

In the

Supreme Court of the United States

THOMAS S. KLEPPE, Secretary of the
Interior, et al.,

Petitioners,

v.

SIERRA CLUB, et al.,

Respondents.

No. 75-552

AMERICAN ELECTRIC POWER SYSTEM, et al.,

Petitioners,

v.

SIERRA CLUB, et al.,

Respondents.

No. 75-561

Washington, D.C.
April 28, 1976

Pages 1 thru 79

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-552, Kleppe against Sierra Club; and 75-561, American Electric Power against Sierra Club.

Mr. Randolph, I think you may proceed when you're ready.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR., ESQ.,
ON BEHAL OF KLEPPE, ET AL.

MR. RANDOLPH: Mr. Chief Justice, and may it please the Court:

This case, which is here on writs of certiorari to the United States Court of Appeals for the District of Columbia, arises under the National Environmental Policy Act, which I will refer to as NEPA throughout my argument.

This provides that an environmental impact statement shall be included in every report or recommendation on proposals for major federal actions significantly affecting the environment.

The federal petitioners violated the provision I've just quoted, according to the Respondents in this case, because they had not prepared one massive impact statement covering all federal activities relating to coal mining in an area respondents call the Northern Great Plains Region. That is a 90,000-square-mile area described in their complaint as comprising northeastern Wyoming, eastern Montana, western

North Dakota and western South Dakota.

I've had distributed to the Court two maps, both of these maps are taken from material in the record. I don't plan to refer to them now, but later in my argument I will refer to them directly.

On cross-motions for summary judgment, the district court ruled in favor of the government and the intervenors in this case.

Among the court's many findings of fact at this stage and on remand for supplementing the record, two findings of fact, we believe, are crucial and dispositive in this case.

First, that the Northern Great Plains Region defined by respondents is not "an entity, region or area considered by the federal government for purposes of any federal program, project, or action."

Second, that there is no existing or proposed federal regional program, plan, project, or other regional federal action for developing coal in the region respondents have defined.

The district court, with respect to these two findings of fact, could not have found otherwise. Our evidence was to this effect in the district court and respondents, without offering any other contrary evidence, not only conceded that no plan or program for development of their Northern Great Plains Region existed, they stressed

that fact.

They argued to the district court, they argued to the Court of Appeals that NEPA compelled the government to adopt such a regional plan or proposal, an argument that, in this Court, they now have ostensibly dropped.

I'll mention briefly a number of the other district court's findings of fact, and then proceed to my argument. And these are findings taken both from the original proceeding in the district court and from the remand.

One, that the government has prepared and will continue to prepare environmental impact statements for groups of mines or individual mines within the area described in respondent's complaint. These impact statements, the court found to be, at page 114a and 115a of the Petition Appendix -- these statements the court found to be comprehensive, and noted that they assessed the cumulative impacts of coal mining and related activities.

One of the statements, impact statements that the district court considered is the six-volume Eastern Powder River Basin impact statement. And for the benefit of the Court, this isn't before the Court, but I brought a copy in so the Court might see what an impact statement looks like; all six volumes.

It covers an area in Wyoming of approximately -- I can't lift it; I would if I --

[Laughter.]

QUESTION: Not with a bad back.

QUESTION: I can't see it from here.

QUESTION: I can.

QUESTION: Right in front of your chair.

MR. RANDOLPH: This covers an area in northeastern Wyoming of approximately 7500 square miles, which is about the size of the State of New Jersey, and focuses on four mining plans and a railroad right-of-way.

As I said, the district court found that that statement was comprehensive and assessed cumulative impacts of coal mining.

The district court found, in addition, that since 1970 the government, the federal government, in cooperation with States, industry, private groups, other individuals, local governments had conducted various coal related studies in the Western States. These were studies only, I must emphasize.

One of these, which was prominently mentioned in the briefs and also in the opinions below, is the Northern Great Plains Resources Program, the NGPRP, as it's sometimes referred to, which was begun in 1972. This was a joint investigation by the States of Wyoming, Montana, Nebraska, North Dakota and South Dakota, that collected data on geology, minerals, including coal, and mainly coal, air quality, social

and economic conditions, and so forth. And then analyzed all this material on the basis of possible development scenarios.

The study, or the program, as I should refer to it, proposed no regional plan; it suggested no preferred development program; it suggested no development program whatsoever. It was not designed to, the district court so found.

The district court also found that since 1973 the Secretary of Interior had continued in effect what was a virtual moratorium on private coal development, new private coal development in the federal coal reserves throughout the country. During this period, a national impact statement or, as it's sometimes referred to, a coal programmatic was prepared. This assessed the old procedures that the Secretary had utilized under the Mineral Leasing Act, and it formulated a new process applicable nationwide for implementing that same Act.

On the basis of this evidence, the district court found that the government had taken action under NEPA, but it was national action in scope, the action was on a national basis.

As to the region that we're discussing in this case, the district court found, as I stressed before, there was no special plan or program for that region as such; and certainly no regional action.

The Court of Appeals reversed, with one judge

dissenting. The Court majority accepted the lower court's findings of fact, but held that the government was, and I use the Court's word, "contemplating" a regional program.

The relevance of this apparently was that under the lower court's, Court of Appeals' view, an impact statement under the state NEPA must be issued well in advance of any report on proposals for major federal action, ergo, contemplation could trigger the impact statement requirement.

I must stress, though, that the Court of Appeals did not hold that the government had yet violated NEPA, but only that it would if it kept following the course that the court thought it was following. And in light of this, the Court issued a remand order, and instructed the government to announce whether it would do one impact statement covering this 90,000-square-mile area.

In January this Court stayed the Court of Appeals injunction, which had prevented the Secretary of Interior from taking action with respect to the four pending mining plans analyzed in the Eastern Powder River Basin impact statement.

Thereafter, in February of this year, the Secretary approved those four mining plans.

As I stated at the outset, we think the district court's decision in this case is correct, and we think the district court's findings of fact end this case.

The government has completed a national impact statement covering coal leasing policies nationwide. It includes an analysis of the four States here, it includes an analysis of every State where federal land is located.

It's completed this massive impact statement covering the Eastern Powder River Basin in Wyoming. That statement has not been challenged in any court. In fact, the statement covers three-quarters of all the economically recoverable coal by strip mining in the area that the respondents define as the Northern Great Plains Region.

QUESTION: Did the government concede that it was required by the Act to file a national impact statement?

MR. RANDOLPH: Yes. It was a national program, and it was major federal action; but it was nationwide. It's been filed -- that's -- the government also has issued impact statements for individual mines, for clusters of mines, and in fact will continue to do so.

The argument here, however, is that none of this is sufficient. That an impact statement must be done for an area smaller than the United States but larger than the Eastern Powder River Basin, which is the size of the State of New Jersey, as I stated.

Even if respondents are right, that that would be a good idea -- and we do not think it would be -- we do think that the National Environmental Policy Act does not mandate

this.

QUESTION: May I ask you, before you proceed, Mr.

Randolph: As was pointed out in another case during the argument yesterday, the language of 102(2)(C) is a little -- it doesn't say anything about filing an impact statement, it just says it shall "include in every recommendation or report on proposals for legislation and other major federal actions" -- I guess the language "recommendation or report on proposals for" qualifies "other major federal actions", or maybe it doesn't.

But what has become -- my question is: What has the government done with this big impact, national impact statement?

It doesn't file it anywhere.

MR. RANDOLPH: No, it doesn't file it; it distributes it in a draft form --

QUESTION: But the statute doesn't require that anything be done with it, except that it be "included in every recommendation or report on proposals for legislation and other major federal actions."

MR. RANDOLPH: Yes. Well, --

QUESTION: It's kind of dumb language.

MR. RANDOLPH: -- what it's done, Mr. Justice Stewart, is published -- and I will give the Court the cite, if I can find it -- in 41 Fed Reg 11035, in March of this year,

a series of regulations implementing the proposals and suggestions and the formulated policy that the National Impact Statement prepares.

So, in other words, they did an impact statement, they have assessed the National Coal Policy --

QUESTION: Right.

MR. RANDOLPH: -- and in 41 Federal Register they have now published regulations which the Secretary expects to implement, taking the suggestions and putting into the policy of environmental factors.

QUESTION: And this is then a proposal for a major federal action?

MR. RANDOLPH: It's a real action on a proposal.

QUESTION: Yes.

QUESTION: Well, if it's simply a report, what was the proposal or major federal action which required it under the Act?

MR. RANDOLPH: The major federal action would be the Secretary's adoption, which he did, I think, in the -- there's an appendix to the green brief by the American Electric Power Company that shows on January of this year the Secretary adopted the new Mineral Leasing Program suggested in the National Impact Statement.

QUESTION: And this is a report on a proposal for major federal action?

MR. RANDOLPH: Yes. Of course, that is not in issue in this case at all.

QUESTION: No, but I just was wondering.

MR. RANDOLPH: And what is at issue in this case, in fact, is whether he has to do an impact statement for the area that respondents have described.

QUESTION: Right.

MR. RANDOLPH: In addition to the ones he's already done.

And, as you pointed out, Mr. Justice Stewart, what the statute says is that a final impact statement must be issued with each report or recommendation on proposals for major federal action.

In this case --

QUESTION: The "and" ought to be an "or". Shouldn't it?

"Legislation or major federal actions".

MR. RANDOLPH: Yes, there's another source --

QUESTION: "Or other major federal actions."

MR. RANDOLPH: -- involved in this case.

QUESTION: Yes.

MR. RANDOLPH: The district court, as I stated, found that a regional plan does not exist and has not been proposed for this region that we're talking about.

Certainly if it hasn't been proposed, there's no

report or recommendation on such a regional proposal for development. The district court so found.

The only proposals in existence here are private applications that the government must act on. The district court found none of the private applications are for regional action. The grant of one coal mining lease does not permit the Secretary of the Interior to grant another any place else in that region.

What, then, are the relevant major federal actions in this case?

The National Coal Leasing Program we've discussed, but we've done an impact statement on that. That leaves only the approval of particular leases, mining plans, rights-of-way, and so forth.

To be sure, these have to be the subject of environmental impact statements. And they will be, if they're not already, the subject of an environmental impact statement.

But, in the absence of a proposal for regional action and a report on that kind of a proposal, NEPA does not require a regional impact statement. Otherwise -- realize what a court is saying to the federal agency; it's saying, "Well, you don't have a regional development program. But we're going to order you to do a regional impact statement, evaluating the environmental effects of the regional action you would have planned if you had a regional program."

"And, on top of that, since NEPA requires you to consider alternatives, we're going to ask you, direct you to consider the alternatives to the regional action you don't have planned but you would have planned if you had."

We don't think that makes any sense.

QUESTION: Mr. Randolph, it is true, though, is it not, that in a challenge to a particular impact statement, relating to a particular mining lease, the argument might be made that it's inadequate because it doesn't sufficiently discuss regional consequences?

MR. RANDOLPH: Yes, that could be done.

QUESTION: And they might, in such a challenge, ask for the same thing they seem to be asking for here?

MR. RANDOLPH: They could. And they have. Environmental groups have asked for that in a number of different cases, and the circuits around the country have looked at the scope of the impact statement: Does it assess the cumulative effects of one more mine and one more mine?

Does it -- is it comprehensive? Does it consider not only the effect of this mine, but the secondary effects?

That's the test. This statement has not been challenged. This statement does that, according to the findings of fact of the district court on page 114a of the petition.

So we think that the district court's findings of fact that there is no regional plan existing or proposed are

conclusive and end this case.

That is not a very complex analysis, we admit. But NEPA, I think I should remind, requires impact statements for actions, not for areas. And we think that our analysis is a proper analysis, as do the other circuits, including now the Second Circuit on remand from this Court, reversing its prior decision in the Conservation Society case.

We think that, to paraphrase Chief Justice Marshall, we must never forget that it is a statute we are expounding here; and if that is forgotten, if a court goes further than that, as respondents ask this Court to do, it enters a never-never land.

Suppose five or ten or any number of suits were brought in regard to the area that we're talking about in the Midwest? Some picked a different area for study. Some picked overlapping areas. Others picked areas that were smaller. Others larger. Some independent.

I submit there is absolutely no principal way for a court to say, after sifting through all the environmental studies and statistics, that here, this is the one area under NEPA that you must study federal agencies.

Now, respondents have proposed a test to enable the Court to do that. I'll call it the three-adverb test, although I'm not sure they're all proper adverbs. And it's a test, I must add, that the district court, or the Court of Appeals

itself did not adopt.

Respondents say that the area they have chosen is mandatory because all federal actions are -- and I use their adverbs -- geographically, environmentally, and programmatically related.

This is summarized in their brief at pages 28 to 29 and then expanded upon throughout.

I'll take the least likely adverb first, programmatically --

QUESTION: Geographically, programmatically -- and what's the third?

MR. RANDOLPH: Environmentally.

QUESTION: Environmentally.

MR. RANDOLPH: I'll take the least likely adverb first, programmatically. Now, I suppose what they mean by this is that all federal actions regarding coal development in the area take place under the same federal program. If they're referring to the National Program for implementing the Mineral Leasing Act, their assertion is true but irrelevant.

One could draw a line around any piece of federal land in the United States and make the same statement. It doesn't lead to their region at all.

If they're referring to some other program for development of their region, their statement is in flat, direct

contradiction of the findings of fact of the district court that there is no such program existing or proposed, a finding of fact, as I stated, that respondents conceded.

Now, they make two other statements. They are geographically and environmentally related.

I think these statements, and we submit these statements, are meaningless, also.

If one encircles any area within the United States, one can say that all the actions within that area are geographically related.

It is likewise environmentally related, in the sense that the effects on the environment from activities within the region will be, of course, felt within the region.

Respondents' answer to this is that our region makes sense because, and I quote from their brief at 104, "it is a geologic fact the extent of the region is defined simply by the presence of coal."

For this they cite their map, and I'd like to turn to that, on page 103 of the respondents' brief.

The shaded portion of that map at 103, respondents tell us, represents, and they say, the Fort Union and Powder River coal formations, and that is the extent of the region.

But we submit that map is highly misleading, and certainly inaccurate.

In the first place, it omits all the coal fields in

the States that they have dealt with here, and I'll get to that in a moment.

But first I'd like to talk about the geologic fact.

QUESTION: Was the map in evidence in the district court?

MR. RANDOLPH: Well, there was a map that was contained in the back pocket of the Northern Great Plains Resources Program that was a geologic map. They referenced that map on the righthand corner of page 103 and say they have drawn this from that map.

And that's what I'm just about to discuss, Mr. Justice Rehnquist.

First of all, they talk about the Fort Union and Powder River coal formations. In fact, what this map shows is the surface exposure only of a portion of the Fort Union rock formation. There is no such thing as a Powder River rock formation, and, in fact, to be precise, there's not such thing as a coal formation at all.

What there is -- the phrase is sometimes used, I admit; but what in fact you have are coal seams in rock formations. So, to get this straight, they have drawn here the surface exposure of the portion of one rock formation, the Fort Union rock formation.

Now, what they have left out, even in respect to

this, is the fact that the Fort Union rock formation goes on for miles and miles and miles beyond this area they've drawn. In fact, --

QUESTION: Well, I suspect you could go a long way before you find nine people that knew less about the Fort Union rock formation --

[Laughter.]

QUESTION: -- than the ones you're arguing to.

We can't resolve this as a question of fact, certainly.

MR. RANDOLPH: I will make that point.

QUESTION: Okay.

QUESTION: It's been made.

[Laughter.]

MR. RANDOLPH: But to sum this up as far as their map is concerned, they've left out about 100,000 miles of the Fort Union rock formation. There is coal in the Fort Union rock formation, and I'll give the Court the pages: pages 218 to 220 in the regional impact statement reports coal in the Fort Union rock formation as far south as the Colorado-Utah border that runs into -- I think it runs into Idaho. It's the Green River coal field.

Anyway, there are about 100,000 miles off if they're drawing the Fort Union rock formation.

QUESTION: Mr. Randolph, I had the impression from

the Court of Appeals opinion that they didn't contrive this area, though, that they found this area in a lot of work that had been done by the government in one way or another. Isn't there some basis for that?

MR. RANDOLPH: That's right. They found this in a geologic map. But I think they --

QUESTION: Well, then, you attribute the arbitrary selection to them or to the government?

MR. RANDOLPH: No. They have, in fact, tried to -- they have another line around this -- tried to duplicate the Northern Great Plains Resources Program Study area, but they left out the State of Nebraska, which that also studied, and that study considered various different areas throughout the different States for different programs.

It didn't propose anything, it was a development program. The reason, we admit --

QUESTION: Well, let me put the question a little differently. Are you saying that the area they described is one that they defined initially, without any reference to prior government tentative proposals or tentative planning or anything like that?

MR. RANDOLPH: The precise area that they define is their area, yes.

The area, just the miles, square miles covered by the Northern Great Plains Resources Program is 140,000 square

miles; theirs is about 90,000 square miles.

It takes in part of the area that this program studied.

Now, right before we break, I'd like to refer to our map and the yellow portion. The underlay on this map is what we understand to be their region, if they had drawn the coal field rather than the rock formation, which is not -- so they don't correspond.

But the underlay is what we understand to be their region. They say: The extent of our region is defined by the presence of coal.

The overlay is the presence of coal, and I don't think one has to -- and there are other coal fields, they look like a botched Rohrschach inkblot test, but there are other coal fields throughout the area -- I don't think one has to be versed in Euclidean geometry to see that on that map any number, countless numbers of lines could be drawn around countless numbers of areas.

Now, if it's simply the presence of coal that defines the region, where does one draw the line? This map is a little misleading, too, because that's a macro-view, and if the Court gets the impression that all that coal is minable, it's a wrong impression, that I'll dispel after lunch.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock.

[Whereupon, at 12:00 noon, the Court recessed to 1:00.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Randolph, you may pick up where you left off.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR., ESQ.,

ON BEHALF OF KLEPPE, ET AL. -- Resumed

MR. RANDOLPH: Mr. Chief Justice, may it please the Court:

I was about to say that the foldover map we have is a kind of a macro-view, a not very well focused satellite picture of coal fields.

The other map we have, however, is a very focused picture of the surface minable coal deposits in the area generally represented, I think, by respondents' complaint.

When one looks at this map, and the blackened areas are the areas of the surface minable coal --

QUESTION: Now, which map are we talking about now?

MR. RANDOLPH: The photographic reduction of the very large map.

Now, the blackened areas are the economically recoverable coal. In the portion on the yellow map that is represented by the underlay -- this map that I'm referring to now shows the economically recoverable coal there.

Our point about this is that when one does focus down even more sharply into this area, where does one draw the

line?

Now, I would suggest, just on a look at this map, that one logical place to draw a line around is in the lower part of the map, in the series of mines that runs north to south, with the numbers 7, 1, 2, 10, 8, 3, 4. If the Court sees that?

QUESTION: Yes.

MR. RANDOLPH: The lower portion of the map, on the lefthand side, toward the west, there's a series of mines with numbers by them, 7, 1, 2, 10, 8, 3, 4. That's where the Secretary of Interior drew his line. He encompassed that area with a 50-mile-wide slot that runs 150 miles north and south.

That's the Eastern Powder River Basin. It's called that because it's to the east of the Powder River, and it lies in the shallower formation. As I said, not all the coal in this area is in the Fort Union rock formation; much of the coal there is in what they call the Wasatch formation.

But, again, my point in all this, and the conclusion from all these maps is that the kind of geological mistakes I've been talking about, we think are inevitable, unless -- unless, in the absence of a regional plan for development, it is left to the Secretary of the Interior, who has the expertise in geology, who has the expertise in environmental considerations, who has the expertise in administering his own

program, thus it's left to him to define the appropriate areas for study in his administration of the Mineral Leasing Act.

QUESTION: Mr. Randolph, --

MR. RANDOLPH: Yes?

QUESTION: -- up in the lefthand corner, these proposed mines, have impact statements been put on those?

MR. RANDOLPH: Some are underway. The --

QUESTION: I see you've got three proposed there.

MR. RANDOLPH: Yes. I would --

QUESTION: One of them is in your area, isn't it?
One of them is in the Powder --

MR. RANDOLPH: Yes, there are two other mines, for which individual impact statements are prepared for them.

And also, I might add for the Court, there are two other clusters of mines on this map; one in the upper right-hand portion of the map and another in the middle portion of the map.

Regional impact statements in considering all those mines are going to be prepared, the Secretary of Interior announced to Congress, the Senate committee, about two months ago.

But, again, my point in all this is that -- in the absence of a regional plan, the definition of the area to be covered has to be left to the Secretary. It's in his discretion.

I think one of the curiosities of this case is that respondents rely upon a case called Udall v. Talman, which, as the Court remembers, is a case that says: in regard to the interpretation of a statute by an official who administers that statute, it's entitled to great weight.

The statute in that case was the Mineral Leasing Act.

QUESTION: Right.

MR. RANDOLPH: The official who administered it was the Secretary of Interior.

QUESTION: What if the Secretary simply decides to make a study of, say, a region of four or five Western States, without recommending or proposing any legislation or any major federal action; does that have to be accompanied, in your view, by an impact statement?

MR. RANDOLPH: Absolutely not. Such studies, Mr. Justice Rehnquist, are underway all the time, continuously. The very existence for the Bureau of Land Management, the very reason for the existence of the Bureau of Land Management, of course, is to manage the federal lands, and they are constantly studying the resources and so on and so forth.

The Bureau of Mines is not really a regulatory agency, it's really a research agency. And they conduct studies all the time.

Various areas are constantly being studied. I think all the federal land, at one point or another, is under constant

analysis and study, for coal mines, for various things. So we don't think that that would require an impact statement. I think the result of that would be that it would deter the governmental agencies from studying the material.

Now, suppose everything I've told to the Court, at least in the argument portion so far, suppose I'm mistaken? Suppose I'm wrong?

Suppose the Court of Appeals accurately detected that a regional development plan is in fact contemplated, and that it just so happens that this regional plan the government is supposedly pondering corresponds, it just happens to correspond with the region that respondents have identified?

Nevertheless, we submit the government still prevails in this case.

The fact is NEPA does not say, or even imply, that an impact statement must be done on contemplation. NEPA does not say that an impact statement must be done when that contemplation somehow mystically rises to the level of a proposal.

What the statute does say, and Mr. Justice Stewart pointed this out earlier in my argument, it says that an impact statement must be done, included in a report on the proposal.

And SCRAP II, this Court's decision in SCRAP II, said and held the statute means what it says. I quote from

the opinion: The time at which an agency must prepare the final statement is the time at which it makes a recommendation or report on a proposal for federal action.

Even under the Court of Appeals opinion, which said the only thing that exists here is some contemplation, that time has not arrived. And we submit it may never arrive. As a matter of fact, we go further, we said, we would submit, it will never arrive.

The court below, we think, therefore, should have affirmed. In the absence of, and violation of NEPA, and the court below found none, it was improper for that court to continue the injunction which prevented the Secretary of Interior from taking actions that have already been fully analyzed in what the district court found to be a comprehensive impact statement that assesses the cumulative consequences of coal mining. That is, the statement for the Eastern Powder River Basin.

I'd like to reserve the balance of my time, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Mendicino.

ORAL ARGUMENT OF V. FRANK MENDICINO, ESQ.,

ON BEHALF OF WYOMING AS AMICUS CURIAE

MR. MENDICINO: Mr. Chief Justice, and may it please the Court:

I am here today on behalf of the State of Wyoming and 21 other amici States, because we have a lot at stake, we think, in the decision that this Court reaches in this case.

We believe that NEPA contemplates a major State role in the implementation of the Act. We know from experience that the impact of federal programs on our States are tremendous. And we believe that program environmental impact statements are truly the only means that we have of determining the scope and the magnitude of these federal programs.

We think that Interior, the Department of the Interior, would defeat those objectives by preparing environmental impact statements under NEPA on a project-by-project basis; and that's our understanding of the real issue in this case.

Now, let me tell you a little bit about the Wyoming experience and what's happening on the ground in my State.

At last count we had no fewer than 134 coal leases, pending applications or prospecting permits in the Eastern Powder River Basin.

Projections for the next few years in the northeastern part of our State call for 34 strip mines, nine electric power and coal gasification plants, 225 miles of new power lines, and 150 miles of new railroad tracks.

We respectfully submit that it's ridiculous to think that a series of environmental impact statements on each one of those particular projects, all of which require, either

directly or indirectly, federal action before they can come into fruition. We think it's ridiculous to think that a series of environmental impact statements on those projects will analyze what's going to happen to our State, in the same way that an environmental impact statement, taking all of them into consideration in determining the cumulative effect of all of those projects, would have.

QUESTION: Mr. Attorney General, your neighboring State of Utah has not joined you in your brief, has it?

MR. MENDICINO: No, sir.

QUESTION: As a matter of fact, it's filed a brief on the other side.

MR. MENDICINO: Yes, sir; it has.

QUESTION: Is that because their experience is somewhat different than yours?

MR. MENDICINO: I believe that one of the reasons -- and I really can't -- I really perhaps can't answer that. I think that they had a facility which has since gone by the board, Your Honor, that may have played a part in their decision not to join in the brief. That's really the only reason that I can give you for that.

After this litigation was initiated, there has been -- or have been indications that the Department will now agree to prepare sub-regional impact statements.

We suggest that that's not a great deal better, at

least in the way that we understand they intend to do it, on a project-by-project basis.

Let me use as an example of this, Sheridan County, Wyoming. There are few --

QUESTION: Mr. Attorney General, what do you do with the language of the statute? Where has there been a regional federal proposal?

MR. MENDICINO: We don't know, Your Honor. We think that they should know.

QUESTION: Well, I know, but if they say there isn't.

MR. MENDICINO: We believe very strongly --

QUESTION: The only time you submit an impact statement is when the federal government makes a report on a proposal. And there hasn't been a report on a proposal on a regional basis.

MR. MENDICINO: Your Honor, we would differ with that.

QUESTION: Well, where is it? That's what I asked you. Where is the report?

MR. MENDICINO: What we are saying in this case, Your Honor, is that in the Department of Interior they do in fact have plans for an area larger in scope than a project-by-project basis, or even larger than the Eastern Powder River Basin.

We don't know where it is, but we do know, as a

matter of fact, as most people do in this country, that we face an energy crisis. We do know that we have enormous untapped natural resources in our State, and we do know that the projects which I have suggested in --

QUESTION: Well, how would you suggest the case go forward, have a lawsuit and call the people from the Interior Department and ask them if they have a proposal or a plan, or what?

MR. MENDICINO: I think the first thing that has to be done is the result of the decision in this Court, is that a determination be made as to the scope of environmental impact statement. If you agree that NEPA calls for an environmental impact statement on a project-by-project basis only, then I think that obviously you would necessarily decide that our argument is incorrect, in terms of the language of the statute.

QUESTION: Well, don't you think before -- under the statute, wouldn't you have to find that there was a proposal somewhere for a regional plan?

MR. MENDICINO: Yes, sir, I certainly do. I don't think we've gotten to that point yet.

QUESTION: Well, I know, but until you find that, isn't the requirement for an impact statement limited to the project that's been proposed?

MR. MENDICINO: Not if there is a plan. They have

taken the position, as I understand the issue -- now, I can't honestly say that I got this understanding from my brother's argument; but as I understand the basic issue in the case, it is whether or not a project environmental impact statement is sufficient.

If you agree that --

QUESTION: Well, wouldn't it be sufficient if all they have in mind, or that's the only proposal that ever has been made is for a project?

MR.MENDICINO: If the only proposal that they have made. But we say that the facts and the pronouncements from the Department clearly demonstrate that their plan goes much further than that. The leases that I have mentioned to you point that out.

QUESTION: Well, I gather, as far as the statute is concerned, at least if you just limit consideration to the words on their face, before they trigger an impact statement there has to be a recommendation or a report on something. And it goes on to say, something, "on proposals for legislation and other major federal actions".

But unless we can say that something, or a court can say that something constitutes a recommendation or a report on one of those things, that the statute doesn't call for an impact statement.

QUESTION: In other words, what is the major federal

action that you rely on?

MR. MENDICINO: Well, I've got to confess, Your Honor, that I've got to rely on Mr. Terris for that.--

QUESTION: Well, wasn't the --

MR. MENDICINO: -- portion of the argument.

QUESTION: -- wasn't the finding of the district court quite to the contrary? That there was no -- that the only proposal there was was a project proposal?

MR. MENDICINO: Yes, that was the finding.

QUESTION: Well, did the Court of Appeals set that aside and find it was erroneous?

MR. MENDICINO: The way that I read -- contrary again to my brother's interpretation -- the way that I read that is that the Court of Appeals sent that back to determine whether or not there was a program that was larger in scope than the project, the specific project.

QUESTION: Thank you.

MR. MENDICINO: That's, I think, extremely important.

I started to mention Sheridan County, and I think you could note this on the map. There's very little development anticipated in that county.

QUESTION: Where is that one?

MR. MENDICINO: That is in the northern part of the State, Your Honor.

QUESTION: Oh, I see it. That's left here of the --

is it -- yes.

QUESTION: On this map, left of the Powder River Valley?

MR. MENDICINO: It's the --

QUESTION: Yes.

MR. MENDICINO: It's the area there with the three small coal deposits that are shown on the left.

QUESTION: The area where 5 and 6 are.

MR. MENDICINO: Right.

The projections for the increase in the population in that county are only nine percent by 1981. However, there are extensive developments taking place south, in Johnson County, Wyoming, in North and Big Horn County, Montana.

If you take the anticipated development with the accompanying population increases, the projections for those two counties, in addition to Sheridan County, the projections are that there will be a population increase in Sheridan County alone of over 40 percent by 1981.

And I think the implications of that, in terms of the need and demand for public services, are obvious. And that points out why we believe that the environmental impact statement has to take into consideration more than a single project.

Now, as stated in the amicus brief, I repeat here, we have not taken a position as 22 States on what that

geographical area should be. We do feel, however, that it must be broader, and that the Act calls for it to be broader than a project-by-project basis.

QUESTION: Mr. Attorney General, you've recently had an extraordinary increase in population down in the Rock Springs area of your State.

MR. MENDICINO: That's right, Your Honor.

QUESTION: Was that attributable to coal development or to something else?

MR. MENDICINO: In part, Your Honor; some was coal and some was trona.

QUESTION: Some was --?

MR. MENDICINO: Trona. Which is another mineral substance.

QUESTION: And that was a --

QUESTION: What else was it?

MR. MENDICINO: Trona, Your Honor.

QUESTION: That was a population explosion down there. Was it anticipated?

MR. MENDICINO: No, sir; not at all. And this is -- this is why we feel that we have such a stake in this game.

QUESTION: Mr. Attorney General, isn't your real point that eventually Interior is going to have to broaden its area and file a report broader than it has, and when it does it will have to have an impact statement? All in the

future.

MR. MENDICINO: That's in part correct, Your Honor.
I suppose that I would --

QUESTION: Well, I don't know what statute you're going to get that under.

MR. MENDICINO: We believe that the development of the West has got to be, just because of the pronouncements and the statements that have been made -- there's more to it than just a determination as to whether we should want to --

QUESTION: But you're relying on the NEPA Act, that's all you're relying on; am I right?

MR. MENDICINO: Yes, sir.

QUESTION: And you're not under it.

MR. MENDICINO: Well, we believe that we are.

QUESTION: You think that Interior should be in a position so that they would have to file the statement.

MR. MENDICINO: We believe --

QUESTION: Until they file a report or take a move in that direction, you lose.

MR. MENDICINO: And our position --

QUESTION: That's the question in this case, isn't it?

MR. MENDICINO: Yes, sir. And we believe that they have -- furthermore, we certainly --

QUESTION: All you have is that they have been studying

it. That's all you have.

MR. MENDICINO: No, we think that we've got much more than that, Your Honor.

QUESTION: You think you --

MR. MENDICINO: In the pattern of what has happened in our State, and in the West, in the last several months.

QUESTION: I mean, but what has Interior been doing?

MR. MENDICINO: They've granted all of these leases, --

QUESTION: That's right.

MR. MENDICINO: -- and permits, and they have pending other applications for various types of coal lease permits.

QUESTION: And you object to the way they're doing it. That instead of doing it piece-by-piece, they should do it all in the region.

MR. MENDICINO: No, I'm saying that the pattern of issuance of those leases demonstrates clearly that there is more involved than simply a determination that a specific lease should or should not be issued. It's a part of a pattern to develop the mineral resources of the West.

QUESTION: But they don't have it. We don't know what it is.

MR. MENDICINO: Well, I --

QUESTION: That's your problem, it seems to me.

QUESTION: Mr. Attorney General, that big impact statement in front of you, does that relate to projects in Wyoming?

MR. MENDICINO: Yes, sir, it does.

QUESTION: Does it relate to just one project, as you've defined it?

MR. MENDICINO: No, sir. But that was initiated --

QUESTION: How many projects does it have?

MR. MENDICINO: -- after the litigation commenced. It relates to four mines, four strip mines and the projected tract which --

QUESTION: Did you make any attack on the sufficiency of that impact statement?

MR. MENDICINO: No, sir.

QUESTION: Why not?

MR. MENDICINO: Because that impact statement was not a part of this litigation, when it was initiated. It was delivered to the Court of Appeals. We're, as a policy matter, very unhappy with that impact statement.

But we've not taken any action to attack it, pending the disposition of this case.

There is a separate question entirely, and that goes to the sufficiency of the impact statement, assuming that there's agreement on the scope.

QUESTION: If you should lose this litigation, do

you think you would have a future opportunity to attack the sufficiency of that statement; or is that involved in this case?

MR. MENDICINO: It's not involved in the case, Your Honor. Yes, I think we would, as to sufficiency.

QUESTION: You would.

MR. MENDICINO: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Terris, --

ORAL ARGUMENT OF BRUCE J. TERRIS, ESQ.,

ON BEHALF OF THE SIERRA CLUB, ET AL.

MR. TERRIS: Mr. Chief Justice, and --

QUESTION: -- before you get underway, I'll put to you the question I put to the -- to your colleague, the Attorney General:

Precisely what language of Section 102 do you call upon?

MR. TERRIS: We rely expressly on the proposal language. And let me be very clear about that.

QUESTION: Proposal for what? For legislation or for major federal action?

MR. TERRIS: No, no -- for major federal action.

Your Honors, there have already been dozens, not of proposals but of federal actions which have taken place since NEPA, without an adequate regional environmental impact statement.

The issue in this case is not a matter of timing. If anything, we are getting too late in the process, not too early.

What we have is a set of proposals, some of which have already been acted upon, and mines have actually been opened. We have, in addition, literally hundreds of additional proposals which are coming in front of Interior.

The issue in this case is whether, in order to approve any of those proposals, to take action, the Secretary of Interior has to have at that time a comprehensive regional environmental impact statement.

Now, in our mind, that is expressly under Section 102.

QUESTION: Well, the key word, Mr. Terris -- at least literally, and I go back to Justice Brennan's question to your associate -- it's a recommendation or a report on a proposal that must be accompanied by an impact statement.

MR. TERRIS: Exactly, Your Honor.

Now, what we have here -- let's just take, we can take any one mine of the dozens that are involved. Let's take the four that were approved by the Secretary after this Court lifted the injunction in January.

The Secretary of the Interior went ahead and approved four mines.

QUESTION: Are they on this map? Do we know --

MR. TERRIS: They are among -- I would hesitate, Your Honor, to tell you which of those numbers in the Eastern Powder River Basin they are, but they are among those numbers.

QUESTION: They are among those in the Eastern Powder River?

MR. TERRIS: Yes, that's quite right, Your Honor.

And he approved them. In approving them, we say that in taking that action -- you see, we've really gone beyond the proposal, we've actually -- the proposal language of NEPA actually requires a statement at an earlier stage. We've really gone beyond that. We're to the point that he has acted. And mines are going to be opened.

QUESTION: Well now, Mr. Terris, in connection with each of those proposals, was there included in it the report thereon, an impact statement?

MR. TERRIS: Yes. Now, let me come expressly to that, and --

QUESTION: Well, why doesn't that satisfy the --

MR. TERRIS: Well, let me deal with that expressly, Your Honor.

This is the document, and it's the document that my brother has pointed to. That document is not in this case, and I'll tell you exactly why. It was not in existence at the time of the district court rendered its decision. A draft of this document was in existence when this case was in front

of the Court of Appeals. The government submitted that draft, as well as the draft of the programmatic statement, to the Court of Appeals.

The Court of Appeals, the Clerk acting for the Court, wrote them a letter and said to them: Why have you given us this document?

The government replied: For your information. It is irrelevant to this case.

QUESTION: But is the -- are the four leases that you rely on also irrelevant? It seems to me all of these --

MR. TERRIS: No. No, they're not.

QUESTION: -- things happened afterwards.

MR. TERRIS: No, let me go one step further, Your Honor.

QUESTION: It doesn't seem to me you can talk about the leases unless they can also talk about what they did as a condition to agreeing to the leases.

MR. TERRIS: Well, Your Honor, let me be clear about this. Remember what the Court of Appeals decided here. The Court of Appeals did not make a final determination in this case. It remanded the case. If the government's position is today -- which I think maybe it is, from my brother's argument -- that this statement now is relevant and does satisfy the requirements of a regional statement, then, I submit, that is a proper --

QUESTION: Well, I didn't understand the argument was that that satisfies the requirement of a regional statement; that it satisfies the requirements of the statute in respect to these four leases, doesn't it?

MR. TERRIS: Well, let me then go back a step, Your Honor.

Our argument is that in considering a proposal and in taking action, the federal government has to do a statement which is regional. That's the --

QUESTION: Well now, where do you get that? That's what I want to --

MR. TERRIS: That's the issue of law.

QUESTION: Yes.

MR. TERRIS: Okay. Okay.

QUESTION: Where does that come from?

MR. TERRIS: But, Your Honor, to get to that question, we have passed the question: Is there a proposal, and is there action?

Then the question, which I think is where we are, --

QUESTION: But I asked you the question -- unless you're just going to assume that there's been some regional proposal.

MR. TERRIS: Your Honor, let me --

QUESTION: Has there or not?

MR. TERRIS: Has there been a regional proposal?

QUESTION: Yes.

MR. TERRIS: Well, let me tell you exactly what there has been --

QUESTION: Well, can you answer it yes or no or not?

MR. TERRIS: I think it -- in our view, there has been a regional analysis and decisions made by the federal government. And let me be very precise on that.

QUESTION: Well, is there -- the words of the statute are that there's a proposal.

MR. TERRIS: Well, you see, it's action that I --

QUESTION: Now, has there been a regional proposal?

MR. TERRIS: There have been regional actions, proposals and actions. Let me be very explicit.

QUESTION: Where are they?

MR. TERRIS: Your Honor, look at -- I would refer you to finding 14 of the district court.

The district court finds as a fact --

QUESTION: Where do we find that in the --

MR. TERRIS: It's in the petition -- it was in the petition for certiorari of the government, Your Honor, and it's in the back.

The district court finds as a fact that the government is attempting to control development -- control development in the Northern Great Plains Region.

That finding is expressly based on an affidavit of

Secretary Morton, that they have taken steps, namely, the Northern Great Plains Resource Program and other actions.

QUESTION: Where is this in the -- or what number is it?

MR. TERRIS: 14.

QUESTION: Finding 14.

QUESTION: Page 90.

MR. TERRIS: He says they are not part of a plan or program to develop or encourage development, but are attempts to control development by individual companies in a manner consistent with the policies and procedures of NEPA.

Now, I submit to you that if he is controlling development in the Northern Great Plains Region, he cannot control development and analyze the situation on a project-by-project basis.

Let me come back to Justice Brennan's question.

QUESTION: You're going a little fast for me now.

QUESTION: You had hardly reached the point of telling me where the proposal is. Have you?

MR. TERRIS: Your Honor, a proposal -- I suppose the way to put it is expressly in terms of this finding --

QUESTION: Well, it's the statutory language, and you at least ought to get to it.

MR. TERRIS: Your Honor, I want to get to it. I want to put it in terms of finding 14. I think at the very least,

that an attempt to control development --

QUESTION: Is a proposal?

MR. TERRIS: -- is a proposal and beyond it; it's an attempt, it's not actually -- he has not actually proposed that he may do that; he has said that -- the finding is that he is attempting to do it.

QUESTION: But he says he has no plan or program to develop or encourage development.

MR. TERRIS: That's quite correct, Your Honor.

Now, the question in this case, really the root question, is: can the government attempt to control development, issue dozens of mining leases, approve railroads, start probably the largest industrial development in the history of this country in a rural area, all with its decisions? Can it do that and say: Yes, we would have to do an environmental impact statement on the region if we did planning; but since we're not going to do any planning, we are excused from it.

In other words, the argument is: The less we do under NEPA, the less NEPA requires us to do.

Now, NEPA three separate times talks about federal planning. Is it conceivable that the Congress of the United States said that if you are controlling development and you're issuing leases and doing all these things, that simply because you won't plan, that you don't have to do any regional analysis?

QUESTION: Well, the Congress can say what you have just said.

MR. TERRIS: Well, I'm saying -- I'm asking the question, because that is the issue in the case.

I don't think Congress has said that either, Your Honor.

QUESTION: Well, do you want us to rewrite it?

MR. TERRIS: I don't think you have to rewrite it, Your Honor. I think the issue is, it seems to me in this case there has been clearly a proposal and we've gone beyond the proposal.

Now, the question is, when you have a proposal --

QUESTION: I think I know what a proposal means. I mean, my idea of a proposal is not yours.

MR. TERRIS: Well, Your Honor, I think that if you're attempting to control development, it's at least fair to say you're proposing to control development.

QUESTION: Well, do you think that's a fortiori, more than a proposal?

MR. TERRIS: I do. It's more than a proposal.

He's taking action. You're not -- an attempt is more than a proposal, it is an action. You are going forward with doing something.

QUESTION: Mr. Terris, let me just be sure I understand. You're saying finding 14 supports your view that

there's a program for regional development. Now, as I read finding 14, most of the references are to national programs of one kind or another. And the specific language you talked about are attempts to control development by individual companies.

MR. TERRIS: Your Honor, the specific studies that are mentioned in finding 14 are both regional studies on this region.

QUESTION: Well, the first one is on a national basis, and the second one is Southeastern Montana and Northeastern Wyoming, which is different from the region you describe.

MR. TERRIS: Your Honor, I want to --

QUESTION: And the third is a national coal leasing policy, and then the fourth is the Indian lands in the NGPRP. But there's quite a group of different things -- is this your strongest finding in support of your position that there's a regional program?

MR. TERRIS: Well, let me be clear, Your Honor. I do not believe that the Department of the Interior has sat down and said: Here is our program for development in the Northern Great Plains.

I do not believe that's happened. I don't believe they're planning. The question, Your Honor, is when they do all these different things, and they attempt to control

development, I think the finding is very clear that that is what they're doing. And, by the way, that finding, Your Honor, is based -- let me just go to the underlying facts on which that finding was based.

Secretary Morton's affidavit says that the Department has taken action to control development of coal on a national basis and in the Northern Great Plains.

Now, that's what that finding is based on. There are some other facts, too, that support that.

QUESTION: Mr. Terris, is it your position that the action that has been taken, I think you've characterized it as a study and in other ways, focuses precisely on the same regional area that you are recommending?

MR. TERRIS: Your Honor, there really are two issues in this case, and they are really sub issues.

The first issue is: Do you have to do a regional statement at all? Is there any requirement in NEPA that require you to do anything more than look at the specific strip mine which is in front of you?

That, I submit to Your Honors, --

QUESTION: Well, that would suggest the answer to that would have to be yes if, in fact, the Interior came up with a proposal for legislation or other major federal action on a regional basis. Then of course there would have to be a regional impact statement.

MR. TERRIS: No, but I'm saying, Your HONor, let me --

QUESTION: Are you saying they did do that, that's what the finding says?

MR. TERRIS: I'm saying that they both had a regional proposal and they had so many individual proposals that they have to be even separate from the first proposition; they have to be analyzed regionally.

Let me go back to Justice Powell's point, because it seems to me it isolates the two basic questions here.

One is: Do you ever have to look beyond the specific topic the government is considering at that moment?

That's the first issue, and I regard that as the basic issue.

The second is is: If the answer to that is yes, you do sometimes have to. Then what should the size of the region be here?

QUESTION: Well, the statute itself may require you to look beyond the particular project, as one of Justice Stevens' questions this morning indicated, that can be done in an individual project statement. It may have to talk about other things than just the immediate consequences of that project.

MR. TERRIS: Your Honor, that is correct, and if the government's position had ever been that what they propose to

do was in the context of an individual project, to look at the entire interrelationship in a region, there would not have been any litigation. The government's position from the start, and it still is today, that they do not have to look beyond the specific project.

QUESTION: Well, why can't -- you can challenge that if you disagree with it when they file an impact statement that everybody concedes is required for a specific project. And you can say it's not broad enough.

MR. TERRIS: We could, Your Honor, and there is a procedural question which was argued in the courts below, which has not been argued in this Court, as to whether, procedurally, the way we should have proceeded, instead of coming in and isolating this basic question which cuts across the board, or whether we should have literally brought separate lawsuits against every single environmental impact statement, which is inadequate, because it does not look at the whole region.

Now, that, Your Honor, I don't think is a basic question, except in terms of judicial economy. I think if we had ever brought one lawsuit after another of that kind, it would have been thought that that was a very improper way for us to proceed.

But I -- that is not the basic issue. I quite agree, if Your Honors believe that the way for us to proceed in the

future is to attack each statement separately, then, of course, we will do so. But I think the basic question in front of us isn't that procedural one, but whether when the government makes clear that its position is that they are not required by NEPA to do regional statements, that in that context they do not have to look beyond --

QUESTION: Mr. Terris, who is better qualified to draw the lines of the region in this area, the Interior Department or this Court?

MR. TERRIS: The Interior Department, Your Honor. And the Interior Department is --

QUESTION: Well, wait a minute. Aren't you asking us to do that?

MR. TERRIS: No. Let me be very clear about that. The line we want is the Department of Interior's line.

QUESTION: And what is that?

MR. TERRIS: And let me go back to the map that was given to you, because --

QUESTION: Well, I understand that their line is the Powder Basin, that's their line.

MR. TERRIS: No. Let me go back --

QUESTION: Isn't that what they say?

MR. TERRIS: Well, let me -- Your Honor, they do in one sense, but let me go back to the map, which was distributed to you.

If you will look on the lefthand side, under Explanation, it is said there is a line which says, Outline of the Northern Great Plains Coal Field.

Now, it's a very faint line in the map, but you will see it winding around, and that line is the identical line which is in our map in the brief, which is the Northern Great Plains Resource Program Study area, the area that they have chosen to control development. The 1975 water study of the Interior Department; statements by Secretary Morton that you had to do a study of this area in order to control and coordinate development; statements by the Administrator of EPA that this was the right area; statements by the Council on Environmental Quality that this was the right area.

QUESTION: They are all studies; no proposal yet.

MR. TERRIS: Your Honor, I'm going to a different question, I believe, when I go to this.

QUESTION: Oh. Okay.

MR. TERRIS: I'm going to the question if you assume that we have met the statute, that there are proposals, then I'm going to the question: What is the right area for analysis?

And what I'm saying to Your Honors is I agree completely that the Department of Interior has considerable discretion in determining what is the proper region.

What I am suggesting to Your Honors is that they have

repeatedly, over and over and over again, said: the right region for environmental analysis under NEPA is the identical region which we have argued there should be a regional analysis.

Now, that isn't a coincidence that we came to the same area. The reason we came to it is because these are geological facts. The government has submitted a brief showing that there is lots of other coal in the United States. That's true. But they are not in the same geological formation, and the Department of the Interior made the decision that the right area, the right geological formation was this one.

Now, I want to go back to Justice Powell's question, because I do not believe that is really the fundamental question in this case. I want to explain that.

If this is the right region, let's make an assumption right now that the sub regions -- and I think that's the way Interior describes them -- that the sub regions are correct.

QUESTION: That's what I wanted to ask you. We've been talking about project-by-project, but really are we not talking about the differences between one over-all region and five sub regions?

MR. TERRIS: Your Honor, that leads me, I think, to the basic point.

QUESTION: Let me just ask one question about that.

Does the record tell us whether the five sub-regional impact statements are all prepared in the same office under the same supervision, or are they working entirely autonomously?

MR. TERRIS: I believe, Your Honor, they tend to be sub-divided, at least in the start, to different regional offices, in different offices of the Bureau of Land Management and other federal agencies that are in the field.

In other words, ---

QUESTION: Would it satisfy your purpose if we had the five sub-regional statements and then they bound them all together in one great huge volume, with a long introduction, sort of talking about the things that overlap among them?

I mean, there's no harm in having the five sub-regional statements, I guess?

MR. TERRIS: No. No, Your Honor. Let me just -- let me explain the ramifications of what we're now dealing with.

And this goes back to Justice Brennan's earlier question. Everybody believes, Your Honor, that you have to look beyond the individual project. I don't think there's any dispute about that.

This statement, this sub-regional statement, makes the same assumptions that we do; namely, you can't look at a mine by itself, you have to take a region. Now, they've taken

a much smaller region, but they have taken a region. And we've cited in our brief at great length how one federal agency after another, EPA, CEQ, Interior, all the other line agencies that deal with this problem, have all agreed that you cannot look at individual statements by themselves.

Now, the government -- we set out, by the way, at great length in our brief, how Secretary Kleppe has essentially agreed with our position. On January 26, he stated that he had made a determination -- it's in the appendix to our brief, the documents -- he had made a determination that indeed you did have to do regional statements.

QUESTION: Where does he make that statement?

MR. TERRIS: Where? It's in --

QUESTION: I don't mean where in the brief, but what was the forum?

MR. TERRIS: The forum was, Your Honor, that when he makes final decisions, at least on big issues, he has what's called a program decision option --

QUESTION: Well, was it a press conference or --

MR. TERRIS: It was announced through a press conference, Your Honor. The document that's in the back is not a press release, it is the actual decision document that he signed.

He had a press conference, and he released it to the press. But we are not relying on simply a press release.

Now, he then told the Senate Committee the same thing a few weeks later, that he had decided to do sub-regional statements. He has done one. Two are about to be started, in North Dakota and Southeastern Montana. Two others are under consideration in a priority list.

Now, at least we believe that he has made the determination, which we have argued for from the beginning, --

QUESTION: Well, we can dismiss the case as moot.

MR. TERRIS: No, Your Honor, I think there's one more issue to decide, and I do not think it is the basic issue, although I think the government, by the way, will dispute that it's moot, even on the point I've just been making.

They want to say that the Secretary has started this process out of the goodness of his heart, NEPA did not require that he do this, and he -- that means he presumably could change his mind at any time.

QUESTION: Well, isn't it the Secretary of Interior in the whole management program to be doing this and before NEPA was ever on the books?

MR. TERRIS: Well, Your Honor, they didn't do it, though, however, before NEPA was on the books, and that's of course why he --

QUESTION: Well, we've had litigation for the last twenty years showing that they've been doing this with -- not

only with coal, but timber and a great many other things.

MR. TERRIS: You mean these kind of environmental analyses?

QUESTION: Not an impact statement, because the word wasn't invented; but making that kind of study, and keeping their studies going currently.

MR. TERRIS: Your Honor, with all respect, I disagree very strongly. I think that the history of NEPA shows how little indeed they did of this kind of thing before 1970, and that what NEPA has done has started really a major revolution in the way that federal agencies proceed in terms of the environment. And I think this is a constructive step along that line.

I would just point out that even if this document on the Eastern Powder River Basin is adequate, and Your Honors say that that is the right region, I would remind you that there have been no such statements on any other part of the region, that at least four-fifths of the region has not been analyzed at all, and that that is what they are just beginning to do.

QUESTION: We don't have to pass on that, do we?

MR. TERRIS: No, not only do you not have to, I think, Your Honor, it would be improper to.

QUESTION: I hope you're not even suggesting that we read it.

[Laughter.]

MR. TERRIS: I am not, Your Honor.

QUESTION: Thank you.

MR. TERRIS: I remind you that I did not bring this pile of documents in front of you, Your Honor.

I do not think it is relevant, except for the fact that I think what is relevant is that the Department of the Interior has decided that, yes, indeed, it does do regional,-- sub-regional statements. But that it does not intend to do regional statements, and I think the major issue you have in front of you that is left, the major issue of dispute is the question: whether we are correct in taking Interior's own lines and saying, yes, indeed, that is the right area. Because I do not think we have a major dispute with Interior on the question of whether sub-regional or regional statements have to be done.

I do think we have a dispute with the Department of Justice, to be very frank about it.

QUESTION: But if the government is right that the Secretary has done this out of the goodness of his heart, and the law doesn't require him to do it, then you're not entitled to any judicial relief in the way of an injunction, I presume.

MR. TERRIS: That's quite true.

QUESTION: That the Court of Appeals was wrong in

issuing the injunction.

MR. TERRIS: That is correct, Your Honor, and that's why I think that it is not moot in any kind of --

QUESTION: So even if we agree with all that you say, that the injunction issued by the Court of Appeals should be dissolved?

MR. TERRIS: Oh, no. No, no, Your Honor.

QUESTION: Well, I thought that's what you said.

MR. TERRIS: No, let me be clear about it.

I rely on Interior's new-found policy of doing sub-regional statements, as confirming our view, and that of EPA and CEQ, that regional analysis is required by NEPA. In other words, I think that is the --

QUESTION: But they say that is not the case.

MR. TERRIS: Your Honor, the Department of Justice says that is not the case.

QUESTION: Well, the Department of Justice represents the United States in all litigation before this Court.

MR. TERRIS: That's quite correct, Your Honor. But Secretary Kleppe said, in his program decision option document, I think it's very clear if you look at it, that he was -- that NEPA required these actions. And I think it is very clear that that's what the Secretary was doing.

QUESTION: And that's sort of an administrative interpretation of the statute, to which we should give

deference?

MR. TERRIS: Yes, sir. I think you should give deference to that. I think, even more, though, Your Honor, I think the proper interpreter of NEPA, the one that Congress and the President have both charged with interpreting NEPA, happens to be EPA and CEQ.

Now, I do -- I think that Interior is entitled to some deference, too. Here I think there is a coincidence which has occurred, in which all three agencies have found that regional analysis is required by the Act.

QUESTION: Now, which are you saying that they say? That a regional --

MR. TERRIS: Sub-regional would be more accurate.

QUESTION: -- a sub-regional statement is required because a sub-regional statement is the natural requirement of a project proposal?

MR. TERRIS: No.

QUESTION: Or are you saying that the Department of Interior has said they have a sub-regional proposal?

MR. TERRIS: I'm not sure what Interior thinks, Your Honor. Let me say that --

QUESTION: Well, you're certainly relying on Secretary Kleppe's decision. Now, did he say they have a regional proposal, or that, for some reason or another, they're going to do a sub-regional statement?

MR. TERRIS: I think it's more accurate to say that NEPA -- that in order to carry out our NEPA responsibilities, we're going to do a sub-regional statement.

QUESTION: Well, do you -- then do you agree with this statement in the Court of Appeals: We hold that comprehensive measure federal action is contemplated in the Northern Great Plains, and therefore -- what?

Do you think that that is enough, that some major federal action is contemplated?

MR. TERRIS: No, but I want to be clear that the Court of Appeals did not think it was enough. The Court of Appeals expressly stated --

QUESTION: Well, it went on from there -- it went on from there to say that the district court's contrary conclusion was in error.

And then went on to order further proceedings based on that statement.

MR. TERRIS: Yes, Your Honor. But it did not say that a contemplated action was enough. It expressly said the contrary. It said, although it thought that action was contemplated, it was going to remand the case to the district court in order to determine whether the federal role -- in other words, the district court was going to determine what kinds of actions really were going to be taken.

QUESTION: Well, the district court found that there

wasn't any proposal, any regional proposal.

MR. TERRIS: It didn't use, I don't believe, Your Honor, those words. It said there was no plan or program.

QUESTION: Well, at the time the Court of Appeals acted, the Court of Appeals seemed to concede there wasn't -- that they agreed that there wasn't any plan or proposal. They just said something is contemplated.

MR. TERRIS: Your Honor, but it said that that's all they could find now, that it was contemplated. Therefore, it was not making a determination --

QUESTION: Well, how could they ever say, then, that up till that very moment an impact statement was required?

MR. TERRIS: It didn't. The holding is not --

QUESTION: Then why shouldn't they have affirmed?

MR. TERRIS: Because, Your Honor, they thought that the issue was unclear on the role of the federal government --

QUESTION: Well, they were clear enough that it was only contemplated.

MR. TERRIS: At that point, Your Honor, it was contemplated. I think, by the way, that's a very conservative view of the facts before the Court of Appeals.

But taking that conservative view, the Court of Appeals then said: We're remanding to the district court to determine what the role of the federal government actually

would be. Now, that's directly consistent, I submit, with SCRAP, that you send it back to the district court to determine whether the federal government was really going to take these kinds of actions.

QUESTION: Is it fair to say, Mr. Terris, that what the Court of Appeals did was to take a whole series of relatively minor actions of the federal government, accumulated them, and said that taking them all together this amounts to major federal action?

MR. TERRIS: In part, you're right, Your Honor; but I think not completely. I think the fact --

QUESTION: Well, didn't they say almost -- did Judge Wright say almost exactly that?

MR. TERRIS: Well, there's one of -- I would have to change at least one part of that statement. That each individual part were not small actions, each one of them is actually a huge action, each one of those actions, for example, has -- and the government, I think, concedes this -- that each one of those is a major federal action under NEPA.

So what the Court of Appeals was saying, in a situation -- and the Court, by the way, expressly came down on this language about controlling development. Where you are controlling development, you have dozens or hundreds of actions, where now it turns out the federal government itself admits they have to do regional analysis. That in that kind

of situation you have to look at the entire region. And I --

QUESTION: I've found this language that I was trying to paraphrase. Judge Wright said: The question is whether the cumulative effect of various federal actions all individually minor, put together constitute major federal action.

Now, he is acknowledging that these were each minor.

MR. TERRIS: Your Honor, all I can say is that he was clearly wrong. And I think he was clearly wrong, Your Honor, on the proposition that I think the federal government will agree with me, because they are each individually, Your Honor, actions in which they admit they have to do environmental impact statements.

The mines we're talking about -- just so that we understand what we're talking about here, each one of these, each mine is among the largest mines in the United States. It has -- each one of the mines has several square miles of area. It is doubtful, according to the federal government itself, that these lands will be reclaimed for dozens of years, and probably maybe not forever.

We're talking about power plants and coal gasification plants of the size that are among the largest in the country.

QUESTION: Mr. Terris, there's one thing you haven't

really addressed. You said there should be one over-all regional statement instead of five sub-regional ones; why?

MR. TERRIS: Well, Your Honor -- let me come back, because I think I -- to the statute, because obviously that's what we're talking about.

Once we decide we've got a proposal or an action, that triggers the environmental impact statement requirement, and I've argued at length about why I think that there is such a proposal and action, in fact there are many of them. And that they are tied together by controlling development.

Now, then, the question -- the question, after you decide that is: What should be the scope of the environmental statement?

Now, I submit that the way you determine that is to look to the five factors in 102(2)(C). You look to what area you have to examine in order to determine the environmental impact and the alternatives to the project. In other words, it's a practical question that one is dealing with at that point.

And CEQ has said the way you look at that, giving a gloss on that, is whether there's an interrelationship, the three adverbs that come from CEQ; they don't come from us.

QUESTION: Is that environmentally, geographically and programmatically?

MR. TERRIS: That is right. Now, those come from CEQ. They are gloss on how do you look at those five factors and analyze them, when you have interrelationships between projects?

Now, we say you have to look at the whole area, but I would not make that argument to Your Honors simply on a logical basis. I think it is true logically, we've argued at length in our brief that it is logically true; but our basic proposition is they decided that you had to look to the whole region to analyze those five factors.

You will see in our brief that EPA said you had to do that, Secretary Morton said you had to do that, the Northern Great Plains Resource Program said you had to do that --

QUESTION: Let me ask a question -- I know the red light's on, so I'll be very brief. But is it not correct that in order for us to say five sub-regions are not adequate, you need one over-all region, we must conclude that the Secretary is arbitrary in determining that five are adequate? Isn't that the standard to use?

MR. TERRIS: I think that's correct, Your Honor. I think you only get to that proposition after you first decide whether regional analysis has to be done at all; then you get to that proposition. And I think the question is whether he was arbitrary in the light of his own and other

federal agencies' prior decisions and actions.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Terris.

Mr. Shea. Whenever you're ready.

REBUTTAL ARGUMENT OF FRANCIS M. SHEA, ESQ.,

ON BEHALF OF PETITIONERS IN BOTH CASES

MR. SHEA: Mr. Chief Justice, may it please the Court:

First I would like to ask the Court to look at that finding 14 again.

QUESTION: Page 90, isn't it?

MR. SHEA: That's on page 90a, yes, in the Petition for Cert.

The Department of the Interior has taken action to control development on a national basis, and they have, with their programmatic on a national basis, and their leasing policy on a national basis.

That covers the whole nation, including the Northern Great Plains.

It says a number of other things, but what this is talking about, as you get down to the end, those actions, however, are not part of a plan or program to develop or encouragement development or it attempts to control development by individual companies in a manner consistent with the policies and procedures of the National Environmental Policy

Act.

I don't see how this can be relied on for the proposition that the federal government and carrier has undertaken to control development of the region. Except as they're controlling development pursuant to a leasing program which applies to the whole nation.

QUESTION: Is it possible, Mr. Shea, that even having completed, which they have not done apparently, even having completed the study of the whole area, and concluded that the development of the coal resources was in the public interest and should proceed, that they might then, with respect to particular mines on particular areas, say that that was an interference with the environment which was not tolerable, and that that particular project would not go forward? Is that possible?

MR. SHEA: Well, of course, if the Court please. There has been no change of position on the part of Interior. The initial affidavit which was put in by Secretary Morton set out and we've completed this coal programmatic, and we have the information from the Northern Great Plains Resources Program. We'll decide possibly we'll have an impact statement for the whole region, but possibly the purposes of NEPA will be better served by preparing an impact statement on an individual project or on certain sub-regions, or on the basis of basin boundaries, et cetera.

And this is exactly what Secretary Kleppe is saying today.

Now, indeed it's so, of course, these studies are going on all the time, and what they finally decide on is what project they will -- what major federal action they will decide to carry forward.

Now, I would like to ask the Court, if it will, to return to the statute, and to SCRAP II, which it seems to me says that the statute means what it says.

And I would like to suggest to the Court that there is a very different question presented on what is -- what Interior is compelled to do, what they must do under the statute, and what they find it wise to do.

Now, they may find it wise to prepare particular regional statements, rather than the statement on a particular project.

Incidentally, I think all the Secretary has said he's going to do is to, he thinks, prepare a couple of more regional statements, I believe in response to question put to him.

But that distinction, it seems to me, has to be kept in mind, which I think your question posed and suggested, and I would like to -- I'm not sure that these matters are not well in mind, from the questions the Court has put -- but looking to 102(2)(C), this is what is compulsory and all

that is compulsory: that there be included in every recommendation or report on proposals for major federal actions significantly affecting the quality of the human environment. And what is to be included?

The environmental impact of the proposed action. Any adverse environmental effects which cannot be avoided should the proposal be implemented.

Alternatives to the proposed action.

Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Now, if the Court please, in SCRAP II, if I understood correctly its holding, its teaching, the Court said that if we want to determine what kind of an impact statement is to be prepared, we must first define accurately what the proposed major federal action is.

And secondly, that in circumstances such as existed there, and as exist here, where the proposals were by private companies, that the recommendation of the proposal for major federal action is the approval of those applications; or, in SCRAP II, the failure to suspend.

But the approval of those actions.

Now, gentlemen, I suggest that it is impossible to read 102(2)(C) -- I shan't say impossible, but it seems to be very difficult to read 102(2)(C) -- as relating to some-

thing other than a specific proposal. The approval of mining leases. But how you can read this as saying that it covers prior action, that it covers applications which are pending, on which there's no commitment to approve; can you read the environmental impact of the proposed action as saying the environmental impact of all prior actions and all applications for leases, and for rights-of-way, for mining plans?

Can you say that any irreversible and irretrievable commitment of resources which would be involved in the proposed action, that you can read into that all the actions which have been taken in the way of leases and mining plans, et cetera? And all those applications which are pending, that there's no commitment to approve, which may or may not be approved?

I suggest to the Court that it is not to be so read.

Now, to be sure, as Mr. Justice Rehnquist suggested, and I think Mr. Justice Stevens suggested it, when there is indeed the recommendation of a proposal of a particular mining plan, for instance, where that's approved, it must deal with the situation in which it is approved. If this adds further impact on the environment that breaks the camel's back, well, of course you've got to look at what the circumstances are, what the cumulative effect of it is. And if it's claimed that that impact statement is inadequate,

it can be claimed that it's inadequate because it doesn't give consideration to the cumulative effects.

But, may I say again, that this doesn't mean that the Secretary is under obligation. He may do it because it is the wise course, it is the most desirable way of managing. But this is quite different from saying that he's under obligation to prepare a regional impact statement.

Now, he would be under an obligation to prepare a regional impact statement if that constituted -- if a plan had been -- if he had a plan which involved the entire region, that he was carrying it into effect. Except, as you know, the decisions of the Courts of Appeals have held that even where you have such a thing as the two phases of the Tetons or where you have the Central Utah project, if part -- authorized by the Congress -- if part of that has independent utility, a single impact statement on that part of the independent utility which does not commit you to go forward and finish the entire project, can be supported by an impact statement which is limited to that part.

Now, therefore, I would submit, Your Honors -- and I did have the feeling that this was brought out in the course of the questions -- that you have got to find a proposal, and the proposal has not, so far as I could hear, been brought to your attention by opposing counsel. Nor by the court below.

I mean, what he talked about, the court below said was all of these prior approvals, all of these things in being, all of the applications which are pending, and the studies which have been made, that these indicate that Interior is contemplating controlling.

QUESTION: Mr. Shea, before you leave that point, Judge MacKinnon, in his dissent, made the point that the commitment of the granting of approval in one area does not necessarily involve a commitment to grant approval in other areas.

In other words, he took the position that these five regions, or perhaps even the individual projects, are not sufficiently interdependent to require any one over-all statement.

Your opponent argues that we need one statement for the entire area. What I'd like you to tell me is whether we need to decide that issue or not.

Do you understand my question?

Do we have to agree with Judge MacKinnon on the point that the entire area is not interdependent in order to agree with his ultimate conclusion?

MR. SHEA: Well, I'm not sure that I really fully understand your question. The findings of the district court is that there is no planned program or other major federal action. Indeed --

QUESTION: And that is the end of the case?

MR. SHEA: Yes. And this was conceded --

QUESTION: Well, we do not have --

MR. SHEA: -- by opposing counsel.

QUESTION: If we agree to that, then we don't have to --

MR. SHEA: I don't see what's left, and I don't see how that has gotten around.

QUESTION: Well, Mr. Shea, it may be that -- it may be that if one project necessarily determines the shape or form or outcome of another, that having a plan for this project necessarily means you have a plan for the other one?

MR. SHEA: If they are integrated, sir.

QUESTION: Well, that's exactly the question.

MR. SHEA: Is that the question?

QUESTION: Well, it seemed to me -- I'm not too clear.

QUESTION: The question is: Do we have to decide whether or not they are integrated?

MR. SHEA: Well, I think that -- you know, this --

QUESTION: As I understand it, your answer is no.

MR. SHEA: In the first place, --

QUESTION: You say no, but Judge MacKinnon apparently thought he had to decide this, if he wanted to --

MR. SHEA: In the first place, you know, there is

a finding that so far as these proposals of the private companies are concerned, that they are not being constructed or carried out pursuant to any integrated plan. And also that the plan that -- these projects of the individual companys are not integrated or interrelated.

Now, if I may try to get at it -- because I don't think I've been responsive. That's finding 31.

If I may try to get at it in this way, if the Court please.

It seems to me that unless you can find a proposal -- unless you can find a proposal, there is no basis for acquiring an impact statement. And the way they sought to get a proposal was to say that all of this is interrelated. I don't think they have -- you know, it would be dependent upon what the interrelation was. The fact that it's interrelated doesn't make it a single project.

It seems to me that the tests which have been made by the Courts of Appeals are the proper tests. That is, if you go forward with this particular proposal, can you -- are you committed to something greater? Or does it have independent utility?

Now, it seemed to me that I thought what Judge MacKinnon was saying was that there isn't any kind of such interrelation as they're talking about.

QUESTION: Well, there isn't necessarily.

MR. SHEA: Right.

QUESTION: It's possible, but not necessarily so.

MR. SHEA: Well, really not -- on 90,000 square miles, it isn't even possible.

QUESTION: Well, possible that some of them near to each other --

MR. SHEA: Oh. But that's a very different matter. That's a very different matter.

It might be that, as Mr. Justice White suggested, it might be that you have a particular proposal which, if you carry it out, you're committed to carrying out something more.

QUESTION: On the other hand, even if a series of projects were wholly unrelated, if the Interior Department actually had a plan for the development, or a proposal for the whole area, there would have to be an area impact statement?

MR. SHEA: That raises, I think, a somewhat difficult question.

QUESTION: I mean a proposal --

MR. SHEA: I would be dubious about that, because does that plan --

QUESTION: What if they made a proposal?

MR. SHEA: If they had such a plan, would that -- remember, it isn't just that there must be a proposal for

major federal action, but it must significantly affect the environment.

So that you would have to find not only that it was a proposal for major federal action, but that it significantly affected the environment.

QUESTION: But at least it would be something that wasn't there before, if you had a proposal?

MR. SHEA: Well, yes.

QUESTION: For an area.

MR. SHEA: But we don't have that, obviously.

This would raise -- you know, I can't just --

QUESTION: Well, the Court of Appeals is against you on that.

MR. SHEA: On what?

QUESTION: They say that apparently they think the possibility is a must, that the Interior Department has gone far enough along the line towards a proposal to trigger the need for an --

MR. SHEA: What they say is that all the actions that have taken place in the past, and all of the pending applications which may or may not be approved, that this, in our view, said the Court, constitutes major federal action, and thus, it goes on to say, thus -- I don't know how it follows --

QUESTION: Well, it all adds up to: for the

purposes of the statute, a proposal -- whether you call it a program, a plan or, I think the language was, nothing at all.

MR. SHEA: Yes, that's right.

And then it goes on to say that thus -- but all it held was that there's contemplation, that they contemplate controlling -- it's the next, the very next sentence, Mr. Justice White, they contemplate controlling the development of the region.

Well, Mr. Chief Justice, I see that I have a red light in front of me.

MR. CHIEF JUSTICE BURGER: Your time is up.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:14 o'clock, p.m., the case in the above-entitled matter was submitted.]

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