In the

Supreme Court of the United States

FLINT RIDGE DEVELOPMENT COMPANY,
Petitioner,

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA, ET AL., and

CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,
Petitioner,

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA, ET AL.,
Respondents.

No. 75-510

No. 75-545

Washington, D.C.
April 27, 1976

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HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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Petitioner, v. THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA, ET AL., Respondents.	:	No. 75-545

Washington, D. C.

Tuesday, April 27, 1976

The above-entitled matter came on for argument at 10:41 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

HOWARD E. SHAPIRO, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioner Hills, et al.

F. PAUL THIEMAN, JR., ESQ., 5800 East Skelly Drive, Tulsa, Oklahoma 74135, for the Petitioner Flint Ridge Development Company.

ANDREW T. DALTON, JR., ESQ., 2536 East 51st Street, Tulsa, Oklahoma 74105, for the Respondents.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 75-510, Flint Ridge Development Company against Scenic Rivers Association and No. 75-545, Carla Hills against Scenic Rivers Association.

Mr. Shapiro, you may proceed whenever you are ready.

ORAL ARGUMENT OF HOWARD E. SHAPIRO

ON BEHALF OF PETITIONER HILLS, ET. AL.

MR. SHAPIRO: Mr. Chief Justice, and may it please the Court: This case is here on writ of certiorari to the United States Court of Appeals for the Tenth Circuit. The question is whether an environmental impact statement must be prepared by the Administrator of the Office of Interstate Land Sales Registration before the registration of subdivision lots under the Interstate Land Sales Full Disclosure Act of 1968 may become effective. And to state the meaning of the question, I will have to explain the Disclosure Act.

The Disclosure Act requires developers selling or leasing 50 or more unimproved lots pursuant to a common promotional plan to file a registration statement, called a statement of record, with the Administrator. The Administrator is the delegate of the Secretary of Housing and Urban Development to whom the functions of carrying out the Disclosure Act have been assigned by Congress.

The Act also requires the developer to furnish a

document called a property report to each purchaser of a lot within the registered subdivision. The proper report contains information from the statement of record which purchasers need to make their decisions. And a statement of record is a detailed description of the property, its ownership, title, access roads, and so on. In some respects the entire process is like a securities registration, and the property report is a good deal like a securities prospectus describing a particular subdivision.

QUESTION: The law was more patterned on the Securities Act of 1933, wasn't it?

MR. SHAPIRO: Yes, it was, your Honor, and I think that's quite a significant point in viewing the Act because the Securities Act of 1933 really represented a choice for Congress to go two ways. It could have decided in favor of some degree of substantive regulation of the economic merits of the securities issue, and instead it opted simply for a disclosure requirement. When Congress decided there were problems about the interstate sale of subdivision lots, it could have done the same thing. It could have empowered the Administrator to consider the merits of subdivision lots and make comments and recommendations on them. Instead, it opted for not substantive regulation, but simply a system of full disclosure.

QUESTION: When was this law enacted?

MR. SHAPIRO: This law was enacted in 1968, your Honor.

Now, unless these disclosure statements are on file and in effect, the developer may not use the mails or facilities of interstate commerce to sell or lease the lots. The statute provides that the Administrator has 30 days from the date the developer files the disclosure statement with his office to determine whether they are accurate and complete in their disclosures under the Act and the regulations.

QUESTION: That's all he has the authority to determine.

MR. SHAPIRO: That's all he has authority to determine.

QUESTION: He can't hold it up because he thinks it's a bad deal for buyers or because he thinks it's a bad use of the land.

MR. SHAPIRO: No. In fact, the Act is explicit on that, your Honor. It provides in section 1716 of the U.S. Code , 15 U.S.C. 1716, that a registration may not be taken to mean that the Secretary or his delegate here, the Administrator, has passed upon the merits -- that's the language of the statute -- has passed upon the merits of the development or has approved it. So the Congress was quite clear they did not want any kind of comment by the Federal Government or control by the Federal Government over the merits

of land use planning or use of subdivisions in any way. They simply wanted disclosure to protect purchasers.

QUESTION: I take it that there are some statements that are required in the filing that relate to the environment.

MR. SHAPIRO: Yes, they do. The statute calls for a disclosure of information about nuisances and sewage and drainage.

QUESTION: What if it had thought that some of those statements were false?

MR. SHAPIRO: If anything required by the statute or regulations is false --

QUESTION: Who do you call him -- the Administrator?

MR. SHAPIRO: The Administrator.

QUESTION: How does the Administrator know if they are false or not?

MR. SHAPIRO: Well, he has a field force which does some inspecting in connection with registration, and if there are false statements that violate the statute, it could be a criminal offense to violate the statute. In any event the Administrator has the power to suspend the registration just as the SEC does for false or inaccurate statements.

QUESTION: Or incomplete statements.

MR. SHAPIRO: Or an incomplete statement. And this brings us to the time limit in the statute. The process works under strict time limits. The developer submits his

disclosure statement when he is ready to begin sales and he wants to use the facilities of interstate commerce. The statements in this record, which I think are Plaintiff's Exhibit 1, are typical. It's a document several inches thick. Once the statements are filed, the 30-day limit that Congress as imposed on the Administrator to complete clearance of those statements goes into effect, starts ticking away.

QUESTION: Can that be extended?

MR. SHAPIRO: If the Administrator finds that the registration statements proposed by the developer are --

QUESTION: Are deficient.

MR. SHAPIRO: -- deficient, he can suspend it until corrections are made.

QUESTION: Indefinitely?

MR. SHAPIRO: Well, what he will do is advise if the registration is suspended. The developer then has a strong incentive to get the correction, and when the corrections are filed, another 30 days starts ticking away, and the effort is then made by the Administrator to complete his review before that 30 days. When that's over, the Administrator sends a letter, nothing more, a letter to the developer saying, "Your registration is effective." And that letter is not an approval of the merits of the project or a report of any kind. It's not even a license; it's simply a notification.

QUESTION: But the Administrator does act

affirmatively to that extent.

MR. SHAPIRO: To that extent.

QUESTION: That is so in every case.

MR. SHAPIRO: In every case, to assure that there is adequate disclosure.

Now, the petitioners in this case are the Secretary and the acting Administrator and a private developer whose disclosure statements were suspended by the courts below until HUD had prepared an environmental impact statement on the merits of the project involved. That project, known as Flint Ridge, is located on heights above the Illinois River which is 70 miles east of Tulsa, roughly, in northeastern Oklahoma. Respondents, the plaintiffs below, were environmental groups concerned with the preservation of the Illinois River in its natural state. They sued to prevent Flint Ridge's disclosure statements from becoming effective until HUD had prepared an environmental impact statement on the development.

The district court and the court of appeals in agreed with the respondents and suspended Flint Ridge's registration until an impact statement is completed by the Administrator.

Now, in our view this case only involves one issue, whether section 102(2)(C) of the National Environmental Policy Act, or NEPA, applies to HUD's supervision of developers' disclosures under the Land Sales Disclosure Act. There is no

question here that the NEPA applies in full to HUD's activities respecting substantive regulation of any kind or grant or other substantive activities. But we are dealing with a narrow question, that is, what section 102(2)(C) requires in a situation like this where there is no substantive regulation.

Section 102(2)(C) of NEPA in effect requires Federal agencies to 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 concerning the environmental effects and alternatives. It requires a Federal agency to weigh the environmental merits of their planning and substantive decision-making, but in our view it doesn't at every point of Federal contact with the private sector. There has to be a Federal proposal or recommendation for and a report on major Federal action. The language of 102(2)(C) is qualified.

Now, the Administrator here is empowered to review the disclosure statements, as has already been indicated, only for accuracy and completeness. This, we submit, is not major Federal action within the meaning of the statute. It's not major Federal action because the Administrator cannot pass on the merits of projects, and, of course, you cannot write an environmental impact statement without passing on its merits, at least to weigh them and to list alternatives,so that that point seems quite clearly barred by the statute

itself expressly, and it's also barred because of the nature of the function since we are only dealing with the disclosure function.

Secondly, we submit that the Administrator makes no recommendation or report on a proposal for major Federal action.

Now, I have already indicated that the statute bars the Administrator from passing on the merits or approving any subdivision. What Congress intended was that land use planning should be reserved to the States. In fact, it went so far as to say that no developer can represent that the Secretary has approved or recommends any particular development. And that's even reflected in the property report as described in the regulations since on the face of every property report there is a disclaimer that this property report does not represent any approval by the Secretary of Housing and Urban Development or any comment on the merits.

QUESTION: Is it your view that the phrase "major Federal action" is the critical phrase?

MR. SHAPIRO: It's exactly in that phrase that it's qualified.

QUESTION: And that the statute, the National Environmental Policy Act of 1969 does not apply even though the action is major unless the Federal participation in the action is also major. Is that it?

MR. SHAPIRO: That's essentially it, your Honor, because what we are dealing with here -- well, really what we are saying is that you cannot turn major private action into major Federal action, even by virtue of --

QUESTION: By virtue of minor participation by the Federal Government.

MR. SHAPIRO: That is exactly the point, your Honor. And we think that this was clearly Congress' intent in the Disclosure Act because of the provisions they included in it barring comment on the merits because the legislative history, where Congress in the Senate report expressly said that the Government may not pass upon the quality of what is being sold or upon such questions as land value, land use, or zoning. They clearly left the whole question of land use planning to the States.

QUESTION: Is it your claim that this is not Federal action at all?

MR. SHAPIRO: No, no. Clearly the Administrator has --

QUESTION: As I paraphrased it the first time was your position.

MR. SHAPIRO: Yes. That's correct.

This becomes even clearer when you look at what the Administrator does not do. He has no land use planning function. He doesn't disburse any funds. He doesn't give any HUD guarantee. He has no control over the design of subdivisions.

He is not permitted to stop a private development or direct the developer to go ahead. He is not in any sense in partnership with the private developer. Indeed, in this case, there are no Federal funds of any kind involved and no Federal planning involved in the Flint Ridge development. It's a private enterprise.

When you consider this in the light of the fact that the Administrator normally has 30 days in which to complete his review before one of the statements automatically becomes effective, it's apparent that you cannot get an environmental impact statement requirement out of the statute.

QUESTION: What's wrong with the argument that an impact statement ought to be prepared and filed so that the Administrator can tell whether the disclosures are adequate and accurate?

MR. SHAPIRO: I think one reason is that it's the Administrator who has to prepare the impact statement.

QUESTION: That's just the statement is a statement of fact.

MR. SHAPIRO: Yes, it is, your Honor.

QUESTION: So instead of making an investigation with his field force and have them write a report to him, he has them write an environmental impact statement saying, "Here are the facts; here is what this will do," and then he has to tell whether the disclosures and the filing are adequate and

accurate.

MR. SHAPIRO: Well, the impact statement in that context would serve primarily as a check-up on the developer. That's what you are implying, that we could have it as a check-up on the developer.

QUESTION: He has to do that, doesn't he? He has to make up his mind whether he is going to approve this filing or not.

MR. SHAPIRO: Well, the principal check on the developer is the obligation to make truthful statements and the criminal sanctions that follow.

QUESTION: He sends people out, I suppose, as you have suggested to see if these disclosures are accurate.

MR. SHAPIRO: Usually they inspect the registered subdivisions themselves to see that they haven't been changed. It is a very limited field force. But the statute itself wouldn't permit the preparation of this within the 30 days. Most environmental impact statements take at least 120 days to prepare, and on a major project a great deal longer. So that the Administrator really has to rely on the submission by the developer and most developers are truthful.

But there is another function which an impact statement could serve, I suppose, and that is that it could tell purchasers about the nature of the development. But that's not involved in this case because --

QUESTION: It could also tell State enforcement authorities something that they might not know.

MR. SHAPIRO: Yes. And that's one of the things they mainly argue here. But that's not involved in this kind of a case because there hasn't been any request here that the basic document for giving information to purchasers and the State authorities, namely, the registration statement be amended to include more environmental information. They haven't requested that the regulations be amended. They simply say that, well, we would like more information, therefore, you must file an impact statement.

Now, given the fact that Congress intended land use planning to be for the States, it seems to me rather difficult to argue,for a State particularly to argue, that, well, we need information so the Federal Government ought to give us more information.

QUESTION: Mr. Shapiro, are there any provisions of the National Environmental Policy Act that require impact statements or their equivalents by anybody but the Federal agencies?

MR. SHAPIRO: No. Section 102(2)(C), as I understand it, applies only to the Federal Government. There is no provision for private developers to file one.

QUESTION: In any aspect or under any circumstances, as far as you know.

MR. SHAPIRO: Under present law, that is my understanding.

QUESTION: Has it ever been suggested or held that the Securities and Exchange Commission ought to file an environmental impact statement when it permits a registration to go into effect?

MR. SHAPIRO: No, it has not. The court below misread a decision called National Resources Defense Council v. SEC out of the District Court for the District of Columbia. That case held that SEC in adopting regulations dealing with more environmental disclosure would have to adhere to the Administrative Procedure Act and make fuller disclosure, arguably, than it had made. But there was no case holding that environmental impact statements are necessary in each SEC filing. In fact, if we had to have them, the impact on our nation's capital markets would be just devastating because of the number of securities issues that are involved.

QUESTION: Well, has even that been held.

MR. SHAPIRO: That has not been held.

QUESTION: Anywhere other than in the District of Columbia?

MR. SHAPIRO: Even the District of Columbia case didn't go that far, your Honor, and no case, to my knowledge, has gone that far.

QUESTION: Has there been any litigation on it beyond

that District of Columbia litigation, that you know of?

MR. SHAPIRO: That I know of, no.

QUESTION: Any claim, in other words --

MR. SHAPIRO: No, what has been going on is a very elaborate rule-making proceeding before the SEC with respect to how much additional disclosure is necessary. That's still going on. There have been hearings and proposals, but certainly there have been no --

QUESTION: That is environmental kind of disclosure?

MR. SHAPIRO: Yes, environmental disclosure, which, of course, is a different question than we have got here. The plaintiffs here did not go to the Administrator and say, "Amend these regulations to require more environmental disclosures in statements of record and property reports.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Thieman.

ORAL ARGUMENT OF F. PAUL THIEMAN, JR.

ON BEHALF OF PETITIONER FLINT RIDGE

DEVELOPMENT COMPANY

MR. THIEMAN: Mr. Chief Justice, and may it please the Court: What is major Federal action? That's the issue in this case. Congress commanded all agencies of the Federal Government in those instances where it proposed to take action which is major Federal action which has a significant effect upon the environment that it must prepare an impact statement.

This impact statement must be prepared by the agency prior to the time that it undertakes the action. The impact statement itself is a detailed written statement prepared by the agency. It describes the impact of the proposed action upon the environment. It describes what alternatives there are to the proposed action.

The purpose of the impact statement is to be used by the agency as a tool to assist it in its decision-making processes. In that connection the agency weighs the impact of the proposed action upon the environment. It measures the benefits of the action against the burdens on the environment. Most importantly, what the purpose of the impact statement is is that it gives to the agency the power to take into consideration as to whether or not it should permit the project to go forward, whether it should modify the project, or whether or not it should stop the project altogether because the environmental consequences are so severe.

Now, if the agency under its organic Act doesn't have the power to permit the project to go ahead, to modify it to reduce the environmental impact, or to stop the agency action altogether, then there is really no use or purpose to fulfill in the preparation of the statement because it's meaningless. To determine whether or not an agency has the power to permit actions to go forward, to modify the proposed action or to stop it altogether, you have to look to the

organic Act under which the agency was created to determine whether or not the agency has such authority and power under the Act. And in this case, when you look at ILSA, you will see that ILSA was passed by Congress and dealt with the subject of sales. In the spectrum of land development sales is at the very end, because what has preceded sales is land acquisition, the planning, the financing, and to a substantial effect development and development afterwards. All of those things which preceded sales HUD has no involvement in and has no authority and has no jurisdiction over the developer's activities.

Take, for instance, Flint Ridge in this case. Flint Ridge acquired its property in February of 1973. No Federal approval was required by HUD in connection with that acquisition. When Flint Ridge was doing its planning and when it was doing all of the things that had to be done to comply with the State and local laws of Oklahoma, there was no approval required by HUD in connection with those approvals, and when Flint Ridge obtained its financing, no Federal approval was required by HUD in connection with that. And more importantly, at the time that Flint Ridge began its construction, which was in 1973, which was more than six months prior to the time that it filed its registration statement with HUD, it actually undertook its construction activity. And by the time of the trial in this case, it had spent over

$3.5 million in construction on this development. And in connection with all of this expenditure of money, all of the construction activities, Flint Ridge did not have to obtain the approval of HUD.

QUESTION: What sort of a development was this?

MR. THIEMAN: This is a second-residence subdivision, your Honor.

QUESTION: And how many units?

MR. THIEMAN: The first -- this is the so-called first phase, and there was 1,014 lots in the first phase.

QUESTION: And how many structures?

MR. THIEMAN: The part that was being sold is vacant lots to purchasers.

QUESTION: I see.

MR. THIEMAN: Of course, what happens in this kind of a development, a developer never knows beforehand how many of the lots within the subdivision that he is going to sell with houses on them, how many he will be selling with contract to build houses, how many he will be selling to other developers -- and by the way all those types are exempt sales under the Act. So what a developer really does is that he registers all of these lots to keep his options open.

QUESTION: You were talking about the timing and you said that HUD doesn't play any part even as a recipient until the time comes for sales. And I was wondering how much

had then been done. Not very much actual construction of structures, is that right?

MR. THIEMAN: Your Honor, it's not in the record, but what is in the record is that between July of '73 and July of '74, over $3.5 million had been spent in actual construction of the development.

QUESTION: That is including sewage or septic tanks, or whatever?

MR. THIEMAN: No, this was just roads, a water treatment plant, improvements, club houses, those types of improvements.

QUESTION: But not the individual units.

MR. THIEMAN: Not the individual units.

So we have a situation that if HUD doesn't have any control over the development activities of the developer, which really is what causes the impact upon the environment, then HUD should not be required to do an environmental impact statement.

QUESTION: The developer has expended all of his money, roads, club houses, and other facilities at his own peril.

MR. THIEMAN: Well, you use the term "peril" --

QUESTION: In the sense that he doesn't know what the ultimate consequence is going to be for the project.

MR. THIEMAN: Is your Honor talking about, when you

say "peril" --

QUESTION: Well, it has been held up now, I take it.

MR. THIEMAN: That's correct, though we say erroneously so.

QUESTION: Yes. But I am talking about hard reality.

MR. THIEMAN: Yes, we have been held up.

I would like to save the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Dalton.

ORAL ARGUMENT OF ANDREW T. DALTON, JR.

ON BEHALF OF THE RESPONDENTS

MR. DALTON: Mr. Chief Justice, and may it please the Court: What we have here is an action brought by several thousand people in the State of Oklahoma who have come together in one way or another in action against their Federal Government to seek compliance and enforcement of Federal law. The shorthand law is NEPA, and, of course, we have the problem when we use the shorthand of sometimes forgetting what the meaning of the language is. It's a National Environmental Policy Act. There has been an attempt to interject before this Court issues of fact and law that were not litigated in the trial court, were not presented before the Tenth Circuit, and have no basis in the record or anything that we are doing here today. For example, we start off with this proposition: The

Department of Housing and Urban Development absolutely refuses to comply with the National Environmental Policy Act, period. That's what started this lawsuit.

The issue before this Court, or non-issue before this Court, is not how you do an environmental impact statement, but, for example, the CEQ and HUD cosponsored a study concerning the environmental consequences of these second-home developments, and one of the purposes of that study was to provide an outline and an environmental information base handbook that can be used to evaluate the consequences. Other people have developed handbooks. There is one by Messrs. Burchell and Mistican from Rutgers. It's a detailed handbook on how to do these things.

It is not the type of EIS that is involved here. We can't get to that issue until they agree to do something.

Another thing that is not at issue before this Court is what to do with the environmental impact statement in whatever form it takes once it is done.

Now, the State of New Mexico has filed an amicus brief and has suggested in their brief many things that can be done and perfectly consistent with the Act in 102(G), I believe it is now, of circulating it among States and local agencies, the information that can be obtained. And they say they really utilize it and they need it very desperately.

QUESTION: Do you suggest that the environmental

impact statement which you think should be filed will bear at all on the decision by the Administrator with respect to the filing?

MR. DALTON: It could very well provide information with respect to the accuracy of the filing. It could very well provide information with respect to the administration of the Act itself, that is, there are many things that the Administrator --

QUESTION: I take it you would be here, however, even if the filing required nothing at all with respect to the environment? no facts at all that that could be called environmental?

MR. DALTON: Yes. And in the record also we have sworn testimony from several officials of the State of Oklahoma, from Offices of Planning and Development, from Offices of Pollution Control and Recreation, concerning the use and utilization which they would put with the information, in asking for the information. And that's consistent with the Act itself. It's one of the purposes of the Act.

Another thing that is not before this Court in terms of issues is whether you can disapprove a filing on environmental grounds. And there are cases such as Zabel v. Tabb out of the Fifth Circuit that say that you can disapprove on environmental grounds. I believe they did similar things in Marco Island here just recently.

QUESTION: What was the reasoning of the Fifth Circuit in the Zabel case?

MR. DALTON: Simply that the National Environmental Policy Act, and particularly 101, provides substantive authority to the agency involved to consider environmental matters and could reduce or suspend or prevent a permit on environmental grounds.

QUESTION: Was that consistent with our first SCRAP opinion in which we said that NEPA does not alter or amend any other statutory provision? And here you do have a statutory provision, don't you, that the Administrator doesn't express any position on the merits?

MR. DALTON: I don't think it's a matter of amendment. I think it's a matter of an enlargement, of giving the agency one more thing to consider.

QUESTION: That was the argument in first SCRAP and it was rejected by this Court.

MR. DALTON: Well, I don't myself understand SCRAP to mean that. I understand SCRAP I to mean that NEPA did not revive a judicial remedy that had previously been excluded.

QUESTION: Well, the opinion said something along the lines that it didn't amend any other statutes, didn't it?

MR. DALTON: Yes, sir.

QUESTION: I think that is the language to which my brother was referring in his question.

MR. DALTON: Yes, sir.

Another issue is not whether HUD can do anything about the environmental degradation it finds, although there are, I believe, many things it can do about it -- provide information to others, for example. And HUD has promulgated what is called Handbook 1390.1, Guidelines for Compliance with the National Enviornmental Policy Act, and part of that requires and directs the members of the Department to meet with and discuss these matters with the developer, the applicant, to work out an amicable way of resolving some of these things without necessarily through an enforcement procedure.

There are other things that are not at issue before this Court, and I think it goes to the question of what really is at issue. The facts are not at issue. The significance of the degradation is not at issue. Judge Bohanon found actual potential effect in all aspects of the environment, for example, upon the depth and course of the river itself, upon socio-economic conditions, esthetic conditions, the habitat, the fish and wildlife. These are on appeal and are not at issue before this Court, and they are found at his finding No. 14.

Another matter that is not at issue before this Court, and which is admitted, is that the filing and the permission to sell interstate commerce facilitates the developer in obtaining money in interstate commerce, and without that, this development would not exist.

They talk about there would be degradation anyway. Well, that's talking about something in abstract, because in the facts of this case, it would not be degradation anyway. We note that they have said they are not doing anything now. Much of this money is spent for other things than environmental degradation. For example, in the record -- and it reflects that less than one-half of the paved roads are in place, less than one-third of the unpaved roads are in place. There are only 16 of the potential 3,000 septic tanks in an area that is ill-suited for septic tanks, according to the findings of the court. There are virtually no structures existing on the 7,000 acres. The human involvement there is minimal at best. The social-economic problems that would ensue as a result of this development are yet to occur and will occur in the future and perhaps by thinking about it now, we may be able to mitigate that, either at the State, local, or Federal level.

Another problem with that argument is that it can ask you to freeze a point in time the question of environmental impact and consider the Flint Ridge in a vacuum, which the Court did not do. There are peripheral effects. Other developments may occur, side issues with respect to development, satellite developments and this sort of thing may occur. This is a very fragile echosystem, the Illinois River Basin.

We also see that many of the effects that will flow from this development will be continuing in nature.

The option, for example, for 14,000 more acres has been dropped. And some of the things they talk about exempting lots and so forth, they haven't done it. In fact, in the letter to this Court asking that it be advanced for hearing, they did complain of the fact that they were at a standstill, if you will. So there is significance to what the Tenth Circuit said and what Judge Bohanon said about money and interstate commerce and the connection between the filing of the approval to sell interstate commerce and the obtaining of money and the environmental degradation.

The issue in this case must be considered of what HUD is trying to do. HUD is trying to get this Court to condone their excessively narrow construction of their operating authority in spite of what Congress said. The issue is very simple. Must HUD under the facts of this case prepare an environmental impact statement in a format tailored to the circumstances of this case prior to giving permission to sell interstate commerce. The answer is simple. Yes, they must. And why? It is compelled by the language of the statute itself, by the legislative history of the statute, by all cases which have construed the National Environmental Policy Act to date by CEQ guidelines and by HUD's own handbook, 1390.1.

Do we have major Federal action significantly affecting the quality of the human environment? You can't

bifurcate that language. It is all part of the same term. And whether you have one or two tests really don't make any difference under the facts of this case. We have proven in the record, and accepted by the trial court and the Tenth Circuit, facts to reflect each test. We approve in magnitude; we approve in controversy; we approve in cumulative effect; we approve in --

QUESTION: Will you pinpoint, for me at least, the major Federal action? What is the major Federal action?

MR. DALTON: Well, the Federal action, to begin, is the giving of permission to sell interstate commerce as a result of a filing. It becomes major when you consider the end result that occurs, and that is the substantial, actual, potential, or cumulative effect on the environment, as stated, for example, in Simmans v. Grant, which is cited in the brief, but for this filing the degradation would not take place. In other words, they were not going to do anything unless they can get that money in interstate commerce. As stated in the Minnesota Public Interest v. Butz case, it makes little sense to call a Federal action minor when the end result, whether by public authority or by private authority, is major.

QUESTION: What if the Federal action consisted only in carrying some of the correspondence of this developer in United States mails and yet the development was absolutely mammoth and had a tremendous impact on the environment and there was Federal action that was essential to get his financing from

the New York bankers. Would that require an environmental impact statement?

MR. DALTON: Well, I am not certain that is a Federal action --

QUESTION: It's an essential ingredient of his financing. Without carrying it in United States mails, this could not possibly be accomplished.

MR. DALTON: If we assume hypothetically that there is a statute which requires the use of the United States mail to send --

QUESTION: No, no, just in fact. This was sent in the mails, and you had the present legislation, you had the present language of the National Environmental Policy Act of 1969.

MR. DALTON: Utilize the mails to mail documents to bankers --

QUESTION: And to get the financing.

QUESTION: And to solicit sales.

MR. DALTON: And to solicit sales. I think probably in that situation they have nothing, I believe nothing, which would result in the degradation substantially because of Federal involvement, although I can see --

QUESTION: You have in mind the facts of my hypothetical?

MR. DALTON: Sir?

QUESTION: You have in mind the facts --

MR. DALTON: Yes, sir. If that is a necessary --

QUESTION: The financing wouldn't be possible without --

MR. DALTON: Fine. Then, if that is the case, this becomes major Federal action significantly affecting the quality of the environment and would require compliance, in my opinion, yes, sir.

QUESTION: That applies to every construction in the country, doesn't it? If it involves money, it involves a major Federal intervention, because you get money through interstate commerce. That's your position.

MR. DALTON: You can get money through interstate commerce, although there is the option available not to get money in interstate commerce, in other words, there are specific exemptions in the Act itself in which they could obtain money in interstate commerce but not have to qualify under the Interstate Land Sales Act. They could have also gone strict intrastate.

QUESTION: But that's your only basis for the major Federal intervention, that's your only one.

MR. DALTON: As far as the Department of Housing and Urban Development is concerned, the only thing they do is to administer the Interstate Land Sales Act.

QUESTION: But I mean this particular case, what was the major Federal action?

MR. DALTON: Giving the permission to sell in interstate commerce which resulted in significant effect on the quality of the human environment.

QUESTION: And that's all.

MR. DALTON: Yes, sir, that's all in any case.

QUESTION: I'm talking about this case.

QUESTION: Suppose there is a securities registration statement filed with respect to a bond issue, the proceeds of which would be used for an offshore oil rig which if installed would certainly have environmental consequences, does the SEC, because it could disapprove, have to file an environmental impact statement?

MR. DALTON: Yes, sir, in my opinion they would. I think probably to maybe get to some of these questions a little more directly, the National Environmental Policy Act is -- one thing, is an administrative reform statute, and it is designed to achieve a certain amount of cooperation among all of the Federal agencies.

Now, one of the problems with the argument that has been presented today and probably one of the underlying premises of the question is that we are talking about HUD existing in a vacuum. There are other Federal agencies. Now, if HUD can't do anything about it, they are required to provide the information and should provide the information to other Federal agencies, State agencies, and local agencies which may in fact be able to

do something about it, whether HUD can or will. So I think probably the answer to your question is very definitely yes.

QUESTION: Mr. Dalton, say that last sentence again. I didn't hear it.

MR. DALTON: The answer to your question is definitely yes, because we cannot consider the lead agency or the responsible agency in a vacuum. They are required to cooperate with other agencies which may and can and probably will do something about it.

QUESTION: Doesn't an affirmative answer, then, really mean the SEC in almost every securities registration situation has to file an environmental impact statement?

MR. DALTON: That is true, but probably there is a fear that an environmental impact statement may look something like the Alyeska situation. I think we can tailor it to the circumstances at hand.

QUESTION: You don't think it would be enough to satisfy the need of other agencies and of local authorities if the Administrator here or the SEC in that context had a rule which required detailed information from the filer?

MR. DALTON: Yes, sir. Well, in this case the HUD Handbook 1390.1 requires such information.

QUESTION: Assume it's true, assume every filing would be true, would the environmental information then be there at public record?

MR. DALTON: It should be, yes, sir.

QUESTION: Why would the agency have to prepare a statement to --

MR. DALTON: That could be the form that the environmental impact statement takes, the development of that type of information which --

QUESTION: Why isn't the more sensible way of going about the problem under this Act to attak the rules to say that there should be a different rule about the filing and its contents?

MR. DALTON: In our opinion, when we began this action, we felt that our position was limited to the facts of this case, the Illinois River in the State of Oklahoma. We discerned or felt we may have some problems with respect to standing and some other issues, a limited amount of approach that we could take, and we directed our question to the Illinois River.

QUESTION: I take it from what you said a minute ago that you might not be here at all if the Administrator had what you thought was an adequate rule with respect to what the developer had to file.

MR. DALTON: If that rule were consistent the National Environmental Policy Act and were promulgated in response to the National Environmental Policy Act. I see no --

QUESTION: Your claim is that in this case the Act,

the statute requires the agency to file an impact statement. That's what's at issue here, isn't it? That's the only issue.

MR. DALTON: Yes, the agency is required to file it, I don't know that the development of the information necessarily must come out of the minds and pockets of the agency.

QUESTION: No, perhaps not. But if you are correct, the statute, the 1969 Act requires the Federal agency to file the impact statement.

MR. DALTON: That is true to some extent. Of course, NEPA has been amended to allow in certain circumstances State agencies which have statewide jurisdiction to participate or prepare --

QUESTION: To participate, certainly, and to help in the preparation. Maybe the agency can contract it out. There are all sorts of questions. But the Act requires the agency ultimately to file it, doesn't it?

MR. DALTON: They accept responsibility for it, yes, sir.

QUESTION: Right. And if you are right, then it's the agency that must file it. This case doesn't have anything to do with what the agency might or might not, or should, require the applicant, the builder, the developer to file, does it?

MR. DALTON: Only in the sense that the Act is a mandate to be innovative and to try to develop ways and means

to the fullest extent possible comply with the Act. This is language of the Act itself. And also not to use an excessively narrow construction of its operating authority to avoid compliance.

QUESTION: The issue here and the only issue, as I understand it -- and you tell me if I am wrong; I often am and may be again -- whether or not the agency has to file an environmental impact statement. Isn't that the only issue here?

MR. DALTON: That's correct.

QUESTION: Is it even quite that. The statute doesn't speak in terms of filing a statement; it speaks in terms of the agency including in a statement with a proposal or recommendation. I was curious to know precisely what is the proposal that is supposed to incorporate the environmental impact statement under your theory of the sequence of events that the agency is to follow here.

MR. DALTON: I think it is a proposal for recommendation, and so forth, that falls within the category of other major Federal action significantly affecting the quality of the human environment term in that section which has to do with the decision to permit the sales in interstate commerce, and that is the triggering action.

QUESTION: But the Administrator really has almost no discretion in deciding whether to permit those sales, does he

once he is satisfied that truthful disclosure has been made?

MR. DALTON: Once he is satisfied, sure, but he has tremendous, or she has tremendous, discretion in determining what is necessary before there is adequate compliance, not only what is necessary in protection of the purchaser, what is necessary in protection of the public interest, and what would make the filing not misleading under the circumstances. These are left for the Secretary and her Administrator to determine.

QUESTION: But that all goes to what the Secretary may require to be filed by the developer, not what the Secretary or the Administrator himself may file in terms of a proposal.

MR. DALTON: No, but that's the thing, what is developed in compliance with the Act. And when you have superimposed upon the Interstate Land Sales Act, the requirement of compliance with NEPA, this would include environmental information sufficient to apprise all parties, all agencies of government, State, local, or Federal, of the environmental consequences.

See, what we have here, I think, is a statutory mandate to exercise compliance with the Act to the fullest extent possible. It's not inherently flexible.

We must construe this statute, the National Environmental Policy Act, from its four corners. We can't pick

out 102(2)(C) and say that this is the only part of the Act. I think all of the cases in regular statutory construction will tell us that. It's a mixed question of law and facts involved in this case, and I think that is one of the things that they said in SCRAP in this case.

They talk about a so-called conflict, and this is this 30-day thing. We must begin with the preface that in order to avoid compliance, the Act -- it must be impossible or it must be expressly prohibited. First of all, this question of conflict was never raised in the trial court. It has not been litigated and there are no facts before this Court in respect to conflict. Again, we are not talking about doing an EIS.

The Tenth Circuit described this as a superficial argument, and quite correctly. ILSA, the Interstate Land Sales Act and NEPA are very compatible. Theyare both full disclosure laws; they both provide information in the public interest. And in fact, if you get into the legislative history of both of them, they used virtually identical language.

There is no specific exemption to compliance in ILSA. They are both -- the Interstate Land Sales Act and the NEPA -- have been amended, and in fact since the instigation of this litigation. And I am sure that Congress knows how to exempt the Department of Housing and Urban Development from compliance. They do so by saying that nothing herein shall be

considered major Federal action significantly affecting the quality of the human environment, and they have done it in several statutes, but not in this one.

To come before this Court and argue that there is a conflict is to admit a specific violation of section 103. Section 103 required all these agencies, HUD included, to review their operating authority and their statutory mandate to determine whether there were any insuperable barriers to compliance. There is nothing to indicate that that review process was to await the taking of major Federal actions significantly affecting the quality of human environment. It was to be done by a date certain. We must conclude, therefore, that HUD did it and found no insuperable barrier to compliance. As the Court said in Calvert Cliffs it's too late now to raise this argument.

Compliance is consistent with CEQ Guidelines. CEQ Guidelines talk about a license, an entitlement to use or a permit. In fact the CEQ itself in a letter dated July 7, 1975, from the Director, to David O. Meeker, of Housing and Urban Development, talked of several arguments that needed further discussion and attention, and among these has been a concern about NEPA compliance in the Office of Interstate Land Sales and suggested ways of complying, such as incorporate information on the environmental impacts in the statement of record, establish thresholds to determine

significance, prepare a program, EIS's and this sort of thing. And they said we believe that HUD could solve the issue by taking steps in line with the above suggestions. The CEQ themselves feel that there is not compliance, and, of course, their determinations are entitled to great weight.

Is there a conflict by administrative burden? They talked about administrative burden in their briefs. We begin with the preface that Congress did intend to interrupt business as usual in these agencies which heretofore have not cared one iota, and before this Court today the Department of Housing and Urban Development does not care one iota about the environment.

The GAO, I think we cited this in our brief, has criticized them, and I think they quite correctly characterized their lack of concern is based on empire building.

We could go further and to say they flat don't care.

The facts of the case control the type of compliance, and it's not that difficult. One of the purposes, as I think we pointed out, has been partially fulfilled, and that is interagency cooperation. The statute must be read as a whole, and to foster interagency cooperation is one of the purposes. Whether HUD can or will do anything about the substantial destruction or the total destruction of this river and the whole basin is not at issue; it is whether maybe

somebody else can as a result of the action that is being taken. It's just not impossible to comply. They can prefile it, they can include it in their filing, they can use the 1390.1 format, they can make a rule.

Gentlemen, the cases below are correct in all respect. They are legally correct, based upon the statutes, the legislative history, the cases that have construed the Act to date, and all of these regulations and guidelines that are involved. They are economically correct. In trying to internalize our true costs and recognize those ultimately, one of the purposes of the National Environmental Policy Act was to learn and quantify all of these costs so that they can be taken into consideration for the protection of the public and the public interest.

It is ethically correct. We have tried to evolve through time a course of ethics of people dealing with people, of people dealing with their society. To date we have not really realized the firm ethics among people, their society, and their environment. The National Environmental Policy Act says, "to create, foster, and maintain a state of productive harmony between man and his environment." That is nothing more than the statement of a principle of ethics. To reverse this case would be to deny the ethical content of the Act and to deny the evolutionary principles of ethics involved. We must continue to restore and maintain that state productivity.

If we do not, we are in for a lot of trouble, particularly in the Illinois River Basin.

NEPA is a vehicle to provide us information. Until we have that information to act intelligently, to make intelligent decisions, we will continue to operate in the dark and to violate the express and exact intent of Congress that we no longer continue to ignore the environmental consequences of our decisions at every agency level, at the lowest level possible in Congress.

Thank you. We ask that you affirm.

MR. CHIEF JUSTICE BURGER: Mr. Shapiro, do you have anything further, or Mr. Thieman? You have about 3 minutes left.

ORAL ARGUMENT OF HOWARD E. SHAPIRO

ON BEHALF OF THE PETITIONER HILLS ET AL.

MR. SHAPIRO: One brief point, your Honor.

We want to make clear that if the developer completely discloses all the facts required under the Act and the regulation, the Administrator must allow his disclosure statement to become effective. He can't suspend it for any reason except inaccuracy or incompleteness.

QUESTION: Does the regulation require the disclosure of any environmental facts at all?

MR. SHAPIRO: If it does, your Honor, the statute and the regulation both do.

QUESTION: Can you point to that?

MR. SHAPIRO: Yes. The regulations at 24 C.F.R. --

QUESTION: Are they in the papers we have?

MR. SHAPIRO: They are not in the papers. You would have to go to the Code of Federal Regulations. It's 24 Code of Federal Regulations 1710.105, and they describe in detail the contents of the statement of record. Among those items that affect the environment --

QUESTION: 1710.105?

MR. SHAPIRO: 1710.105, 24 C.F.R. 1710.105.

Among the factors that bear on the environment are a requirement for a description of the topography, of the climate, nuisances, noises, access and roads, local utilities, including such things as water, sewage, drainage, flood control. There has to be a description of recreational and common facilities which would include things like the human factor in the environment, schools, fire, police, health, shopping facilities, and all that.

QUESTION: What part of the statute bears on this, if any?

MR. SHAPIRO: In the statute, specifically the 12 items that are specifically required to be included --

QUESTION: Is this in the appendix to your brief?

MR. SHAPIRO: This is in the appendix to the brief. I was looking at the petition, but it's in the brief also.

QUESTION: Somewhere around 5a?

MR. SHAPIRO: 4a, 5a. It's section 1406 on page 5a. It's 15 U.S.C. 1705.

QUESTION: All right. Which subsection?

MR. SHAPIRO: Subsection 2, which requires a description of topography; subsection 3 --

QUESTION: No, that hardly does.

MR. SHAPIRO: Subsection 5, in particular, which calls for a description of noise and safety, and other facilities, municipalities. And then these are expanded. It's 2 and 5 expanded by the regulations.

QUESTION: That kind of environment from the purchaser's point of view.

MR. SHAPIRO: Yes, which is the purpose of the statute, your Honor. And going back to my point, if the developer discloses all the information required by the statute and regulations, then the Administrator has no choice but to allow his registration statement to go into effect. And that doesn't matter -- that is so regardless of the quality of the development.

QUESTION: Even though in disclosure it says this is very noisy.

MR. SHAPIRO: They could disclose it's noisy; they could disclose that .. water.

QUESTION: And terrible drainage.

MR. SHAPIRO: As long as they disclose the facts required.

QUESTION: Then you say your friend's clients must come in and act on that statement?

MR. SHAPIRO: Yes, your Honor.

QUESTION: But not expect HUD to do the impact statement.

MR. SHAPIRO: That is right. The only thing they could do would be to ask that the regulation be broadened to include more environmental information for the use of all interested parties.

QUESTION: If they looked at these data and asserted that they were false statements, that the noise was greater than disclosed, that drainage was not as good as disclosed, then what would they do about it? What would be their remedy?

MR. SHAPIRO: As long as they were not purchasers, their only remedy would be to complain to HUD and to the Attorney General alleging there had been violations of the Act --

QUESTION: Would that stand, do you think?

MR. SHAPIRO: Well, they could at least write a complaint, as any citizen can. They would not have any standing to bring a legal proceeding as such.

QUESTION: It's a matter between the registrant and HUD, isn't it?

MR. SHAPIRO: The purchaser also has certain -- if

they were purchasers, it would mean a lot. Then they would have a standing to revoke, to sue for injunctive relief and for certain damages -- these are all contained in the Act -- and, of course, to complain of the violation.

QUESTION: What if there were 2,000 people who owned homes around the perimeter of the development area?

MR. SHAPIRO. Their remedy would only be to go to HUD and say, "You ought to have better regulations," and petition for better regulations.

QUESTION: But they would have no standing, you think, in any --

MR. SHAPIRO: Any legal proceeding.

QUESTION: -- legal proceeding.

MR. SHAPIRO: That's right.

QUESTION: Is the filing of a deliberately false statement by a developer subject to criminal liability?

MR. SHAPIRO: Yes, it is, your Honor.

QUESTION: I suppose anyone can write to the Criminal Division or the U.S. Attorney and --

MR. SHAPIRO: That's right, your Honor.

QUESTION: Is that 25 percent or whatever it is?

MR. SHAPIRO: There is no fee, but we do depend on them for enforcement. And there have been criminal actions brought under this statute where there has been misrepresentation.

QUESTION: They need standing to be ..

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:41 a.m., the arguments in the above-entitled matter were concluded.)