

September 2018

Western Organization of Resource Councils v. Zinke

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Recommended Citation

Brister, Daniel (2018) "Western Organization of Resource Councils v. Zinke," *Public Land & Resources Law Review*. Vol. 0 , Article 1.

Available at: <https://scholarworks.umt.edu/plrlr/vol0/iss9/1>

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***Western Organization of Resource Councils v. Zinke*, 892 F.3d 1234
(D.C. Cir. 2018)**

Daniel M. Brister

Due to advances in climate science and an increased understanding of coal’s role as a greenhouse gas, Appellant conservation organizations sued the Secretary of Interior for failing to supplement the 1979 Programmatic EIS for the Federal Coal Management Program. The D.C. Circuit Court held neither NEPA nor the APA required a supplemental EIS and that the court lacked jurisdiction to compel the Secretary to prepare one. Expressing sympathy for the Appellants’ position, the D.C. Circuit took the unusual step of offering advice to future plaintiffs on how they might succeed on similar claims.

I. INTRODUCTION

Western Organization of Resource Councils v. Zinke addressed whether the United States District Court for the District of Columbia erred in holding that an updated review of the Federal Coal Management Program (“Coal Program”) was not required under the National Environmental Policy Act (“NEPA”) and the Administrative Procedures Act (“APA”).¹ The Western Organization of Resource Councils and Friends of the Earth (“Appellants”) argued that the Secretary of the Interior (“Secretary”) was required to supplement the 1979 Programmatic Environmental Impact Statement (“PEIS”) for the Coal Program as a result of advances in climate science and improved understanding of the role of coal combustion as the single greatest source of atmospheric greenhouse gas emissions.²

The United States Court of Appeals for the District of Columbia held that NEPA did not require the Secretary to update the PEIS because the 1979 final approval of the Coal Program constituted the only “major Federal action” and no further review was necessary in the absence of any new action.³ The D.C. Circuit also rejected Appellants’ contention that commitments to supplement the PEIS made in the Coal Program’s implementing regulations created a legally binding obligation for supplementation of the 1979 PEIS even if NEPA did not require it.⁴ While the statements “might have created a binding duty on the agency at one point,” to supplement the 1979 PEIS, subsequent amendments to the implementing regulations in 1982 released the Secretary from any duty

1. *W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234 (D.C. Cir. 2018).
2. *Id.* at 1237.
3. *Id.* at 1245.
4. *Id.*

that may have arisen under the language of the original regulations beyond those specifically mandated by NEPA.⁵

II. FACTUAL AND PROCEDURAL BACKGROUND

In the 1970's, the Secretary commenced a series of administrative actions to establish a comprehensive planning system for the granting and administration of coal leases. These regulations became known as the Federal Coal Management Program and provided a means for the Bureau of Land Management ("BLM") to be more proactive in the processing of lease applications.⁶ In 1979, the Secretary, acting through the BLM, issued a PEIS for the Coal Program pursuant to NEPA.⁷ In July of that year, the BLM issued a Record of Decision ("ROD") officially adopting the Coal Program.⁸ The BLM amended the Coal Program's implementing regulations in 1982 and issued a corresponding supplement to the PEIS in 1985.⁹ The PEIS has not been supplemented since.¹⁰

In 2014, Appellants sued the Secretary of Interior and other Interior officials in district court seeking an order compelling the Secretary to supplement the PEIS for the Coal Program due to the changed circumstances represented by new science.¹¹ In granting the Secretary's motion to dismiss, the district court held that the BLM had "no duty to supplement the 1979 programmatic EIS for the federal coal management program because there is no remaining or ongoing major federal action . . ."¹² Plaintiffs appealed the district court's decision.¹³

While the appeal was pending in 2016, Interior Secretary Sally Jewell froze all new Coal Program leases while the agency prepared a supplemental PEIS.¹⁴ According to Secretary Jewell, advances in climate science required, ". . . a more comprehensive, programmatic review."¹⁵ With new leases on hold while the Secretary prepared the supplemental PEIS, Plaintiffs and Defendant filed a joint motion asking the D.C. Circuit to hold the case in abeyance, which it did.¹⁶

Jewell's replacement, Interior Secretary Ryan Zinke, lifted the moratorium in March of 2017, and ordered the immediate cessation of all work on the supplemental PEIS.¹⁷ Subsequently, the D.C. Circuit granted

5. *Id.* (citing 40 C.F.R. § 1505.3 (July 6, 2018)).

6. *Id.* at 1238.

7. *Id.*

8. *Id.* at 1236.

9. *Id.* at 1237.

10. *Id.* at 1236.

11. *Id.* at 1237.

12. *Id.* at 1236-37 (quoting *W. Org. of Res. Councils v. Jewell*, 124 F. Supp. 3d 7, 13 (D.D.C. 2015)).

13. *Id.* at 1237.

14. *Id.* at 1240.

15. *Id.* (citing Order No. 3338 (Jan. 15, 2016), reprinted at J.A. 1476-77).

16. *Id.*

17. *Id.*

Appellants’ motion to rescind the abeyance and set a briefing schedule for the case.¹⁸

III. ANALYSIS

The Appellants asserted that NEPA required the Secretary to issue a supplemental PEIS addressing climate change related impacts of the Coal Program.¹⁹ Since NEPA does not provide a mechanism for private citizens to sue to enforce its provisions, the Appellants asserted their claim under a specific provision of the APA. The D.C. Circuit therefore reviewed the Secretary’s compliance under APA § 706(1), which states “reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.”²⁰ Appellants requested that the D.C. Circuit order the Secretary to supplement the PEIS to remedy the Department of Interior’s failure to act.²¹

Appellants relied upon two arguments they claimed compel the Secretary to supplement the PEIS.²² First, they pointed to the supplementation requirements in the regulations promulgated by the Council on Environmental Quality (“CEQ”), which is the federal agency charged with administering NEPA.²³ Second, they referred to statements the Secretary included in the original PEIS and ROD committing to update the environmental analysis if circumstances changed.²⁴ In both the ROD and the PEIS, the Secretary promised that the PEIS “would be updated when conditions change sufficiently to require new analyses of those impacts.”²⁵

The D.C. Circuit held that neither argument mandated the Secretary to update the PEIS.²⁶

A. NEPA and CEQ Regulations

CEQ regulations require an agency to supplement an EIS to account for “significant new . . . information relevant to environmental concerns and bearing on the proposed action or its impacts.”²⁷ Appellants claimed that recent advances in climate science, which were unavailable at the time the original PEIS was written, constituted new information under CEQ regulations.²⁸ The Secretary did not disagree with Appellants’ contention that the analysis of coal’s impact on climate change in the

18. *Id.*

19. *Id.* at 1241.

20. *Id.* (quoting 5 U.S.C. § 706(1)).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 1245 (quoting PEIS at 3-68, J.A. 328; ROD at 98, J.A. 1399).

26. *Id.*

27. *Id.* (citing 40 C.F.R. § 1502.9(c)(1)(ii)).

28. *Id.*

original PEIS was outdated. Rather, the Secretary argued that no supplementation was mandated because no new action had occurred or was being proposed.²⁹

In support of their position, Appellants cited the United States Supreme Court's decision in *Marsh v. Oregon Natural Resources Council*.³⁰ In *Marsh*, environmental groups sued to stop a dam under construction on a tributary of Oregon's Rogue River.³¹ While the construction was ongoing, new information emerged that had not been available when the project's EIS was written.³² The Court promulgated a two-part test to determine whether the Department has a duty to supplement an EIS, and require an agency to take a "hard look" at the environmental impacts of an action when (1) a "major federal action" remains to be carried out and (2) new information reveals that this remaining action will have significant environmental impacts in a manner or extent not yet considered.³³ The Supreme Court in *Marsh* agreed with the environmental groups' assertions that the dam's ongoing construction work constituted a "major Federal action" yet to occur, and explained that new information could force an agency to supplement an EIS when "remaining governmental action would be environmentally 'significant.'"³⁴

The Appellants argued the Supreme Court's reasoning in *Marsh*, combined with new climate change data, and the Coal Program's ongoing approval of individual leases mandated the completion of a new EIS.³⁵ Appellants further argued the PEIS required supplementation under *Marsh* because the remaining governmental action of approving individual coal leases would be environmentally significant.³⁶ The D.C. Circuit disagreed, citing the facts of a different United States Supreme Court case, *Norton v. Southern Utah Wilderness Alliance* ("SUWA"), as being more on point.³⁷ In *SUWA*, environmental groups sought to compel the BLM to supplement an EIS involving a regulatory program (Wilderness Study Areas).³⁸ The groups argued that NEPA required the Agency to prepare a supplemental EIS in response to changed conditions resulting from increased off-road-vehicle use.³⁹ In its holding, the Supreme Court reasoned that the "major Federal action" in the Wilderness Study Areas project had been completed

29. *Id.* at 1242 (citing Appellee's Br. 19, Nov. 7, 2017, 15-5294).

30. *Id.* (citing *Marsh v. Oregon Natural Resources Council*, 109 S Ct. 1851 (1989)).

31. *Id.* at 1242.

32. *Id.*

33. *Id.*

34. *Id.* at 1241-42 (quoting Appellant's Br. 30-31, Sept. 15, 2017, 15-5294 (quoting *Marsh*, 490 U.S. at 371-74)).

35. *Id.*

36. *Id.*

37. *Id.* at 1243.

38. *Id.* at 1242.

39. *Id.* at 1242-43.

upon the “approval of a land use plan[.]” and therefore, found neither an “ongoing ‘major Federal action’ nor a corresponding duty to supplement.”⁴⁰

In *Marsh*, the duty to supplement hinged on identifying the specific major federal action and the moment it was rendered complete.⁴¹ The Supreme Court held that the action was the in-progress construction of the dam.⁴² The major Federal action identified by the Supreme Court in *SUWA* was the adoption of a comprehensive land use plan which was held completed at the moment it was finalized.⁴³ Relying on *SUWA*, the D.C. Circuit held that there no longer remained an outstanding major federal action, as adoption of the overarching Coal Program, rather than the ongoing approval of individual leases, constituted the major federal action under NEPA.⁴⁴ According to the D.C. Circuit, the Secretary’s approval of the Coal Program in 1979 constituted the only major Federal action requiring NEPA analysis.⁴⁵

B. The Department’s Prior Statements

Appellants alternatively argued that even if supplementing the PEIS was not mandated under NEPA, the agency made a binding commitment to do so in the 1979 PEIS and ROD.⁴⁶ The D.C. Circuit agreed that those documents did create certain obligations for the Secretary at the time of their issuance, as evidenced by statements that the PEIS “would be updated when conditions change sufficiently to require new analyses of those impacts.”⁴⁷ However, the statements’ omission from the 1982 revision to the Coal Program “. . . made clear that [the Department] did not intend to bind itself to any supplementation duty beyond that imposed by NEPA.”⁴⁸

IV. ALTERNATE AVENUES AVIALABLE TO APPELLANTS

In its decision, the D.C. Circuit took the unusual step of offering advice to potential future plaintiffs on how they might achieve their goals through alternate means.⁴⁹ Proposing “several avenues” by which plaintiffs might “raise their claims regarding the climate-change implications of coal leasing,” the D.C. Circuit suggested they file a rule making petition requesting the Secretary consider the significant

40. *Id.* at 1243 (quoting *SUWA* at 72-73) (emphasis added).

41. *Id.*

42. *Id.* at 1242.

43. *Id.* at 1243.

44. *Id.* at 1244.

45. *Id.* at 1243-44.

46. *Id.*

47. *Id.* (quoting PEIS at 3-9, J.A. 269; ROD at 98, J.A. 1399).

48. *Id.*

49. *Id.* at 1244-45.

environmental impacts of the Coal Program in the regulations.⁵⁰ Additionally, the D.C. Circuit suggested Appellants could challenge the approval of individual coal leases on the grounds that their specific EISs fail to consider the cumulative climatological effects of coal leasing.⁵¹ If the Secretary then attempted to tier the analysis to the PEIS for the Coal Program, the PEIS could be challenged as being “too outdated to support new federal action.”⁵² In her Concurrence, Circuit Judge Karen Henderson opined that it was unnecessary and inappropriate for the D.C. Circuit to identify such alternate litigation strategies.⁵³

V. CONCLUSION

In holding that neither NEPA nor the agency’s own stated commitments compelled the Secretary to undertake a supplemental PEIS for the Coal Program, the D.C. Circuit affirmed the District Court’s order of dismissal.⁵⁴ While ultimately rejecting the Appellants’ claims, the D.C. Circuit noted the “Appellants raise[d] a compelling argument that the Secretary should now revisit the issue [climate change] and adopt a new program or supplement its PEIS analysis.”⁵⁵ Going even further, the D.C. Circuit set out specific recommendations for how a future plaintiff might successfully litigate on similar claims.⁵⁶ While the D.C. Circuit may have been sympathetic to the Appellants’ goals, its restrictive holding makes it more difficult to challenge a PEIS as a result of changed circumstances and reinforces the difficulty of challenging an “agency’s failure to consider the cumulative climate impacts of federal coal leasing.”⁵⁷

50. *Id.* at 1244.

51. *Id.*

52. *Id.* at 1244.

53. *Id.* at 1246.

54. *Id.* at 1245-46.

55. *Id.* at 1244.

56. *Id.*

57. *Id.* (quoting Appellants’ Br. 34, Sept. 15, 2017, 15-5294).