IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Plaintiffs,

v.

WILLIAM J. PERRY, et al.,

Defendants.

CIV 94-598 TUC ACM

MEMORANDUM OPINION

I. BACKGROUND

A. Facts

In 1988, Ft. Huachuca (the Fort) was directed by Congress to transfer its U. S. Army Informations System Command (USAISC) unit to Ft. Devens, Massachusetts and to receive from Ft. Devens a U. S. military intelligence school. In 1991, under the Defense Base Closure and Realignment Act of 1990 (BRAC 90), that directive was amended to allow the USAISC unit to remain in place while affirming that the military intelligence school be added to Ft. Huachuca. In preparing for this expansion, the Army completed an Environmental Impact Statement (EIS) under the provisions of the National Environmental Policy Act (NEPA). Because a separate EIS had been prepared for the anticipated 1988 swapping of units with Ft. Devens, the Army was able to meet the requirements of the NEPA with a Final Supplemental Environmental Impact Statement (FSEIS).[1] The FSEIS was formally

[1] 40 C.F.R. § 1502.9 (c) states: "Agencies: (i) Shall prepare supplements to either draft or final environmental impact statements if: (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts..."

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complete on October 21, 1992.

Plaintiffs claim that the FSEIS fails to satisfy the NEPA and bring suit under authority of the Administrative Procedure Act (APA).[2] They allege that the Army has violated the NEPA and remains in violation due to its failure to prepare an adequate analysis of the cumulative impacts which its expansion activities at Ft. Huachuca will cause on the San Pedro River area, the aquifer there and the San Pedro Riparian National Conservation Area downstream from the Fort.[3] Plaintiffs allege that the San Pedro River (the River) is the last perennially flowing river in southern Arizona and contains the widest diversity of mammals in the country, 20 species of raptors and 200 other bird species, supports hundreds of other fish, reptile and amphibians, and has retained 75% of its native plants which is unusual for the southwest.[4] Many of these species are rare and federally protected. To protect this area, Congress created the San Pedro Riparian National Conservation Area (the Riparian Area) in 1988.[5] Plaintiffs allege that the continued pumping of groundwater will essentially dry up the San Pedro River, just as it did the neighboring Santa Cruz River.[6] Plaintiffs further allege that because Ft. Huachuca drives the economy and growth of the San Pedro valley area, "the key part of any environmental analysis of the Army's actions

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[2] 5 U.S.C. § 706.

[3] Plaintiffs' Motion for Summary Judgment at 4.

[4] Id.

[5] Id. at 5.

[6] Id. at 4-6 and Exhibits 3 & 4; Plaintiffs' Reply in Support of Summary Judgment, Exhibit 1, The Southwest's Last Real River, Will it Flow On? at 13.

is the cumulative impacts analysis"[7] and that the Army has failed to provide that analysis.

Defendants assert as a defense that the action is barred by the special 60-day statute of limitations as provided in the BRAC 90. The Plaintiffs contest this defense and argue that their claim is not so barred because there was no final agency action and that, in the alternative, the statute of limitations should be equitably tolled.

B. Procedural

Plaintiffs filed suit on July 8, 1994, following the Army's publication of a Notice of Intent to produce a Draft Master Plan EIS for the Ft. Huachuca expansion. Plaintiffs seek two things: 1) a declarative judgment that the Army must analyze the cumulative impacts of its actions at the Fort, and 2) an injunction setting a schedule for the Army to complete the required analysis and mitigate any impacts. Plaintiffs brought a Motion for Summary Judgment on April 19, 1995. Defendants have also brought a Motion for Summary Judgment asserting the statute of limitations, mootness, and ripeness. In order to grant summary judgment for either party, the Court must be convinced that there is no issue of genuine material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

II. NATIONAL ENVIRONMENTAL POLICY ACT & BASE REALIGNMENT AND CLOSURE ACT

The National Environmental Policy Act (NEPA) is the "basic national charter for protection of the environment." 40 C.F.R. 1500.1(a). The Act requires an EIS to be completed before the federal government or its agencies proceed with any major activity which will

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[7] Id. at 4

impact the environment.[8] These statements are to be prepared in three stages: a draft EIS, a final EIS, and, if needed, a supplemental EIS. 40 C.F.R. 1502.9. The guidelines require that the EIS be completed before action is taken or resources committed in furtherance of a proposal.[9]

The EIS requirement is not intended to create a burden of paperwork, but to compel federal agencies to exercise a modicum of foresight and thought before they begin activity which may harm the environment.[10] The EIS is to be concise and to the point as well as "supported by evidence that the agencies have made the necessary environmental analyses." 40 C.F.R. 1500.2 (b). Thus, the NEPA and its implementing regulations present an apparent tension between accomplishing real, credible analysis of environmental impacts and yet doing so with efficiency and speed.

To promote speed and prevent redundant analysis, the guidelines permit and encourage the use of procedures such as combining environmental documents with other documents and "tiering" from broad

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[8] An EIS should include detailed discussion of:
(1) the environmental impact of the proposed action.
(2) any adverse environmental impacts which are unavoidable if the project is undertaken
(3) alternatives to the proposed action
(4) the trade-off between short-term use of the environment and the maintenance and enhancement of long-term productivity
(5) any irreversible and irretrievable commitments of resources which would be involved in the action
42 U.S.C. § 4332 (2) (c) (i-v)

[9] 40 C.F.R. 1502.5 (a) "For projects directly undertaken by Federal agencies, the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary."

[10] "NEPA's purpose is not to generate paperwork--even excellent paperwork--but to foster excellent action." 40 C.F.R. 1500.1(c)

master or plan EIS statements to more specific statements to avoid repetitive discussion of the same issues. 40 C.F.R. 1500.4. One other such method of particular relevance here is the provision that the agencies shall reduce excessive paperwork through "incorporating by reference." 40 C.F.R. 1500.4 (j). In this case, the Plaintiffs assert that references in the Army's FSEIS purportedly incorporating a future Master Plan EIS fail to meet the requirements of NEPA because that Master Plan EIS was not prepared before the expansion decision was finalized. As a result, the cumulative impact analysis which was to be contained in the Master Plan EIS was not included in the decision making process.

Two primary authorities apply the NEPA to the Army's expansion of activities at the Fort. First, NEPA applies directly to the Army as a federal agency under authority of that statute.[11] Second, observance of NEPA requirements is explicitly required under the BRAC 90.[12] Procedures under the BRAC 90 and its predecessor are intended by Congress to streamline the process of military base realignments and closures and bypass the political maneuvering and deal making that had historically hampered efficient allocation of resources by the military.[13] However, although expediting the process was the primary goal of Congress, the BRAC 90 was not intended to and does not

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[11] 42 U.S.C. § 4321; 32 C.F.R. 188.4 (b) (1).

[12] 10 U.S.C. § 2687 (b) (2).

[13] Illustrated recently by the controversy surrounding President Clinton's involvement in the McLellan AFB closing. Under the BRAC 1990 Act, the President appoints an 8 member bipartisan commission to review a list of proposed base closures submitted by the Secretary of Defense. The President approves or rejects the recommendations of the commission and submits them to the Congress which must reject them within 45 days, or they take the effect of law. The recommendations must be implemented within two years. 10 U.S.C. 2687, 104 Stat. 1808-13.

authorize, a less rigorous observance of NEPA.[14]

III. STATUTE OF LIMITATIONS

A. BRAC 90 Provides a 60-Day Statute of Limitations

In order to promote efficiency and speed in completing base closures and realignments, the BRAC 90 provides for a short statute of limitations. Any claim involving an agency's "act or failure to act" in compliance with the NEPA is to be brought within 60 days of the occurrence. BRAC 1990 Act, § 2905 (c) (3). The Army contends that it made a final administrative action from which time the statute of limitations should have run at the time of "the published record of decision stating that the Army had complied with the requirements of NEPA and implementing the realignment process." That event occurred on October 21, 1992. Plaintiffs brought this suit on July 8, 1994--nearly one and one-half years later.

The Supreme Court has spoken in dicta about the 60-day statute of limitations for NEPA claims under BRAC 90. In Dalton v. Specter, 14 S.Ct. 1719 (1994), the Court affirmed the 60-day limitation of the BRAC and acknowledged that NEPA actions had delayed other base closures, necessitating the shorter statute of limitations. Id. at 1731. In a concurring opinion, Justice Souter, joined by Justices Blackmun, Stevens and Ginsburg, described the deadlines as " tight and rigid" and

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[14] However, in furtherance of the BRAC's goal of ensuring finality in the selection of bases for closure and realignment, that statute limits the alternatives that the Army must consider as a part of the Environmental Impact Statement. Specifically, once a base has been selected by the BRAC Commission for closure or realignment, the EIS-producing department is not required to look at other bases as alternatives. In this case, therefore, the Army would not be required to consider either not accepting the new troops or sending them to a different post as an impact-mitigating alternative. 10 U.S.C. 2905 (c) (B).

"unbending." Id. at 1729.[15]

B. Finality of the Army's Action in 1992

In response to the Defendants' assertion that the claim is barred by the 60-day statute of limitations, Plaintiffs assert 1) that the final agency action did not occur until there was a formal "failure to act" by the Army, as evidenced by the 1994 publication of a "Notice of Intent" to begin a Master Plan EIS, indicating that they had failed to do so previously in spite of representations to the contrary,[16] or, in the alternative, 2) that the Army's representations of a forthcoming Master Plan EIS caused Plaintiffs' failure to bring a claim within the 60-day window, and thus the statute should be tolled.[17]

Plaintiffs allege that although the FSEIS filed by Defendants was incomplete, no suit was filed because the Defendants made affirmative assertions that a satisfactory Master Plan EIS was being prepared which, incorporated into the FSEIS, would bring the FSEIS into compliance with the NEPA. Plaintiffs allege that they relied on these statements, preventing them from bringing suit within the statute of limitations. Defendants argue that any reference to other EIS reports[18] are irrelevant and that Plaintiffs should have filed within

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[15] Nevertheless, the Court acknowledged that NEPA stood in a unique position in the context of BRAC 90: [T]he Act does make express provision for judicial review, but only of objections under the National Environmental Policy Act..." Id. at 1731

[16] Plaintiffs' Response to Motion for Summary Judgment at 8.

[17] Plaintiffs' Response to Motion for Summary Judgment at 5.

[18] The 1992 Final Supplemental Environmental Impact Statement for Base Realignment at Fort Huachuca, Arizona says that it "describes in general terms the potential cumulative impacts associated with the overall increased activities at the installation." The document refers to two other impact statements being prepared: a Master Plan EIS and a Draft Master Plan EIS, the latter to be available in 1993. The document suggests that these future EIS documents will provide more complete analysis of cumulative impacts than is provided by the

60 days of the FSEIS publication on October 21, 1992.[19]

To bring a claim under the Administrative Procedure Act, Plaintiffs must challenge a final agency action. Lujan v. National Wildlife Federation, 497 U.S. 871, 882 (1991). If this Court finds that the reference forward in time by the Army's FSEIS to a yet to be completed Master Plan EIS was permissible and proper, then it would follow that the FSEIS was completed to the satisfaction of the NEPA in 1992, pending only the completion of the incorporated document. The NEPA permits incorporation of other documents, but Defendants in their Response to Plaintiffs' Motion for Summary Judgment, deny that references to the Master Plan EIS should be considered at all and aver that the Master Plan EIS is a distinct and separate agency action.[20] That Master Plan is not a document prepared under the authority of the NEPA; instead, it is prepared in accordance with Army Regulation 210-20 promulgated by the Department of the Army. However, the Defendants offer no explanation for the references to the Master Plan EIS made within the FSEIS except to say that they were "unfortunate".[21] Therefore, this Court must determine whether the references within the FSEIS to the Master Plan EIS are intended to incorporate the Master

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admittedly "general" description given in the 1992 FSEIS.

[19] Defendants' response to Plaintiffs' Motion for Summary Judgment at 7, n 5. "Plaintiffs have alleged that the Army 'deferred' the cumulative impacts portion of the BRAC 90 FSEIS to the future Master Plan programmatic environmental impact statement...The reason for plaintiffs' linking of these separate agency actions is clear--*they* must make such flimsy arguments in an attempt to avoid the APA's finality requirements and the BRAC 1990 Act's 60-day statute of limitations..."

[20] Id.

[21] Hearing for Motion for Summary Judgment, July 31, 1995.

Plan EIS.[22] If the Court determines that they are not so intended, then the Plaintiffs' claim is barred by the BRAC 90 statute of limitations. Furthermore, this Court must answer this inquiry in determining whether the doctrine of equitable tolling applies to this case, as Plaintiffs argue in the alternative.

C. Principles of Equitable Tolling

Plaintiffs allege that, even if their claim is subject to the BRAC 90 statute of limitations, that statute should be equitably tolled. Ordinarily, the question of whether a statute of limitations should be tolled is a question for the district court in the first instance. Seattle Audubon Soc'y v. Robertson, 931 F.2d 590, 595 rev'd on other grounds, 503 U.S. 429, 112 S.Ct. 1407 (1992). Federal courts have applied the doctrine in two types of situations: 1) where the plaintiff has been prevented from asserting his claim due to some wrongful action on the part of the defendant and 2) where the plaintiff was prevented from bringing his claim through some extraordinary circumstance. Seattle Audubon at 595 citing Forti v. Suarez-Mason, 672 F.Supp. 1531, 1549-50 (N.D.Cal. 1987). In the case at hand, Plaintiffs argue that their claim falls into the first category.

1. Notice and Discovery

The fundamental inquiry in determining the applicability of

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[22] Defendants assert that the Notice of Intent is outside of the administrative record and should not be included as a part of this Court's review. Ninth Circuit case law takes a contrary view. While the scope of review is normally limited to the administrative record, in many NEPA cases a more expanded review has been deemed justified, for instance where an environmental impact statement fails to *mention* a serious environmental consequence. Here, Plaintiffs demonstrate that the NOI and the Master Plan EIS it refers to may be inextricably linked to the FSEIS which justifies expanding the record. National Audubon Society v. U.S. Forest Service, 46 F.3d 1437,1447 (9th Cir. 1993), Animal Defense Counsel v. Hodel, 840 F. 2d 1432, 1436 (9th Cir. 1988).

equitable tolling is whether or not the plaintiff was given notice of the injury. "The touchstone for determining the commencement of the limitations period is notice: a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of the action." Gerritsen v. Consulado General de Mexico, 989 F.2d 340, 344 (9th Cir. 1993). Where the plaintiff has been prevented from bringing a claim as a result of some fraud practiced by the defendant, the statute of limitations does not run until such time as the fraud is actually discovered by the plaintiff. Ernst & Young v. Matsumoto, 14 F.3rd 1380, 1384 (9th Cir. 1994). This inquiry is the special domain of the trial court because it is governed and informed by the particular facts of the case. White v.Boston (In re White) 104 B.R. 951, 958 (S.D.Ind. 1989). However, where the plaintiff had a reasonable opportunity to discover the fraud, but failed to do so, the court may find that equitable tolling is inappropriate. Ernst & Young, 14 F.3d at 1385. "One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151, 104 S.Ct. 1723, 1726 (1984).

2. Plaintiffs argue that Equitable Tolling should apply because they did not have notice of Defendants' wrong before the Statute of Limitations expired

Plaintiffs allege that the FSEIS failed to satisfy the NEPA when it was filed, but that the promise within the FSEIS of a future Master Plan EIS to be incorporated therein forestalled them from taking any action. Furthermore, Plaintiffs contend that the portion of the FSEIS called "Cumulative Impact Analysis" was so incomplete that it rose to the level of a complete omission of any such analysis. Therefore, the references under that heading to the Master Plan EIS were properly

interpreted as a promise that the cumulative impact analysis would be performed at a future date. In other words, Plaintiffs argue that they never had notice of the Army's alleged failure to satisfy NEPA because the Army was promising to do so in the near future. Furthermore, Plaintiffs allege that the Army made repeated references to a future, more complete, Master Plan EIS which would satisfactorily address cumulative impacts as required by the NEPA.[23] Thus, Plaintiffs argue, the statute of limitations did not begin to run until DOD published a Notice of Intent to begin drafting the Master Plan EIS and the "fraud" was discovered in May of 1994.[24]

This Court is aware that the Army or some other agency might offer a section of EIS study which is incomplete and which disengenuously refers to some future coming analysis as the bona fide analysis. If that were the case, a plaintiff would be required to bring action within the applicable statute of limitations. In the case at hand, that statute of limitations is provided in BRAC 90. Alternatively, the plaintiff might argue that equitable tolling applied. In order to prevail on such a claim, the plaintiff would be required to demonstrate that both the defendant actually devised the deceptive strategy described above and that the plaintiff had pursued his claim with diligence.

The feasibility of this argument hinges on the question of whether

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[23] Plaintiffs' Motion for Summary Judgment at 2; Plaintiffs' Response to Defendants' Motion for Summary Judgment at 4-6.

[24] Plaintiffs' Motion for Summary Judgment, Exhibit 2. Plaintiffs cite Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946) holding that the bar of the statute does not run until the fraud is discovered. Thus, they argue, the BRAC 90's statute of limitation should begin "when the Army revealed that it was not in the process of preparing the required and promised analysis." Plaintiffs' Response to Motion for Summary Judgment at 8.

or not an informed, reasonable reading of the Army's FSEIS supports the conclusion that 1) the FSEIS does not satisfy the NEPA, and 2) the references within the FSEIS to other forthcoming documents are meant to incorporate those documents into the FSEIS. If the answer is "yes" to both of these queries, the Plaintiffs have a colorable argument for equitable tolling. Thus, Plaintiffs' argument that equitable tolling should apply is intertwined with the question of whether or not the NEPA was satisfied by the Army's FSEIS, which is the very basis of Plaintiffs' suit. Therefore, this Court has reviewed the EIS as a threshold inquiry in order to determine whether or not the internal references to the Master Plan EIS are offered in response to the NEPA's mandated cumulative impact analysis through reference. The Court has also considered the Plaintiffs' allegation to have had no notice of the Army's alleged fraud for a period of nearly one and a half years. Plaintiffs claim that following the October 1992 publication of the FSEIS, they awaited completion of the Master Plan EIS until May, 1994. The remedy of equitable tolling requires that this Court carefully balance the equities between both sides.

3. Plaintiffs fail to satisfy the standards for equitable tolling

Under the APA, all parties are charged with a knowledge of the law. Thus, Plaintiffs are charged with the knowledge that a Notice of Intent (NOI) is the first requirement of administrative action and should arguably have been more diligent in monitoring the lapse of time between the 1992 FSEIS publication and the late-coming 1994 NOI. Under the APA, Plaintiffs might have brought a claim charging that the Army had not acted in a reasonable time. Furthermore, if Plaintiffs were relying on the belief that the Master Plan EIS had already been started, they were arguably remiss in not looking for the NOI to

substantiate that belief. Therefore, this Court must also determine whether or not the Plaintiffs should have reasonably discovered the fraud during such time or whether it was reasonable for them to rely on the affirmative assertions of the Army that the cumulative impact analysis was underway. The Supreme Court has said that one who fails to act diligently cannot rely on equitable relief to excuse that failure. Baldwin County Welcome Ctr. v. Brown, 466 U.S. at 151.

This Court is not persuaded that the Plaintiffs pursued their claim with the required diligence. In reaching this determination, the Court finds the following evidence informative. First, Plaintiffs have described that the EIS process may result in a splitting off of one part of the analysis from another and argued that in this case, the cumulative impact analysis was intended or represented to be split off in such manner. However, the Defendants have demonstrated that 1) there is a cumulative impact section in the FSEIS, and 2) the Master Plan is a document produced under authority of Army Regulation 210-20 and not under the authority of the NEPA. Therefore, the Plaintiffs had notice that the cumulative impact analysis section in the FSEIS might have been, in fact, offered in total as it was presented in the FSEIS rather than intended to be deferred as a "split-off" separate EIS under the name "Master Plan EIS."

The requirements and scope of analysis of environmental impacts provided for by Army regulation may be different than those prescribed in the National Environmental Protection Act. The Master Plan is supposed to incorporate some NEPA documents. AR 210-20, 2-7 (c). However, the Master Plan is oriented in a large part to the real property and physical boundaries of the installation. AR 210-20, 3-3, c. (2) describes the environmental baseline analysis section of the

Master Plan: "Serves as a description of the baseline environmental conditions at the installation and the installation's ability to support assigned missions..." Because the Master Plan is a decisional document, the Master Plan itself requires an Environmental Impact Statement.. AR 210-20, 2-1 (a); AR 200-1. Any cumulative impact analysis performed under the NEPA for the BRAC 90 should have considered the impact of the 270 odd troops added to the post on the finite water resources there and at the River and the Riparian Area and their potential for inducing growth which would impact the consumption of water. The purpose of the cumulative impact analysis performed for the Master Plan is intended to be performed under authority of the NEPA as well, but with different purposes. Because the Master Plan is intended to guide activities on the post in the future, it should be broader in its scope and inquiry than the FSEIS for the BRAC 90 should have been. The cumulative impact analysis in the Master Plan EIS should take a hard look at the capabilities of the post to support sustained expansion, new missions or increased activity in light of the finite water resources of the area and the potential for impact on the River and the Riparian Area. Therefore, it was incumbent on the Plaintiffs to research and to make inquiry to the Army about the scope, purpose and intent of the Master Plan EIS and whether that document would serve to satisfy the objectives of the NEPA regarding the FSEIS. Unfortunately, they claim to have relied on these references to the Master Plan EIS as affirmative representations that the cumulative impact analysis of the FSEIS was intended to be embodied in the Master Plan EIS.

Second, the Plaintiffs have not denied that they failed to participate in the public comment opportunities regarding the FSEIS.

This fact is highly prejudicial to Plaintiffs' argument for equitable tolling which should be granted only where a plaintiff has exercised diligence in pursuing his claim.

Finally, Plaintiffs have not demonstrated that the references in the FSEIS were intended to deceive them. Although a reasonable reader might certainly interpret the references as Plaintiffs claim to have interpreted them, a closer study reveals differences between the FSEIS cumulative impact analysis required under the NEPA for a BRAC 90 action and that required for a Master Plan. The onus was on the Plaintiffs to make this closer study. If Plaintiffs had made inquiry or research into the purpose and scope of a Master Plan EIS, they would have been compelled to conclude that it was a separate agency action and that the time for challenging the 1992 FSEIS was ripe at the time of its publication and the Record of Decision in October of 1992.

Additionally, Plaintiffs have emphasized that their call for cumulative impact analysis to be performed is not an attack on the substance of the FSEIS published in 1992, but rather a claim brought under the APA to require the Army to perform for the first time analysis which was not performed in the first instance. This distinction attempts to avoid the BRAC 90's requirement that any challenges to the substance of NEPA actions be brought within 60 days of such actions. Plaintiffs argue that their procedural claim to compel action in the first instance, was brought within 60 days of their discovery that the agency had failed to take a required action, the cumulative impact analysis, as evidenced by the NOI.

This Court finds the Plaintiffs' distinction unpersuasive based on the facts of the instant case. The Army produced a cumulative impact section (Chapter 5) in the FSEIS. Plaintiffs' claim is based

on the language in that section of the FSEIS purportedly deferring the cumulative impact analysis to the Master Plan EIS and on the incompleteness of the cumulative impact of the FSEIS. Therefore, however incomplete and inadequate the cumulative impact analysis may have been, this Court is not persuaded that there was, in fact, no cumulative impact analysis at all. Because there was, in fact, some section offered as a "cumulative impact analysis," any challenge regarding that analysis is substantive and not merely procedural.

IV. FRAMEWORK FOR REVIEW OF AN EIS

A. Overarching Goals of the NEPA

In assessing the merit of Plaintiffs' claim of fraud and argument for equitable tolling, this Court has reviewed as a threshold issue the adequacy of the Army's cumulative impact analysis in the FSEIS. The NEPA and its EIS requirement have two primary goals: 1) to require that federal agencies and others who will perform major activities with the potential to harm the environment consider the impacts before they are made, and 2) to permit the public to have a voice in the considerations. Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 814 (9th Cir. 1987), rev'd on other grounds, 490 U.S. 332 (1989). When reviewing an agency action which is subject to NEPA, the role of the court is "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions" so that the goals of the NEPA are respected. Id. at 117 citing to Baltimore Gas & Elec., 462 U.S. at 97-98.

The Court's approach is to be somewhat deferential to the agency. For example, the Supreme Court has observed that "NEPA merely prohibits uninformed--rather than unwise--agency action." Robertson v.

Methow Valley Citizens Council, 490 U.S. 332, 351, 109 S.Ct. 1835, 109 (1989). The reviewing court must normally defer to the agency on questions requiring technical expertise and methodology but not where the agency has completely failed to include some factor which was necessary for a truly informed decision. Inland Empire Public Lands Council v. Schultz, 992 F.2d 977, 981 (9th Cir. 1991). The court must not substitute its own judgment in the substantive agency decision but must critically judge whether the agency has satisfied the process required by law. Adler v. Lewis, 675 F.2d 1085, 1096 (9th Cir. 1982).

Courts are empowered to review the actions of a federal agency producing an EIS under the APA, 5 U.S.C. § 706, which permits a court to set aside an agency action under six different standards.[25] In the Ninth Circuit, "a judicial gloss" has developed on the statute[26] so that courts employ the "rule of reason"[27] to evaluate whether the agency engaged in a reasonably sufficient analysis of all the probable environmental consequences. Enos v. Marsh, 769 F.2d 1363, 1372 (9th Cir. 1995). In reviewing an EIS for sufficiency, courts have engaged in a fact-intensive analysis.[28] Thus, this Court is asked to

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[25] For example, under the determination that an agency's action was "arbitrary and capricious". The Ninth Circuit's rule blends the arbitrary and capricious standard which is considered favorable to the defending agency with a "lesser" standard from the APA of any action "without observance of procedure required by law" 5 U.S.C. s 706 (2)(D). Shoshone -Pauite Tribe v. U.S., 1994 WL 808133 (D. Idaho 1994) at 7.

[26] Id.

[27] The test simply evaluates whether or not the decision to include information in or exclude information from an Environmental Impact Statement was reasonable under the circumstances. Commonwealth of Mass. v. Watt, 716 F.2d 946, 948 (1st Cir. 1983).

[28] See for example Oregon Natural Resources Council v. Marsh, Nos. 93-36122, 94-35370, Slip op. (9th Cir. Jun 29, 1995). The court there included in its review consideration of factors such as the likely impact of a dam on a downstream river designated a Wild and

determine, in light of the facts seen most favorably for the Army, whether or not it has completed its task of gathering and analyzing all of the information which NEPA mandates in order to reach an informed decision.[29]

B. Requirements of a Cumulative Impact Statement in an EIS

A reviewing court must find that the agency took a "hard look" at all the environmental consequences of its proposed action.[30] As a part of the agency's assessment, the EIS must include a realistic study of the cumulative impacts of the proposed action. The duty to discuss cumulative impacts in an EIS is mandatory and not within the agency's discretion.[31] The implementing regulations set forth these instructive definitions:

> **40 C.F.R. § 1508.7** Cumulative impact Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or Non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Scenic River, and detailed several fact issues which the EIS had not studied such as the implication of diminishing fish populations, and the relevance of seasonal increases in water flow through the river.

[29] See for example, Leavenworth Audubon Adopt-a-Forest Alpine Lakes Protection Society v. Ferraro, 881 F.Supp. 1482 (W.D. Wash. 1995) where district court examined whether or not the U.S. Forest Service had violated NEPA by a failure to consider the impact of a timber sale on the watershed and soil conditions in the area, on bull trout, and on old-growth ponderosa stands. After extensive review of the facts, the court granted in part and denied in part a motion for summary judgment in favor of the plaintiffs and granted in part and denied in part a motion for summary judgment for the defendants.

[30] Oregon Natural Resources Council v. Marsh, Nos. 93-31622, 94-35370, slip op. at 7590 (9th Cir. Jun 29, 1995) citing Marble Mountain Audubon Soc'y v. Rice, 914 F.2d 179, 182 (9th Cir. 1990)

[31] Id. at 7599. In that case, the failure to discuss the cumulative impact of three separate dams when taken together, as opposed to analyzing the effect of each dam separately, was held to be no assessment of cumulative impacts at all.

> 40 C.F.R. § 1508.8 Effects Effects include: (a) Direct effects, which are caused by the action and occur at the same time and place. (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

D. Army's 1992 FSEIS

The Army's 1992 FSEIS section on cumulative impacts provides a very cursory overview of the long-term environmental impacts of the Fort's expansion. Within that document, there are references to future EIS statements which arguably support the Plaintiffs' assertions. Typical of these is this reference, quoted in its entirety:

> "5.15.5 Biological Resources -
> Increased range use has the potential to significantly impact the sensitive biological resources at Fort Huachuca. The separate Master Plan EIS, combined with other studies and biological commitments on the installation, will provide safeguards to reduce impacts to insignificant levels."

(Admin. R. at 4958, Sect. 5.15.5)

Defendants claim that all references to any other EIS were irrelevant. If defendant, the non-movant, is given the benefit of the doubt, then the paragraph quoted above should be considered without the second sentence. As such, the entire cumulative impact analysis on biological resources in the FSEIS is reduced to one sentence stating, "Increased range use has the potential to significantly impact the sensitive biological resources at Fort Huachuca." It should be readily apparent that this single sentence does not provide sufficient analysis of cumulative impacts and it seems likely that any reasonable reader would be naturally prompted to accept the following sentence as logically related. Thus, even when considering the facts in a light

favorable to the defendant, it remains entirely reasonable that the references to a Master Plan EIS would be construed as supplying through reference the analysis which is apparently missing from the FSEIS.

There are at least three ways of explaining the Army's repeated references within the FSEIS to its Master Plan EIS which, depending on what theory is selected, shape the outcome of this litigation. If the Army deliberately made references to the Master Plan EIS in the FSEIS with the purpose of misleading a reasonable reader into believing that the Master Plan would supply the necessary cumulative impact analysis, then the Defendants should be estopped from asserting the statute of limitations as a defense. Alternatively, if the Army made reference to the Master Plan EIS with the good faith intent of producing and incorporating it, Plaintiffs must prevail in their argument that the statute of limitations began to run upon the NOI published in May of 1994 which provided the first notice of the Army's failure to complete the Master Plan EIS in time to aid the decision making process. Finally, if the Army is to be believed when it asserts that the repeated references to the Master Plan EIS were irrelevant, extraneous verbiage in the FSEIS and were never intended to supply reference to more complete cumulative impact studies than what was on the face of the FSEIS, then Defendants must prevail in asserting the statute of limitations. Under this theory, the Army claims that it produced a cumulative impact analysis which, however woefully inadequate on its face, was intended to be self-contained and final and any challenges to that analysis were to be brought within 60 days.

This Court is convinced that the Defendants' cumulative impact analysis was incomplete, as a matter of law. The pertinent regulations explicitly require that the effects of growth generated by an agency

action be contemplated and that potential impacts be discussed in relation to their magnitude. It is hard to imagine anything more obvious than the impact of Sierra Vista's continued growth on the nearby San Pedro River and the federally protected and managed Riparian Area and species there. This Court finds that the Army's FSEIS fails to satisfy the requirements of the NEPA as it fails to supply cumulative impact analysis on the River, the Riparian Area, and the associated ecosystem. The uniqueness and close proximity of the River and the Riparian Area and the magnitude of the possible impact mandates a more comprehensive and detailed investigation which the Army has failed to perform despite the fact that regulation requires environmental impacts to be discussed in proportion to their significance. 40 C.F.R. § 1502.2 (b). Failure to address these major areas frustrates the intent of the NEPA to promote informed decision making. In reaching this determination, the Court is not substituting its own judgment for that of the agency, but limiting its review to an observance that the agency has failed to consider the environmental consequences of its action. Adler v. Lewis, 675 F.2d 1085, 1096 (9th Cir. 1982). In future environmental impact analysis, the Army must strive to address the cumulative impacts of continued expansion activities on the River and Riparian Area, as well as the accompanying development of the Sierra Vista area. The future cumulative impact analysis should consider expansion in the context of a continuum rather than as an isolated and independent activity. Creeping development and unrestrained draining of the aquifer represents a real threat to the Riparian Area.[33] The Army must not turn a blind eye to this problem

[33] "At present, municipal and industrial pumping from the City of Sierra Vista and the U.S. Defense Department's Fort Huachuca Army Base has had only a modest impact on the River. Their pumping is primarily

or to the fact that its actions may tend to exacerbate it.

A reasonable person having read the FSEIS might have believed that the FSEIS was so seriously incomplete that reference to and incorporation of a separate document was necessary. A reasonable reader might conclude that the Army's references to a Master Plan EIS supplied the necessary reference and incorporation of that separate document. However, in light of all of the facts, this Court is not persuaded that there was design or intent to mislead the Plaintiffs. This Court has concluded that the Plaintiffs failed to discharge their burden under law of pursuing their claim with all due diligence and is convinced that if they had exercised only a slightly higher degree of care, their claim could have been brought in time. Therefore, although this Court agrees with Plaintiffs that the Army failed to perform an adequate cumulative impact analysis, that claim is now barred by the statute of limitations under the BRAC 90.

For the foregoing reasons,

IT IS ORDERED that Plaintiffs' Motion for Summary Judgment is

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from wells in the regional aquifer centered about 10 miles from the River. With increased urbanization, additional well development closer to the stream is likely to occur. Such pumping, coupled with the growing Sierra Vista-Fort Huachuca effect, would further endanger the River.

In addition, in 1993, the United States Base Realignment and Closure Commission report recommended changes that would increase Fort Huachuca's water consumption by 20 percent. Because the Army decided not to construct family housing on the base, new residential development in or near the city seems inevitable. Moreover, the Base Commission has proposed closing the Monterey, California Defense Language Institute and a Sierra Vista developer has offered to donate 129 acres to help move the Institute to Sierra Vista. The Institute would expand the Base by approximately 5,000 people and would increase water use by approximately 2,500 acre feet per year. Without careful planning, these developments would place increased stress on the hydrologic connections between the groundwater system and the San Pedro River."
Robert Glennon & Thomas Maddock, In Search of Subflow, 35 Arizona Law Review 567, 589 (1994).

DENIED.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment is GRANTED.

Judgment is hereby entered in favor of the Defendants.

Dated this 30th day of August, 1995.

ALFREDO C. MARQUEZ
Senior U. S. District Judge