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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: (1) 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..."

Hughes Clausen Randall ACM

1 40 C.F.R. § 1508.8 Effects Effects include: (a) Direct
2 effects, which are caused by the action and occur at the
3 same time and place. (b) Indirect effects, which are caused
4 by the action and are later in time or farther removed in
5 distance but are still reasonably foreseeable. Indirect
6 effects may include growth inducing effects and other
7 effects related to induced changes in the pattern of land
8 use, population density or growth rate, and related effects
9 on air and water and other natural systems, including
10 ecosystems.

11 D. Army's 1992 FSEIS

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

17 "5.15.5 Biological Resources -
18 Increased range use has the potential to
19 significantly impact the sensitive biological
20 resources at Fort Huachuca. The separate Master
21 Plan EIS, combined with other studies and
22 biological commitments on the installation, will
23 provide safeguards to reduce impacts to
24 insignificant levels."

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

26 Defendants claim that all references to any other EIS were
27 irrelevant. If defendant, the non-movant, is given the benefit of the
28 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

1 complete on October 21, 1992.

2 Plaintiffs claim that the FSEIS fails to satisfy the NEPA and
3 bring suit under authority of the Administrative Procedure Act (APA).²
4 They allege that the Army has violated the NEPA and remains in
5 violation due to its failure to prepare an adequate analysis of the
6 cumulative impacts which its expansion activities at Ft. Huachuca will
7 cause on the San Pedro River area, the aquifer there and the San Pedro
8 Riparian National Conservation Area downstream from the Fort.³

9 Plaintiffs allege that the San Pedro River (the River) is the last
10 perennially flowing river in southern Arizona and contains the widest
11 diversity of mammals in the country, 20 species of raptors and 200
12 other bird species, supports hundreds of other fish, reptile and
13 amphibians, and has retained 75% of its native plants which is unusual
14 for the southwest.⁴ Many of these species are rare and federally
15 protected. To protect this area, Congress created the San Pedro
16 Riparian National Conservation Area (the Riparian Area) in 1988.⁵
17 Plaintiffs allege that the continued pumping of groundwater will
18 essentially dry up the San Pedro River, just as it did the neighboring
19 Santa Cruz River.⁶ Plaintiffs further allege that because
20 Ft. Huachuca drives the economy and growth of the San Pedro valley
21 area, "the key part of any environmental analysis of the Army's actions
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23 ² 5 U.S.C. § 706.

24
25 ³ Plaintiffs' Motion for Summary Judgment at 4.

26 ⁴ Id.

27 ⁵ Id. at 5.

28 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.

1 is the cumulative impacts analysis"⁷ and that the Army has failed to
2 provide that analysis.

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

8 B. Procedural

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

21
22 **II. NATIONAL ENVIRONMENTAL POLICY ACT & BASE REALIGNMENT AND**
23 **CLOSURE ACT**

24 The National Environmental Policy Act (NEPA) is the "basic
25 national charter for protection of the environment." 40 C.F.R.
26 1500.1(a). The Act requires an EIS to be completed before the federal
27 government or its agencies proceed with any major activity which will

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7 Id. at 4

1 impact the environment.⁸ These statements are to be prepared in three
2 stages: a draft EIS, a final EIS, and, if needed, a supplemental EIS.
3 40 C.F.R. 1502.9. The guidelines require that the EIS be completed
4 before action is taken or resources committed in furtherance of a
5 proposal.⁹

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

15 To promote speed and prevent redundant analysis, the guidelines
16 permit and encourage the use of procedures such as combining
17 environmental documents with other documents and "tiering" from broad
18

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

26 ' 40 C.F.R. 1502.5 (a) "For projects directly undertaken by
27 Federal agencies, the environmental impact statement shall be prepared
28 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)

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

12 Two primary authorities apply the NEPA to the Army's expansion of
13 activities at the Fort. First, NEPA applies directly to the Army as
14 a federal agency under authority of that statute.¹¹ Second,
15 observance of NEPA requirements is explicitly required under the BRAC
16 90.¹² Procedures under the BRAC 90 and its predecessor are intended
17 by Congress to streamline the process of military base realignments and
18 closures and bypass the political maneuvering and deal making that had
19 historically hampered efficient allocation of resources by the
20 military.¹³ However, although expediting the process was the primary
21 goal of Congress, the BRAC 90 was not intended to and does not
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23 ¹¹ 42 U.S.C. § 4321; 32 C.F.R. 188.4 (b) (1).

24 ¹² 10 U.S.C. § 2687 (b) (2).

25 ¹³ Illustrated recently by the controversy surrounding President
26 Clinton's involvement in the McLellan AFB closing. Under the BRAC 1990
27 Act, the President appoints an 8 member bipartisan commission to review
28 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.

1 authorize, a less rigorous observance of NEPA.¹⁴

2
3 III. STATUTE OF LIMITATIONS

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

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

16 The Supreme Court has spoken in dicta about the 60-day statute of
17 limitations for NEPA claims under BRAC 90. In Dalton v. Specter, 14
18 S.Ct. 1719 (1994), the Court affirmed the 60-day limitation of the BRAC
19 and acknowledged that NEPA actions had delayed other base closures,
20 necessitating the shorter statute of limitations. Id. at 1731. In a
21 concurring opinion, Justice Souter, joined by Justices Blackmun,
22 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).

1 "unbending." Id. at 1729.¹⁵

2 B. Finality of the Army's Action in 1992

3 In response to the Defendants' assertion that the claim is barred
4 by the 60-day statute of limitations, Plaintiffs assert 1) that the
5 final agency action did not occur until there was a formal "failure to
6 act" by the Army, as evidenced by the 1994 publication of a "Notice of
7 Intent" to begin a Master Plan EIS, indicating that they had failed to
8 do so previously in spite of representations to the contrary,¹⁶ or, in
9 the alternative, 2) that the Army's representations of a forthcoming
10 Master Plan EIS caused Plaintiffs' failure to bring a claim within the
11 60-day window, and thus the statute should be tolled.¹⁷

12 Plaintiffs allege that although the FSEIS filed by Defendants was
13 incomplete, no suit was filed because the Defendants made affirmative
14 assertions that a satisfactory Master Plan EIS was being prepared
15 which, incorporated into the FSEIS, would bring the FSEIS into
16 compliance with the NEPA. Plaintiffs allege that they relied on these
17 statements, preventing them from bringing suit within the statute of
18 limitations. Defendants argue that any reference to other EIS
19 reports¹⁸ are irrelevant and that Plaintiffs should have filed within
20

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

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

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

27 ¹⁸ The 1992 Final Supplemental Environmental Impact Statement for
28 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

1 60 days of the FSEIS publication on October 21, 1992.¹⁹

2 To bring a claim under the Administrative Procedure Act,
3 Plaintiffs must challenge a final agency action. Lujan v. National
4 Wildlife Federation, 497 U.S. 871, 882 (1991). If this Court finds
5 that the reference forward in time by the Army's FSEIS to a yet to be
6 completed Master Plan EIS was permissible and proper, then it would
7 follow that the FSEIS was completed to the satisfaction of the NEPA in
8 1992, pending only the completion of the incorporated document. The
9 NEPA permits incorporation of other documents, but Defendants in their
10 Response to Plaintiffs' Motion for Summary Judgment, deny that
11 references to the Master Plan EIS should be considered at all and aver
12 that the Master Plan EIS is a distinct and separate agency action.²⁰
13 That Master Plan is not a document prepared under the authority of the
14 NEPA; instead, it is prepared in accordance with Army Regulation 210-20
15 promulgated by the Department of the Army. However, the Defendants
16 offer no explanation for the references to the Master Plan EIS made
17 within the FSEIS except to say that they were "unfortunate".²¹
18 Therefore, this Court must determine whether the references within the
19 FSEIS to the Master Plan EIS are intended to incorporate the Master
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22 admittedly "general" description given in the 1992 FSEIS.

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24 ¹⁹ Defendants' response to Plaintiffs' Motion for Summary Judgment
25 at 7, n 5. "Plaintiffs have alleged that the Army 'deferred' the
26 cumulative impacts portion of the BRAC 90 FSEIS to the future Master
27 Plan programmatic environmental impact statement...The reason for
28 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.

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

6 C. Principles of Equitable Tolling

7 Plaintiffs allege that, even if their claim is subject to the BRAC
8 90 statute of limitations, that statute should be equitably tolled.
9 Ordinarily, the question of whether a statute of limitations should be
10 tolled is a question for the district court in the first instance.
11 Seattle Audubon Soc'y v. Robertson, 931 F.2d 590, 595 rev'd on other
12 grounds, 503 U.S. 429, 112 S.Ct. 1407 (1992). Federal courts have
13 applied the doctrine in two types of situations: 1) where the plaintiff
14 has been prevented from asserting his claim due to some wrongful action
15 on the part of the defendant and 2) where the plaintiff was prevented
16 from bringing his claim through some extraordinary circumstance.
17 Seattle Audubon at 595 citing Forti v. Suarez-Mason, 672 F.Supp. 1531,
18 1549-50 (N.D.Cal. 1987). In the case at hand, Plaintiffs argue that
19 their claim falls into the first category.

20 1. Notice and Discovery

21 The fundamental inquiry in determining the applicability of
22

23 ²² Defendants assert that the Notice of Intent is outside of the
24 administrative record and should not be included as a part of this
25 Court's review. Ninth Circuit case law takes a contrary view. While
26 the scope of review is normally limited to the administrative record,
27 in many NEPA cases a more expanded review has been deemed justified,
28 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).

1 equitable tolling is whether or not the plaintiff was given notice of
2 the injury. "The touchstone for determining the commencement of the
3 limitations period is notice: a cause of action generally accrues when
4 a plaintiff knows or has reason to know of the injury which is the
5 basis of the action." Geritsen v. Consulado General de Mexico, 989 F.2d
6 340, 344 (9th Cir. 1993). Where the plaintiff has been prevented from
7 bringing a claim as a result of some fraud practiced by the defendant,
8 the statute of limitations does not run until such time as the fraud
9 is actually discovered by the plaintiff. Ernst & Young v. Matsumoto,
10 14 F.3d 1380, 1384 (9th Cir. 1994). This inquiry is the special
11 domain of the trial court because it is governed and informed by the
12 particular facts of the case. White v. Boston (In re White) 104 B.R.
13 951, 958 (S.D.Ind. 1989). However, where the plaintiff had a
14 reasonable opportunity to discover the fraud, but failed to do so, the
15 court may find that equitable tolling is inappropriate. Ernst & Young,
16 14 F.3d at 1385. "One who fails to act diligently cannot invoke
17 equitable principles to excuse that lack of diligence." Baldwin County
18 Welcome Ctr. v. Brown, 466 U.S. 147, 151, 104 S.Ct. 1723, 1726 (1984).

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

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

1 interpreted as a promise that the cumulative impact analysis would be
2 performed at a future date. In other words, Plaintiffs argue that they
3 never had notice of the Army's alleged failure to satisfy NEPA because
4 the Army was promising to do so in the near future. Furthermore,
5 Plaintiffs allege that the Army made repeated references to a future,
6 more complete, Master Plan EIS which would satisfactorily address
7 cumulative impacts as required by the NEPA.²³ Thus, Plaintiffs argue,
8 the statute of limitations did not begin to run until DOD published a
9 Notice of Intent to begin drafting the Master Plan EIS and the "fraud"
10 was discovered in May of 1994.²⁴

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

22 The feasibility of this argument hinges on the question of whether
23

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

26 ²⁴ Plaintiffs' Motion for Summary Judgment, Exhibit 2.
27 Plaintiffs cite Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946) holding
28 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.

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

19 **3. Plaintiffs fail to satisfy the standards for equitable tolling**

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

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

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

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

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

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

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

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

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

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

1 on the language in that section of the FSEIS purportedly deferring the
2 cumulative impact analysis to the Master Plan EIS and on the
3 incompleteness of the cumulative impact of the FSEIS. Therefore,
4 however incomplete and inadequate the cumulative impact analysis may
5 have been, this Court is not persuaded that there was, in fact, no
6 cumulative impact analysis at all. Because there was, in fact, some
7 section offered as a "cumulative impact analysis," any challenge
8 regarding that analysis is substantive and not merely procedural.
9

10 IV. FRAMEWORK FOR REVIEW OF AN EIS

11 A. Overarching Goals of the NEPA

12 In assessing the merit of Plaintiffs' claim of fraud and argument
13 for equitable tolling, this Court has reviewed as a threshold issue the
14 adequacy of the Army's cumulative impact analysis in the FSEIS. The
15 NEPA and its EIS requirement have two primary goals: 1) to require that
16 federal agencies and others who will perform major activities with the
17 potential to harm the environment consider the impacts before they are
18 made, and 2) to permit the public to have a voice in the considera-
19 tions. Methow Valley Citizens Council v. Regional Forester, 833 F.2d
20 810, 814 (9th Cir. 1987), rev'd on other grounds, 490 U.S. 332 (1989).
21 When reviewing an agency action which is subject to NEPA, the role of
22 the court is "simply to ensure that the agency has adequately
23 considered and disclosed the environmental impact of its actions" so
24 that the goals of the NEPA are respected. *Id.* at 117 citing to
25 Baltimore Gas & Elec., 462 U.S. at 97-98.

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

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

10 Courts are empowered to review the actions of a federal agency
11 producing an EIS under the APA, 5 U.S.C. § 706, which permits a court
12 to set aside an agency action under six different standards.²⁵ In the
13 Ninth Circuit, "a judicial gloss" has developed on the statute²⁶ so
14 that courts employ the "rule of reason"²⁷ to evaluate whether the
15 agency engaged in a reasonably sufficient analysis of all the probable
16 environmental consequences. Enos v. Marsh, 769 F.2d 1363, 1372 (9th
17 Cir. 1995). In reviewing an EIS for sufficiency, courts have engaged
18 in a fact-intensive analysis.²⁸ Thus, this Court is asked to

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20 ²⁵ For example, under the determination that an agency's action
21 was "arbitrary and capricious". The Ninth Circuit's rule blends the
22 arbitrary and capricious standard which is considered favorable to the
23 defending agency with a "lesser" standard from the APA of any action
24 "without observance of procedure required by law" 5 U.S.C. s 706 (2)
25 (D). Shoshone -Pauite Tribe v. U.S., 1994 WL 808133 (D. Idaho 1994) at
26 7.

27 ²⁶ Id.

28 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

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

5 B. Requirements of a Cumulative Impact Statement in an EIS

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

13 40 C.F.R. § 1508.7 Cumulative impact Cumulative impact is the
14 impact on the environment which results from the incremental
15 impact of the action when added to other past, present, and
16 reasonably foreseeable future actions regardless of what agency
17 (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.

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

20 ²⁹ See for example, Leavenworth Audubon Adopt-a-Forest Alpine
21 Lakes Protection Society v. Ferraro, 881 F.Supp. 1482 (W.D. Wash. 1995)
22 where district court examined whether or not the U.S. Forest Service
23 had violated NEPA by a failure to consider the impact of a timber sale
24 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.

25 ³⁰ Oregon Natural Resources Council v. Marsh, Nos. 93-31622, 94-
26 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)

27 ³¹ Id. at 7599. In that case, the failure to discuss the
28 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.

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

4 There are at least three ways of explaining the Army's repeated
5 references within the FSEIS to its Master Plan EIS which, depending on
6 what theory is selected, shape the outcome of this litigation. If the
7 Army deliberately made references to the Master Plan EIS in the FSEIS
8 with the purpose of misleading a reasonable reader into believing that
9 the Master Plan would supply the necessary cumulative impact analysis,
10 then the Defendants should be estopped from asserting the statute of
11 limitations as a defense. Alternatively, if the Army made reference
12 to the Master Plan EIS with the good faith intent of producing and
13 incorporating it, Plaintiffs must prevail in their argument that the
14 statute of limitations began to run upon the NOI published in May of
15 1994 which provided the first notice of the Army's failure to complete
16 the Master Plan EIS in time to aid the decision making process.
17 Finally, if the Army is to be believed when it asserts that the
18 repeated references to the Master Plan EIS were irrelevant, extraneous
19 verbiage in the FSEIS and were never intended to supply reference to
20 more complete cumulative impact studies than what was on the face of
21 the FSEIS, then Defendants must prevail in asserting the statute of
22 limitations. Under this theory, the Army claims that it produced a
23 cumulative impact analysis which, however woefully inadequate on its
24 face, was intended to be self-contained and final and any challenges
25 to that analysis were to be brought within 60 days.

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

1 action be contemplated and that potential impacts be discussed in
2 relation to their magnitude. It is hard to imagine anything more
3 obvious than the impact of Sierra Vista's continued growth on the
4 nearby San Pedro River and the federally protected and managed Riparian
5 Area and species there. This Court finds that the Army's FSEIS fails
6 to satisfy the requirements of the NEPA as it fails to supply
7 cumulative impact analysis on the River, the Riparian Area, and the
8 associated ecosystem. The uniqueness and close proximity of the River
9 and the Riparian Area and the magnitude of the possible impact mandates
10 a more comprehensive and detailed investigation which the Army has
11 failed to perform despite the fact that regulation requires
12 environmental impacts to be discussed in proportion to their
13 significance. 40 C.F.R. § 1502.2 (b). Failure to address these major
14 areas frustrates the intent of the NEPA to promote informed decision
15 making. In reaching this determination, the Court is not substituting
16 its own judgment for that of the agency, but limiting its review to an
17 observance that the agency has failed to consider the environmental
18 consequences of its action. Adler v. Lewis, 675 F.2d 1085, 1096 (9th
19 Cir. 1982). In future environmental impact analysis, the Army must
20 strive to address the cumulative impacts of continued expansion
21 activities on the River and Riparian Area, as well as the accompanying
22 development of the Sierra Vista area. The future cumulative impact
23 analysis should consider expansion in the context of a continuum rather
24 than as an isolated and independent activity. Creeping development and
25 unrestrained draining of the aquifer represents a real threat to the
26 Riparian Area.³² The Army must not turn a blind eye to this problem

27
28 ³² "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

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

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

16 For the foregoing reasons,

17 IT IS ORDERED that Plaintiffs' Motion for Summary Judgment is
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20 from wells in the regional aquifer centered about 10 miles from the
21 River. With increased urbanization, additional well development closer
22 to the stream is likely to occur. Such pumping, coupled with the
23 growing Sierra Vista-Fort Huachuca effect, would further endanger the
24 River.

25 In addition, in 1993, the United States Base Realignment and
26 Closure Commission report recommended changes that would increase Fort
27 Huachuca's water consumption by 20 percent. Because the Army decided
28 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).

1 DENIED.

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

4 Judgment is hereby entered in favor of the Defendants.
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6 Dated this 30th day of August, 1995.
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9
10 ALFREDO C. MARQUEZ
11 Senior U. S. District Judge
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