

No. 23-975

In The
Supreme Court of the United States

SEVEN COUNTY INFRASTRUCTURE COALITION
and UINTA BASIN RAILWAY, LLC,

Petitioners,

v.

EAGLE COUNTY COLORADO and
CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

**AMICUS CURIAE BRIEF OF
TN RANCHING COMPANY, RIO BLANCO
COUNTY COMMISSION OF RIO BLANCO
COUNTY, COLORADO, WHITE RIVER
CONSERVATION DISTRICT, DOUGLAS
CREEK CONSERVATION DISTRICT, AND
WYOMING STOCK GROWERS ASSOCIATION
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS CURIAE¹

Amicus TN Ranching Company, owned by Butch and Jeannie Jensen, is a 5th generation family owned and operated ranch located near Price, Utah. The ranch owns approximately 1,200 head of livestock which graze more than 13,000 “animal unit months²” of forage on their allotments located on lands managed by the U.S. Department of the Interior, Bureau of Land Management (“BLM”). Each of TN Ranching Co.’s term grazing permits granted by the BLM is subject to analysis under the National Environmental Policy Act (“NEPA”). As such, the determination of what is an “indirect effect” as defined under the analysis of *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004) (*Public Citizen*) compared with the analysis under *Sierra Club v. FERC*, 867 F.3d 1373 (D.C. Cir. 2017) has a direct impact on TN Ranching Co.’s livelihoods as the loss of their term grazing permits would decimate their livestock operation and livelihood. Additionally, the Uintah Basin Railway runs through a portion of TN Ranching Co.’s private property and through their BLM grazing allotments.

¹ Rule 37 statement: The parties were notified and consented to the filing of this brief no more than 10 days before its filing. *See* Sup. Ct. R. 37.2. No party’s counsel authored any of this brief; *amicus* alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

² An animal unit month (“AUM”) is the amount of forage consumed by one animal (e.g., cow and her calf or yearling cow) on lands managed by the U.S. Forest Service or BLM. Livestock grazing permits in the United States on federal lands allow the grazing of a specific number of AUMs based on the size of the grazing allotment, type of livestock and time period of the year specified in the grazing permit.

Amicus Rio Blanco County Commission of Rio Blanco County, Colorado, is located in northwestern Colorado (Rio Blanco). *Amici* White River Conservation District and the Douglas Creek Conservation District (collectively “local governments”) are located within Rio Blanco County, Colorado. Rio Blanco County contains approximately 2,064,000 acres of land, 56 percent of which is managed by the BLM, 24 percent is privately owned, and 17 percent is managed by the United States Forest Service. The incorporated areas of Rangely and Meeker in Rio Blanco County consist of approximately two percent of the land base, and the State of Colorado owns less than one percent of the land in the County. Because of the significant amount of federally managed land within the boundaries of these units of local government, they are intricately impacted by federal agency decisions and their accompanying analyses under NEPA. Additionally, because NEPA grants to local governments additional opportunities to participate in the NEPA process above and beyond the opportunity to provide public comment, local governments will be hampered in participating in their additional regulatory processes unless there is a clear consistent definition and analysis of what is included as an “indirect affect.”

Amicus, the Wyoming Stock Growers Association (“WSGA”) was organized on April 4, 1872, to advance and protect the interest of the state’s livestock producers. It was the second state cattlemen’s organization created in the United States. Wyoming Stock Growers was the first association formed in the Wyoming

territory. It is the only organization in the state focused entirely on serving the needs of the cattle industry, which is the largest segment of Wyoming’s agricultural production. The mission of the Wyoming Stock Growers Association is to serve the livestock business and families of Wyoming by protecting their economic, legislative, regulatory, judicial, environmental, custom, and cultural interests. The Wyoming Stock Growers Association advocates for the protection of private property rights from overly burdensome regulatory interference. The Association maintains a legal fund to enable it to initiate, defend or support litigation on critical issues with the potential to have a major impact on its members’ ranching enterprises.

The *amici curiae* represent both local governments as described in the implementing regulations under the NEPA and agricultural landowners reliant on their federal lands grazing permits, which have to be evaluated under NEPA. Sixty two percent of counties in the United States have federal public lands within their borders. 2024 Federal Policy Priorities | National Association of Counties (naco.org) (<https://www.naco.org/resource/2024-federal-policy-priorities#:~:text=Sixty-two%20percent%20of%20counties,have%20federal%20public%20land>) (last viewed April 3, 2024). These parties bring a unique perspective on the question before this Court because they are directly affected by the various courts’ conflicting determinations of what is included as an “indirect effect.”



SUMMARY OF ARGUMENT

The purpose of this brief is to illustrate the difficulties that a split in the circuits has on local governments and agricultural interests in determining the breadth of “indirect effects” under the NEPA. Local governments, such as those represented by *amici*, are granted specific and important opportunities to participate with federal agencies in preparing and analyzing documents prepared pursuant to the NEPA. These specific opportunities include developing local land use plans which have to be specifically and separately considered by a federal agency in making its final decision. Agricultural operations that are absolutely dependent on the use of the federal lands to continue their livelihoods are also directly impacted by this split in the circuits, particularly when those challenging a decision can either challenge the final decision in a federal district court in the circuit in which the permit is granted, or in the D.C. District Court. It should not be a “race to the courthouse” to challenge a decision based upon an alleged failure to properly analyze “indirect effects” based upon differing circuit court determinations. See Lampe, Joanna (2024) *Congressional Research Service, Where a Suit can Proceed: Court Selection and Forum Shopping*, LSB10856, LSB10856 (congress.gov) (<https://crsreports.congress.gov/product/pdf/LSB/LSB10856>) (last visited April 3, 2024).

Yet that is often what happens in these cases. See e.g. *Wyoming v. United States Dep’t of Interior*, No. 07-CV-0319-B, 2008 WL 11335156, at *2 (D. Wyo. Nov. 7, 2008), *vacated sub nom. Wyoming v. U.S. Dep’t of*

Interior, 587 F.3d 1245 (10th Cir. 2009) (stating that “Initially, this Court finds it unfortunate that a United States District Court [the D.C. District Court] sitting over 2,000 miles away from the actual subject of this litigation feels compelled to hand down a ruling affecting land that lies in this Court’s backyard [Federal District Court for the District of Wyoming]. As the United States Supreme Court has stated, ‘In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.’” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947). However, depending upon whether the plaintiff wishes the court to reject an analysis under NEPA for failing to consider impacts over which the agency has no authority or jurisdiction to consider can be the deciding factor whether to file in the D.C. District Court rather than a federal district court in the Eleventh, Sixth, Fourth or Seventh Circuits. *Amici* would urge the U.S. Supreme Court to accept certiorari in this case to remedy this split in the circuits, end the “race to the courthouse” and ensure that the D.C. Circuit Court and the Ninth Circuit Court comply with the plain meaning of *Public Citizen*.

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ARGUMENT

According to NEPA, all federal agencies shall prepare an environmental impact statement (“EIS”) or an environmental assessment (“EA”), (i.e., a NEPA

document) for “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. . . .” 42 U.S.C. § 4332(C). Such EIS or EA shall analyze the direct, indirect and cumulative effects of the proposed agency actions. 40 C.F.R. § 1508.1(g)(2) (2023). Under this court’s decision in *Public Citizen*, consideration of such direct, indirect and cumulative effects stops where the agency’s statutory authority stops; in other words, an indirect action is one that would occur “but for” the proposed federal action. In contrast, the D.C. Circuit Court and the Ninth Circuit Court require agencies to go further and analyze any effect that is “reasonably foreseeable.” The Petitioners’ Petition for Writ of Certiorari thoroughly discusses this issue.

What this brief would focus on, however, is the impact of this split in the circuit courts on local governments who also have the ability to participate in the NEPA analysis process, including providing analysis on direct, indirect and cumulative impacts. Such local government participation includes both “consistency review” between the federal agency land use plans, decisions and programs and the local government’s local land use or policy plan. Local governments can also be granted “cooperating agency status” from the federal agencies pursuant to NEPA. For agriculturalists, whose livelihoods depend on being able to use their federal lands grazing allotments, this split in interpretation causes a “race to the courthouse” once the NEPA review of their term grazing permits is released,

meaning that a term grazing permit impacting TN Ranching Co. or members of the Wyoming Stock Growers Association can be challenged in Washington D.C., 2000 miles away from the impact of the decision in hopes of a different outcome based on the D.C. Circuit's outside interpretation of *Public Citizen*.

A. NEPA's Command of Consistency Review for Local Governments

NEPA applies to all agencies of the federal government and requires an environmental analysis for all "major federal actions significantly affecting the human environment." 42 U.S.C. § 4321 *et seq.* The courts have traditionally adopted a very broad interpretation of when NEPA applies, meaning that every time the federal government makes a decision for almost any action that may have an environmental impact, NEPA compliance is required. *See e.g., Citizens Alert Regarding the Environment v. United States Environmental Protection Agency*, 259 F. Supp.2d 9, 20 (D.D.C. 2003).

With regard to the mandate for a "consistency review," the NEPA regulations require that the environmental consequences section of an EIS shall include "possible conflicts between the proposed action and the objectives of Federal, Regional, State, Tribal and local land use plans, policies, and controls for the area concerned." 40 C.F.R. § 1502.16(a)(5) (2023). Additionally, an EIS must discuss any "inconsistency of a proposed plan with any approved State or local plan and laws (whether or not federally sanctioned)." 40 C.F.R.

§ 1506.2(d) (2023). Where inconsistencies exist, the EIS should describe the extent to which the agency would reconcile its proposed action to the local government’s plan, policy, control or law. *Id.*

The environmental consequences section of the EIS shall also include economic and technical considerations “including economic benefits of the proposed action.” 40 C.F.R. § 1502.16(b) (2023). The regulations note that while economic and social considerations, in and of themselves, do not require the preparation of an EIS, when economic or social effects are interrelated with environmental effects, the EIS shall discuss and consider economic and social effects. *Id.* Finally, NEPA commands that copies of comments by State or local governments must accompany the EIS or EA throughout the review process. 42 U.S.C. § 4332(C).

To take advantage of NEPA’s regulatory requirements requiring consistency with local plans or policies, numerous local governments such as counties and conservation districts have adopted local land use plans specifically for the purpose of consistency review. For example, *amici* Rio Blanco County Colorado and the Douglas Creek and White River Conservation Districts (collectively local governments) adopted their Land and Natural Resources Plan and Policies in 2021. Updated LUP 2022ApprovedFinal_0.pdf (https://wrcd-dccd.colorado.gov/sites/wrcd-dccd/files/documents/Updated%20LUP%202022ApprovedFinal_0.pdf) (colorado.gov). This local land use plan was specifically written in light of NEPA’s requirement to:

As required by the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), the National Forest Management Act (NFMA) and other federal statutes, this Plan will be applied to federal regulatory frameworks that govern the management of federal land in regard to the rangeland, soil, water, wildlife, air, energy, and other resources. For example, Federal law requires federal agencies to give meaningful consideration to policies asserted in plans developed by local governments, including counties and conservation districts.

Id. at 1.

Amici local governments' local land use plan discusses the local governments' positions relating to the need for credible data, county history, customs and culture³, federal land management policies, air quality policies, climate change policies, forest management, wildfire and community wildfire planning, livestock grazing, noxious weeds and invasive species, oil, gas, coal and minerals, socioeconomic and economic viability of the local area, soils, special designation areas and scenic byways/viewsheds, travel management, access and recreation, water—rights and use, wild and scenic

³ Culture is defined as the customary beliefs, social forms and material traits of a group; an integrated pattern of human behavior passed to succeeding generations. *Webster's New Collegiate Dictionary*, 277 (1975). A custom is a usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory and has acquired the force of law with respect to the place or subject-matter to which it relates. *Bouvier's Law Dictionary*, 417 (1st ed. 1867).

river designations, wild horses, burros and estray livestock, and wildlife management. Because these local governments are within the Tenth Circuit of Appeals, the local governments analyzed the potential direct, indirect and cumulative effects of possible federal agency actions based on the requirements of *Public Citizen*. However, if litigation over a federal decision in which a federal agency completed a “consistency review” is brought in the D.C. District Court, the effort of the local government to write a plan consistent with *Public Citizen* is all for naught simply based on where the litigation is brought. This is a significant disadvantage to local government’s participation in the NEPA analysis because the local land use plan will never be consistent.

B. NEPA’s Command of Cooperating Agency Status for Local Governments

Cooperating agency status also gives local governments the ability to participate as part of a federal agency’s decision-making process. Pursuant to NEPA, an applicant for cooperating agency status must be both (1) an elected body such as a conservation district board of supervisors or a county commission and (2) possess “special expertise.” “Special expertise is defined as the statutory responsibility, mission or related program experience of the local governing body.” 40 C.F.R. § 1508.1(ee) (2023). A State, Tribal or local agency of similar qualifications may, by agreement of the lead agency, become a cooperating agency. 40 C.F.R. § 1501.8(a) (2023). For example, under the Colorado

state statutes, the White River and Douglas Creek Conservation Districts are made up of locally elected officials whose special expertise is to provide leadership in the wise use of the natural resources within the Districts' boundaries. Conservation districts in Colorado are defined as "local governments" and have the ability to participate in government-to-government interactions with the federal agencies. The Districts within Rio Blanco County have developed their Land & Natural Resource Use Plan and Policy to translate their statutory mandate (Colo. Rev. Stat. § 35-70-108) into land management policy and direction for federal agencies to consider.

For example, one of the Districts' responsibilities is: "To prepare a plan for the care, treatment, and operation of the lands within the district." Colo. Rev. Stat. § 35-70-108(1)(k). Additionally, Colorado conservation districts were created by the state legislature to provide for constructive methods of land use providing for the conservation and preservation of natural resources, including adequate underground water reserves, the control of wind and water erosion, and the reduction of damage resulting from floods. The purposes of the conservation districts are to "insure the health, prosperity, and welfare of the state of Colorado and its people . . ." Colo. Rev. Stat. § 35-70-102.

Similarly, by state statute, Colorado county governments, like Rio Blanco County, are also local governments with special expertise. In fact, Colorado statutes allow local governments to:

Coordinate, pursuant to 43 U.S.C. sec. 1712, the “National Environmental Policy Act of 1969”, 42 U.S.C. sec. 4321 et seq., 40 U.S.C. sec. 3312, 16 U.S.C. sec. 530, 16 U.S.C. sec. 1604, and 40 C.F.R. parts 1500 to 1508, with the United States secretary of the Interior and the United States secretary of Agriculture to develop land management plans that address hazardous fuel removal and other forest management practices, water development and conservation measures, watershed protection, the protection of air quality, public utilities protection, and private property protection on federal lands within such county’s jurisdiction.

Colo. Rev. Stat. § 30-11-101(k).

Thus, based on these statutory authorities, the policies and powers of these local governments encompass the obligation to protect the customs and culture of the local citizens, to provide for community stability, and to protect the natural environment and resources as cooperating agencies.

In addition to stating that federal agencies shall consider local governments as cooperating agencies, NEPA regulations specify the procedures regarding the same. With respect to cooperating agencies, NEPA regulations state that the lead agency shall:

- (1) Request participation in the NEPA process at the earliest practicable time.
- (2) Use the environmental analysis and proposals of cooperating agencies with

jurisdiction by law or special expertise, to the maximum extent practicable.

- (3) Meet with a cooperating agency at the latter's request.
- (4) Determine the purpose and need, and alternatives in consultation with a cooperating agency.

40 C.F.R. § 1501.7(h) (2023).

The lead agency shall develop a schedule, set milestones for environmental reviews in consultation with all lead, cooperating and participating agencies as soon as practicable. 40 C.F.R. § 1501.7(i) (2023). With regard to cooperating agencies, the regulations require:

(b) Each cooperating agency shall:

- (1) Participate in the NEPA process at the earliest practicable time.
- (2) Participate in the scoping process (described in § 1501.9).
- (3) On request of the lead agency, assume responsibility for developing information and preparing environmental analyses, including portions of the environmental impact statement or environmental assessment concerning which the cooperating agency has special expertise.
- (4) On request of the lead agency, make available staff support to enhance the lead agency's interdisciplinary capability.

(5) Normally use its own funds. To the extent available funds permit, the lead agency shall fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(6) Consult with the lead agency in developing the schedule (§ 1501.7(i)), meet the schedule, and elevate, as soon as practicable, to the senior agency official of the lead agency any issues relating to purpose and need, alternatives, or other issues that may affect any agencies' ability to meet the schedule.

(7) Meet the lead agency's schedule for providing comments and limit its comments to those matters for which it has jurisdiction by law or special expertise with respect to any environmental issue consistent with § 1503.2 of this chapter.

(8) To the maximum extent practicable, jointly issue environmental documents with the lead agency.

40 C.F.R. § 1501.8 (2023).

Because of the split in the circuits related to the required analysis in *Public Citizen*, participation in the scoping process is minimized if the federal agency and local government have to try to figure out how broad the "indirect effects" are depending on where they anticipate litigation will be filed. To ensure that directly impacted federal agencies and local governments can comply with NEPA, the D.C. Circuit and the Ninth

Circuit should be required to interpret *Public Citizen* as this Court plainly stated.

C. Impacts of the Split in the Circuits on the Regulated Public

The impact of the split in the circuits over the basic tenants of the breath of the issues in a NEPA document also significantly affects the regulated public such as TN Ranching Co. and members of the Wyoming Stock Growers Association. According to the Council of Environmental Quality, approximately 12,000 substantive environmental reviews under NEPA are completed by the federal agencies each year. *See* Council on Environmental Quality, “The Fourth Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (NEPA),” October 2016, https://ceq.doe.gov/docs/ceq-reports/Attachment-A-Fourth-Cooperating-Agency-Report_Oct2016.pdf. Although BLM grazing permits, like the ones held by TN Ranching Co. and the members of the Wyoming Stock Growers Association, are renewed every 10 years, the BLM manages approximately 18,000 such permits, meaning that the BLM has to complete 1,800 NEPA analyses and permit renewal decisions each year on grazing alone. Because complying with NEPA is getting increasingly difficult based on the massive amount of litigation that is filed, the BLM is behind on their renewal process and litigation has been filed alleging the court must order the BLM to rectify the backlog and complete the NEPA process for grazing permit renewal. *See Western*

Watersheds Project et al. v. Secretary of the Interior, 23-cv-02677 (D.D.C., filed September 12, 2023) (*WWP litigation*). While the WWP litigation does not allege a violation of failure to adequately consider indirect impacts, the resulting NEPA analysis for the *amici* grazing permits will individually involve an analysis of “indirect effects” and whether such analysis by the lead federal agency and cooperating agencies is upheld will depend on where any final decision is challenged.

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CONCLUSION

WHEREFORE, *amici* respectfully request that the Supreme Court grant the Petition for Writ of Certiorari.

Respectfully submitted,
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