10-1975

Flint Ridge Development Company v. Scenic Rivers of Oklahoma

Lewis F. Powell Jr.

PJ/gg 12-1-75

Grant

DISCUSS

CA 10 held that HUD must file an impact statement with NEPA with respect to every real estate development that is the subject of a Disclosure statement under the Land Sales Desclosure Act of 1969.

PRELIMINARY MEMORANDUM

Grant.

This case seems a good opportunity to explore the farthest reaches of NEPA.

Phil

N.B.

December 5, 1975 Conference — Cert to CA 10 (Lewis, McWilliams, Doyle)

List 3, Sheet 2

No. 75-510

FLINT RIDGE DEVELOPMENT CO. — Federal/Civil

v.

SCENIC RIVERS ASS'N. OF OKLAHOMA — Timely

No. 75-545

HILLS (SEC. OF HUD)

v.

SCENIC RIVERS ASS'N. OF OKLAHOMA

1. Summary: CA 10 has held that the National Environmental Policy Act (NEPA) 42 U.S.C. 4321 et seq., requires HUD to file an environmental impact statement before a disclosure statement filed with it by a private real estate developer pursuant to the Interstate Land Sales Full Disclosure Act ("the Disclosure Act"), 15 U.S.C. 1701 et seq., may become effective. Both the private developer and the SG seek certiorari, claiming that this decision is a quantum leap in the application of NEPA, brings NEPA into conflict with the Disclosure Act and will cause havoc in the private real estate business.

2. Facts and Decision Below. The Disclosure Act was passed in 1968 to prevent abuses in the sale of unimproved tracts of land, by requiring developers to make full public disclosure of information needed by potential buyers. It is modeled on the Securities Act of 1933 and parallels that Act in many respects. Its basic requirements are that a developer file a "statement of record" with HUD before selling any lots, and that the developer furnish a potential purchaser a "property report" before any contract is signed. Both documents contain descriptions of the subdivision and its state of title.

The developer cannot begin selling lots until thirty days after filing its statement of record which becomes effective automatically on the thirtieth day unless HUD decides

that it is incomplete or inaccurate and requires amendments. If HUD acts, the effective date is suspended until the developer files the additional or corrected information. One section of the Act provides that

> [t]he fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the statement of record is true and accurate on its face, or be held to mean that the Secretary has in any way passed upon the merits of, or given approval to, such subdivision.

Early in 1974 the Flint Ridge Development Company, almost ready to start selling off a 3000 lot subdivision adjacent to the Illinois River in Oklahoma, filed its statement of record and property report with HUD. After an amendment, the statement became effective on May 2, 1974. After the filing but before the effective date, respondents filed suit in E.D. Okla. (Bohanan, J.) alleging that HUD's allowing the Flint Ridge statement to become effective would be "major federal action significantly affecting the quality of the human environment" under NEPA, and that HUD therefore had to prepare an environmental impact statement before allowing the statement to become effective. On August 2, 1974, by oral order later reduced to writing, the DC declared the Flint Ridge statement "suspended, vacated, and held for naught," and enjoined HUD from approving the Flint Ridge filing until HUD had prepared an impact statement.

CA 10 affirmed. There was no question, according to

CA 10, that a large real estate development would have a significant effect on the environment. The real issue was whether HUD's review of the Flint Ridge filing constituted "major federal action." CA 10 felt that it did, by analogy to its previous decision in Davis v. Morton, 469 F. 2d 593 (1972), in which it had held that an impact statement was required before the Secretary of the Interior could approve a lease of land by an Indian tribe to a land development company. The crux of CA 10's reasoning is this paragraph:

> The similarity between our case and Davis is that both involve filing and approval of private action. The result of approval here is that the developer is free to seek funds in commerce for the development. In each instance the filing is a preliminary step which is followed by substantial consquences to the environment; thus, there is action which leads to the development which in turn affects the human environment.

Without discussing why, the court stated that it considered this case analogous to those in which government funding or government loan guarantees had been held to be major federal action requiring impact statements. "In sum," said CA 10, "the consequences of the government's approval of the statement in terms of ease of obtaining funds and in terms of the ultimate direct consequences on the environment of the building of the houses" showed that NEPA applied.

CA 10 rejected the appellants'/petitioners' argument that its holding would bring NEPA and the Disclosure Act into irreconcilable conflict. The appellants'/petitioners' concern

was that it would be impossible to prepare an impact statement within the thirty days the Disclosure Act allows HUD before a filing becomes effective automatically. The court thought HUD could simply suspend the developer's statement of record pending preparation of the impact statement.

3. Contentions: Flint Ridge and the SG make pretty much the same contentions, the difference being that the SG makes them more concisely and forcefully:

(a) First, the SG emphasizes the potential impact of CA 10's decision upon HUD's administration of the Disclosure Act. The "crushing administrative burden" is illustrated by the fact that, even if the impact statement requirement is confined to future original filings, HUD will be required to file 50% more such statements annually than the most now filed by any agency (432 annually, by the Department of Transportation). If the requirement should be extended to all consolidations and amendments of filings as well as original filings, HUD would have to file ten times as many statements annually. Should it be extended to all filings on record, HUD would have to file almost twice as many impact statements as have been filed by the entire federal government from the passage of NEPA to this date (3,344 final statements to date; HUD has 7,000 filings on record).

(b) Second, it would seem that CA 10's reasoning also would apply to securities filings under the 1933 Act, since the Disclosure Act was modeled on that earlier statute. In

fact, the DC for the District of Columbia, in an unappealed decision, already has held that NEPA applies to securities registrations. National Resources Defense Council v. SEC, 389 F. Supp. 689 (1974).

(c) Third, CA 10 has misread both the language and the purpose of NEPA. NEPA requires inclusion of an impact statement "in every recommendation or report on proposals for . . . major federal actions significantly affecting the quality of the human environment." Under the Disclosure Act HUD makes no recommendation or report on a proposal for major federal action; it simply assures adequate disclosure by the private developer. The purpose of NEPA, to make agencies consider environmental factors in their decision-making, does not apply in the case of the Disclosure Act, since HUD has no substantive authority over the developer and does not even pass on the "merits" of his project. CA 10 erred in analogizing the Disclosure Act to statutes involving federal funding, guarantees, approval, and licensing, for here HUD simply has no power whatsoever over the private party's actual decision to develop the land.

(d). CA 10's holding brings NEPA into conflict with the Disclosure Act, since it is impossible to prepare an impact statement within the thirty days accorded HUD by the Disclosure Act before a filing becomes effective. Contrary to what CA 10 said, supra, HUD cannot simply suspend the registration until

the impact statement is prepared, for the Disclosure Act specifically limits HUD's suspension power to situations in which the developer has failed to make sufficient disclosures. The very purpose of the thirty-day provision is to assure that the requirement of registration does not cause developers costly delays.

(In its own petition Flint Ridge frames this particular point a bit more dramatically. It claims that CA 10's decision amounts to a holding that NEPA "repealed by implication" the thirty-day provision of the Disclosure Act, in the face of this Court's statement in United States v. SCRAP, 412 U.S. 669 (1973), that NEPA was not intended to effect such repeals of other legislation. In addition, Flint Ridge claims that the delay caused by the preparation of impact statements will throw untold numbers of developers into bankruptcy.)

Respondents answer each of these contentions. First, they note that CA 10's decision seems to require an impact statement only for new original filings, so HUD's figures on the number of statements that could be required if filings on record and amendments were covered are speculation at the moment. Second, they note that the SEC apparently has decided to live with the impact statement requirement imposed by the decision of the DC for the District of Columbia, since that agency did not appeal. Third, CA 10 did not misread NEPA, since HUD obviously takes action which leads to a substantial effect on the environment.

Moreover, internal HUD regulations provide for consideration of environmental factors, including filing of an impact statement, in the course of all HUD activities not specifically exempted by the regulations themselves, and passing upon statements of record from developers is not an exempted activity; thus, it seems that HUD itself recognizes that NEPA applies in this situation. Finally, HUD's concern for the effect of delay upon the thirty-day provision of the Disclosure Act rings hollow when one considers statistics showing that 90% of the filings already are held up beyond the thirty days due to HUD suspension orders (for amendments to complete the filings or correct misleading portions).

4. Discussion: Obviously this is an important case. CA 10's decision probably would not be extended to cases in which Disclosure Act filings are amended or consolidated, as the SG fears, since concern with the environmental impact of a real estate development logically should arise and be dealt with one time only, at the beginning. Nor would one expect a sane court to require HUD to suspend in wholesale fashion all filings already on record in order to investigate the impact of subdivisions already being sold. Even with the impact statement restricted to the future original filings, however, CA 10's decision will result in a substantial burden on HUD and costly delays for the private developers. A reasonable person can wonder whether Congress intended or even foresaw

this effect upon the Disclosure Act, a relatively simple piece of consumer protection legislation, when it passed NEPA.

Both sides cite a lot of lower court cases in efforts to show that application of NEPA to the Disclosure Act is or is not a giant step beyond previous applications. My impression is that it is a significant departure: simply insuring full disclosure in a transaction between two private parties seems a far cry from becoming in some sense an active partner by loaning or giving money, guaranteeing a loan, approving the transaction on its merits or licensing a party to make the transaction. CA 10's position is, in effect, that NEPA applies anytime the federal government has the power to stop a private transaction that will affect the environment. Stated differently, anytime Congress sets up a regulatory scheme that gives an agency the power to require information in connection with a private transaction, and to prohibit the transaction until the information is forthcoming, NEPA would apply on the theory that every failure to stop a transaction that could have environmental consequences would be "major federal action."

No one has illuminated the SEC's failure to appeal its own adverse ruling. A wild guess is that the SEC thought it would be hard for someone to trace a particular securities offering through a company's financial maze to its ultimate effect upon the environment, and therefore thought the DC's decision would not hurt too much. The SG notes, however, that

the SEC has informed him it wants certiorari granted in this case, too.

The failure of the HUD internal regulations specifically to exempt Disclosure Act approvals from the regulations' environment-related requirements may be the result of HUD's oversight or its feeling that no one would ever think the approvals were covered at all.

Considering all factors - the effect on HUD and on the private developers, the implications of the decision for other government regulatory agencies, the possible conflict created between NEPA and the Disclosure Act - the cases look like grants.

December 1, 1975	Jordan	DC and CA 10 ops. in both petns.

*PJ/gg 12-1-75

PRELIMINARY MEMORANDUM

CONFERENCE - December 5, 1975
List 3, Sheet 2
No. 75-545

Cert to CA 10
(Lewis, McWilliams, Doyle)

HILLS [Secretary of HUD]

v.

Federal/Civil

SCENIC RIVERS ASS'N. OF OKLAHOMA

Timely

See Preliminary Memorandum in No. 75-510.

Conference 12-5-75

Court CA - 10 ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19... No. 75-545

Submitted ....., 19... Announced ....., 19... (Vide 75-510)

CARLA A. HILLS, ETC., ET AL., Petitioners

vs.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA, ET AL.

10/8/75 Cert. filed.

Grant
&
Consolidate
with
75-510

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
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Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

Conference 12-5-75

Court CA - 10 .... Voted on ...., 19...
Argued ...., 19... Assigned ...., 19... No. 75-510
Submitted ...., 19... Announced ...., 19... (Vide 75-545)

FLINT RIDGE DEVELOPMENT COMPANY, Petitioner

vs.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA, ET AL.

10/2/75 Cert. filed.

Stewart case in
Hinder case important & probably
wrongly decided.
Brennan opinion erroneous.
Rule in probably Rule in
White makes Rule with
a major decisive consequence.
far reaching wrong.
+ plainly would apply
Then to SEC. Hinder same as
also to Brennan language in
last para needs to
be clarified.

Grant

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	AFF	MOTION G	D	ABSENT	NOT VOTING	
Rehnquist, J.		✓		x Reverse summarily										
Powell, J.		✓												
Blackmun, J.		✓												
Marshall, J.		✓												
White, J.		✓												
Stewart, J.		✓												
Brennan, J.		✓												
Douglas, J.														
Burger, Ch. J.			✓											

CRS/gg 4-9-76

BOBTAIL MEMORANDUM

TO: Justice Powell

FROM: Carl R. Schenker DATE: April 9, 1976

No. 75-510 Flint Ridge Dvmt. Co. v. Scenic Rivers Assn.
No. 75-545 Hills v. Scenic Rivers Assn.

I recommend reversal (which the Docket Sheet indicates to be almost a foregone conclusion).

It is necessary to begin by noting a distinction between two possible sources of environmental information: (1) the agency and (2) the developer. The suit below was to require the agency to file EIS's before ok'ing ILSA filings. Resolution of that issue will not control whether HUD can or must seek environmental disclosures from the developers in the ILSA filings.

1. Is HUD required to prepare an EIS?

Section 102(2)(C) sets out the prerequisites for an EIS's being required: "[A]ll agencies of the Federal Government shall -

> "(C) include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement [on environmental impact]."

I agree with the SG and Flint Ridge that these prerequisites do not exist here.

EIS's are not required under NEPA everytime an environmentally significant project is undertaken by someone. Rather, they are required when there is a "major federal [action] significantly affecting the . . . environment." It is conceded that there is a significant [effect]" here, but it is difficult to find a "major federal [action]." This is so because the statutory role of the federal government with respect to these subdivisions is so tangential - involving not a substantive decision, but only requiring full disclosure. The entire "action" here thus is by the developers, with HUD playing a completely passive role of requiring complete disclosure. As far as impact on the environment goes, the statutory situation is more or less the same as is would be in the absence of ILSA.

Given this, there are only two paths by which the Court could be faithful to the requirement that EIS's be filed only where there is a "major federal [action]."

(1) The first is to hold that HUD's approval of ILSA filings is not "major federal [action]." (2) The second would be to hold that NEPA implies a grant of authority to HUD to block subdivisions because they are environmentally unsound. This would give HUD's approval an "active" component.

It is to be doubted that by requiring EIS's for "major

federal actions", Congress intended to convey substantive authority on agencies to convert what were not "major federal actions" into such actions. Therefore the first course must be followed, and the decision below must be reversed.

2. Filings by the Developers.

Respondents really present no contrary argument. Their principal argument, and that of the amici, is not so much that there is "major federal [action]" as that it would be useful to make this information available to the public, the developers, and the state authorities who can do something about possible environmental damage by the developers. This argument, however, puts the cart before the horse. The purpose of § 102(2)(C) does not seem to be informing the public per se. Rather it is to require federal decisionmakers to take environmental factors into account in choosing their options. Here "choice" by the federal decisionmakers plays no role. When that is the case, it seems unlikely that Congress would have wanted to finance general-education EIS statements. That, however, does not mean that there is no role for NEPA to be used as respondents suggest. HUD and Flint Ridge agree that NEPA may authorize HUD to require environmental disclosures from the developers in their ILSA filings. That, howver, was not the suit below. *

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* Footnote on next page.

Summary: (1) HUD is not required to file an EIS because its role in approving ILSA filings is not "major federal [action]."

(2) HUD may nonetheless have authority to require disclosures from the developers, though that question is not at issue here.

CARL

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* I could not find the complaint anywhere in the papers. But the DC opinion makes it appear that the only cause of action was on whether the agency had to complete an EIS. I might mention that the NRDC v. SEC, 387 F. Supp. 689, involved the same question that will not be reached here - namely, what the SEC could or should require by way of environmental information in a registration statement. It did not impose on the agency any burden of preparing EIS statements.

April 23, 1976

No. 75-510 Flint Ridge Development Co.
v. Scenic Rivers Assn.
No. 75-545 Hills v. Scenic Rivers Assn.

Dear Chief:

I find, after reviewing the briefs in the above cases, that I think it best for me to recuse myself.

In view of the possible retroactive impact of an affirmance of CA10's holding, I could have a conflict of interest.

Sincerely,

The Chief Justice

lfp/ss

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
Join TM 6/10/76	agree 6/11/76	Join TM 6/18/76	Join TM 6/11/76	typed draft 6/1/76 1st draft	Join TM 6/18/76	out	Join TM 6/18/76	Join TM 6-4-75
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					75-510 Flint Ridge v. Scenic Rivers 75-545 Hills v. Scenis Rivers			