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United States District Court,
C.D. California,
Western Division.

CITY OF SANTA CLARITA and Ventana Conservation and Land Trust, Plaintiffs,
v.
U.S. DEPARTMENT OF INTERIOR, Gale Norton in her official capacity as Secretary of the Department of Interior; Fish and Wildlife Service, Marshall Jones, in his official capacity as Acting Director of the Fish and Wildlife Service; Diane K. Noda, in her official capacity as Field Supervisor for the Fish and Wildlife Service; Bureau of Land Management, Nina Hatfield, in her official capacity as Acting Director of the Bureau of Land Management; Mike Pool, in his official capacity as California State, Defendants.
CEMEX, Inc., a Louisiana Corporation, Defendant-in-Intervention.

No. CV02-00697 DT (FMOx). | Jan. 30, 2006.

Attorneys and Law Firms

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JOINT FINDINGS OF FACT AND CONCLUSIONS OF LAW

DICKRAN TEVRIZIAN, Judge.

I. *FINDINGS OF FACT*

A. *Nature of case*

***1** 1. This case presents Plaintiffs City of Santa Clarita and Ventana Conservation and Land Trust's (collectively, "Plaintiffs" or "the City") challenge of administrative agency actions pursuant to the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et. seq.*, National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et. seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.

2. At issue are seven species which Plaintiffs believe are affected by, or have the potential to be affected by, the Project: the unarmored threespine stickleback ("Stickleback"), the Arroyo Toad ("Arroyo Toad"); the slender-horned spineflower ("Spineflower"), the least Bell's vireo ("Vireo"), the southwestern willow flycatcher ("Flycatcher"), the California red-legged frog ("Red-legged Frog"), and the coastal California gnatcatcher ("Gnatcatcher").

3. Federal mineral estate management practices could affect adjacent and nearby city-owned land, and may affect the City of Santa Clarita's interests in endangered and threatened species.

4. Ventana's members allege that they have educational, recreational, and scientific interests in endangered and threatened species located in and around the project area.

B. *Factual Background*

5. The Bureau of Land Management ("BLM") manages the mineral estate at Soledad Canyon pursuant to its "multiple use" land-use authority under the Federal Land Policy and Management Act. The BLM's land management plan for this area, the "South Coast Resource Management Plan," finalized in 1994, expressly provides that aggregate mining is an appropriate land-use activity in the Soledad Canyon area. (Administrative Record ("AR") 001734.)

6. 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."(AR 001697.)

7. In 1990, the BLM awarded CEMEX, Inc.'s ("CEMEX") predecessor-in-interest, Transit Mixed Concrete Company ("TMC"), two successive ten-year federal contracts ("Federal

Contracts") to mine 56.1 million tons of sand and gravel from a Federally-owned mineral estate located adjacent to the Santa Clara River in the lower Soledad Canyon area of Los Angeles County. (AR 14888.)

8. Following issuance of the Federal Contracts, CEMEX proposed the Soledad Canyon Sand and Gravel Mining Project (the "Project"). The Project calls for the mining of a conglomerate rock formation on a ridge adjacent to the Santa Clara River ("Santa Clara River" or "River") on a site that was previously mined for about 20 years. (AR 020138.) The mining would be conducted in two 10-year phases. (*Id.*) Water would be used for aggregate production, dust suppression, compaction of fines, ready-mixed production, and truck washing. (AR 020139.)

9. The Project would require approximately 442 acre-feet of water per year during Phase 1 and 726 acre-feet per year during Phase 2. (AR 020139.) The Project's water system was designed to conserve water, and all of the water used will be recycled. (*Id.*) One existing production well and several proposed production wells are planned to divert underflow of the Santa Clara River to obtain water for the mining activities. (*Id.*)

***2** 10. In November 1995, the BLM began informal consultation with the U.S. Fish and Wildlife Service ("Service") regarding the Project. The Chambers Group, an environmental consulting company, prepared a Biological Assessment ("BA"), as directed by the BLM and in coordination with the Stickleback recovery team, to document the impact to threatened and endangered species from the Project. (AR 021100, AR 021175.) In June 1996, the BLM completed the BA pursuant to the requirements of the Endangered Species Act ("ESA"). (AR 021100.)

11. On January 14, 1998, the Service issued a Biological Opinion ("BO") addressing impact's to the Stickleback, concluding that the proposed Project is not likely to jeopardize the continued existence of the species. (AR 014887.)

12. In June 2000, the BLM issued a Final Environmental Impact Statement ("FEIS") under the National Environmental Policy Act ("NEPA") for the Project. (AR 001661.) The FEIS included a comprehensive analysis of the impacts of the proposed project on threatened and endangered species, including the Stickleback and the Arroyo Toad.

13. In August 2000, the BLM issued a Record of Decision ("ROD") approving the Project. (AR 005655, 005661.) The ROD incorporates the Service's January 14, 1998 Biological Opinion (including the Incidental Take Statement ("ITS")) for the Stickleback, which opinion is appended to the ROD as Appendix C. (AR 5661.) The ROD specifically approved the "[i]ncorporation of the terms and conditions prescribed by the [U.S. Fish & Wildlife] Service in the Biological Opinion."(*Id.*)

14. The City and several other parties filed administrative appeals of the BLM's ROD to the Interior Board of Land Appeals ("IBLA"). (AR 16673-74.) On January 8, 2002, the IBLA issued a decision rejecting the appeals and affirming the ROD. Fed. Defendants' Exh. 2, *Sierra Club, Santa Clarita Group, et al.*, 156 IBLA 144(2002).

15. On April 24, 2001, the BLM submitted a supplemental effects analysis to the Service requesting the Service's concurrence that the Project would not affect the Arroyo Toad, Red-legged Frog, Vireo and Flycatcher, and was not likely to adversely affect the Gnatcatcher and Spineflower. (AR 026914.)

16. On June 1, 2001, the BLM submitted a supplemental information memorandum to the Service, providing notification that the north fines storage area, which was to have been used to store fine materials from the mine site on the north face of the mountain, would be eliminated. (AR 026940.)

17. On June 5, 2001, the Service issued a letter concurring with the BLM's determinations that the Project would not affect the Red-legged Frog, Vireo and Flycatcher, and was not likely to adversely affect the Gnatcatcher and Spineflower. (AR 19838-40, 026942-944.) The Service withheld concurrence on the Arroyo Toad based on recent sitings at the Project Site. (AR 26943, 026942-944.)

18. In August 2001, the BLM issued a Supplement to the Biological Assessment ("SBA") that evaluated new information and addressed the potential effects of the Project on the Arroyo Toad that were not considered in the previous formal and informal consultations. (AR 019860-20097.)

***3** 19. On October 25, 2001, the Service issued a Supplemental Biological Opinion ("SBO") which concluded that the Project is not likely to jeopardize the continued existence of the endangered Arroyo Toad. (AR 021036-172.)

20. The SBO analyzes the effects of the anticipated total amount of water consumption for the Project, and discusses the effects of installation, operation and maintenance of existing and proposed production and monitoring wells. (AR 20139, 20142, 20149.)

C. *The IBLA Appeal*

21. On January 8, 2002, the IBLA issued a decision rejecting the administrative appeals filed by the City of Santa Clarita and affirming the ROD. Fed. Defendants' Exh. 2

22. Because some Arroyo Toad tadpoles were discovered within the Project boundary after the ROD was issued, the IBLA addressed BLM's responsibilities with respect to NEPA evaluation of the discovery of the Arroyo Toad in its decision addressing the City's administrative appeal. Fed. Defendants' Exh. 2 at 29.

23. In its opinion, the IBLA stated as follows:

> Regarding the Arroyo Toad, the BLM decision is modified, as conceded by BLM on appeal, to reflect the necessity for BLM to further consult with FWS regarding Project impacts in view of the finding in the SBA that the Project is likely to adversely affect the Arroyo Toad. Further, the decision is modified to reflect that, after issuance of the BO, BLM will apply any further mitigation measures found to be necessary to mitigate impacts to the Arroyo Toad and determine whether any further NEPA analysis and decision are required.

Fed. Defendants' Exh. 2 at 29. The IBLA's decision thus modified the ROD to require BLM to apply the additional mitigation measures for the benefit of the Arroyo Toad that were included in the SBO.

24. Consistent with the IBLA's directive "to determine whether any further NEPA analysis and decision are required," the BLM on March 3, 2004 prepared a "Determination of Land Use Plan Conformance and NEPA Adequacy" ("DNA"), which determined that new information and circumstances relating to the Project, including impacts on the Arroyo Toad in light of the issuance of the SBO, did not require that BLM prepare a supplemental NEPA analysis. Fed. Defendants' Ex. 3 at 1-4 to 1-5.

D. *The Stickleback and Arroyo Toad Incidental Take Statements Meet All ESA Requirements*

25. Contrary to Plaintiffs' arguments that the ITS for the Stickleback failed to specify the level of take, the Service explained why quantifying a specific number of Sticklebacks that would be taken incidentally in the reach of station A1 downstream to monitoring station P3 (the Old Lang Gauging Station), where the River naturally dries on a seasonal basis, would not be possible: "The actual number of unarmored threespine sticklebacks that would be taken cannot be predicted because the species' small size makes detection difficult and the' number of individuals inhabiting the area varies. Additionally, determining if a particular fish was incidentally taken as a result of drying of the stream attributed to TMC's activities or if it dies as a result of natural seasonal drying would not be possible." (AR 014898.)

***4** 26. The Stickleback ITS thus incorporates as a term and condition the requirement that pumping cease if the regular monitoring of water temperature, oxygen level, stream depth, and stream flow indicates that the water quality and quantity parameters reach particular action levels, which are designed to ensure that the Stickleback and its habitat downstream of monitoring station P3 are protected. (AR 014899.) Once monitoring indicates that the water quality and quantity standards defined by the action level are once again achieved, pumping is limited to a rate and amount that will not result in fluctuations of the water level, water temperature, or oxygen level until the onset of rains during the next wet season. (*Id.*) These triggers are unambiguous and rationally linked to parameters that were determined to be within the Sticklebacks' observed habitat requirements. (AR 014903.)

27. In the Arroyo Toad ITS, the Service explained why the number of toads incidentally taken as a result of the Project could not be specifically quantified: "The number of Arroyo Toads affected would depend upon the type of habitat in which the activity would occur. For example, the installation of a well in upland habitat would likely cause the take of few individuals; however, the drying' of a breeding pool may kill hundreds. Because the abundance of Arroyo Toads varies with the season and year, the number of individual Arroyo Toads that could be taken during project activities cannot be accurately predicted." (AR 020156-57.)

28. The Arroyo Toad ITS thus utilizes several monitoring wells, as well as action levels at which water pumping will be modified or eliminated, to protect Arroyo Toad habitat within the bedrock channel. (AR 20142-44, 20156, 20156-57, 20142-20144.)

29. The Arroyo Toad ITS sets forth two different triggers for reinitiation of consultation, depending on location within the Project Site. For incidental take that occurs outside breeding pools, the ITS states:

> The Bureau shall contact the Service whenever the number of dead Arroyo Toads found outside of breeding pools in a given year reaches three and the cause of death or injury is unknown or may be due to project activities. Provided that protective measures ... and the terms and conditions of this [BO] are being fully implemented, operations need not cease while the cause of mortality is being determined. Once the cause of death or injury has been determined, the Service and Bureau shall decide whether any additional protective measures are required to address the cause of the loss of the Arroyo Toads. (AR 020157.)

30. For incidental take that occurs as a result of the unanticipated drying of breeding pools, the ITS states:

> If Arroyo Toad eggs or tadpoles die within the bedrock channel in Area B ... as a result of the drying of a breeding pool that was not anticipated, based on the hydrological information used in the request for consultation and this [BO], the Bureau shall require [TMC] to cease pumping immediately and shall contact the Service. (AR 020157.)

E. ***The BO's HPP and SBO's Measures Minimize Project Impacts To The Stickleback And Arroyo Toad.***

***5** 31. Plaintiffs refer to "the Stickleback and Arroyo Toad HPPs," but there is no such plan designated as such in the record. The only actual HPP in the administrative record is a draft "habitat protection plan," prepared in January 1998, designed to protect the permanent habitat of the Stickleback downstream of the Project. (AR 019922, 003008.) The measures of that draft HPP ultimately were incorporated into the approved Project and the BLM's 2000 ROD as mitigation measures (AR 005661) and, as such, are described in the Project description section of the BOs. (AR 014888-92, 020138-020144.)

32. The Santa Clara River enters the eastern boundary of the Project site in the small southeastern 40-acre corner at the Project Site known as Area B. (AR 20170.) Here, surface flow is directed to a bedrock channel passing through a portion of Area B. The bedrock channel is the last reach of the River in the Project area to dry.

33. The bedrock channel ends near the southern boundary of Area B. (AR 20170.) From the southern boundary of Area B to Pole Canyon Fault (near monitoring well P2), surface flows are intermittent in years of normal and low rainfall, beginning to dry at the Pole Canyon Fault and progressively move upstream through Area B. (AR 20148, 20170.) In these years, flows in this reach of the River will normally cease during late spring and summer months and resume during the wet season in the fall and winter months. (AR 19880.) In addition, during dry periods, the "river reach extending from Station P-1 to slightly above the large pond at Station P-4 also generally dries up in the late summer or fall."(AR 21189.)

34. At Pole Canyon Fault, a bedrock constriction forces underflow of the River to the surface in the vicinity of the Old Lang Gauging Station. (AR 14895, 20170.) Thus, surface flow may be present at this location year-round, even when surface flow dries upstream of the Pole Canyon Fault. New Lang Gauging Station is located approximately 1800 feet downstream of Old Lang Gauging Station.

35. The permanently flowing habitat for the Stickleback is located immediately to the west of New Lang Gauging Station, below P4. In this reach of the River, surface flow continues year-round, even when no surface flow may be measured at New Lang Gauging Station. During periods of non-storm flows, this reach provides areas of gentle, shallow flow suitable for Stickleback nesting. (AR 09602-09603, 20170.)

36. The BLM developed the HPP to eliminate Project impacts to the permanently flowing Stickleback habitat near the Rivers End Trailer Park (downstream of the Project

site) because this is the one area with year-round flow that is critical to the population. (AR 9608-9612.) The HPP was developed in coordination with the Service and representatives of the Unarmored Threespine Stickleback Recovery Team and provides for monitoring of four action levels (flow, depth, oxygen level and water temperature) that would trigger pumping restrictions should the action levels be exceeded. (AR 14890.)

***6** 37. One aspect of the HPP is monitoring monthly changes in the speed of flow to assess Project effects on the permanently flowing habitat for the Stickleback, with a trigger of a 25% decrease in speed of flow based on differences in flow rate at the permanently flowing Stickleback habitat from one monthly monitoring period to the next. This action level for stream flow is based on a statistical comparison with the upstream habitat control site. The action level is a 25-percent decrease in flow at the permanently flowing Stickleback habitat that is significantly different compared to the change in flow at the upstream control site. (AR 3027-29; AR 21271-72, AR 14903.) The purpose of this monitoring is to determine whether the Project is affecting the quality and quantity of flow in the permanently flowing habitat.

38. In support of its assertion that the 25% flow trigger is the "maximum" decrease that the Stickleback can tolerate, Plaintiffs cite a document prepared by one of its consultants. First, the 25% flow trigger is an action level, not a threshold, and the 25% is within the range of the naturally occurring decrease in flow in the relevant reach of the Santa Clara River over a one-month period, which is between 15 and 32 percent, and thus is a conservative trigger. (AR 021271-72.) Second, Plaintiffs' claim that the tracking of "flow from one month to the next, rather than Project-induced reductions in flow, measured as the real-time difference between upstream and downstream flow levels" is inaccurate and completely misses the goal of monitoring, which is to determine whether the Project is affecting the quality of the permanently flowing habitat. Plaintiffs' claim that the river is highly dynamic ignores the fact that the Project reach of the river is particularly dynamic during floods. (AR 14893.) Monitoring will occur during the dry season. Plaintiffs also overlook the fact that the HPP includes a number of other monitoring parameters that protect the Stickleback habitat. (AR 003026-27, 003030.)

39. The SBO identifies monitoring activities for Arroyo Toad for two portions of the River with persistent flow through the late summer or most of the year (AR 20152):(1) the use of monitoring wells MW4 and MW5 (located near the bedrock channel in the eastern portion of the river in Area B) to address possible upstream impacts of water withdrawals; and (2) the use of monitoring wells MW4 and MW6 (to be located in the vicinity of permanent monitoring wells P2 and P3 near Pole Canyon Fault) to address possible downstream impacts of water withdrawals. (AR 20142-43.) Both the MW4/MW5 and MW4/MW6 monitoring will track differences in groundwater elevation. (AR 020143.) Importantly, these monitoring activities supplement the monitoring set forth in the HPP for Stickleback habitat. Contrary to Plaintiffs' assertions, water resource development in Area B had been contemplated for the Project prior to the SBA and SBO. (AR 1741.)

***7** 40. Plaintiffs' allegation of errors in the SBO's Arroyo Toad monitoring program are incorrect. First, monitoring and action levels at MW4 and MW5 are independent of MW6 and will protect the Arroyo Toad habitat in the bedrock channel in Area B, upstream of MW6. (AR 20143-44.) This "dewatering" of the entire reach, as claimed by Plaintiffs, could not be possible.

41. Second, the HPP's requirements still apply and protect the permanently flowing Stickleback habitat located between P4 and P6, downstream of Old Lang Gauging Station and MW6.

42. Third, MW6 would not be placed in the area of greatest surface flow. The record clearly states, in the context of the Stickleback permanently flowing habitat between P4 and P6, that "the rest of the streambed upstream from the pond and the Pole Canyon Fault is either seasonally dry or has low oxygen levels."(AR 21268.) This includes the area Plaintiffs contend has perpetual flow.

43. Fourth, the MW4/MW6 monitoring activity tracks whether Project pumping is affecting groundwater elevations. When the weekly average groundwater elevation in MW6 (the downstream well) drops by 0.3 feet more than the weekly average groundwater elevation drop in MW4 (the upstream well), all Project pumping must cease. (AR 20143.) Additionally, if the cumulative difference in groundwater elevation drops by more than 3.5 feet during the dry season, pumping must stop. Since these action levels would occur during the dry season, pumping will cease until surface flow resumes in this reach near MW6 following recharge of the aquifer by fall and winter rains. (*Id.*) Plaintiffs' reading of this

language to conclude that CEMEX would never need to stop pumping ignores the seasonal nature of this measure.

44. Plaintiffs' claims regarding the purported construction of "five new production wells" under the SBO and Arroyo Toad HPP are incorrect. The SBA states that by placing a minimum of two wells in Area B instead of relying on one well, it is possible to utilize the upstream well as a monitoring well. (AR 19887.) Potential alternative locations for wells are identified, if necessary, to further reduce impacts to the Arroyo Toad. (AR 19887.) Even if new wells are drilled, the total amount of water drawn from all of the production wells would not exceed the amounts analyzed in the FEIS and BA. Moreover, the City's contention that these wells would "de-water an additional reach of the River, resulting in additional take of Stickleback that was not addressed in the BO ..." fails to appreciate that the "no jeopardy" determination in the BO was based on the fact that the Project would protect the permanently flowing habitat for the Stickleback, downstream of Old Lang Gauging Station. (AR 14898.) Any new wells would not alter this conclusion as long as the downstream habitat remains protected.

F. ***The BO and SBO Considered All Relevant Information***

1. ***Plaintiffs Reliance on the March 2, 1995 Dougan Letter is Misplaced Because the March 2, 1995 Dougan Letter Was Superceded***

***8** 45. Plaintiffs cite a March 2, 1995 letter from then-BLM field Manager Julia Dougan commenting on an early draft of the BA. However, eight months later, on November 7, 1995, Dougan submitted additional comments on a revised version of the BA, stating:

> Generally, the document is well-written and easily read. Chambers Group has revised the BA as requested in BLM's previous comment letter dated February 1995. Specifically, the revised BA addresses wildlife species other than the unarmored threespine stickleback and includes a discussion of habitat associates and potential for utilization. Additionally, the revised BA includes a comprehensive analysis and discussion of project impacts to water quality and surface and subsurface flows in the Santa Clara River. (AR 14322.)

46. Dougan further stated: "Chambers Group has provided a thorough and technically sound analysis of impacts. Specifically, other aspects of the mitigation and revegetation are thoughtful and attempt to minimize impacts to the maximum practicable extent. The baseline vegetation survey was particularly comprehensive and provides a good reference for development of the revegetation plan."(AR 14324.)

47. Thus, Plaintiffs' attempt to rely on Ms. Dougan's comments on the early draft to find fault with the BA-and ultimately, the BO-fails. Ms. Dougan's comments were properly considered and incorporated into the Final BA, and she had changed her assessment to near praise of the BA in November 1995.

2. ***The BA and BO Disclosed All Potential Impacts on Endangered Species***

48. The BA is nearly 250 pages in length and includes extensive surveys, data and analysis. (AR 21100-21334.)

49. With respect to the Stickleback, the 1998 BO fully explains and considers the quality and extent of Stickleback habitat and fully analyzes the impact of the Project on the species. Both the 1991 Survey and the 1998 BO recognized that the surface flow of the Santa Clara River in the vicinity of the Project tends to dry up each year during the summer months and is most important as a seasonal connecting habitat that allows continuing genetic exchange between upstream and downstream perennial aquatic habitat for the species. (AR 014893.) The BO acknowledges the effect to the species from pumping and appropriately focuses mitigation measures on ensuring that pumping does not reduce the quality of Stickleback habitat downstream of Old Lang Gauging Station, where stream flow is perennial. (AR 014896.)

50. Plaintiffs allege that a 1991 Biological Survey identifies, "[g]ood potential habitat [for the vireo] in riparian area, [although] no individuals [were] seen or heard during survey[,]" but that the BA "concluded ... that there was no potential for Vireo occurrence on site...." The BA acknowledges possible habitat for the species, but none were located during surveys. (AR 21173.) No records of the species occurring in the Project Site were identified, and disturbance in the area was concluded to lower the potential habitat quality in the area for the species. (*Id.*)

***9** 51. The San Diego horned lizard and the raptor species are not federally listed and thus are not appropriate for Section 7(a)(2) consultation. Additionally, the BA did address possible impacts to raptor habitat (AR 21263), and on the San Diego horned lizard. (AR 21170.) With respect to the Gnatcatcher, in 2001, at the time of the BLM and Service determinations at issue in this case, none of the designated critical habitat for the Gnatcatcher overlapped with the Project area or was closer than 10 miles from the Project site. (AR 026916.)

3. *The BO and SBO Considered All Relevant Data*

a. *The Service Did Not Ignore Any Relevant Data*

52. Contrary to Plaintiffs' assertion, the environmental baseline analysis was not based solely on records of River flows for the period of 1949-50 to 1969-70. Rather, the BA evaluated monthly water level data obtained from Monitoring Well MW-1 for the period of November 1989 through July 1993. (AR 21214-15.) The BA also utilizes surface flow information for the Santa Clara River at New Lang Gauging Station for the period of 1971-1989 and Newhall County Water District well information for the period of 1981 through 1993. (AR 009440, 009501-02.) Moreover, even if Plaintiffs' assertion were correct, the 1949-50 to 1969-70 flow data from Old Lang Gauging Station provides a conservative assessment of water flow in the River because surface flow in the River has actually increased substantially from that time. This increase is attributed in large part to factors in the eastern watershed such as importation of water and increased run-off from urbanization. (AR 9448.) Thus, the measurements taken for the Santa Clara River downstream of the Project site and downstream from the City of Santa Clarita, shows that the average surface flow increased by 74% between the period of 1952-1972 compared to the period of 1972-1992. (AR 9440.)

b. *The Service Adequately Responded to the December 8, 2000 CDFG Letter and Adequately Considered Project Impacts to the Spineflower*

53. On November 8, 2000, the California Department of Fish & Game ("CDFG") submitted a letter to the County, with a copy to the Service, commenting on the Project. In its letter, CDFG stated that the Project "poses unacceptable risks" to the survival of the Bee Canyon Spineflower population, "one of only two remaining locations in Los Angeles County for this extremely rare species."(AR 019693 .)

54. The Service considered the comments from the CDFG on the Spineflower. (AR 026943.) Specifically, the portion of the Project that had been proposed closest to the area of known Spineflowers, the North Fines Storage Area, and which was the focus of the CDFG's comments, was eliminated from the Project as part of the County review process. *See* BLM Memorandum (June 1, 2001) (informing the Service that the NFSA had been eliminated). (AR 19832-33.) Based on this, the Service concluded that "[t]he deletion of the [NFSA] ... eliminates any threat that catastrophic failure of the Storage area could degrade or destroy habitat of the slender-homed spineflower and would ensure that fugitive dust from this site would not affect the slender-horned spineflower or its habitat."(AR 026943.)

II. *CONCLUSIONS OF LAW*

A. *Standard Of Review*

***10** 55. Pursuant to the APA, judicial review of this case is based upon the Administrative Record. *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 549 (1978). Accordingly, this Court thoroughly reviewed the entire Administrative Record looking for documents that supported Plaintiffs' claims, and documents that did not support Plaintiffs' claims. Also, this Court struck various declarations filed by the Plaintiffs and Intervenors that were supplemental to the Administrative Record filed by the Federal Defendants. Order Regarding Motions to Strike (Nov. 3, 2005)."[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."*Camp v. Pitts,* 411 U.S. 138 (1973); *Florida Power & Light Co. v. Lotion,* 470 U.S. 729, 743-44 (1985); *Lands Council v. Powell,* 379 F.3d 738, 747 (9th Cir.2004).

56. Although the parties filed statements of uncontroverted facts, the facts in this case are already before the Court in the form of the Administrative Record. Thus, this Court must simply assess whether the facts in the Administrative Record, as a matter of law, provided a basis for the agencies to make the underlying decisions being challenged. *City & County of San Francisco v. United States,* 130 F.3d 873, 877 (9th Cir.1997).

B. *Standing*

57. Plaintiffs, the City of Santa Clarita and Ventana, have adequately alleged standing to bring this action. *City of*

Sausalito v. O'Neill, 386 F.3d 1186, 1196 (9th Cir.2004); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992).

C. *Plaintiffs' Third and Ninth Claims For Relief Are Deemed Waived And Denied*

58. The Third Claim for Relief in Plaintiffs' First Amended Complaint alleges an "Improper Issuance of an Incidental Take Permit: UTS."The Ninth Claim for Relief in Plaintiffs' First Amended Complaint alleges a "Failure to Act Upon Critical habitat Designation: the UTS."Judge Takasugi ruled on virtually identical claims in a related case, *Center for Biological Diversity v. United States Fish & Wildlife Serv.*, US. D.C., C.D. Cal. Case No. 02-0412, a case now on appeal to the Ninth Circuit (Appeal No. 02-00412).

59. Plaintiffs' November 16, 2004 memorandum of points and authorities in support of their Motion for Summary Judgment, at page 1, states that Plaintiffs' "reserve argument" on these claims, but offers no legal basis for doing so. Defendants objected to Plaintiffs' attempt to unilaterally reserve these claims for future consideration. Plaintiffs' March 15, 2005 reply brief in support of their motion for summary judgment attempts to distinguish, at page 3, the cases cited by the Defendants, but again offers no basis for their decision to reserve argument.

60. In the Parties' Joint Status Report (September 16, 2004), the Plaintiffs stipulated that they would proceed with cross-motions for summary judgment, and agreed upon a briefing schedule. Plaintiffs did not reserve argument on the Third or Ninth Claim for Relief at that time.

***11** 61. Plaintiffs have no legal basis for reserving argument on any claims for relief, especially where they expressly stipulated to brief this case on cross-motions for summary judgment. Claims not raised in a summary judgment motion should be considered abandoned and waived. *Mountain States Legal Foundation v. Espy*, 833 F.Supp. 808, 813 n. 5 (D.Idaho 1993) Accordingly, summary judgment is granted to the Defendants on the Third and Ninth Claim for Relief.

D. Plaintiffs First and Eleventh Claims are Denied

62. Section 7(a)(1) of the ESA does not pose substantive requirements on federal agencies relating to specific actions (i.e.projects). Rather, it imposes a requirement on the Secretary of Interior to "review other programs" (i.e. programs not arising under the ESA), and to utilize these programs in furtherance of the goals of the ESA. 16 U.S.C. § 1536(a)(1).Section 7(a)(1) mandates broader programmatic conservation efforts, while Section 7(a)(2) applies to specific projects.

E. *The BA and BO Are Not Deficient*

63. The Court finds, based upon its review of the Administrative Record, that the BA and BO acknowledge the possible impact on Stickleback from pumping and appropriately focus mitigation measures on ensuring that pumping does not reduce the quality of Stickleback habitat downstream of Old Lang Gauging Station, where stream flow is perennial. (AR 014896.)

64. The Court finds that the San Diego homed lizard and the raptor species are not federally listed and thus are not appropriate for Section 7(a)(2) consultation.

65. The Court finds, based upon its review of the Administrative Record, and given the lack of evidence of the Vireo's presence and the fact that mitigation measures incorporated into the Project to maintain flow for the Stickleback should be adequate to protect potential Vireo habitat, that it is apparent that the BLM and Service fully considered the impacts of the Project on the Vireo. (AR 026918, 026943.)

66. The Court further finds, based upon its review of the Administrative Record, that the BLM and Service were justified in concluding that the proposed Project was not likely to adversely affect that Gnatcatcher. (AR 026943.)

F. *The Incidental Take Statements Are Not Deficient*

67. As a matter of law, an incidental take statement is only issued, for the incidental take of individual animals, after the Service has already determined that an action is not likely to jeopardize the continued existence of a *species*.16 U.S.C. § 1536(b)(4). Plaintiffs' focus on individual animals or specific populations is misplaced. Notably, the prohibition against take in Section 9(a)(1) of the ESA applies only to animals, and contrary to Plaintiffs arguments, the ESA does not prohibit take of the spineflower, a listed plant. Furthermore, any take of individual animals that occurs in compliance with the terms of an incidental take statement is not considered an illegal take and does not violate Section 9 of the ESA. 16 U.S.C. § 1536(o).

***12** 68. With respect to Plaintiffs' argument that the ITSs fail to specify the level of "take," there is no "per se" rule under

the ESA that an ITS must specifically quantify an amount of take. The ESA requires that an ITS must "specif[y] the impact of such taking on the species", while the implementing regulations provide that an ITS will "[s]pecif[y] the impact, i.e., the amount or extent, of such incidental taking on the species".16 U.S.C. § 1536(b)(4) (i) and 50 C.F.R. § 402.14(i). As the Ninth Circuit has emphasized, the key aspect of an ITS is that it "set forth a 'trigger' that, when reached, results in an unacceptable level of incidental take, invalidating the safe harbor provisions, and requiring the parties to re-initiate consultation."*Arizona Cattle Growers' Ass'n,* 273 F.3d at 1250. However, this "trigger" does not require a specific number. "[W]e have never held that a numerical limit is required [in an ITS].... while Congress indicated its preference for a numerical value, it anticipated situations in which impact could not be contemplated in terms of a precise number."*Id.* at 1249-50.In fact, the preamble to the ESA consultation regulations clarifies that:

> The Service declines to endorse the use of numerical amounts in all cases over the use of descriptions of extent, because for some species loss of habitat resulting in death or injury to individuals may be more deleterious than the direct loss of a certain number of individuals.

51 Fed.Reg. 19926, 19953-54 (June 3, 1986).

69. The ESA Consultation Handbook provides that when a project proponent is preparing an ITS, incidental take may be described (1) by a specific number, (2) by level of disturbance to habitat, (3) or expressed "as a change in habitat characteristics affecting the species" where such information exists. (ESA Consultation Handbook, 4-47; CEMEX RJN, ¶ 6, Exh. F.) It acknowledges that "in some situations, the species itself or the effect on the species may be difficult to detect," and, in those cases, an ITS should provide "some detectable measure of effect." *Id.* at 4-47.Analyzing such "effect," however, can be achieved in more than one way:

> For instance, the relative occurrence of the species in the local community may be sufficiently predictable that impacts on the community (usually surrogate species in the community) serve as a measure of take, e.g., impacts to listed mussels may be measured by an index or other censusing technique that is based on surveys of nonlisted mussels .... Similarly, if a sufficient causal link is demonstrated (i.e., the number of burrows affected or a quantitative loss of cover, food, water quality or symbionts), then this can establish a measure of the impact on the species or its habitat.

Id. at 4-47 to 4-48.

70. Plaintiffs rely on a single district court case for its assertion that ITSs have to identify an exact level of "take." However, this authority, *Natural Resources Defense Council v. Evans,* 279 F.Supp.2d 1129, 1184 (N.D.Cal.2003), is consistent with the above discussion and contradicts Plaintiffs' claim:

> ***13** A numerical limit is not required where infeasible ... a combination of numbers and estimates may be used instead.... In the absence of a specific numerical value, however, the defendant must establish that no such numerical value could be practically obtained. Where no numerical value can be obtained, the agency must at least set forth some surrogate for defining the amount or extent of incidental take.

Id. at 1184 (citing *Arizona Cattle Growers*, 273 F.3d at 1249, 1250).

71. Here, with respect to the Stickleback, the Service explained why quantifying a specific number of Sticklebacks that would be taken incidentally would not be possible: "The actual number of unarmored threespine sticklebacks that would be taken cannot be predicted because the species' small size makes detection difficult and the number of individuals inhabiting the area varies. Additionally, determining if a particular fish was incidentally taken as a result of drying of the stream attributed to TMC's activities or if it dies as a result of natural seasonal drying would not be possible."(AR 014898.) The Stickleback ITS incorporates, as a term and condition, the requirement that pumping cease if the regular monitoring of water temperature, oxygen level, stream depth, and stream flow indicates that the water quality and quantity parameters reach particular action levels, which are designed

to ensure that the Stickleback and its habitat are protected. (AR 014899.) The Court finds that these triggers are unambiguous and rationally linked to parameters that were determined to be within the Sticklebacks' observed habitat requirements.

72. In the Arroyo Toad ITS, the Service explained why the number of toads incidentally taken as a result of the Project could not be specifically quantified:

> The number of Arroyo Toads affected would depend upon the type of habitat in which the activity would occur. For example, the installation of a well in upland habitat would likely cause the take of few individuals; however, the drying of a breeding pool may kill hundreds. Because the abundance of Arroyo Toads varies with the season and year, the number of individual Arroyo Toads that could be taken during project activities cannot be accurately predicted. (AR 020156-57.)

73. The Arroyo Toad ITS sets forth two different triggers for reinitiation of consultation, depending on location within the Project Site. For incidental take that occurs outside breeding pools, the ITS states:

> The Bureau shall contact the Service whenever the number of dead Arroyo Toads found outside of breeding pools in a given year reaches three and the cause of death or injury is unknown or may be due to *project* activities. Provided that protective measures ... and the terms and conditions of this [BO] are being fully implemented, operations need not cease while the cause of mortality is being determined. Once the cause of death or injury has been determined, the Service and Bureau shall decide whether any additional protective measures are required to address the cause of the loss of the Arroyo Toads.

***14** (AR 020157.) The Court finds that this condition is reasonable, since incidental take outside of breeding pool areas is expected to be low. Moreover, it is not unusual for the Service to permit operations to continue, provided all protections set forth in the BO and ITS are being implemented, while the cause of mortalities is researched, particularly in situations like this in which there could be other causes for animal mortalities.

74. For incidental take that occurs as a result of the unanticipated drying of breeding pools, the ITS states:

> If Arroyo Toad eggs or tadpoles die within the bedrock channel in Area B ... as a result of the drying of a breeding pool that was not anticipated, based on the hydrological information in the request for consultation and this [BO], the Bureau shall require [TMC] to cease pumping immediately and shall contact the Service.

(AR 020157.) The Court finds that in criticizing this measure, Plaintiffs ignore the fact that the Project incorporates a detailed monitoring program and action levels, based on hydrological consultations and proposed methodology developed during discussions among the BLM, Service and TMC, that ensure that withdrawal of water does not affect the surface water flowing to the bedrock flood control channel in Area B where Arroyo Toad tadpoles were observed. (AR 020142-44.)

G. *The Incidental Take Statement Need Not Contain An HPP*

75. Plaintiffs attack the HPP developed in connection with the Project. To the extent Plaintiffs are attacking the HPP as part of a larger argument against the ITS, they are wrong as a matter of law. Plaintiffs' statement that an ITS must or will contain habitat protection plans is an incorrect statement of the law. The ESA ITS provisions do not mention, much less require, an HPP for a valid ITS, nor does the ITS issued here incorporate the HPP. 16 U.S.C. § 1536(b)(4). Rather, the BLM's and CEMEX's development of the HPP and additional Arroyo Toad measures helped form the basis for the analyses of possible jeopardy to the Stickleback and Arroyo Toad in the BO and SBO, all of which preceded the issuance of the ITSs. As such, Plaintiffs' challenges to the HPP are incorrectly alleged to be challenges to the ITSs.

H. *No Requirement To Use Protocol Surveys*

76. Plaintiffs claim that the surveys are defective because they were not "protocol" surveys. As a legal matter, the existence of survey protocols does not create any legal obligations, i.e., there is no "mandate" to use the survey protocols. and thus. Plaintiffs' claim fails. Furthermore, the survey protocols Plaintiffs identify arose following preparation of the BA. Survey protocols for the federally-listed species of concern(i.e., Red-legged Frog, Arroyo Toad, Vireo, Flycatcher and Gnatcatcher) had not been developed by the Service at the time the biological surveys for the Project were conducted (i.e., 1990 to 1995). The protocol survey methodologies for these latter species were developed during the following years: 1997(Red-legged Frog, Flycatcher and Gnatcatcher); 1999 (Arroyo Toad) and 2001 (Vireo). (Plaintiffs' RJN, Exhs. C-G.)

***15** 77. The surveys conducted for the Project were adequate. Initial wildlife surveys were conducted by Chambers Groups wildlife biologists in 1990 on February 2, April 18 and May 5. (AR 7835-38.) Surveys included the riparian corridor off the Project Site to determine habitat suitability for Vireo and Flycatcher. During the three surveys, a recording was played to elicit a response from Vireo to determine the presence of this species. Plaintiffs' claim that use of this recording was "remiss" based on 2001 survey guidelines is moot because those guidelines were published eleven years after the surveys.

78. Additional focused, species-specific surveys were conducted between 1992 and 1995. (*See* AR 8550-58; 8818-21; 9231-43; 9254-67.) Included among these surveys were an April 4, 1991, sensitive butterfly survey, and a March 30, 1995, sensitive reptile survey for the coastal western whiptail lizard, coastal rosy boa, coast patch-nosed snake and coast horned lizard. (AR 21150-52, 21320-29, 21332-34.)

79. Also, a multi-year habitat assessment was implemented for the Stickleback, and a southwestern pond turtle survey was conducted in the Santa Clara River Corridor adjacent to and downstream of the proposed mining site on July 6-8, 1994. (AR 21150, 21309-21317.) The report of the southwestern pond turtle survey included other reptiles, amphibians and fish that were observed during the survey and comments on the likelihood of the occurrence of other sensitive reptiles and amphibians within this reach of the Santa Clara River. (AR 21309-17.) Based on these initial plant and wildlife surveys, subsequent focused surveys, and habitat monitoring, the BA was prepared and finalized in June 1996. (AR 21101-21334.) Given these extensive surveys, Plaintiffs' claims of inadequacy must fail.

I. *Reinitiation Was Not Required*

80. Under the ESA, an agency must reinitiate consultation when "new information reveals [that] effects of the action may affect listed species or critical habitat in a manner or to an extent not previously considered" or if the action is "subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion."50 C.F .R. § 402.16.

81. To the extent that Plaintiffs' failure to reinitiate claims are directed at Defendant Service, they must be dismissed. Under the ESA, the "action agency" in an ESA consultation process "has the primary responsibility for implementing section 7's substantive commands." 51 Fed.Reg. at 19,928.As set forth in the preamble to the consultation regulations, the Service lacks any authority to require an action agency to reinitiate consultation. 51 Fed.Reg. at 19,957.

82. Plaintiffs allege that the CDFG letter required reinitiation. Plaintiffs' argument overlooks the fact that the CDFG's comment is outdated for the Project, because the portion of the Project that had been proposed closest to the area of known Spineflowers (i.e., the North Fines Storage Area), and which was the focus of the CDFG's comments, had been eliminated from the Project as part of the County review process. In its June 1, 2001 memorandum, the BLM informed the Service that the NFSA had been eliminated. (AR 19832-33.) Based on this, the Service concluded that "[t]he deletion of the [NFSA] ... eliminates any threat that catastrophic failure of the storage area could degrade or destroy habitat of the slender-homed spineflower [ ] and would ensure that fugitive dust from this site would not affect the slender-horned spineflower or its habitat."(AR 026943.)

***16** 83. Plaintiffs' claim that the BLM and Service ignored "baseline" data supplied by CDFG and the U.S. Forest Service blatantly misrepresents the record. The BLM specifically responded to the CDFG's November 8, 2000 letter by preparing its April 24, 2001 request for concurrence to the Service that included a supplemental effects analysis for the Project on various species. (AR 26914-26923.) In the request for concurrence, the BLM specifically stated that it was prepared "[i]n response to comments submitted by the California Department of Fish and Game ... and others after BLM's Record of Decision approving the TMC project was signed...." (AR 26914.)

84. The U.S. Forest Service retracted statements made to the BLM, based on subsequent communications between the agencies. In a March 11, 2002 letter, the Regional Forester wrote "[a]fter review of the EIS and Biological Opinion, the Forest Service is satisfied that the mitigation measures adequately address the issues raised in our letter of January 24,2002."(CEMEX RJN, January 18, 2005, Exh. M.)

85. In any event, as a matter of law, the letter from the CDFG did not constitute new information warranting reinitiation of formal consultation, because it did not identify any effects that the Project may have on listed species or critical habitat in a manner or to an extent not previously considered by the BLM or the Service. With respect to the Spineflower, the Service already considered CDFG's comment and concluded it was mooted by elimination of the NFSA. (AR 026943.) A comment by a state agency on state law issues that are already superceded by subsequent project mitigation does not constitute "new information." With respect to the Stickleback, all of the "new information" is, in fact, old information already considered by the Service and BLM in evaluating the Project's effects on the Stickleback. Specifically, the 1996 BA and 1998 BO extensively considered the effects of withdrawing water from the Upper Santa Clara River. (AR 014887-903; AR 020136-72.) In addition, this issue was addressed by the Service in its June 5, 2001 concurrence letter. (AR 026943.)

86. The Administrative Record, as cited in the Findings of Fact, above, reflects that the agencies considered all issues in that letter, so no "new information" exists which warrants reinitiation.

87. Furthermore, this Court lacks jurisdiction over all other ESA § 7 reinitiation claims raised by the Plaintiffs regarding the Stickleback, because the species is not set forth in the 60-day notice. [1] The ESA citizen suit provision requires that any plaintiff provide written 60-day notice to the Service and any alleged violators of a violation prior to bringing suit. 16 U.S.C. § 1540(g)(2)(A). This notice is mandatory, and failure to provide the requisite notice deprives the courts of jurisdiction over such claims.*Hallstrom v. Tillamook County,* 493 U.S. 20, 31 (1989); *Southwest Ctr. for Biological Diversity v. United States Bureau of Reclamation,* 143 F.3d 515, 520 (9th Cir.1998).

***17** 88. For the reasons above, Plaintiffs' Sixth, Seventh and Eighth claims for relief fail as a matter of law and summary judgment is granted to the Defendants.

J. *CONDITION 9AA is not a project acceleration clause*

89. With respect to the claim of Project acceleration, it was raised, argued and adjudicated against the City in the prior decision entering the Consent Decree. (CEMEX RJN, January 18, 2005, ¶ 1, Exh. A, pp. 27-28.) Also, the Forest Service comments relating to this issue were retracted in a March 2002 letter to the BLM. (*Id.* at 13, Exh. M.)

K. *The Additional Wells Will Not Result in New or Greater Impacts*

90. There is no evidence that any changes to the wells would result in new or greater impacts, as this Court previously explained in *CEMEX v. County of Los Angeles:*

> These possible additional well sites were expressly contemplated in the event that monitoring data showed that the existing wells would be located in different areas to reduce impacts ... With the level of water extracted remaining the same, this Court finds that the Project remains as previously analyzed and has not significantly changed in a way relevant to environmental concerns. Since the City's challenge to the Consent Decree based on alleged project changes is without merit, no supplement to the EIS or recirculation of the EIR is required. (CEMEX's RJN, Exh. A, at 27.

L. *There was No "Take" of Arroyo Toad, Stickleback, or Spineflower*

91. Plaintiffs' Seventh claim, which alleges that the Project will illegally take stickleback and Arroyo Toad, ignores the existence of the ITSs for the species, which shield "incidental take" of these species by the Project from the "illegal take" enforcement provisions of Section 9 of the ES A. Plaintiffs fail to show that the Project, which has yet to be implemented, has failed to comply with the terms of the BO or SBO, or that there is actual or imminent harm amounting to a take in excess of the ITSs.

92. Moreover, Plaintiffs' claim that the Project will take spineflower fails because the prohibition against "take" set forth in Section 9(a)(1)(B) of the ES A applies only to listed animals, as a matter of law, there can be no take of the spineflower, which is a listed plant.

M. ***There was No Violation of Section 7(a)(1)***

93. The City's First and Eleventh claims allege violations of Section 7(a)(1) of the ES A. Section 7(a)(1) of the ES A imposes a requirement on the Secretary of Interior to "review other programs" (i.e., programs not arising under the ESA) and to utilize these programs in furtherance of the goals of the ESA. 16 U.S.C. § 1536(a) (emphasis added).Section 7 specifically contrasts federal "programs" with federal "actions." The City contends that the Project is a "program," but offers no evidence in support. The Court concludes that the Project is not a program within the meaning of Section 7(a)(1).

94. Moreover, the City shows no error by the Federal Defendants. Section 7(a)(1) is to be narrowly construed, to avoid "divest[ing] an agency of virtually all discretion in deciding how to fulfill its duty to conserve."*Pyramid Lake Paiute Tribe of Indians v. United States Dept. of Navy,* 898 F.2d 1410, 1417-1418 (9th Cir.1990). It is clear that "an agency has broad discretion to carry out its obligations under section 7(a)(1) so long as its actions satisfy the ESA's general prohibition against jeopardizing listed species[.]") *San Francisco Baykeeper v. United States Army Corps of Eng'rs,* 219 F.Supp.2d 1001 (N.D.Cal.2002). Thus "the agency may reasonably interpret its § 7(a)(1) obligations to extend no further than engaging in conservation programs that benefit threatened species."*Northwest Environmental Advocates v. U.S. Environmental Protection Agency,* 268 F.Supp.2d 1255, 2003 WL 21487274 at *16 (D.Or.2003).

***18** 95. It is well-established that agency's engaging in Section 7(a) (2) consultation, and the implementation of identified mitigation measures, is sufficient to satisfy the requirements of Section 7(a) (1) of the ESA. *See San Francisco Baykeeper v. U.S. Army Corps of Eng'rs,* 219 F.Supp.2d at 1026; *Defenders of Wildlife v. Flowers,* 2003 WL 22143271 at *2-3 (D.Ariz.2003); *Oregon Natural Resources Council Fund v. U.S. Army Corps of Eng'rs,* 2003 WL 117999 at *4 (D.Or.2003).

96. The Federal Defendants engaged in formal consultation for the Project, and concluded that the Project would not jeopardize the continued existence of the Stickleback (AR 014870-014903) or the Arroyo Toad (AR 020136-020172.) A variety of reasonable and prudent measures were incorporated into the Project to minimize impacts on these species. (AR 14890-91, 20139-43.) The BO and SBO include conservation recommendations to minimize or avoid adverse effects of the Project on the Stickleback and Arroyo Toad. (AR 014900, 020162.) Other species, including the least Bell's vireo, southwestern willow flycatcher, and California red-legged frogs, were considered by the Federal Defendants through informal consultation. (AR 026943).

N. ***Defendants Complied With NEPA***

97. The Tenth Cause of Action alleges failure to comply with NEPA. The planning and review process for the Project has undergone 12 years of intensive regulatory review and public scrutiny at both the state and federal level. From 1990 to 2002, the County initiated a process that culminated in an exhaustive environmental impact report for the Project under the California Environmental Quality Act. From 1995 to 2000, the BLM conducted an extensive, independent NEPA review of the Project. During the NEPA environmental review process, which resulted in the production of a comprehensive Final Environmental Impact Statement in June 2000, both a Draft EIS and a Supplement to the Draft EIS were published and subjected to eight months of public review. (AR 005658.) All public comments were carefully analyzed and responded to, and the alternative mining plan approved by the BLM included comprehensive mitigation measures designed to permit economic development with the least environmental impacts.(*Id.*)

98. As part of the NEPA review process, the BLM coordinated and consulted with the Service, the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, the South Coast Air. Quality Management District, the Southern California Association of Governments, the Governor's Office of Planning and Research, the California Department of Conservation Division of Mines and Geology, the California Department of Transportation, and the State Water Quality Control Board. (*Id.*)

99. The BLM's NEPA process resulted in a 2000 page EIS and Record of Decision approving the Project. Approximately 20 parties, including the City, challenged the adequacy of the EIS in an administrative appeal to the Interior Board of Land Appeals, which rejected all such appeals and affirmed the BLM's EIS and ROD. BLM subsequently reviewed its NEPA analysis and determined its analysis

was sufficient. Furthermore, the BLM consulted with the Service, pursuant to the ESA section 7, on the impacts to all endangered and threatened species found in an around the Project Site that may be affected by the Project. (See AR 014887, 020136, 026942.)

***19** 100. Two comprehensive and thorough biological opinions were produced by the Service. (*Id.*) The Service reasonably concluded that, due to project design measures and incorporated mitigation measures that minimize any adverse effects of the Project on Stickleback and Arroyo Toad, such as monitoring of surface and subsurface flows to protect species' habitat, the Project is not likely to jeopardize the continued existence of those species. (AR 020155-56, 014897.)

101. The Incidental Take Statements in the U.S. Fish & Wildlife Service's BO for the unarmed threespine stickleback, and in the SBO for the Arroyo Toad, were not "major federal actions" triggering separate and additional NEPA obligations on the part of the Service. The incidental take statements do not authorize CEMEX to engage in the sand and gravel mining activities at the Project site. Moreover, the Service is not required to file NEPA documents every time it issues a biological opinion or an incidental take statement. *Southwest Center for Biological Diversity v. Klasse,* CV-S-97-1969 (GEB JFM (E.D.Cal.1998); *Westlands Water Dist. v. U .S. Dept. of the Interior,* 275 F.Supp. 1157, 1221 (E.D.Cal.2002).

102. *Ramsey v. Kantor,* 96 F.3d 434 (9th Cir.1996), cited by Plaintiffs, is not to the contrary. *Ramsey* did not involve an incidental take statement issued by federal consultant agency to a separate federal action agency that authorized the project, as is the case here. Instead, *Ramsey* involved an incidental take statement between the National Marine Fisheries Service and a fishery management council established by a federal consent decree that allocated salmon fishing rights. That fishery management council was not considered to be a federal authorizing agency for NEPA purposes. Unless the incidental take statement in *Ramsey* was itself deemed a federal authorization, there would have been no NEPA review for a federally authorized take of endangered salmon. Because of this, the *Ramsey* court regarded the incidental take statement as the sole federal authorizing document, and the functional equivalent of a Section 10 incidental take permit. Here, there was separate NEPA review by BLM.

103. The U.S. Fish & Wildlife Service is not the "action agency" with regulatory jurisdiction to approve this project. The BLM is the federal agency that approved the Project and that approval is a "major federal action" for NEPA purposes. These facts distinguish this case from *Ramsey.*

104. For the purposes of the City's challenges in the instant case (Case No. 02-697), the record reflects that BLM undertook an exhaustive NEPA review of the Project, including impacts on all potentially affected species. As such, there is no need for a redundant NEPA review by the Service. Thus, Federal Defendants and CEMEX are entitled to summary judgment with respect to Plaintiffs' claims of violations of NEPA. Accordingly, Federal Defendants' motion for summary judgment with respect to Plaintiffs' Tenth Cause of Action will be granted, and Plaintiffs' motion for summary judgment with respect to the same claim will be denied and the Tenth Cause of Action will be dismissed with prejudice.

***20** 105. For the reasons above, summary judgment is granted to the Defendants on the Third, Fifth, Sixth, Seventh, Eighth, and Ninth Claims for Relief associated with alleged procedural violations of the ESA.

106. For the reasons above, summary judgment is granted to the Defendants on Plaintiffs' First, Second, Fourth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, and Seventeenth Claims for Relief associated with alleged substantive violations of the ESA.

107. For the reasons above, summary judgment is granted to the Defendants on Plaintiffs' Tenth Claim for Relief associated with alleged procedural violations of NEPA.

O. *No injunctive relief*

108. Because Plaintiffs failed to prevail on any issue, their request for injunctive relief is denied. In any event, rather than imposing an injunction, the correct remedy, if the Court were to find an ESA or NEPA violation, is to remand to the agency for reconsideration and issuance of a new decision. *See*5 U.S.C. § 706(2)(A).

P. *JUDGMENT*

This prolonged history and extensive review of the Project is not undermined by this current action. After massive briefing and detailed presentations and oral argument by the parties, and a careful review and analysis by this Court, this Court concludes as a matter of law that Plaintiffs' claims in these actions do not constitute a legal challenge

sufficient to reverse the determinations made by the agencies. Accordingly, this Court **denies** the Plaintiffs City of Santa Clarita's and Ventana Conservation and Land Trust's Motion for Summary Judgment and **grants** the Federal Defendants and CEMEX's Cross-Motions for Summary Judgment.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2006 WL 4743970

Footnotes

1 In a 60-day notice of intent to sue dated February 2, 2001, Plaintiffs alleged a failure to reinitiate § 7 consultation as follows:

> "According to the California Department of Fish and Game, TMC's propose mining project will affect the endangered slender horned spineflower. The project may also affect the least bell's vireo, the yellow-billed cuckoo, and the: southwestern willow flycatcher. The BO issued by the FWS did not discuss the effects the mining operation would have on these valuable and endangered plants and wildlife. Pursuant to clear and unambiguous ESA regulations, the BLM must reinitiate section 7 consultation to examine these potential impacts. The BLM's failure to do so constitutes a violation of the ESA."(Fed. Defendants' Exh. 4, February 2, 2001 60-day Notice of Intent, at 10.)

In a second notice of intent to sue dated November 13, 2001, Plaintiffs alleged a failure to reinitiate § 7 consultation as follows:

> "Information set forth in the BA and in documents submitted by the California Department of Fish and Game suggests that TMC's project 'May affect' the least Bell's vireo and the slender-horned spineflower. Specifically, the BA suggests that alteration of the hydrology of the Santa Clara River could impact potential habitat of the least Bell's vireo. The California Department of Fish and Game has concluded that airborne dust from the operation will impact the spineflower. "Formal" consultation was not, however, requested for either one of these species. Such formal consultation should have been requested. By failing to request 'formal' consultation on these two species, the BLM has violated its duties under the ESA."(Fed. Defendants Exh. 4, Nov. 13, 2001 60-day Notice of Intent, at 11.)

Neither of these notices of intent to sue mentions the Stickleback. (Fed. Defendants' Exh. 4,)