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Shi-Ling Hsu

Florida State University College of Law

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JUDICIAL REVIEW FOR THE PUBLIC LANDS: COMMENT TO ERIC BIBER

SHI-LING HSU*

Eric Biber's contribution to this *Environmental Law Without Courts* Symposium is, as he always is, insightful and lucid. His observations on how judicial review directly and indirectly affect administrative agency practices get to the crux of why we organized this symposium at Florida State—understanding those things that happen inside of administrative agencies and outside of judicial review. The applicability of this phenomenon to public lands management is especially instructive because of the nature of those industries that lease federal public lands. As it turns out, the prospect of judicial review—as well as the lack thereof—casts a long shadow indeed on the practices of administrative agencies managing federal public lands.

Biber's article reviews two ways in which case law has limited the scope and intrusiveness of judicial review: (i) requiring judicial challenges to address *specific agency actions*, rather than broader programmatic ones, and rather than agency *inactions*, and (ii) imposing barriers in the form of standing requirements for plaintiffs. Biber is doubtful that these limits systematically discriminate against environmental organizations as plaintiffs, as there are a number of structural reasons that better explain the fact that environmental organizations are more commonly plaintiffs and, therefore, more frequently losers in litigation. It thus seems more appropriate to consider, as Biber does, the long-term implications of the relevant case law and the trends therein. What indeed, as Biber asks, "is the potential over the next ten to twenty years for the role of courts vis-à-vis land management agencies to change?"¹

The potential is great. It is hard to forecast, as the relationship between courts and federal land management agencies surely depends to some extent on political, geopolitical, and ecological conditions that seem increasingly chaotic these days. While the judiciary is obviously not an explicitly political body, it would be naïve to think that, at least from a descriptive point of view, judges would truly stand by and let Rome burn. The seemingly accelerating effects of climate change, the election of President Donald Trump, and the volatile and shifting allegiances among nations all have the

* D'Alemberte Professor and Associate Dean for Environmental Programs, Florida State University College of Law.

1. Eric Biber, *Looking Toward the Future of Judicial Review for the Public Lands*, 32 J. OF LAND USE & ENVTL. L. 359, 360 (2017).

potential to affect the way that the American judiciary views its role in an American democracy—if it in fact remains a democracy.

I have two comments on Biber's contribution, neither of which is a direct challenge, except insofar as to suggest that his summary of the case law might be subject to change in a dramatically climate-changed world, an emerging authoritarian dystopia, or a radically different world order. If anything, I hope Biber, as a leading theoretical and practicing scholar of public land management, would take these comments as an invitation to take a more normative tone in his work in this area.

My first comment is that it is troubling that courts have shied away from review of programmatic agency decisions. One can readily understand the administrative law tradition of leaving agencies to freely make the larger, technically difficult policy decisions without the threat of litigation. It also makes more sense jurisprudentially, as courts should only be adjudicating choate actions and injuries, not grand plans and vague harms. But it may be just as important, and perhaps more important, for courts to have an oversight role because programmatic decisions play a very large role in shaping broad patterns of capital investment, much more so than the day-to-day decisions that courts seem more willing to review. The Northern Great Plains Resources Program² helped usher in an era of unprecedented mineral exploitation, one that continues to reshape the landscape decades after its initiation. The low sulfur content of this Western coal,³ less environmentally harmful than that mined in the Midwestern and Appalachian U.S., coupled with the Clean Air Act sulfur dioxide emissions trading program, led to an explosion of mining activity that has reshaped the economies of the Northern Great Plains states.⁴ As we all know, the twilight of this era of coal mining has been brought about not by regulation or by recognition of the social costs of coal combustion, but by the emergence of cheap natural gas by hydraulic fracturing, which has itself become a transformative industry.

There is a certain path-dependence to the development of fossil fuel industries, which tend to be highly capital-intensive. Programmatic decisions establish the conditions under which large amounts of capital are mobilized. Once mobilized, the owners of this capital yearn to deploy it, repeatedly and broadly. What was the effect of the Northern Great Plains Resource Program?

2. U.S. ENVTL. PROT. AGENCY, ROCKY MOUNTAIN-RAIRIE REGION, NORTHER GREAT PLAINS RESOURCES PROGRAM, ACCOMPLISHMENT PLAN (1974).

3. U.S. DEP'T OF ENERGY, ENERGY INFO. ADMIN., U.S. COAL RESERVES: AN UPDATE BY HEAT AND SULFUR CONTENT ix-xi (1993).

4. Daniel J. Daly, *Coal*, ENCYCLOPEDIA OF THE GREAT PLAINS, <http://plainshumanities.unl.edu/encyclopedia/doc/egp.ind.014> (last visited Apr. 2, 2017).

It was the large-scale development of fossil extraction resources with massive amounts of capital investment. Conservatively, producing the roughly 400 million tons of coal from the Powder River Basin⁵ requires a capital outlay of \$5.4 billion as a start-up cost for a mine that would last about thirty years.⁶ This kind of money will not be easily stranded. The stakes for programmatic decisions are thus much greater than those deemed to be “specific” agency actions, those more susceptible of judicial challenge.

Why does capital-intensity in fossil fuel industries create such path-dependency? The answer is a political-economic one. Expensive capital investments create their own political economies. Making money extracting fossil fuels is a volume business, dependent upon the freedom to operate expensive pieces of machinery for extended periods of time to extract amounts of fossil fuel of low value relative to the machinery. Fossil fuel extraction is only profitable when it can deploy large amounts of expensive capital for long periods of time without interruption from pesky regulators.

One obvious answer to my argument is that if there are social costs or environmental externalities associated with operating this expensive capital, we have environmental laws, tort laws, and other public laws that serve to internalize externalities. Private capital investors run the risk of running afoul of these public laws should their capital be deemed in the future to impose social costs.

How well has that model of *ex post* regulation worked out? Heroically, perhaps, but insufficiently. The reality is, especially given the political structure that favors Western extraction interests, that a capital investment in fossil fuel extraction is a commitment of resources that is irreversible. Politically speaking, capital investments in fossil fuel extraction are too big to fail.⁷ What is sorely needed is some sobriety before huge amounts of private capital are committed to some socially risky venture.

5. U.S. DEP'T OF ENERGY, U.S. ENERGY INFO. ADMIN., ANNUAL COAL REPORT 2015 3 tbl.1 (2016), <http://www.eia.gov/coal/annual/pdf/acr.pdf>.

6. The startup capital cost of a typical 5,000 tonnes/day (about 5,500 tons/day) surface coal mine is approximately \$19 million, exclusive of transportation and processing. InfoMine, *Mining Cost Models, 5,000 Tonne per Day Open Pit Mine Model*, COSTMINE, <http://costs.infomine.com/costdatacenter/miningcostmodel.aspx> (last visited Apr. 2, 2017). The cost model assumes a very low stripping ratio, or amount of soil to be removed from above a mined resource, and it is likely that larger mines would have larger capital costs.

7. See generally Juliet Eilperin, Steven Mufson & Philip Rucker, *The oil and gas industry is quickly amassing power in Trump's Washington*, WASH. POST (Dec. 14, 2016), https://www.washingtonpost.com/politics/the-oil-and-gas-industry-is-quickly-amassing-power-in-trumps-washington/2016/12/14/0d4b26e2-c21c-11e6-9578-0054287507db_story.html?utm_term=.5a0efefcc6c5.

The "Keep it in the Ground" movement, a push to unilaterally terminate mineral leasing on federal lands altogether,⁸ would seem to be a programmatic decision. But the key difference between the "Keep it in the Ground" movement and a programmatic decision to lease is the option value of not leasing. Everyone can see the ecological irreversibility in leasing: once coal, oil, or gas is extracted, there is no putting it back. Reabsorption of combusted carbon dioxide takes place on geologic time scales that are irrelevant to humankind. By contrast, leaving it in the ground preserves the option of extraction and combustion at a later date.

But in addition to this irreversibility, we generally overlook another one that pertains not to extraction, but to the capital investment. Once a programmatic decision to lease is made, vast sums of money are spent to extract fossil fuels; invested as they are in equipment that is very specific to the task of extracting fossil fuels, this money cannot be *unspent*. Leaving it in the ground retains the option value of later investing the money. Going slowly always seems to be a sensible idea when confronted with uncertainties. Unfortunately, the scale economy business of fossil fuel extraction works best not when going slowly, but when going full bore.

This leads me to my second comment, one that is not addressed by Biber's article: the increased importance of National Environmental Policy Act (NEPA) review and the need for courts to undertake a more searching review of projects that involve an "irreversible or irretrievable commitment of resources."⁹ Again, irreversibility is considered in ecological terms. In the Bureau of Land Management's (BLM) Environmental Impact Statement (EIS) for the Overland Pass Pipeline Project, the BLM writes, on the subject of irreversible/irretrievable commitments:

An irreversible or irretrievable commitment of resources refers to impacts on or losses to resources that cannot be recovered or reversed. Examples include permanent conversion of wetlands, or loss of cultural resources, soils, wildlife, agricultural, and socioeconomic conditions. The losses are permanent. Irreversible is a term that describes the loss of future options. It applies primarily to the effects of *use* of nonrenewable resources, such as minerals or cultural resources, or to those factors, such as soil productivity, that are renewable only over long periods of time. . . .

8. See Biber, *supra* note 1, at 360 n.5.

9. National Environmental Policy Act, § 102(C)(v), (1970), 42 U.S.C. § 4332(C)(v) (1970).

The monetary investment by Overland Pass is *not* considered to be an irreversible or irretrievable commitment of resources. If this project was not built, the investment that would have otherwise been spent on these projects could be spent elsewhere.¹⁰

Similarly, the Final Programmatic EIS for the 2012-2017 Outer Continental Shelf Oil and Gas Leasing Program provides that “the consumption of fuels during exploration, construction, production, and decommissioning would represent an irreversible and irretrievable commitment. The offshore oil and natural gas resources recovered as a result of the proposed action would be irretrievable once they are consumed.”¹¹ The Programmatic EIS goes on to state that biological resources may, of course, also be irreversibly or irretrievably committed before an EIS, in contravention of NEPA.¹²

My argument is that this is an insufficient way of looking at irreversibility. Monetary investments *are* irreversible to some extent, just because of the politics of large expenditures of money. The fiction that large private expenditures are solely the business of the private investors is the exact reason why economic investments should be a legitimate source of inquiry in reviewing programmatic decisions under NEPA.

This might seem an odd line of inquiry to take under NEPA, or for a reviewing court to undertake, since courts don’t typically engage in economic analysis in reviewing agency decisions. But how is that different from engaging in the ecological analysis required of courts under NEPA? Are judges any less expert in economic matters than they are in ecological ones?

The whole point of NEPA is to be proactive. NEPA requires that agencies evaluate the cumulative impact of “reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions,”¹³ and to include “similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis

10. U.S. DEP’T OF INTERIOR, BUREAU OF LAND MGMT., OVERLAND PASS NATURAL GAS LIQUIDS PIPELINE FINAL ENVIRONMENTAL IMPACT STATEMENT 7-1 (2007) (emphasis added).

11. U.S. DEP’T OF INTERIOR, BUREAU OF OCEAN ENERGY MGMT., OUTER CONTINENTAL SHELF OIL AND GAS LEASING PROGRAM: 2012-2017: FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT 7-1 (2012), https://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/Five_Year_Program/2012-2017_Five_Year_Program/07_Irreversible.pdf.

12. *Id.* at 7-2.

13. 42 C.F.R. § 1508.7 (2012); *Summary of the National Environmental Policy Act*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-national-environmental-policy-act> (last visited Apr. 2, 2017) (“NEPA’s basic policy is to assure that all branches of government give proper consideration to the environment prior to undertaking any major federal action that significantly affects the environment.”).

for evaluating their environmental consequences together”¹⁴ So why would reviewing agencies not consider the reasonably foreseeable private capital decisions made by private investors? Certainly, the behavior of the fossil fuel industries is predictable. Making some fairly obvious suppositions should not be outside of the realm of inquiry for agencies, nor for courts.

Legal rules and institutions seem to embody an idea that capital investment is an unalloyed good. Government policy should take great pains to avoid interfering with the long-term operation of capital, lest it discourage investment and unwittingly tamp down economic activity and growth. If there are any latent or future negative externalities associated with the operation of that capital, that is a public law matter; we leave that to the business of environmental law, tort law, or whatever body of law it is that might address the externality. One thing that agencies can and should do is undertake a more searching inquiry into some fairly predictable actions that might be undertaken by private investors in light of their land use management decisions, even programmatic ones. To be sure, this would not initially be environmental law “without courts.” But if the point of this conference is to highlight some agency practices that might thrive without judicial supervision, then this is one conceptual step that seems worth contemplating.

14. *Id.* § 1508.25(a)(3).