The Burger Court Opinion Writing Database

Kleppe v. Sierra Club

427 U.S. 390 (1976)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 11, 1976

Re: (75-552 - Kleppe v. Sierra Club
(75-561 - American Electric Power v. Sierra Club

Dear Lewis:

I join your proposed opinion dated June 9.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 24, 1976

RE: Nos. 75-552 & 75-561 Kleppe v. Sierra Club

Dear Thurgood:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 21, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 75-552 (A-451), Kleppe v. Sierra Club

I would defer consideration of this application until the petition for certiorari reaches the Conference.

P.S.

P. S.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 2, 1976

Re: No. 75-552, Kleppe v. Sierra Club
No. 75-561, American Electric Power v. Sierra Club

Dear Lewis,

I am glad to join your opinion for the Court in these cases.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 2, 1976

Re: Nos. 75-552 & 75-561 - Kleppe v. Sierra Club

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 1, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 75-552 -- Kleppe v. Sierra Club
No. 75-561 -- American Electric Power v. Sierra Club

In due course I shall circulate a dissent in this one.

T.M.

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: JUN 23 1976

Recirculated: _____

Nos. 75-552 & 75-561, Kleppe v. Sierra Club

Mr. Justice Marshall, dissenting.

While I agree with much of the Court's opinion, I must dissent from Part IV, which holds that the federal courts may not remedy violations of the National Environmental Policy Act [NEPA], 83 Stat. 852, 42 U.S.C. § 4321 et. seq. -- no matter how blatant -- until it is too late for an adequate remedy to be formulated. As the Court today recognizes, NEPA contemplates agency consideration of environmental factors throughout the decisionmaking process. Since NEPA's enactment, however, litigation has been brought primarily at the end of that process -- challenging agency decisions to act made without adequate environmental impact statements or without any statements at all. In such situations, the courts have had to content themselves with the largely unsatisfactory remedy of enjoining the proposed federal action and ordering the preparation of an adequate impact statement. This remedy is insufficient because, except by deterrence, it does nothing to further early consideration of environmental factors. And, as with all after-the-fact remedies, a

pp. 1, 4

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: JUN 25 1976

Recirculated: _____

PRINTED

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 75–552 AND 75–561

Thomas S. Kleppe, Secretary of the Interior, et al., Petitioners,
75–552 *v.*
Sierra Club et al.

American Electric Power System et al., Petitioners,
75–561 *v.*
Sierra Club et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1976]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring in part and dissenting in part.

While I agree with much of the Court's opinion, I must dissent from Part IV, which holds that the federal courts may not remedy violations of the National Environmental Policy Act (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*—no matter how blatant—until it is too late for an adequate remedy to be formulated. As the Court today recognizes, NEPA contemplates agency consideration of environmental factors throughout the decisionmaking process. Since NEPA's enactment, however, litigation has been brought primarily at the end of that process—challenging agency decisions to act made without adequate environmental impact statements or without any statements at all. In such situations, the courts have had to content themselves with the largely unsatisfactory remedy of enjoining the proposed federal action and ordering the preparation of an

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 2, 1976

Re: No. 75-552 - Kleppe v. Sierra Club
No. 75-561 - American Electric Power v. Sierra Club

Dear Lewis:

Please join me.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 31, 1976

No. 75-552 Kleppe v. Sierra Club
No. 75-561 American Electric Power v. Sierra Club

MEMORANDUM TO THE CONFERENCE:

I circulate herewith a typewritten draft (xeroxed) of an opinion for the Court in the above cases.

In view of the "backup" in the Print Shop, I thought it might be best to make the draft available to you in this form. Although I do not anticipate changes in the basic structure of the draft. I probably will make some editing changes. These will be reflected in a printed copy that I hope to circulate later this week.

Lewis

L.F.P., Jr.

ss

lfp/ss 5/29/76

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: MAY 3 1 1976

Recirculated: _____

No. 75-552 KLEPPE v. SIERRA CLUB
No. 75-561 AMERICAN ELECTRIC POWER
v. SIERRA CLUB

MR. JUSTICE POWELL delivered the opinion of the Court.

Section 102(2)(C) of the National Environmental Policy Act of 1969[1] (NEPA) requires that all Federal agencies include a detailed statement of environmental consequences - known as an environmental impact statement - "in every recommendation or report on proposals for legislation or other major Federal actions significantly affecting the quality of the human environment." The United States Court of Appeals for the District of Columbia Circuit held that officials of the Department of Interior (the Department) and certain other Federal agencies must take additional steps under this section, beyond those already taken, before allowing further development of Federal coal reserves in a specific area of the country. For the reasons set forth, we reverse.

2, 6, 7, 12, 13

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: JUN 9 1976

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 75–552 AND 75–561

Thomas S. Kleppe, Secretary of the Interior, et al., Petitioners,
75–552 *v.*
Sierra Club et al.

American Electric Power System et al., Petitioners,
75–561 *v.*
Sierra Club et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

Section 102 (2)(C) of the National Environmental Policy Act of 1969 [1] (NEPA) requires that all federal agencies include a detailed statement of environmental consequences—known as an environmental impact statement—"in every recommendation or report on proposals for legislation or other major Federal actions significantly affecting the quality of the human environment." The United States Court of Appeals for the District of Columbia Circuit held that officials of the Department of Interior (the Department) and certain other federal agencies must take additional steps under this section, beyond those already taken, before allowing further development of federal coal reserves in a specific area of the country. For the reasons set forth, we reverse.

[1] 83 Stat. 852, Pub. L. 91–190, 42 U. S. C. § 4321 *et seq.*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 26, 1976

Case Held for No. 75-552 Kleppe v. Sierra Club
and No. 75-561 AEPS v. Sierra Club

MEMORANDUM TO THE CONFERENCE:

No. 75-1491 Pacific Legal Foundation v. Natural Resources Defense Council

This suit involves the Bureau of Land Management's (BLM) program of issuing permits to cattlemen to graze their livestock on public lands. The Bureau has prepared a "programmatic" environmental impact statement (similar to the "Coal Programmatic" statement prepared by the Department of Interior in Kleppe v. Sierra Club) assessing the overall effect of its permit program. At the instance of the Natural Resources Defense Council (NRDC), the District Court held that BLM also had to prepare impact statements on specific grazing areas, leaving it to BLM's discretion whether those statements would cover individual permit areas, geographic "districts," or even larger areas. The NRDC and BLM subsequently worked out a mutually satisfactory plan for BLM compliance (involving impact statements on some 212 "regions," to be completed by 1988), which the District Court then incorporated in its final judgment.

Petitioners are cattlemen's associations which intervened as defendants in the District Court and appealed the court's order after BLM withdrew its own appeal pursuant to the agreement worked out with NRDC. CADC affirmed on the District Court's opinion, without argument.

The agreement between NRDC and BLM, accepted by the District Court, effectively moots this case. Petitioners' only reason for seeking certiorari is their fear that the requirement of extra impact statements will raise the cost of grazing permits. In any event, the District Court opinion in consistent with Kleppe v. Sierra Club. I shall vote to Deny.

L.F.P., Jr.

ss

75-552

6/2/76 WHR to LFP

SUGGESTIONS IN KLEPPE v. SIERRA CLUB.

(1) On page 7, in the first full paragraph beginning on that page, you have a sentence to the effect that "an impact statement must be included . . . if the private activity to be permitted is one 'significantly affecting the quality of the human environment' . . .". Following are citations to an opinion wirtten for the Court of Appeals of the D. C. Circuit by Skelly Wright, as wellas a Tenth Circuit opinion. Judge Wright's opinion in SIPI has very broad language in it which I would not want to see the Court adopt unknowingly, and a hasty reading of the Tenth Circuit opinion leaves me with the same feeling. Could you change the sentence before the reference to these cases, and the one after the reference, to read this way:

> "Two Courts of Appeals have held that an impact statement must be included in the report or recommendation on the proposal for such action if the private activity to be permitted is one 'significantly affecting the quality of the human environment' within the meaning of § 102(2)(C) . . . . (case citations) . . . . The federal petitioners do not dispute that such a requirement is proper on the facts of this case, and indeed have prepared impact statements . . . etcetera."

(2) On page 14, beginning in the third line, your opinion says "The procedural duty imposed upon agencies by this section is quite precise, and it is this procedure that makes the statute judicially enforceable." A veteran nitpicker might draw a subtle implication that there would

be objections to judicial enforcement of a less precise statute, which I do not think is what you mean. How about changing the sentence to read: "The procedural duty imposed upon agencies by this section is quite precise, and the role of the courts in enforcing that duty is similarly precise."

(3) Footnote 2 states that "Jurisdiction was based on 5 U.S.C. §§ 701-706 . . . etc." Since we have never held that the Administrative Procedure Act provides an independent basis of federal jurisdiction, could you change this language so as to read "Respondents asserted jurisdiction under 5 U.S.C. §§ 701-706, etc. . . ."?

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 2, 1976

Re: Nos. 75-552 and 75-561 - Kleppe v. Sierra Club

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 1, 1976

Re: 75-552 Kleppe v. Sierra Club
75-561 American Elec. Power v. Sierra Club

Dear Lewis:

Please join me.

Sincerely,

John

Mr. Justice Powell

Copies to the Conference