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INTRODUCTION: DOWN THE IMPERILED COLORADO

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In the twenty years since its enactment, the National Environmental Policy Act (NEPA) has taken root and grown into an enduring legal institution. In that time the courts have shaped NEPA into the equivalent of an environmental due process clause that accords procedural rights to rivers, forests, wildlife, and all other aspects of the natural environment threatened by actions of the federal government.

But NEPA can also be viewed from another perspective, as a social and political institution that is more a stepchild of Congress than a true part of the judicial process. Although the conventional wisdom is that NEPA is merely procedural, the line between policy and procedure is not always obvious, and the statute therefore invites judges to voice their policy opinions. NEPA lawsuits often involve the same environmental groups and administrative agencies who regularly fight it out in Congress. Since NEPA lawsuits are often a continuation of unresolved legislative issues, Congress has sometimes intervened in NEPA litigation to withdraw jurisdiction or to limit remedies as if the separation of powers doctrine were nonexistent. Environmental groups and government agencies tend to view the courts as just another tactical weapon to use on the larger battlefield of national environmental policy.

The development of NEPA as a socio-political institution cloaked in judicial procedures can be illustrated by briefly tracing the history of one struggle that began shortly after enactment of the law and which continues unresolved to the present. It is a story of conflict between

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two federal agencies, the Bureau of Reclamation (the Bureau) and the Western Area Power Administration (WAPA), and the advocates for an overdeveloped and imperiled river — the Colorado.

In 1963, the Bureau completed construction of Glen Canyon Dam, the keystone dam of the Upper Basin regulatory and storage system, and began filling the Lake Powell reservoir. Since the dam preceded the enactment of NEPA, there was no formal assessment of the impacts which would result from the dam or the filling of Lake Powell. And no one, not the National Park Service, the Bureau, nor the environmentalists, seriously considered what might happen twenty miles downstream where the Colorado River enters its greatest creation — the Grand Canyon National Park.

As Lake Powell filled and the hydroelectric generators started up, the river changed form. The Colorado, once a warm, muddy torrent described as "too thick to drink, too thin to plow," dropped its sediment load in the placid waters of Lake Powell. It now emerges below the dam as a cold, clear, serpentine river, beautiful, but deadly to downstream species of native fish such as the endangered humpback chub.

To provide extra power during peak use hours in western cities, the Bureau manipulates the reservoir like a bathtub, pulling the plug during peak hours and putting it back in during low demand. In the Grand Canyon, the Colorado rises and falls as much as thirteen feet in a single day, washing away sand beaches and leaving only piles of boulders, stranding fish and river runners alike. Stripped of its sediment load, the river no longer creates new beaches or sandbars. The old river environment is being washed away, and in its place a fundamentally different river is emerging.

I. THE BUREAU'S COURSE THROUGH COURTS AND CONGRESS

Following the enactment of NEPA in 1970, friends of the river began to look at the Act as a tool for forcing a reconsideration of the criteria used by the Bureau to operate the dam, hoping to work out a more balanced, less damaging operating regime. The first challenge was brought, in *Grand Canyon Dories, Inc. v. Walker,* by commercial raft operators contending that the disruption of normal flows was interfering with their ability to conduct river trips.[1] The court, however, did not find any evidence that the plaintiffs had requested that the Bureau itself consider the question of whether NEPA applies to ongoing government action which was initiated prior to the passage of the Act. The court dismissed for lack of ripeness, leaving it to the Bureau, in the first instance, to decide whether NEPA applied to the continuing operation of Glen Canyon Dam.[2]

Three and a half years later, the applicability of NEPA to the Glen Canyon operating criteria was again presented for judicial review, in

1. 500 F.2d 588 (10th Cir. 1974).
2. *Id.* at 590.

Badoni v. Higginson, by a group of Navajo Indians who alleged that rising waters in Lake Powell threatened to inundate sacred tribal sites at Rainbow Bridge National Monument.[3] The *Badoni* plaintiffs, learning from *Grand Canyon Dorries,* had requested the Bureau to decide whether or not NEPA applied, but the Bureau would only respond that it was working on a decision. Once again the court dismissed for lack of ripeness, finding that the Bureau had not taken any position at all, let alone a position of "*sufficient clarity and finality*" suitable for judicial review.[4] Beyond implying that the Bureau could continue postponing a decision indefinitely, the *Badoni* court added an entirely gratuitous conclusion that a Bureau decision to avoid NEPA analysis would probably be upheld, since the operation of Glen Canyon Dam was largely determined by contractual obligations to deliver hydropower.[5]

During pendency of the *Badoni* appeal, a more sophisticated plaintiff, the Environmental Defense Fund (EDF), sought to avoid the ripeness problem by suing to compel the Bureau to prepare a single comprehensive environmental impact statement (CEIS) covering all proposed federal water projects in the Colorado River Basin and to enjoin construction of any new projects until the statement was completed.[6]

The Bureau, faced with a real threat to its basin-wide program, responded quickly. First, it went to Congress in October, 1978 and obtained a provision in the Interior appropriations bill which stated that construction of Colorado Basin water projects could not be enjoined so long as site-specific environmental impact statements (EISs) for the new projects had been prepared.[7] Thus relieved of the injunction threat, the Bureau announced that it would prepare a CEIS on the Colorado Basin, including site-specific statements for new projects, but would not include site-specific analyses of existing components such as Glen Canyon.

Armed with this new strategy, the Bureau returned to the Tenth Circuit to moot the *Badoni* appeal by successfully arguing that its new commitment to prepare a basin-wide impact statement was adequate even if it did not include a specific review of operations at Glen Canyon.[8]

Even before the *Badoni* appeal was decided, however, it was apparent that the Bureau was having second thoughts about its commitment to prepare a CEIS. Following more discussions with members of Congress, it settled upon a strategy of persuading Congress to order it *not* to prepare the statement. It did so by having the Interior Department request specific funding authority to prepare the CEIS, even though it was not necessary and had not been done in the past.[9]

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3. 455 F. Supp. 641 (D.Utah 1977).
4. *Id.* at 648 (emphasis in original).
5. *Id.* at 648-49.
6. Environmental Defense Fund, Inc. v. Higginson, 655 F.2d 1244, 1245 (D.C. Cir. 1981).
7. Pub. L. No. 100-371, 102 Stat. 857, 866 (1988).
8. Badoni v. Higginson, 638 F.2d 172, 181 (10th Cir. 1980), *cert. denied,* 452 U.S. 954 (1981).
9. *Environmental Defense Fund,* 655 F.2d at 1247 n.7.

The Bureau then went back to the *Environmental Defense Fund* court to argue that although a CEIS was "desirable," it was not needed immediately, might not be needed at all, and in any event should be delayed until Congress gave its approval by acting on the appropriations request. The District Court held that the Bureau was acting within its discretion and granted summary judgment.[10]

The ball was now back in Congress' court, and, to no one's surprise, Congress refused the CEIS funding request.[11] Then, after waiting until the EDF appeal had been fully briefed, the Bureau announced that it would drop the CEIS entirely, citing Congress' denial of the funding request and Interior's " 'current budgetary restraints.' "[12] The Court of Appeals had little choice other than remanding the matter to determine if the new Bureau approach could be upheld under the highly deferential "arbitrary and capricious" standard.[13] After seven years of litigation, the Bureau had changed its position at least three times, dodged every bullet, and not once submitted itself to the jurisdiction of NEPA. With more than a little help from Congress, the Bureau's rout of the environmental groups was complete.

II. PLAYING FOR TIME

The Bureau had clearly won the first phase of the Glen Canyon Dam/NEPA fight, and there might not have been a second round if two crucial events had not occurred. For the first of these, the Bureau had only itself to blame: in 1979, the Bureau proposed an upgrade, or rewind, of the Glen Canyon Dam's generators, which would most likely have resulted in an increase in the dam's downstream impacts. The second event, which managed to drag a second federal agency into the battle, was unavoidable: the original long-term contracts for Glen Canyon hydropower would eventually expire. Both events involved the dam, and required fresh agency decisions, thereby resurrecting the NEPA issues. And both events managed to trigger identical agency responses: delay, play for time, commission some studies, and hope the specter of NEPA will go away.

A. The Rewind Controversy

On a scale of relative significance, the Bureau's rewind proposal was not particularly momentous or remarkable. By rewinding Glen Canyon's generators, more hydropower capacity could be achieved and the dam could provide more electricity during times of peak demand. More capacity at peak times, however, meant greater volumes of water being released at peak times, which meant more fluctuations in the downstream flow and more disruption of the river. This time the rafting companies, still smarting from the *Grand Canyon Dories* decision, led the attack.

10. Environmental Defense Fund, Inc. v. Higginson, 14 Env't. Rep. Cas. (BNA) 1008 (D.D.C. 1980).
11. *Environmental Defense Fund,* 655 F.2d at 1247 n.7.
12. *Id.*
13. *Id.*

With an irony that could not have escaped Secretary Watt, the rafters retained his old public interest law group, the Mountain States Legal Foundation, and displayed no intention of backing down. Watt, unwilling to abandon the rewind proposal and unwilling to commence a NEPA study, ordered yet another preliminary study, the *Glen Canyon Environmental Studies.*

The purpose of the study was to determine first if the operation of Glen Canyon Dam was impacting the downstream environment and, if so, to consider whether dam operations could be modified in a way which would still satisfy compact obligations but create less havoc downstream. If both questions were answered in the affirmative, the Bureau would then proceed to do a full EIS. The *Glen Canyon Environmental Studies* commenced in 1982, and for years it seemed that the NEPA issue, at least as far as the Bureau was concerned, was once again dormant.

B. WAPA Enters the Fray

As the Bureau was busy fighting damage control over the rewind issue, the Glen Canyon stage was graced by the addition of a new player. Back in the *Badoni* decision, the Utah District Court had suggested that the Bureau of Reclamation was the wrong party to sue, since the Bureau was operating the Dam according to contractual obligations to deliver hydropower.[14] The correct party to sue, then, would be the agency which had contractual authority over Glen Canyon hydropower: the Western Area Power Administration (WAPA), an agency within the Department of Energy which, since 1977, had the authority to market Glen Canyon hydropower. And, as it turned out, the Glen Canyon contracts would be up for renewal in 1989.

In 1980, WAPA began drafting new criteria for the post-1989 contracts. In September, 1984, WAPA published a pertinent *Hydrologic Study,* which found that WAPA's proposed criteria for the post-1989 contracts would not have any new environmental impacts. In November, however, the *Hydrologic Study's* conclusions were apparently contradicted by an environmental report it had commissioned which confirmed that flow fluctuations in the river were causing extensive damage. Since the new criteria would increase flow fluctuations, it was likely that the impacts described in the environmental report could only get worse. Rather than resolving the conflicts by resorting to the NEPA process, WAPA, in December, 1985, issued a cursory Environmental Assessment (EA).

Environmental plaintiffs later produced extensive evidence that the EA was conducted with a single objective in mind — to result in a finding of no significant impact (FONSI) such that NEPA would not apply — and seriously distorted reality in pursuit of that goal.[15] Indicative

14. *Badoni,* 455 F. Supp. at 648-49.

15. Salt Lake City v. Western Area Power Admin., No. C86-10006 (D. Utah April 14, 1988) (available on WESTLAW, 1988 WL 167244).

of this goal was the order issued by the agency's Administrator, and brought to light in the subsequent litigation, to "do the minimum necessary?"[16] Accordingly, a FONSI was issued in January, 1986, and shortly thereafter WAPA published its *Final Post-1989 General Marketing and Allocation Criteria and Call for Application of Power.*

Surprisingly, it was not an environmental group which initially attacked WAPA's distortion of the NEPA process. In October, 1986, the Utah Power & Light Company and over 100 municipalities in Utah and Wyoming filed suit challenging WAPA's issuance of the post-1989 criteria on several grounds, including the failure to prepare an EIS.[17] Seeking to obtain expanded allocations of the cheap hydropower produced at Glen Canyon, the utility plaintiffs had seized upon NEPA as a handy litigation weapon. But once their power allocation demands were met, the original plaintiffs decided to settle with WAPA and drop their NEPA claims.

At this point the environmental groups, led by the Grand Canyon Trust, entered the suit against WAPA, seeking declaratory and injunctive relief on essentially the same NEPA grounds.[18]

III. TIME RUNS OUT

WAPA's evasion strategy had in large part failed, and it now found itself in court facing plaintiffs with a strong NEPA case. WAPA, in defending its FONSI opinion, frantically tried to restore the credibility of the *Hydrologic Study* and EA. WAPA also argued that it was not the appropriate agency for NEPA scrutiny, since the Bureau was the agency which actually operated Glen Canyon Dam and set the minimum and maximum release levels.

In short, WAPA was attempting to whip-saw NEPA plaintiffs: the *Badoni* court had already stated in dicta that the Bureau merely carried out the policy set by the hydropower contracting decisions, and the contracting agency was attempting to show that it merely had some input into the Bureau's operation of Glen Canyon Dam.[19] It was obvious that one of the two agencies, or both, were determining how much was being released from Glen Canyon, but both agencies, when faced with the prospect of NEPA compliance, pointed the other way. Had WAPA prevailed in court with this defense, the judiciary would have been saying, in effect, that *no one* was operating Glen Canyon Dam.

In the end, the court never had to decide the issue. In January, 1988, the *Glen Canyon Environmental Studies Final Report* that had been ordered by Secretary Watt back in 1982 was released. The report concluded that the present operation of the dam was indeed severely impacting the Colorado River downstream, including the stretch through the

16. *Id.*
17. *Id.*
18. *Id.*
19. *Badoni,* 455 F. Supp. at 648-49.

Grand Canyon, and that the dam could indeed be operated within statutory guidelines in a manner likely to mitigate these impacts. Both of the report's guiding questions had been answered in the affirmative, and the Bureau's earlier hints that such conclusions would lead to an EIS came back to haunt it.

The Bureau's instinctive response was to question the Studies' integrity, citing unusual flow patterns and flood conditions during study years, and order yet another phase of studies. The time for delaying tactics, however, had come and gone.

The prolonged legal disputes had finally spilled over into the public arena. *The Arizona Republic,* a major newspaper not known for environmental advocacy, began to editorialize in favor of downstream protection and an EIS.[20] Arizona's Republican Senator, John McCain, took up the cause and intervened directly to force Secretary Lujan to act. In July, 1989, 25 years after completion of the dam and 15 years after the first lawsuit, the Secretary capitulated and ordered the Bureau to prepare an EIS.

WAPA, perhaps fittingly, soon found that its own EA was being systematically discredited in court by the Bureau's *Glen Canyon Environmental Studies.* Sensing the tidal change marked by Interior's about-face, WAPA surrendered and presented an "irreversible commitment" to prepare an EIS on the post-1989 criteria to the District Court. In a final gesture of defiance to the spirit of NEPA, WAPA then attempted to implement the post-1989 criteria and execute long-term contracts, with reopener clauses, prior to the completion of the EIS. On September 29, 1989, the district court enjoined WAPA's premature implementation of the proposed criteria.[21]

Although both the Bureau and WAPA have now been ordered to begin preparation of EISs, the struggle is hardly over. Having consumed a leisurely six years on the *Glen Canyon Environmental Studies,* the Bureau has announced it will complete an EIS by the end of 1991, hardly time enough for a careful assessment.

For its part, WAPA has yet to announce a study schedule. But it has indicated that its EIS will be narrowly focused because it has already decided that its contracting discretion is sharply circumscribed by statute, a conclusion that will probably generate yet another lawsuit in the future.

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20. *See, e.g.,* Burkhart, *Glen Canyon Dam Water-Release Plan Stirs Controversy,* Ariz. Republic, July 15, 1988, at F4, col. 1; Lessner, *One of the State's Most Valuable Resources Dying in The River,* Ariz. Republic, Jan. 2, 1989, at A18, col. 1. For further discussion of the controversy surrounding the operation of the Glen Canyon Dam, see Shaffer, *Sands of Time,* Ariz. Republic, Sept. 24, 1989, at C1, col.1; Hoy, *Glen Canyon Dam Faces Study,* Ariz. Republic, July 28, 1989, at B1, col. 1; Daniels, *River Panel to Devise Colorado's Floodway,* Ariz. Republic, July 1, 1987, at B1, col.1.

21. National Wildlife Federation v. Western Area Power Administration, No. 88-C-1175-G (D.Utah Sept. 29, 1989) (order enjoining implementation).

IV. CONCLUSION

The Bureau of Reclamation has played an important role in developing water and power for the West. In the process of opening the West to agriculture, it developed a grateful and loyal constituency of western farmers, and later power users, who in turn supported and elected congressional representatives who unquestioningly supported more Reclamation projects.

As the years went by, the West moved beyond the frontier development phase into a diverse urban society. A new generation awakened to environmental values. Millions of newcomers arrived, determined to preserve the values that had brought them west in the first place. But the Reclamation machine moved on, destroying rivers and rearranging the landscape, indifferent to change.

In the case of Glen Canyon, the Bureau's management decisions have directly affected the greatest of America's national parks — the Grand Canyon. Yet the National Park Service, the federal agency charged with protecting the Canyon, was nowhere to be seen or heard during the long years of controversy. It was not for lack of interest. When the Bureau and the National Park Service collide within the Interior Department, it is the Park Service which almost always loses and is ordered to keep quiet.

The reason for this mismatch between two agencies in the same department of the same government is simply that the Park Service does not deliver economic goods like cotton, alfalfa, wheat, and electricity. All it can deliver is grand scenery, the quiet of open spaces, and an encounter with the natural world for anyone who wants to go there.

It is this fundamental disparity, repeated, if less dramatically, throughout the government, that creates the need for NEPA. Government agencies that deliver tangible goods to specific constituents must be held in check by a process that invites the public to be heard and forces agency consideration of what economists call externalities, the costs resulting from resource development which are spread across the entire population in the form of environmental destruction.

To achieve these goals, and to create this check on agency action, NEPA has summoned the judiciary into the political arena. As a result, courts can become intertangled in the political process. Sometimes the courts have been ambushed by Congress (aided and abetted, as here, by the agency subject to NEPA), and sometimes NEPA has been misused by special interests to pursue goals unrelated to the Act's environmental purposes.

On balance, however, NEPA has plainly provided a useful forum for the resolution of national environmental policy that is a step apart from the political powers controlling the federal agencies. Through NEPA, the Glen Canyon conflict was kept alive in the judiciary until

other political forces could be brought to bear and the hard shells of the Bureau and the WAPA could be forced open to public scrutiny.

The fact is that NEPA works. For every renegade like the Bureau of Reclamation that must be dragged through 15 years of litigation, there are a hundred agencies that have accommodated the spirit and practice of NEPA. And for every environmental assessment that is made there are probably a hundred that were not necessary because the mere prospect of the sunlight of public exposure and judicial scrutiny was sufficient to kill off a bad idea. We have ample reason to celebrate the success of NEPA and to wish it a long life.