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The Tenth Circuit Rediscovers NEPA's Public Participation Policies in Sierra Club v. Hodel

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NOTE

THE TENTH CIRCUIT REDISCOVERS NEPA's PUBLIC PARTICIPATION POLICIES IN *SIERRA CLUB V. HODEL*[1]

STATEMENT OF THE CASE

In 1987, Garfield County in southern Utah decided to upgrade a twenty-eight-mile stretch of the Burr Trail from a one-lane dirt road into a two-lane graveled road. The Burr Trail, which Garfield County has maintained since the 1940s, runs across or adjacent to Capitol Reef National Park, the Glen Canyon National Recreation Area, and two wilderness study areas[2] (WSAs). The county sought to improve and widen the road to facilitate travel between the town of Boulder and these federal lands. Environmental groups[3] ("Sierra Club") objected to the county's plan and filed suit in the federal district court for the central district of Utah.[4] Two issues arose from this controversy.[5] First, does the Bureau of Land Management's (BLM) involvement in this project [6] constitute "major federal action" within the meaning of the National Environmental Policy Act of 1969 ("NEPA"),[7] thereby triggering the act's procedural requirements. Second, if NEPA's threshold issue of major federal action is met, can prior environmental studies supplemented by evidence presented at trial substitute for an environmental assessment (EA) and finding of no significant impact (FONSI).

In its pleadings, Sierra Club claimed that the county was required to obtain BLM's determination of the scope of the right-of-way[8] and BLM's authorization under the Federal Land Policy and Management Act of 1976

1. 848 F.2d 1068 (10th Cir. 1988).

2. Steep Creek WSA and North Escalante WSA. *Id.* at 1073.

3. Sierra Club, National Parks and Conservation Association, Southern Utah Wilderness Alliance, and the Wilderness Society.

4. Sierra Club v. Hodel, 675 F. Supp. 594 (C.D. Utah 1987), *aff'd in part, rev'd in part,* 848 F.2d 1068 (10th Cir. 1988).

5. In a third issue not addressed in this note, Sierra Club also attacked Garfield County's plan on the grounds that the county did not possess a valid right-of-way, or alternatively, that if the county did have a right-of-way, its scope is limited to the historical uses of the trial. For a further discussion of this issue, *see* Note, *Not Just Another Pre-emption Case,* 30 Nat. Res. J. 217 (1990).

6. The District Court described BLM participation in the road project as follows: "attendance at Garfield County planning meetings, expressing its opinion that Garfield County has a valid right-of-way, reviewing the stakes laid by engineers along the trail, determining that the project is entirely within the county's right-of-way, concluding that FLPMA does not restrict the project, and promising to monitor the construction as it progresses." 675 F. Supp. at 612.

7. 42 U.S.C. §§4321-4370 (1982 & Supp. V 1987).

8. This determination is based on Utah state law. BLM applied the state standard of "reasonable and necessary" to determine the scope of the right-of-way. 675 F. Supp. at 606.

("FLPMA")[9] for road improvements affecting WSAs before beginning the road project.[10] Sierra Club further claimed these BLM activities coupled with BLM's dedication of time and personnel constitute a "major federal action" which "significantly affects the human environment" within the meaning of NEPA,[11] and therefore, BLM is required to prepare an environmental assessment of the effects of the project.[12] Finally, Sierra Club asked the district court to be the finder of all factual issues in the case.[13]

The county denied that it needed BLM approval for its action, claiming it had a valid, existing right-of-way. Based on this right, the county rejected Sierra Club's argument that the road expansion constituted a major federal action.[14]

The BLM claimed its responsibilities were limited to reviewing the road expansion's effects on federal interests. BLM also determined that the county has a valid right-of-way, negating any need to obtain BLM authorization of the road project. The agency claimed that it had no authority over the roadwork, and consequently, the project did not constitute major federal action. BLM futher maintained that even if major federal action existed, substantial evidence contained in prior environmental studies of the area showed that the action did not significantly affect the human environment. Therefore, BLM argued it should not be required to prepare a specific EA.[15]

On November 30, 1987, the federal district court for the central district of Utah held that BLM's participation[16] in the county's project constituted major federal action, but that an environmental assessment was not required in this case.[17] The court found that previous environmental studies in addition to evidence presented at the twenty-five-day trial affirmed BLM's position that the project had not significant impact on the environment.[18] Thus, though BLM's role triggered NEPA, the act's procedural requirements had already been satisfied. Sierra Club, Garfield County, and BLM appealed to the Tenth Circuit Court of Appeals.

On June 6, 1988, the Tenth Circuit agreed that BLM's role in this project constituted major federal action, thereby triggering NEPA.[19] The Tenth Circuit did not, however, agree with the district court that all aspects of BLM's participation amounted to major federal action.[20] The court of

9. 43 U.S.C. §§ 1701-1784 (1982 & Supp. V 1987).
10. 848 F.2d at 1073.
11. 42 U.S.C. § 4332(C) (1982).
12. 848 F.2d at 1073-74.
13. *See id.* at 1092; 675 F. Supp. at 602.
14. 675 F. Supp. at 600.
15. *Id.*
16. See *infra* note 6.
17. 675 F. Supp. at 613.
18. *Id.* at 615. BLM never issued a Finding of No Significant Impact (FONSI) in the case.
19. Sierra Club v. Hodel, 848 F.2d 1068, 1090 (10th Cir. 1988).
20. *Id.*

appeals only found major federal action in BLM's duty to protect WSAs from "unnecessary and undue degradation" under FLPMA.[21] Further, the Tenth Circuit held that once major federal action is found, a court's only recourse is to remand the case to the appropriate federal agency to prepare an EA. The presentation of environmental evidence at trial, and the subsequent district court finding of no significant impact, "unlawfully usurped the agency's dominion over that issue."[22] The appeals court remanded the case with instructions to BLM to prepare an EA for those portions of the project which impact on a WSA.[23] This decision allowed Garfield County to begin upgrading sections of the Burr Trail which do not environmentally impact WSAs.[24]

BACKGROUND

National Environmental Policy Act

In 1969, Congress passed the National Environmental Policy Act, and on New Year's Day, 1970, President Nixon signed it into law. NEPA requires all federal agencies which propose "major federal actions significantly affecting the quality of the human environment" to include with their proposal a detailed statement of its environmental impact.[25] In *Baltimore Gas & Electric v. Natural Resources Defense Council, Inc.*,[26] the Supreme Court described the "twin aims" of the act:

> First, it [NEPA] places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.[27]

Although NEPA's effectiveness in promoting alternative governmental actions has been questioned,[28] it forces federal agencies to study and consider the environmental consequences of these actions, and to make this information available to the public.[29]

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21. 42 U.S.C. § 4332(C) (1982).
22. 848 F.2d at 1092-93.
23. *Id.* at 1096.
24. Approximately 30% of the road is bounded on each side by a WSA. 675 F. Supp. at 608.
25. 42 U.S.C. § 4332(C) (1982).
26. 462 U.S. 87 (1983).
27. *Id.* at 97-98 (quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978)).
28. *See* Hill & Ortolano, *NEPA's Effect on the Consideration of Alternatives: A Crucial Test*, 18 Nat. Res. J. 285 (1978).
29. The power of the statute may not be as great as environmentalists had originally hoped, but NEPA's effect on agency decisionmaking, though limited, has probably been beneficial. D.R. Mandelker, NEPA Law and Litigation Ch. 11 (1984); *see also* W. Rodgers, Environmental Law 697-701 (1977); J. Battle, Environmental Decisionmaking and NEPA 111-13 (1986).

NEPA's Trigger—Major Federal Action—When Major Local Action Is Federalized

The threshold question in a NEPA case is whether "major federal action" is involved. If not, NEPA does not apply. NEPA does not define the term "major federal action." It did, however, establish the Council on Environmental Quality (CEQ) to "formulate and recommend national policies to promote the improvement of the quality of the environment."[30] CEQ, in turn, has promulgated regulations defining "major federal action."[31] The Supreme Court has held that "CEQ's interpretation of NEPA is entitled to substantial deference."[32]

CEQ regulations prescribe a broad interpretation of NEPA's applicability.[33] Actions need not be totally federal in nature. In fact, nonfederal actions which are "assisted, conducted, regulated, or approved by federal agencies,"[34] are subject to NEPA requirements. Also, a federal agency's failure to act can trigger NEPA when this failure is reviewable under the Administrative Procedures Act or other law as agency action.[35]

When primarily nonfederal action is involved, courts have attempted to find the limits of the CEQ's liberally inclusive definition of "major federal action." One focus has been CEQ's requirement that actions "potentially subject to Federal control and responsibility . . ." be labeled as "major federal action."[36] Federal control requires that the agency have the authority to exercise a certain degree of discretion concerning the proposed action. Federal action which is purely ministerial in nature will not trigger NEPA.[37]

An example of federal discretion which did not amount to potential federal control arose in California in the summer of 1983. When several

30. 42 U.S.C. § 4342 (1982). *See* Murchison, *Does NEPA Matter?—An Analysis of the Historical Development and Contemporary Significance of the National Environmental Policy Act*, 18 U. Rich. L. Rev. 557 (1984); *but see* Fairfax & Barton, *A Decade of NEPA: Milestone or Millstone*, Renewable Resources J. Summer 1984 at 22.

31. "'Major Federal action' includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. . . . Actions include the circumstances where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedures Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; . . .

(b) Federal actions tend to fall within one of the following categories:

. . . (4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities."

40 C.F.R. § 1508.18 (1988).

32. Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

33. 40 C.F.R. § 1508.18 (1988).

34. *Id.*

35. *Id.*

36. *Id.*

37. N.A.A.C.P. v. Medical CTR, Inc., 584 F.2d 619, 634 (3rd Cir. 1978).

Japanese beetles were found near Sacramento, the State of California set up a scientific advisory panel to make recommendations for preventing a possible infestation of bugs. Three members of the eight person panel were federal employees. The panel recommended an insecticide spraying program. Local groups and residents sued the Department of Agriculture for failing to prepare an EIS as required by NEPA.[38] The Ninth Circuit in *Almond Hill School v. United States Department of Agriculture* held that though federal involvement on the panel may be a factor in determining whether NEPA is triggered, in this case federal involvement was "marginal at most," and "[m]arginal federal action will not render otherwise local action federal."[39]

In 1982, the City of Denver asked the Tenth Circuit to study the relationship between rights-of-way over federal lands and NEPA.[40] Denver had in 1924 acquired a right-of-way through national forest lands in western Colorado in order to divert water to the city water supply. In *City of Denver v. Bergland,* Denver asked the court to assess what authority the USFS or BLM had over its construction plans. The court of appeals held that where Denver's plans indicated a deviation from its original right-of-way, BLM had sole authority to approve the deviations.[41] Exercise of this authority amounted to major federal action and required BLM to comply with NEPA.[42]

The Tenth Circuit had earlier held in *Davis v. Morton* that a federal agency's power to approve leases of reserved Indian lands constituted major federal action.[43] Later, in *Scenic Rivers Association of Oklahoma v. Lynn,* the Tenth Circuit appears to have chartered the outer limits of major federal action.[44] The court of appeals found major federal action in the Department of Housing and Urban Development's (HUD) authority to review a developer's statement of record filed pursuant to the Interstate Land Sales Full Disclosure Act.[45] The Secretary of HUD is required to approve such statements of record within thirty days or approval will occur automatically.[46] Only a procedural defect will prevent automatic approval. Despite this limited degree of discretion, the Secretary does have the power to suspend a statement. The Tenth Circuit held that this federal power to suspend private action amounts to major federal action.[47]

38. Almond Hill School v. United States Dep't of Agric., 768 F.2d 1030 (9th Cir. 1985).
39. *Id.* at 1039.
40. City of Denver v. Bergland, 695 F.2d 465 (10th Cir. 1982).
41. *Id.* at 481 (citing 43 C.F.R. § 2802.2 (1988)).
42. *Id.* at 481.
43. 469 F.2d 593 (10th Cir. 1972).
44. 520 F.2d 240 (10th Cir. 1975), *rev'd on other grounds,* 426 U.S. 776 (1976).
45. 15 U.S.C. §§ 1701-1720 (1988).
46. *Id.* § 1706(a).
47. 520 F.2d at 243-44.

The Third Circuit court of appeals has characterized the *Scenic Rivers* holding as "questionable at best." N.A.A.C.P. v. Medical CTR, Inc., 584 F.2d 619, 634 (3rd Cir. 1978).

The Third Circuit has held that purely "ministerial" agency actions do not trigger NEPA. In *N.A.A.C.P. v. Medical CTR, Inc.*,[48] HUD approved a private Delaware hospital's capital expenditure program. The plan had been previously approved by the state as required by the Social Security Act. HUD approval merely verified that the correct procedures had been followed. Such a ministerial action does not trigger NEPA.[49] In its holding, the court noted that HUD did not give any financial or planning assistance to the program.[50] In dicta, the court observed that even if an agency has no discretion to exercise, major federal action can exist if the agency substantially assisted the local action.[51]

No formal test exists to determine what degree of federal involvement in local action elevates it to the level of major federal action. "The matter is simply one of degree."[52] If the federal government has clear power to cancel a local action, NEPA applies. If the federal involvement is purely ministerial, NEPA does not apply. In theory, where a federal agency possesses some discretion over a local action and provides some assistance to the local actor, major federal action could exist. Courts must make a case-by-case analysis of federal involvement, in light of NEPA's policy of broad applicability, to decide this issue.

Need for an Environmental Assessment

NEPA requires that a federal agency prepare an environmental impact statement (EIS) for all major federal actions significantly affecting the quality of the human environment.[53] An EIS is not always necessary, however, since not all major federal actions have significant environmental effects. In order to determine if a significant impact exists, CEQ regulations require an agency to prepare an environmental assessment (EA).[54] This "mini EIS" is used to determine if a full EIS is necessary. If the EA concludes that the environment will not be significantly affected, the agency is required to issue a finding of no significant impact (FONSI).[55] If the EA concludes otherwise, and EIS is commissioned. These documents serve to satisfy NEPA's twin aims: to encourage environmentally informed decisionmaking by the government and to provide this environmental information to the public.

The Supreme Court in *Baltimore Gas & Electric* concluded that NEPA required federal agencies to take a "hard look" at the environmental

48. 584 F.2d 619.
49. *Id.* at 634.
50. *Id.* at 631.
51. *Id.* at 634.
52. Friends of Earth v. Coleman, 518 F.2d 323, 329 (9th Cir. 1975).
53. 42 U.S.C. § 4332(C) (1982).
54. 40 C.F.R. §§ 1501.4(b), 1508.9 (1988).
55. *Id.* §§ 1501.4(e), 1508.13.

consequences of major federal actions.[56] Courts review agency decisions based on the "hard look" standard when deciding whether an agency has satisfied the mandates of NEPA.[57] CEQ regulations represent the procedural basis for this "hard look."

Courts have generally held CEQ regulations to be mandatory. Agencies have been required in cases of major federal action to issue an EA followed by either an EIS or a FONSI. The regulations, however, also point out that "NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action."[58] The Tenth Circuit has, on one occasion, found agency procedures adequate even when the procedures followed did not strictly comply with CEQ regulations.

In *Wyoming v. Hathaway,* the Tenth Circuit decided against strict compliance with NEPA.[59] Consumers of poisons used for predator control sought to enjoin the Environmental Protection Agency (EPA) from issuing an order which cancelled the registration of three poisons. The plaintiffs argued that by failing to prepare an EIS, EPA had violated NEPA. The court rejected this argument, and held that a specific EIS is not always required if an agency has already produced a study whose objectives and content were very similar to the proposed EIS.[60] EPA had already produced such a study, in the court's view. The Tenth Circuit sought support for its holding in Congress' intent in passing NEPA:

> Congress was seeking to require the governmental agencies to think about, and consider, environmental considerations in making decisions. It was not intended to force the agency to merely follow out a regimen. There are enough of these without imposing another.[61]

The *Hathaway* decision stands as an exception to the mandatory requirements of NEPA. To support a policy of cutting waste and needless paperwork, the court of appeals allowed a prior study to substitute for a specific EIS,[62] "NEPA's most detailed and elaborate environmental document."[63] The court failed to consider the public participation aim of NEPA in its analysis.

Until *Sierra Club v. Hodel* arose, the Tenth Circuit had not had an opportunity to decide what, if anything, might substitute for an EA. Compared to an EIS, an EA is a much less detailed document. Also, unlike an EIS, an EA is not specifically mentioned in NEPA itself. Only

56. 462 U.S. 87, 97 (1983).
57. T. Vanderver, Jr., *National Environmental Policy Act* in Environmental Law Handbook 372-73 (8th ed. 1985).
58. 40 C.F.R. § 1500.1(c) (1988).
59. 525 F.2d 66 (10th Cir. 1975).
60. *Id.* at 72.
61. *Id.*
62. This study arguably was not very similar to an EIS. 525 F.2d at 73-74 (Seth, J., dissenting).
63. Sierra Club v. Hodel, 848 F.2d 1068, 1099 (10th Cir. 1988) (Barrett, J., dissenting).

CEQ regulations define the EA.[64] Finally, though an EA is itself surrounded by public participation regulations, the *Hathaway* court did not seem interested in such matters. Therefore, the integrity of the EA requirement was jeopardized.

ANALYSIS

Where Is the Major Federal Action?

The District Court Finds It Everywhere

Judge Aldon J. Anderson held "on the basis of the facts, the federal regulation, Tenth Circuit precedent and the purposes of NEPA," that BLM's participation in the Burr Trial upgrade amounted to major federal action.[65]

More specifically, the court viewed the Tenth Circuit's decision in *City of Denver v. Bergland* as dispositive of the issue.[66] The court interpreted *Bergland* as holding that NEPA applied to BLM's consideration of a deviation from a right-of-way.[67] Since BLM determined that Garfield County had exceeded its right-of-way in ten locations, BLM ordered a moratorium on construction until the county eliminated these deviations. The district court held that the existence of such authority triggered NEPA.[68]

The court, recognizing that "conflicting views of the subject [major federal action]" existed,[69] chose to provide further support for its holding from Tenth Circuit precedent. Judge Anderson cited *Scenic Rivers* for the proposition that an "agenc[y's] ability to suspend private action amount[s] to major federal action."[70] In the present case, BLM had a duty to apply the "reasonable and necessary" standard of Utah law in order to determine the scope of the county's right-of-way.[71] BLM also had a duty under FLPMA to protect the WSAs from unnecessary degradation.[72] Under the reasoning of *Scenic Rivers*, each duty gave rise to BLM authority to suspend the county's roadwork. Judge Anderson rooted his holding that the Burr Trail project was major federal action within the meaning of NEPA in BLM's exercise of its discretion in furtherance of these two statutory duties.

64. 40 C.F.R. § 1508.9 (1988).
65. Sierra Club v. Hodel, 675 F. Supp. 594, 613 (C.D. Utah 1987), *aff'd in part, rev'd in part*, 848 F.2d 1068 (10th Cir. 1988).
66. *Id.* at 612.
67. *Id.*
68. *Id.* at 613.
69. *Id.* at 612.
70. *Id.*
71. *Id.* at 613.
72. 43 U.S.C. § 1782(c) (1982).

The Tenth Circuit Agrees Up to a Point

The Tenth Circuit analyzed BLM's authority somewhat differently. First, the court reviewed the relevant CEQ regulations, caselaw and treatises in order to fashion a test as to when federal involvement with a nonfederal activity constituted major federal action.[73] The court held that the correct inquiry is "whether BLM either has exercised control over the County's major road improvement project or has the authority and duty to do so."[74]

The court first applied this test to BLM's duty to monitor the county's roadwork to ensure that it did not exceed the scope of its right-of-way. The court found that BLM's activities in furtherance of this duty failed to give BLM the requisite control to trigger major federal action.[75] Although BLM did have control where the county exceeded its right-of-way, this control vanished when the county corrected its error.[76] Since the county has always returned to its existing right-of-way, BLM has no control over the project. Therefore, the court reasoned that this BLM duty does not trigger NEPA.

Next, the court analyzed BLM's duty toward WSAs under FLPMA. The act specifically protects WSAs, and requires that ". . . the Secretary [of Interior] shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of (WSAs). . . ."[77] The CEQ promulgated regulations describing which degrading activities should be regulated.[78] One listed activity is roadwork on existing rights-of-way.[79] The court of appeals noted that BLM does not have the authority to stop the county from upgrading the Burr Trail.[80] The court found, however, that its authority to require the county to pursue alternative plans during construction which are less degrading to the WSAs amounted to the exercise of sufficient control over the road project to trigger NEPA's requirements.[81]

73. Sierra Club v. Hodel, 848 F.2d 1068, 1089-90 (10th Cir. 1988). Though this case focuses on the "federal" component of major federal action, the court also addressed the "major" component. *Id.* at 1092. The court's inquiry into this issue is similar to a finding of "probable cause." The court found that this project "involves realignments, widening, considerable blasting, a significant improvement in the quality of the road surface, and large increases in future traffic," and concluded that "[s]urely that much work is a major project." *Id.*

74. *Id.* at 1090.

75. *Id.*

76. *Id.*

77. 43 U.S.C. § 1782(c) (1982).

78. *See* Interim Management Policy and Guidelines for Land Under Wilderness Review (IMP), 44 Fed.Reg. 72,014-15 (1979).

79. Revised IMP, 48 Fed.Reg. 31,855 (1983).

80. 848 F.2d at 1090.

81. *Id.*

Judge Barrett, in dissent, urged "that there is simply no principled difference between the two federal responsibilities. . . ."[82] He found that neither responsibility triggered NEPA. However, the dissent agreed with the district court's finding that both federal duties involve an element of control. He found that the discretion which BLM must exercise in determining the "reasonable and necessary" scope of the county's right-of-way "is virtually the same" as the discretion involved in protecting WSAs from "unnecessary and undue degradation."[83] Though the dissent attempts to point to an inconsistency in the majority, it fails to answer the ultimate question of why BLM's involvement in this case does not rise to the level of major federal action.

The three different results reached by the federal judges deciding this case exemplify the lack of adequate guidance in this area. All three judges reach logical solutions based on current CEQ regulations and caselaw. The Tenth Circuit majority's approach may be the most acceptable simply because it charters a middle road.

The CEQ has adopted a guideline as to what federal activities tend to federalize an otherwise local activity.[84] CEQ should compliment this list by formulating a second list of activities which do not tend to trigger NEPA. Though such a list could hardly be exhaustive, it would likely guide courts to more reasoned and consistent opinions. It may also help alleviate the tremendous NEPA caseload in the federal court system.[85]

The Environmental Assessment Requirement

The District Court Satisfied the Requirement Itself

Judge Anderson began his discussion by pointing out that "classically" after a finding of major federal action, an agency is required to prepare an EA, followed by either an EIS or a FONSI. The court conceded that under ordinary circumstances, a court would violate the doctrine of primary jurisdiction by retaining jurisdicion to conduct its own factfinding.[86] The court found, however, that this was not such a classic case.[87]

82. 848 F.2d at 1100 (Barrett, J., dissenting).

83. *Id.*

84. 40 C.F.R. § 1508.18 (1988).

85. It should be noted that Sierra Club petitioned for rehearing in this case on the major federal action issue. The Tenth Circuit had only found major federal action in the Secretary of Interior's duty under FLPMA § 603(c), 43 U.S.C. § 1782(c) (1982) to protect WSAs from unnecessary degradation. Sierra Club wished to raise the issue of whether the Secretary's duty under FLPMA § 302(b), 43 U.S.C. § 1732(b) (1982) to protect *all* public lands from unnecessary and undue degradation implicated NEPA. The court declined to grant rehearing on the issue, holding that the assertion of a new grounds for relief was not a correct grounds for rehearing under Fed. R. App. P. 40(a). 848 F.2d at 1100-01.

86. Sierra Club v. Hodel, 675 F. Supp. 594, 602 (C.D. Utah 1987), *aff'd in part, rev'd in part*, 848 F.2d 1068 (10th Cir. 1988).

87. *Id.* at 604.

The case was unique first, because Sierra Club had requested that the court act as factfinder. Sierra Club also actively participated in a twenty-five-day factfinding trial. Second, the court found that BLM had prepared a "substantial record" in the case.[88] The court recognized that the agency has factfinding expertise and that the court's role is one of review.[89] However, Judge Anderson proceeded to treat the evidence presented at trial as a part of the record which he must review in order to determine if the agency has taken a "hard look" at the environmental consequences of its action.[90]

The Tenth Circuit Rejects Any Judicial Factfinding under NEPA

The Tenth Circuit did not agree with Judge Anderson that this case was out of the ordinary. First, the court of appeals addressed the fact that Sierra Club had requested judicial environmental factfinding. This request, BLM argues on appeal, amounted to a waiver by Sierra Club to challenge the district court's factfinding.[91]

BLM's Waiver Argument

The court of appeals recognized the principle that a party may not complain on appeal of errors which that same party had invited below.[92] The court, however, rejected BLM's argument that Sierra Club had done this. First, the court noted that Sierra Club had consistently charged BLM with procedural NEPA violations in this case.[93] As a result, the court strongly doubted that Sierra Club intended the court's factfinding to replace its NEPA challenges.[94] Second, the court held that since NEPA imposes procedural requirements on public agencies, private parties such as Sierra Club probably did not have the authority to waive the statute's requirements.[95]

The dissent attacked each of these grounds. First, Judge Barrett found that Sierra Club had in fact requested judicial factfinding fully intending the district court to decide the matter.[96] Second, the dissent noted that federal courts "do not enforce NEPA in a vacuum or *sua sponte*."[97] If

88. *Id.* at 602.
89. *Id.*
90. *See id.* at 604.
91. Sierra Club v. Hodel, 848 F.2d 1068, 1092 (10th Cir. 1988).
92. *Id.* (citing Deland v. Old Republic Life Ins. Co., 758 F.2d 1331, 1336 (9th Cir. 1985).
93. *Id.*
94. *Id.*
95. *Id.* at 1092.
96. *Id.* at 1099 (Barrett, J., dissenting). Judge Barrett raises the question, "Why did the parties present exhaustive trial testimony and exhibits dealing with environmental issues involving the Burr Trail project to the district court if the parties did not intend that the district court decide them?" *Id.* at 1099 n.4.
97. *Id.* at 1099 (Barrett, J., dissenting).

Sierra Club, a private party, had not sought an injunction based on NEPA, no injunction would issue. Therefore, Sierra Club should be able to waive the NEPA challenges which Sierra Club itself brought. The dissent did not wish to give Sierra Club a "second chance to dispute settled facts"[98] and thereby waste ". . . the excellent results of a lengthy and comprehensive trial."[99]

NEPA and Its Regulations Require an Environmental Assessment

After disposing of the waiver argument, the court held that the district judge had in fact usurped the BLM's authority by first excusing the agency's failure to prepare an EA, and then finding that the road project would have no significant impact.[100] The court held that "an agency's failure to prepare an environmental assessment constitutes reversible error which cannot be cured by district court findings."[101]

The Tenth Circuit rooted its holding in the unambiguous command of CEQ regulations.[102] BLM is required to take a "hard look" at the consequences of its proposed actions. These regulations are mandatory and contain very few exceptions.[103]

The court made it clear that NEPA and its regulations fail to give a district court any factfinding role. The agency must take the "hard look." The court's role is simply one of review of the agency's record. If the agency has not created a sufficient record, the court's only course of action is to remand the issue to the agency.[104]

The Role of the Public in the NEPA Process

The majority also rooted its holding in NEPA's underlying policy of public participation. The court cited numerous instances where NEPA and its regulations provide for public involvement in the study process.[105] The act provides that the public shall have access to the governmental statements and comments used by the preparer of an environmental statement.[106] The CEQ requires that agencies "shall involve . . . the public, to extent practicable, in preparing [environmental] assessments."[107] Also, FONSIs shall be released to the public,[108] and any FONSI involving

98. *Id.*
99. *Id.* at 1097 (Barrett, J., dissenting).
100. *Id.* at 1092-93.
101. *Id.* at 1093.
102. *See* 40 C.F.R. § 1501.4 (1988).
103. *Id.*
104. 848 F.2d at 1093 (citing Florida Power & Light v. Lorion, 470 U.S. 729, 744 (1985)).
105. *Id.* at 1093-94.
106. 42 U.S.C. § 4332(C) (1982).
107. 40 C.F.R. § 1501.4(b) (1988).
108. *Id.* § 1501.4(e)(1).

unprecedented actions shall not be finalized until public review has taken place.[109] Allowing a court to conduct factfinding at trial would circumvent this process, and effectively thwart the public's role in NEPA decision-making. The "cross-pollination of views [resulting from public participation] could not occur within the enclosed environs of a courtroom."[110]

The Other Circuits

The court of appeals looked for additional support for its holding from other jurisdictions, but no other district court judge appears to have conducted such extensive NEPA-related environmental factfinding at trial.

The court did find some support in two Ninth Circuit decisions.[111] Both cases involved Federal Energy Regulatory Commission (FERC) decisions which constituted major federal actions. FERC failed in each case to file an EA. The agency simply claimed that there would be no significant environmental impact resulting from its actions. The Ninth Circuit held that this failure to prepare an EA constituted reversible error. The court refused to conduct a judicial search of FERC's record to determine if the agency had taken a "hard look" before reaching its conclusions.

The Ninth Circuit refused to even review an agency's existing record to determine if the decision not to prepare an EIS was justified. The court remanded for the preparation of an EA. By implication, it is unlikely that the Ninth Circuit would allow a district court to create a record at trial.

The Impact of *Sierra Club v. Hodel*

The Tenth Circuit failed to explore the public participation policies and procedures of NEPA when *Wyoming v. Hathaway* allowed a prior environmental study to substitute for an EIS. In *Sierra Club v. Hodel,* the court rediscovered these NEPA underpinnings and used them to protect an EA from a similar fate.

In *Hathaway,* the court allowed a prior EPA study to substitute for an EIS. The court deemed the study to be the functional equivalent of an EIS. In so ruling, the court elevated CEQ's introductory statement that NEPA was more concerned with excellent action than with excellent paperwork[112] above NEPA's own requirement that an EIS be prepared and the public be informed. The court's drive for efficiency failed to consider the mandatory nature of NEPA's EIS requirement and the role which the public is to play in an agency's preparation of an EIS.

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109. *Id.* §§ 1501.4(e)(1), 1506.6.

110. Sierra Club v. Hodel, 848 F.2d 1068, 1094 (10th Cir. 1988).

111. LaFlamme v. F.E.R.C., 842 F.2d 1063 (9th Cir. 1988); The Steamboaters v. F.E.R.C., 759 F.2d 1382 (9th Cir. 1985).

112. 40 C.F.R. § 1500.1(C) (1988).

In *Sierra Club,* Judges Anderson and Barrett followed *Hathaway*'s lead by concluding that sound agency action is more important than simply following NEPA procedure. Judge Barrett's dissent posed the question why, if prior environmental studies coupled with extensive trial testimony showed that the Burr Trail project will have no significant environmental impact, should the court of appeals remand the case to BLM to reach the same conclusion based on a less extensive study labeled an EA.[113]

The majority responded with the arguments which were absent in *Hathaway.* First, NEPA has mandatory procedural requirements which a court should enforce, not circumvent. Second, NEPA's integrity is tied to the participation of the public in the process. Substitute EISs or EAs close the door on public involvement.

If the Tenth Circuit is given an opportunity to revisit its decision in *Hathway,* the powerful reasoning in *Sierra Club v. Hodel* could prevail this time around.

CONCLUSION

Twenty years after NEPA's enactment, the Tenth Circuit has protected the integrity of the act by vacating a district court's environmental fact-finding. In so doing, the court of appeals has drawn a line by refusing to allow evidence introduced at trial to supplement an inadequate environmental assessment. The court declined to extend the paperwork-efficiency rationale of *Hathaway* to allow the judiciary to supplement a substantial but incomplete agency record. The court resurrected the public participation policy of NEPA, absent in *Hathway,* to reach its holding. The court of appeals thereby protected the environmental assessment, an essential procedure in an "essentially procedural" statute.[114]

Finally, much litigation still centers on the issue of what constitutes major federal action. Without further guidance, courts will continue to exercise great leeway in analyzing this threshold question. The tremendous range of federal actions and federal involvement in local actions ensures the continued popularity of NEPA lawsuits. Also, the fact-specific nature of the individual cases and subsequent opinions effectively limits the scope of their precedent. Only new legislative or CEQ guidance in this area can lead the courts in a consistent path and help reduce the sheer quantity of their NEPA case loads.

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113. *See* 848 F.2d at 1097, 1099 (Barrett, J., dissenting).

114. *See* Vermont Yankee Nuclear Power Corp. v. Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475, 1480 (9th Cir. 1983).