activities in National Forests, provided: “Certification or other approval issued by State agencies or other Federal agencies of compliance with laws and regulations relating to mining operations will be accepted as compliance with similar or parallel requirements of these regulations”). (Emphasis supplied.) Unlike the regulations analyzed in Granite Rock concerning hardrock mining, there are no BLM regulations acknowledging that states have authority to certify, or license, the environmental aspects of mineral materials sales.

24 Finally, the City argues that there is no conflict between the Materials Act and SMARA because the BLM contracts' force majeure provisions allegedly excuse CEMEX from its contractual obligations, even if the County acts in violation of the Supremacy Clause. Br. 26. The force majeure provisions only make the contracts voidable at the option of the purchaser, not void. Thus, if another governmental body takes action that might be viewed as triggering the force majeure clause, CEMEX has the option to terminate the contracts, but is not required to do so. Instead, if it chooses, CEMEX can file a lawsuit to challenge the legality of the interfering governmental action, as it has done here.

25 At Br. 29, Santa Clarita argues that reversal is required because the District Court had preconceived notions about the Project that “tainted” his alleged “preemption by delay” finding.” This argument does not establish a case for reversible error. For one thing, Santa Clarita did not move to disqualify the District Court on any basis, and it is too late to challenge the Consent Decree in reliance on 28 U.S.C. § 144. The only other basis for challenge is 28 U.S.C. § 455, which authorizes disqualification for extra-judicial bias. However, Santa Clarita's evidence of so-called “bias” arose only during the course of judicial proceedings and were based on information and

beliefs acquired by the District Court in its judicial capacity - not from an extrajudicial source and thus proper. United States v. Frias-Ramirez,670 F.2d 849, 853 n.6 (9th Cir.) cert denied 459 U.S. 842 (1982); Pau v. Yosemite Park and Curry Company, 928 F.2d 880, 885 (9th Cir. 1991). In these circumstances, Santa Clarita's argument as to the District Court's alleged “preconception” is not viable under 28 U.S.C. § 455.

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