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RESPONSE OF THE UNITED STATES OF AMERICA TO THE SUBMISSION MADE BY THE SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY AND DR. ROBIN SILVER PURSUANT TO ARTICLE 14 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

I. INTRODUCTION

This memorandum responds to a request from the Secretariat of the Commission for Environmental Cooperation that the Government of the United States of America respond to a submission by the Southwest Center for Biological Diversity and Dr. Robin Silver ("Submitters") made pursuant to Article 14 of the North American Agreement on Environmental Cooperation ("NAAEC" or "Agreement"). Article 14 provides that the Commission for Environmental Cooperation ("CEC") may consider submissions from non-governmental organizations or persons asserting that Canada, Mexico, or the United States ("the Parties") is failing to effectively enforce its environmental law. If the Secretariat considers that a submission, in light of any response from the Party concerned, warrants development of a factual record, the Secretariat is to inform the Council pursuant to NAAEC Article 15 and provide the reasons why it believes that a factual record is warranted.

The Southwest Center for Biological Diversity and Dr. Robin Silver have made a submission to the Secretariat in which they assert that the United States is failing to enforce the requirements of the National Environmental Policy Act of 1969 ("NEPA" or "Act"). Specifically, the Submitters claim that the Department of the Army ("Army") is violating NEPA by failing to examine the cumulative environmental impacts on the San Pedro riparian ecosystem in southeastern Arizona, of a personnel increase at nearby Fort Huachuca. *See* A Submission Pursuant to Article 14 of the North American Agreement on Environmental Cooperation Submitted to: The Secretariat of the Commission for Environmental Cooperation by Earthlaw On Behalf of the Southwest Center for Biological Diversity and Dr. Robin Silver ("the Submission") at 13.

The United States Government believes that the Article 14 process is an important component of the cooperative environmental protection efforts among the Parties. The United States has been, and continues to be, a firm supporter of the process established by Articles 14 and 15 in appropriate circumstances. The CEC Secretariat has, nonetheless, recognized that certain types of assertions are not properly the subject of a factual record. For example, the Article 14 process is not intended to be a forum for challenging legislative changes to the nature and scope of a Party's environmental laws.[1] In addition, the Secretariat has declined to request the preparation of a factual record if ongoing litigation could obviate the need to address the assertions in a factual record.[2]

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[1] *See* Letter from Victor Lichtinger to Jay Tutchton re: Submission SEM-95-001 (September 21, 1995).

[2] *See* Determination Pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation (Submission SEM-96-002, May 28, 1996).

In this case, the Secretariat should not request authorization to prepare a factual record regarding the assertions in the Submission for the following reasons. First, the United States is not failing to effectively enforce its environmental laws as contemplated by Article 14(1) of the NAAEC because the Submitters' assertions relate to actions that were complete before the Agreement's entry into force or relate to proposed federal actions that are not ripe for challenge under United States law. Second, the Submitters' suggestion that there is an ongoing failure to enforce the requirements of NEPA misstates applicable law. Third, the Submitters failed to pursue private remedies under United States law in a timely manner, and when they did pursue remedies, they abandoned them as moot. Fourth, the development of a factual record could adversely affect the pending judicial appeal by the Southwest Center for Biological Diversity and others of the dismissal of a suit brought under the Endangered Species Act ("ESA") which arises from the facts that are the subject of the Submission. Finally, the Submission suggests that the Submitters do not have a complete understanding of the activities at Fort Huachuca related to population and groundwater use.

II. BACKGROUND

A. Fort Huachuca

Fort Huachuca is an active Army installation occupying 73,344 acres in southeastern Arizona, sixty miles southeast of Tucson. The Fort was established in 1877 as a frontier outpost, one of seventy such posts stretching across the southwest frontier. During the two World Wars, Fort Huachuca was an active training site for combat soldiers. The Fort was temporarily closed during the Korean War era, but reopened in 1954 to build and operate electronic testing facilities. Fort Huachuca today comprises a portion of the Army communications command. It is the center for Army intelligence training and remains a major center for electronic testing. A portion of the original outpost has been declared a National Historic Landmark.

Fort Huachuca lies adjacent to the community of Sierra Vista. The current daily population at the Fort (including employees working and military families residing on-post) is approximately 15,300. Slightly more than 6,600 employees reside off-post in the Sierra Vista community along with approximately 6,200 military family members. In 1995, the population of Sierra Vista (including Fort Huachuca) was 37,815. Population figures and projections show that the number of residents in Sierra Vista is growing and is expected to continue to increase. Appendix 2 to the Statement of Thomas G. Cochran (February 26, 1997) (Attachment 1). Conversely, the number of personnel at Fort Huachuca is declining, despite Submitters' assertions to the contrary. *Compare* Appendix 1 to the Statement of Thomas G. Cochran (Attachment 1) and Submission at 2.

Since 1989, there has been no permanent increase in the population at Fort Huachuca that could potentially threaten, through greater demands for groundwater, the viability of the San Pedro riparian ecosystem. While Fort Huachuca experienced a temporary increase in population between 1992 and 1994, the temporary increase was short-lived. Population statistics show that

the total number of on-post employees at the Fort has decreased by 1,959 since 1989. Attachment 1, Appendix 1. Approximately 1,340 of these workers lost their employment positions between 1992 and 1996. Army population planning projections indicate Fort Huachuca will continue to lose personnel throughout the foreseeable future. It is estimated that the Fort will eliminate another 500 positions by the year 2000. *Id.* In addition, stringent water conservation measures have led to a decrease in usage and pumping of water at the Fort by twenty-seven percent between 1989 and 1996. *Id.*

B. National Environmental Policy Act

NEPA sets forth the nation's environmental goals and a broad national policy to achieve them. The Act serves as a blueprint for examining a range of environmental effects of proposed federal actions, most notably through Section 102(2)(C). In Section 102(2)(C) of NEPA "Congress authorizes and directs that, to the fullest extent possible," federal agencies prepare environmental impact statements for "major Federal actions significantly affecting the quality of the human environment. . . ." NEPA, § 102(2)(C), 42 U.S.C. § 4332(2)(C). The regulations of the Council on Environmental Quality ("CEQ")[3] implementing NEPA define "major Federal action" to include "actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. Environmental impact statements (EISs) prepared under NEPA must include a discussion of: (1) the environmental impacts of a proposed action; (2) any adverse environmental effects which cannot be avoided; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources which would be involved should the proposed action be implemented. NEPA, §102(2)(C), 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.8.

When an agency determines that it will prepare an EIS, it must publish a notice of intent in the *Federal Register*, which describes the proposed action, possible alternatives and the proposed scoping process. Scoping is an early and open process for determining the scope of the issues to be addressed in an EIS, and to identify the significant issues related to the proposed action. Participants in the process should include affected federal, state and local agencies; affected Indian tribes; and the interested public. 40 C.F.R. § 1501.7. To determine the scope of an EIS, the agency must consider: (1) connected actions, cumulative actions, and similar actions; (2) reasonable alternatives to the proposed action, including the no action alternative, and mitigation measures; and (3) direct, indirect, and cumulative impacts. *Id.* at § 1508.25.

Upon the conclusion of the scoping process, the agency prepares a draft EIS and publishes a notice of its availability in the *Federal Register*. The draft EIS must be circulated for comment among government agencies, affected tribes, and the interested public for at least 45 days before the preparation of the final EIS. The final EIS must respond to all substantive comments individually and collectively, and notice of its availability is published in the *Federal Register*. The agency must then wait 30 days before making a final decision on the proposed action. 40 C.F.R. §§ 1502.9(a), 1506.9, 1506.10. The decision document, called a "Record of

[3]CEQ is an agency of the United States government established in the Executive Office of the President under Title II of NEPA. It is the principal agency responsible for the administration of NEPA, primarily through the adoption of interpretive regulations.

Decision" ("ROD"), is a concise statement of the agency's decision, factors considered in the agency's decision making, alternatives considered, and any mitigation measures. 40 C.F.R. § 1505.2.

In some circumstances agencies are required to prepare supplements to either draft or finals EISs if: (1) substantial changes are made in the proposed action that are relevant to environmental concerns; or (2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. Agencies may also prepare supplements when they determine that the purposes of NEPA will be furthered by doing so. 40 C.F.R. § 1502.9(c)(1), (2).

The CEQ regulations implementing NEPA require agencies to adopt their own individual NEPA procedures. As discussed below, Congress has exempted base realignment and closure actions performed by the Department of Defense (DOD) from some of NEPA's Section 102(2)(C) EIS requirements, and has modified other NEPA requirements with respect to such actions.

C. NEPA Requirements As Modified By, And In The Context Of, Base Realignment And Closure Actions

On October 24, 1988, the Congress of the United States ("Congress") passed the Defense Authorization Amendments and Base Closure and Realignment Act of 1988, Pub. L. 100-526, 102 Stat. 2623 (1988) ("1988 BRAC Act") (Attachment 2). Under the 1988 BRAC Act, Congress directed the United States Secretary of Defense to appoint a commission to review all military installations within the United States and recommend installations for closure or realignment (i.e., mission or personnel relocation).

The 1988 BRAC Act included a partial exemption from the requirements of NEPA for the implementation of base realignment and closure decisions made under the 1988 BRAC Act. Specifically, the 1988 BRAC Act exempted the recommendation and selection process from the NEPA requirement that an agency compare environmental impacts of alternatives to installations proposed for closure or realignment. *Id.* at § 204(c)(1). The 1988 BRAC Act also contained an express statute of limitations for legal challenges brought under NEPA to base realignment and closure actions. *Id.* at § 204(c)(3). Persons were required to seek judicial review of alleged NEPA violations within 60 days of the government's act or failure to act pursuant to base realignment and closure or realignment directives. *Id.*

On December 29, 1988, the Commission that was convened pursuant the 1988 BRAC Act recommended that the Army relocate the United States Army Information Systems Command ("USAISC"), which is comprised of approximately 2,200 personnel, from Fort Huachuca to Fort Devens in Massachusetts. The Commission also recommended that the Army consolidate elements of the United States Army Intelligence School (USAIS), which consisted of approximately 3,000 personnel, then located at Fort Devens, with the remainder of the United States Army Intelligence School at Fort Huachuca. These realignments were projected to increase the employee population at Fort Huachuca by approximately 800 personnel.

On November 5, 1990, Congress passed the Defense Base Closure and Realignment Act of 1990, Pub. L. 101-510, 104 Stat. 1808 (1990) ("1990 BRAC Act") (Attachment 3). The 1990 BRAC Act's stated purpose is "to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." *Id*. at § 2901(b). This act mandated new procedures for selecting military installations for closure or realignment. Under the 1990 BRAC Act, the Secretary of Defense was required to provide a list of recommended bases for closure or realignment to a commission appointed by the President.[4] The commission was directed to review and analyze the Secretary's recommendations, conduct public hearings, and forward a report containing its findings and recommendations to the President. The President was empowered to approve or reject the recommendations. Congress also reserved the right to disapprove the recommendations. If Congress did not disapprove the recommendations approved by the President, they became law.

Like the 1988 BRAC Act, the 1990 BRAC Act contained the same partial exemption from NEPA requirements for decisions regarding the selection of base closures and realignments. *Id.* at § 2905(c). It also included the express 60-day statute of limitations for bringing NEPA challenges to BRAC actions. *Id.* at § 2905(c)(3). The 60-day statute of limitations was created to provide for fair, though prompt, challenges in the courts because Congress recognized that "[e]xpedited procedures . . . [were] essential to make the base closure process work."[5]

D. NEPA Analysis Conducted By The Army At Fort Huachuca For Actions Under BRAC 1988 and BRAC 1990

The Army published a Final EIS in June 1990 for the 1988 BRAC Act realignment action, analyzing the impacts of the expected net increase of approximately 800 personnel at Fort Huachuca. In this document the Army analyzed the environmental impacts of alternative phasing plans for relocating the USAISC to Fort Devens and consolidating the Army Intelligence School faculty and personnel at Fort Huachuca. The Army provided the public and other federal agencies with the opportunity to comment on the realignment prior to completing the Final EIS.

BRAC 91 Commission activities halted implementation of the planned 1988 BRAC Act realignments. That commission recommended the closure of Fort Devens and the retention of all USAIC personnel at Fort Huachuca. The commission also validated the decision of the 1988 BRAC Act Commission to transfer personnel from Fort Devens to Fort Huachuca. This BRAC decision meant that the employee population at Fort Huachuca was anticipated to increase by approximately 3,030 personnel instead of the original 800 under the 1988 BRAC Act Commission decision. However, concurrent reductions to the work force at Fort Huachuca has resulted, since 1992, in an overall decrease in the population at the base. After receiving notification that the President had approved the BRAC 91 Commission's recommendation to

[4]The 1990 BRAC Act required that a BRAC Commission meet three times over the next five years, once in 1991, 1993, and 1995.

[5] H.R. Rep. No. 101-665, 101st Cong., 2d Sess. 384 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 3077 (Attachment 4).

close Fort Devens and retain USAISC at Fort Huachuca, and the Congress had not disapproved, the Army began preparing a Supplemental EIS ("SEIS") on this new realignment directive. In August 1992, the Army released the Final SEIS on the BRAC 91 realignment, and completed a ROD for this action on October 21, 1992.

The Final SEIS evaluated the effects on air quality, water resources, geology, wastewater treatment, traffic and transportation, solid waste disposal, and biological and cultural resources, of retaining the USAISC at Fort Huachuca. *See* Attachment 5. It also considered socio-economic impacts related to demographics, noise, public safety and aesthetics. The Army looked at potential cumulative environmental impacts associated with increasing the employee population at Fort Huachuca. The SEIS analyzed cumulative impacts for air quality, § 5.15.1; water resources, § 5.15.2; solid waste, § 5.15.3; cultural resources, § 5.15.4; biological resources, § 5.15.5; noise, § 5.15.6; and socioeconomic effects, § 5.15.7. *See* Submitter's Exhibit 15.

In several sections of the Final SEIS, the Army mentioned that it was currently preparing a separate "Master Plan" EIS that would analyze environmental impacts of ongoing and planned missions at the Fort.[6] This statement was not intended to imply that the Army would provide additional environmental analysis of the BRAC 91 Commission realignment. The Army's Final SEIS was generated to completely satisfy the NEPA requirements for environmental planning for that realignment — a discrete, singular and congressionally-mandated action.[7] Additionally, no subsequent environmental analysis has been conducted to support the BRAC 91 Commission action, nor would any additional analysis be appropriate or required because the NEPA process calls for the consideration of environmental values and consequences during the planning stages of an agency's action.

During the preparation of the 1992 SEIS the Army solicited comments from the public in accordance with the CEQ regulations for implementing NEPA. *See* 40 C.F.R. § 1501.7 (requirements for determining issues to be addressed in an EIS or "scoping") and Part 1503 (procedures for soliciting comments on a draft EIS) (Attachment 6). In fact, the Army went beyond its obligations under NEPA by engaging in the scoping process under section 1501.7 because scoping is not required for a SEIS. *See* 40 C.F.R. § 1502.9(c)(4) (Attachment 6). A draft SEIS and solicitation for comments were distributed to over 300 agencies and interested persons, and notice of the availability of this document was published nationally in the *Federal Register*. 56 Fed. Reg. 40876 (Aug. 16, 1991) ("Notice of Intent to Prepare Environmental Impact Analyses for Base Realignment Actions"). Only eight parties responded in writing to the draft SEIS during the designated comment period.

The Submitters, Southwest Center for Biological Diversity and Dr. Robin Silver, did not participate in the BRAC 91 NEPA process, nor did they register their concerns about the impacts of Army BRAC 91 Commission realignment actions at Fort Huachuca on water resources or endangered or threatened species until well after NEPA compliance documentation was complete. Dr. Silver first contacted Fort Huachuca in November 1993 to express his concerns

[6] *See, e.g.*, Submitters' Exhibit 15 at 5-24.

[7] An express statement of the focus of the Final SEIS is set out at pages 1-2 of that document (Attachment 5).

about alleged inadequacies of the Final SEIS. This was more than one year after the Army had completed the Final SEIS, signed a ROD and began implementing the realignment.

The Army began to implement the BRAC 91 Commission realignment at Fort Huachuca in November 1992. By the Fall of 1994, the realignment of personnel was finished and the construction of facilities to support the realignment was essentially complete. No other actions at Fort Huachuca have been tied to or are dependent on the BRAC 91 Commission realignment.

E. Installation Master Plans

All Army installation commanders are required by regulation to develop and update Real Property Master Plans as a means of managing real estate development and usage on their installations.[8] These plans serve as blue prints for Army installation commanders that will enable them to maximize use of their real property to best respond to future missions and community aspirations, while retaining the capability to train soldiers and provide them with necessary family support facilities and services. Army Master Plans are comprehensive documents encompassing long- and short-range plans, and capital investment and troop mobilization strategies. They do not focus on any one ongoing or planned future activity, but rather evaluate all current and projected activities to promote optimal planning for the use of developed and undeveloped land and installation facilities.

Environmental impacts associated with implementing a Master Plan or Master Plan Update must be analyzed in accordance with NEPA. Moreover, the Army Master Planning regulation encourages incorporating NEPA analysis as early as possible in the planning process. In 1991, the staff at Fort Huachuca began to prepare an update to the existing Master Plan. The Fort's environmental staff determined that an EIS was needed to properly analyze the potential environmental impacts that could result from implementing the updated plan. The Fort Huachuca environmental staff initiated preliminary work on a Master Plan EIS in 1992. The Master Plan EIS intended to focus on the potential environmental impacts of all existing and planned activities at Fort Huachuca. Accordingly, the Master Plan EIS will necessarily be broader in scope than either of the BRAC EISs discussed above and is not structured to consider the specific potential impacts of implementing the BRAC 91 Commission realignment or possible mitigation measures to offset those impacts.

Work on the Master Plan EIS was halted shortly after it began in 1992 for a re-determination by the Army of whether such an expansive analysis was required under NEPA to support the Master Plan Update. Discussions continued between the staff at Fort Huachuca and higher Army officials until the Winter of 1994. Finally, the Army approved completion of the Master Plan EIS and, on May 19, 1994, published nationally in the *Federal Register* its intention to complete it. 59 Fed. Reg. 26214 (1994) (Attachment 8).

Work on the Master Plan EIS is still ongoing. NEPA, which is concerned with the prospective analysis of government actions, only requires that the Army complete its analysis

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8 Army Regulation 210-20, Master Planning for Army Installations, dated July 30, 1993 (Attachment 7).

prior to deciding to implement the Master Plan. The Army intends to complete the EIS before making that decision.

F. Submitters' Legal Challenges Against The Army

On July 8, 1994, the Submitters filed suit in the United States District Court for the District of Arizona claiming that the Army was violating NEPA because it allegedly postponed analysis on cumulative impacts in the BRAC 91 Final SEIS and had never completed the analysis of those impacts in a published Master Plan EIS. In August 1995, the District Court ruled against the Submitters and dismissed their NEPA suit on procedural grounds because they had failed to seek judicial review within the statute of limitations period specified in the 1990 BRAC Act.

Although the District Court could not exercise jurisdiction over the substance or merits of the Submitters' complaint because the statute of limitations had lapsed, the court noted that it thought that the Final SEIS did not satisfy NEPA requirements for analyzing cumulative impacts. The court's statement as to the adequacy of the Army's Final SEIS is not legally binding precedent because the question of the adequacy of the SEIS was not before the court. The court also concluded that the Army's actions with respect to the SEIS were complete in 1992. *Southwest Center for Biological Diversity et. al v. Perry*, No. 94-598, Slip Op. at 15 (D. Az. Aug. 30, 1995) (Submitters' Exhibit 19). In so ruling, the court rejected the Submitters' argument that failure to subsequently correct the inadequacies of the 1992 SEIS constituted an ongoing violation of NEPA, and found that Submitters had failed to act diligently in pursuing any claim that they might have had. *Id.* at 22.

Submitters appealed the District Court's NEPA decision to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") in October 1995. In September of 1996, the Submitters approached the Army with a request to join them in a motion to dismiss their appeal. *See* Statement of Robert Klarquist (Attachment 11). The Submitters and the United States jointly requested that the Ninth Circuit dismiss the appeal as moot. The Ninth Circuit granted the parties' motion on October 16, 1996. *See Southwest Center v. Perry*, No. 95-16941 (9th Cir. Oct. 16, 1996) (Order dismissing appeal) (Attachment 12).

On November 20, 1994, the Southwest Center for Biological Diversity and other organizations filed another suit in the District Court claiming that the Army was violating the ESA. In that case, the plaintiffs alleged that the Army had not formally consulted with the United States Fish and Wildlife Service on the effects its actions were having on endangered and threatened species. The plaintiffs argued that the Army's groundwater pumping was causing a decrease in the flow of the San Pedro River and thereby harming various endangered or threatened species dependant on the river.

On July 8, 1996, the District Court rejected plaintiffs' arguments and ruled that the Army was complying with the ESA consultation requirements.[9] The court acknowledged that the

[9]The Plaintiffs did not rely on the BRAC 1991 commission realignment or any other specific activity at Fort Huachuca as the basis for their ESA law suit. Instead, they broadly alleged that the Army failed to consult with the

Army was still preparing the Master Plan EIS and appropriately consulting "informally" with the United States Fish and Wildlife Service on the effects of its actions at Fort Huachuca. The court also implicitly recognized that there was no legal requirement for the Army to complete the Master Plan EIS within any specific time-frame (*See* Submitters' Exhibit 12). The Southwest Center and the other parties to the ESA suit have appealed this decision to the Ninth Circuit. The outcome of the appeal is still pending.

Both the NEPA and ESA law suits, and this Submission hinge on the same assertion: that day-to-day operations at the Fort were causing a depletion of finite water resources and the Army has failed to consider that environmental impact in its planning activities. While the United States government is a firm supporter of the public submissions process established under Articles 14 and 15 of the NAAEC, for several reasons discussed below, this Submission does not warrant a request from the Secretariat for authorization to develop a factual record.

III. DISCUSSION

A. The Assertions In The Submission Are Not Properly The Subject Of A Factual Record Under Articles 14 And 15

In the Submission, the Southwest Center for Biological Diversity, *et al.* attempt to merge actions of the Army that are separate and distinct in support of their contention that the Army has engaged in an "ongoing" violation of NEPA. One of those actions is the Army's decision on how to implement the BRAC 91 Commission mandates relating to the base realignment at Fort Huachuca. The second action is the preparation of Fort Huachuca's Master Plan and a corresponding EIS, neither of which is complete. Significantly, in their NEPA lawsuit, the Submitters argued that these two actions should be treated as one. The argument was rejected by the court. Judge Marquez ruled that two separate and distinct agency actions were at issue. The court found that under NEPA the Army's action with regard to base realignment was separate from the proposed installation Master Plan. *Southwest Center v. Perry*, No. 94-598 at 15 (D. Az. Aug. 30, 1995) ("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"). The court further found that there was no continuing violation of NEPA and that the United States was not presently failing to comply with the statute. *Id.*

The first activity, the Army's decision-making process on how to implement BRAC 91 Commission mandates, ended in 1992, well before the NAAEC entered into force on January 1, 1994. The Secretariat and the CEC Council have both recognized that alleged "failures to effectively enforce" that occur entirely before the effective date of the NAAEC are beyond the

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Fish and Wildlife Service concerning impacts on protected species in the San Pedro River basin resulting from general operations at Fort Huachuca. *Southwest Center, et al. v. Perry*, No. 94-814, Slip Op. at 2 (D. Az. July 8, 1996)(Submitters Exhibit 12).

purview of the factual record development process.[10] Under United States law, an agency's action is final upon publication of the ROD or upon the initiation of the implementation of the proposed action. Here, the final agency actions, and the basis for the Submitters' allegation of failure to enforce NEPA, are the Army's publication of a ROD on October 21, 1992, which approves the base closure and realignment decision, and initiation of implementation of that decision.[11] At that point, the statute of limitations began to run. Once the sixty days had passed, and long before January 1, 1994, all further opportunities for challenge were foreclosed.

Similarly, with respect to the second activity that is of concern to the Submitters, there is no basis for recommending the preparation of a factual record as there can be no violation (whether ongoing or discrete) of NEPA with respect to a proposed agency action. Failure to produce a future document or failing to render a decision pursuant to a proposed action is not a NEPA violation. Once the final Master Plan EIS has been issued and the ROD implementing the Master Plan is signed, the action is final for purposes of challenge under NEPA. There can be no cause of action brought against the Army under the United States' environmental laws until the Army completes its preliminary drafts of the EIS and releases them to the public; therefore this activity cannot, at the present time, be the basis of a viable allegation that the United States is failing to enforce its environmental laws.[12] The Submitters will have the opportunity to comment on the impacts on the San Pedro River ecosystem from the Army's proposed decisions with respect to the Fort Huachuca Master Plan during the generation of the Master Plan EIS.

Neither of these actions constitute a failure to effectively enforce United States law after the effective date of the NAAEC, January 1, 1994. Accordingly, neither action is the appropriate subject of a factual record under Article 15 of the NAAEC.

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[10] *See* Council Resolution #96-08, *Instruction to the Secretariat of the Commission for Environmental Cooperation on the Preparation of a Factual Record Regarding the "Construction and Operation of a Public Harbor Terminal for Tourist Cruises on the Island of Cozumel, State of Quintana Roo, Mexico,"* Toronto, Canada, August 2, 1996, at 2 (directing the Secretariat, in developing the factual record, to consider whether the Party is failing to effectively enforce environmental law since the NAAEC's entry into force); *Recommendation of the Secretariat to Council for the Development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, Submission SEM-96-001, June 7, 1996 at 4 (There is no evidence of express or implied intent in the NAAEC that Article 14 apply retroactively to events concluded prior to January 1, 1994. Article 14 permits the development of a factual record only based on an allegation of a present or continuing failure to adequately enforce a Party's environmental law.)

[11] Troops began arriving at Fort Huachuca from Fort Devens in November of 1992.

[12] *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). The rationale for this inability to challenge a proposed action is compelling. As the United States Supreme Court has instructed:

> agency action is not ordinarily considered "ripe" for judicial review . . . until the scope of the controversy has been reduced to manageable proportions, and its factual components fleshed out, by concrete action that harms or threatens to harm the complainant.

Id. at 873.

B. The Submitters Did Not Pursue Private Remedies When They Were Available To Them Under Domestic Law And The Submission Does Not Reflect Other Elements Of Article 14 Of The NAAEC

Another important consideration that weighs against the Secretariat proceeding further with the Submission is that the Submission does not reflect some of the important elements of Article 14(2) and Article 14(3) of the NAAEC. Although the Agreement does not prohibit the Secretariat from requesting authorization from the Council for the development of a factual record when one or more of the factors listed in Article 14(2) and Article 14(3) are not encompassed by a submission, the factors constitute criteria that the are important as guidance in determining if a submission requires further attention from the CEC. Therefore, when a submission lacks certain of these criteria, that fact should weigh in favor of a Secretariat decision against requesting Council authorization to prepare a factual record.

In determining if a response is warranted from the Party concerned, the Secretariat is guided under Article 14(2)(c) by whether private remedies in connection with the matter are available and whether they have been pursued by the submitter. Similarly, Article 14(3)(b)(ii) encourages the Party concerned, in its response to a submission, to advise the Secretariat as to whether private remedies are available and have been pursued by the submitter.

The Submitters had private remedies available to them under United States law, which they failed to pursue. As discussed above, the Submitters did not avail themselves of the opportunity to raise concerns about perceived deficiencies in the 1992 SEIS during the public review and comment period. They failed to register their concerns about any potential impacts on water resources and endangered or threatened species resulting from Army actions at Fort Huachuca until well after the NEPA compliance documentation was completed.

In his opinion on the Submitters' legal challenge in United States district court, Judge Marquez criticized their failure to engage in this process, noting that "[p]laintiffs have not denied that they failed to participate in the public comment opportunities regarding FSEIS."[13] It is well established that participation in the NEPA process should be timely and meaningful. *See City of Angoon v. Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) ("Those who challenge an EIS bear responsibility 'to structure their participation so that it is meaningful, so that it alerts the agency. . . .'") (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553-554(1978)), *cert. denied*, 484 U.S. 870 (1987).

In addition to failing to participate in the administrative process of developing the 1992 SEIS, the Submitters also failed to pursue in a timely manner available judicial remedies when they did not bring a suit in United States court alleging a violation of NEPA until long after the 60-day statute of limitations had expired. When the length of time encompassed by the process of developing the SEIS is combined with the 60-day limitations period, it is evident that the Submitters had ample opportunity to pursue potential remedies available under domestic law.

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[13] *Southwest Center et. al v. Perry*, Slip Op. at 14.

Submitters who fail to pursue in a timely manner remedies that are available to them under domestic law should not be provided with another forum to air their delinquent complaints.

Furthermore, after the Submitters appealed the District Court's decision, they acknowledged that their challenge to the adequacy of the 1992 NEPA SEIS was moot. An action becomes moot when the issue involved has become purely academic or "dead," and any decision on the issue will have no practical effect. *See* Appendix 1 to the Statement of Robert L. Klarquist (Attachment 11). The Submitters' admission that this matter is moot obviates the need for a response, and should weigh heavily in favor of the Secretariat proceeding no further toward production of a factual record.

Thus, the Submitters did not pursue the many private remedies available to them. Instead, they have chosen to raise before the CEC — an issue that they have already agreed is moot. Accordingly, the Secretariat should not request authorization to prepare a factual record on this Submission.

C. Preparation of a Factual Record Could Interfere with a Pending Judicial Proceeding in a Companion Case under the United States Endangered Species Act

The Southwest Center for Biological Diversity and others have pending before the Ninth Circuit an appeal of the companion case brought under the ESA. *See* discussion above at 10. The Submitters raise claims in this pending appeal that are similar to those made in their Submission. Specifically, they claim that the Army has violated domestic environmental law by failing to adequately consider effects to the San Pedro River ecosystem and species dependant on that ecosystem. The existence of this pending and closely-related action by the Submitters is not a bar under the NAAEC to a request by the Secretariat for authorization to prepare a factual record on the Submission. Nonetheless, the Secretariat has already recognized that the outcome of a pending judicial proceeding based on the same facts alleged in an Article 14 submission could impact directly on the issues raised in the submission and, should the submitter prevail, may resolve many or all of those issues.[14] This is another compelling reason why the Secretariat should not request authorization to prepare a factual record on this Submission.

D. A Factual Record On This Submission Would Not Significantly Advance The Goals Of The Agreement

The Army has undertaken numerous measures that have already significantly reduce its use of groundwater. Through the implementation of aggressive water conservation measures and the use of treated effluent, Fort Huachuca pumped twenty-seven percent less groundwater in 1996 than it did in 1989.[15] Even while the Fort was experiencing the temporary increase in

[14] *See* Secretariat Determination Pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation (Submission SEM-96-002, May 28, 1996.)

[15] Groundwater pumpage figures reveal that the Army's water demand at the fort was over 850 acre/feet per year less in 1996 as compared to 1989.

population due to the BRAC 91 Commission realignment, the fort reduced its yearly water demands by 278 acre/feet between 1992 and 1994. *Id*.

The Army is committed to investing a significant portion of its installation budget on water capture and recharge projects that will likely replace more water into the regional groundwater aquifer than it extracts for essential uses. This year the fort commissioned an $83,000 mountain front recharge feasibility study to identify the best recharge methods and locations. If this study is successful, the Army intends to spend an additional $750,000 over the next two years to implement it. The Army has also projected that it will allocate over $10 million in funding for expanded effluent reuse and recharge projects in the year 2000.[16] The Army estimates that these measures alone will result in further decreases totaling a yearly savings of 1,000 acre/feet by the year 2025 as compared to 1989. Statement of Tom Cochran at 3 (Attachment 1).

It is important to bear in mind that these groundwater conservation and capture and recharge measures undertaken by the Army to reduce any adverse potential impacts resulting from its activities at Fort Huachuca are not required by NEPA under the circumstances associated with the assertions in the Submission. NEPA is a procedural planning statute that requires agencies to consider the potential environmental impacts of proposed projects before they act. As part of this planning process, NEPA further requires agencies to review reasonable mitigation measures that could lessen identified impacts. NEPA does not, however, require implementation of these measures, unless they have been committed to in a ROD, which the Army did not do with respect to the 1992 Final SEIS.[17] Id. at 350.[18] The Submission suggests that the Southwest Center for Biological Diversity and Dr. Silver seek the development of a factual record that would support the argument that the Army has failed to mitigate the impacts of complying with the BRAC 91 mandates. Since NEPA does not require mitigation,[19] preparation of a factual record would not significantly advance the goals of the Agreement[20], such as to "foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations." *See* NAAEC, Art. 1(a).

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[16]The City of Sierra Vista is also pursuing water recharge projects. It currently has received grants from the Arizona Water Protection Fund and the State of Arizona to implement an effluent recharge project near the San Pedro River. This project is intended to create a buffer zone between the city's groundwater wells and the river. Studies indicate that this project will greatly reduce the potential impacts from local groundwater pumping on the San Pedro Riparian Conservation Area — the area of greatest concern to the Submitters. Statement of Tom Cochran at 4 (Attachment 1).

[17]The United States Supreme Court addressed the question of whether NEPA requires that an agency mitigate the impacts of an activity in *Robertson v. Methow Valley Concerned Citizens Council*, 490 U.S. 332 (1989). The Court was presented with the argument that a proposed ski resort would adversely impact a herd of native mule deer. "[I]t would not have violated NEPA," the Court determined, "if the Forest Service, after complying with the Act's procedural prerequisites, had decided that the [proposed development] justified the issuance of a special use permit, notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd."

[18] *Id*. at 350.

[19]The assertions on pages 5-6 of the Submission state that NEPA requires the Army to mitigate the environmental impacts of increasing the population of Fort Huachuca. That characterization of the law is erroneous.

[20]*See, e.g*., NAAEC, Article 1 (objectives of the Agreement).

In addition, since the completion of the 1992 BRAC SEIS, the Army has completed dozens of EISs in support of federal actions at Fort Huachuca. *See* list of NEPA documents prepared by the Army (Attachment 9). These actions have ranged from fielding and operating the M-1 battle tank to installation of an alternative energy project (solar heating and cooling units). Currently, the Army is preparing, in addition to the Master Plan EIS, two NEPA environmental assessments (EAs). One of these assessments focuses on the potential environmental impacts of implementing an approved recommendation of the BRAC 95 Commission to realign 198 employees from Fort Ritchie, Maryland, to Fort Huachuca. The other EA analyzes the impacts of establishing a 150-person civilian personnel operation center ("CPOC") in an existing facility at the fort. Statement of Tom Cochran at 3 (Attachment 1).

The principle environmental concern the Master Plan EIS and the two EAs focus on is the potential impacts of the proposed actions on water and biological resources. Preliminary drafts of these studies contain significant analysis of these issues including an objective review of the state of knowledge regarding potential groundwater pumping impacts on the San Pedro River. The United States Fish and Wildlife Service has already reviewed drafts of these studies and, while it has expressed the opinion that formal consultation will be required to consider the potential effects on various endangered species that might occur with implementation of the Master Plan EIS, it has concurred with the Army determination that the BRAC 95 and CPOC actions will have no effect on the endangered and threatened species on or near the fort. *See* Letter from Sam F. Spiller, United States Fish and Wildlife Service, to Thomas G. Cochran, United States Army, at (February 4, 1992) (Attachment 10).

IV. CONCLUSION

The Secretariat should not request authorization from the Council to develop a factual record on the Submitters' assertions of failure by the United States to effectively enforce its environmental law. The assertions are either based on final agency actions that are outside the purview of the factual record development process because they occurred completely prior to the NAAEC's entry into force, or they concern proposed agency actions that cannot under United States law give rise to allegations of non-compliance until they become final. A domestic court has already ruled there is no ongoing failure by the United States to enforce NEPA with respect to the same allegations that are raised in the Submission. In addition, the Army is taking numerous proactive measures to protect the environment at Fort Huachuca. The Submitters did not participate in the NEPA process that is the primary basis of their assertions when the opportunity was available, and they long ago forfeited their rights to pursue any alleged NEPA claim they might have had relating to the 1992 Final SEIS. Lastly, preparation of a factual record by the CEC could significantly interfere with a pending appeal that arises from essentially the same basic set of facts as the assertions in the Submission. For all of these reasons preparation of a factual record would not be a wise use of the CEC's limited resources and would not significantly advance the goals of the North American Agreement on Environmental Cooperation.