The Andrews Kurth

Moot Court National Championship

January 22-25, 2014

2014 Competition Problem

***FRIENDS OF NEWTONIAN*, Petitioner**

v.

***UNITED STATES DEPARTMENT OF DEFENSE and MAINSTAY RESOURCES, INC.*, Respondents**

IN THE
SUPREME COURT
OF THE UNITED STATES

No. C13-0124-1

OCTOBER TERM 2013

***FRIENDS OF NEWTONIAN*, Petitioner**

v.

***UNITED STATES DEPARTMENT OF DEFENSE and MAINSTAY RESOURCES, INC.*, Respondents**

ORDER GRANTING WRIT OF CERTIORARI

PER CURIAM:

The petition for a writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit is hereby granted.

IT IS ORDERED that the above-captioned matter be set down for argument in the 2013 term of this Court, said argument to be limited to the following issues:

I. Is there a final federal action that is ripe for judicial review in this matter?

II. Does the United States Department of Defense's lease of and participating royalty interest in the mineral rights of a decommissioned military base constitute a major federal action requiring an Environmental Impact Statement pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. §4321 *et seq.*?

UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

FRIENDS OF NEWTONIAN Petitioner	
	Case No. 12-1314
v.	
UNITED STATES DEPARTMENT OF DEFENSE and MAINSTAY RESOURCES, INC. Respondents	

Decided October 15, 2013

Before Judges Gray, McBride, and Thompson.

Gray, Circuit Judge, for the Court.

Petitioner Friends of Newtonian files this interlocutory appeal from the denial of a preliminary injunction entered by the United States District Court for the Western District of New Tejas in favor of respondents the United States Department of Defense and Mainstay Resources, Inc. For the reasons stated below, we affirm.

I. BACKGROUND FACTS

A. Fort Watt and the Department of Defense

The Defense Base Realignment and Closure Act of 1990 allows the United States military to reorganize its installation infrastructure to more efficiently and effectively support its forces and increase operational readiness. In 2001, the Department of Defense (the "DoD") considered closing and/or realigning a number of military installations throughout the United

States. Among the installations considered was Fort Watt, a military base located in New Tejas that originally housed the 2014th Airborne Division.[1]

The Defense Base Closure and Realignment Commission ("Commission"), based on recommendations from the DoD, conducted a thorough review regarding the continued viability of Fort Watt. Among the criteria it considered, the Commission gave priority consideration to Fort Watt's potential military value, including: (1) future mission capabilities and the impact on fighting, training, and readiness; (2) the availability and condition of suitable alternate land and facilities for military operations; (3) mobilization, surge and future force requirements at existing and potential alternate military installations; and (4) costs of operations. The Commission also considered the human impact and the possible economic and environmental effects that closing Fort Watt could have on the surrounding community, on threatened or endangered species in the area, and on air and water quality. As part of the determination process, the Commission conducted an independent analysis of the base and obtained input from the public regarding the Commission's plans for Fort Watt.

Fort Watt was no longer useful as a military base, had become a drain on government resources, and was becoming more and more difficult to maintain. The original military purpose of Fort Watt was a hold-over from the Cold War era.[2] The Commission determined that by 2001 all missions and critical personnel from Fort Watt had been relocated to other facilities, and the remaining military, civilian, and contractor positions at the base were being eliminated. Fort Watt was running at a deficit and costing the DoD more than $750,000.00 a month to maintain. Fort Watt's relatively remote location in the northern part of New Tejas

[1] Many military installations, although utilized by the DoD, are located in whole or in part on public land "withdrawn for military purposes" from property owned by the Bureau of Land Management. Fort Watt, however, consisted entirely of "fee-owned land" owned outright by the DoD.

[2] Fort Watt was originally used as a command post for the classified Vault-Tec Nuclear Missile Detection, Deflection, and Administration Project.

made it prohibitively expensive to keep the base properly supplied per DoD regulations. The communities and business that had sprung up around the base when it was first established had begun to dwindle as personnel were transferred from Fort Watt over the years. After careful consideration, the Commission determined that Fort Watt should be closed and the land sold.

As part of the decision process to sell Fort Watt, the Commission completed an Environmental Impact Statement ("EIS") as required by the National Environmental Policy Act of 1969 ("NEPA"). NEPA requires a federal agency to consider environmental values and factors in any decision-making process for major federal actions and projects undertaken by the agency. The federal agency must examine potential environmental impacts of its proposed actions and explore reasonable alternatives to those actions.

The Commission moved through each of the NEPA steps with little difficulty or opposition. It completed its site visit to Fort Watt in early 2002. The public was notified about the possible closure and subsequent sale of the Fort Watt land. The Commission mandated a public review period for comments – although given the sparse population in the area around Fort Watt, the Commission received little input from the locals regarding its proposed plans. The record below reflects that there were a few public comments and concerns regarding the proposed decommissioning and sale expressed by a local New Tejas environmental group, in one newspaper story, and in a May 2002 op-ed letter in the local paper.[3]

[3] We consider the op-ed letter of considerable interest as it was authored by Pedro Tierramante, Sr., a former Captain stationed at Fort Watt prior to his retirement from the Army: "With another round of base closings on the horizon, it is important for us to prevent such an event from happening to Fort Watt. Those of us who have lived on or near Fort Watt – as my family did for the eight memorable years I was posted to the base and now my wife and I in our golden years – know how important it is to keep Fort Watt open. The military brings new people into our community and helps support our local economy. Without Fort Watt, the tragic loss from our area of businesses, jobs and families will continue until our community is nothing more than a ghost town. We must stand behind our military and never lessen the importance of our troops to this area. I therefore issue a call to arms in hopes of preventing our region from becoming a wasteland of oil derricks and abandoned homes. Write or call your congressmen and senators with one message: Leave Fort Watt Alone."

The Commission prepared its draft EIS based on both agency expertise and public comments. The draft EIS contained a full description of the environment and surrounding communities around Fort Watt that could be affected by the sale as well as a reasonable range of alternate uses to which the land might be put. It analyzed the positive and negative environmental effects which might stem from decommissioning the installation and selling the Fort Watt property to private entities. The EIS also detailed possible future uses for the land – such as residential communities, multi-family housing, business parks or other commercial uses – and how each of the potential alternate uses could impact the areas surrounding Fort Watt.

One potential option mentioned in the EIS was oil recovery and extraction, which the EIS stated could prove to be extremely lucrative given Fort Watt's location straddling a portion of the Albertus Magnus Shale formation ("Magnus Shale"). The EIS addressed in detail the potential impacts of conventional oil and gas development on the Fort Watt area. It also briefly discussed unconventional oil and gas operations, including hydraulic fracturing or "fracking." The EIS included a definition of fracking and explained that, although not economically feasible at the time, it could be an option in the future depending on technological advances.[4]

The Commission received public comments on the draft EIS and subsequently prepared a final EIS based on those comments. The Commission then issued a Record of

[4] At the time the EIS was completed in 2002, the shale oil in the Magnus Shale was economically inaccessible using conventional drilling methods. While fracking has been around in some form for several decades, it did not become a viable means of shale oil and gas production until the late 2000s. Modern fracking techniques involve drilling vertically into the rock formation for several thousand feet and then drilling horizontal wells branching out from the vertical well. To retrieve the oil or natural gas, huge quantities of water mixed with sand and chemicals are then injected at high pressure and volume into the rock, which creates fissures through which the trapped oil and gas may move more freely towards the well. Water typically accounts for about 90 percent of the fracturing mixture; sand accounts for about nine and one half percent; and chemicals account for the remaining one half of one percent of the mixture.

Decision, which was the final step needed before submitting the recommendation to the President and to Congress for approval.

B. Mainstay Resources, Inc.

Mainstay Resources, Inc. ("MRI") is one of the largest independent oil and natural gas exploration and production companies in the United States. It owns or leases more than 2,000,000 acres of land throughout the United States devoted to oil and natural gas production.

By 2000, MRI was leasing approximately 50 acres of land in the south of New Tejas. MRI had expressed keen interest in expanding its presence in New Tejas given the astronomical potential profits the oil and gas industry anticipated could be made from the Magnus Shale, the low cost of doing business in the state, the business-friendly tax structure, and the state's relatively lenient environmental regulations. But MRI's repeated efforts to expand into northern New Tejas in the early 2000s had not succeeded.

New Tejas' governor at the time, Robert Dohan, had eagerly lobbied for MRI to expand its presence in New Tejas, for both political and personal reasons. Dohan was an outspoken proponent of "Bigger Business, Better Jobs." He frequently stated in interviews and speeches that "new companies mean new jobs, new money and new consumers for New Tejas. You do right by New Tejas, and we'll do right by you." Dohan was a vocal proponent of the possibility of millions of dollars in oil and natural gas revenue flowing into New Tejas' economy should MRI increase its business presence in the state.[5]

[5] On a personal level, Dohan and the CEO of MRI, David Lytle, were close friends who attended college together and had remained social and golfing buddies for more than 20 years. Correspondence between Dohan and Lytle showed that Dohan routinely apprised Lytle of the status of the NEPA review process. Dohan passed along information provided to him by the Commission and by local politicians living near Fort Watt. Dohan also provided Lytle with some behind-the-scenes feedback from New Tejas' congressional representatives indicating how Congress might vote on the proposed sale once the Commission completed its report.

C. Fort Watt is Sold and Construction Begins

The Commission ultimately concluded that Fort Watt had become redundant and was no longer needed for national security. It provided a report to the President and to Congress recommending that Fort Watt be decommissioned and the land sold to help defray the DoD's costs. The Commission's recommendations were accepted, and the land and facilities of Fort Watt were approved for sale in November 2002.

After the Commission's recommendation to sell Fort Watt was approved, the DoD conducted all necessary remediation requirements for the property. This included, among other things, extensive onsite remedial actions and disposal and clean-up of any hazardous substances that were present at the site.

All 2,200 acres of Fort Watt were eventually sold off in pieces during 2003, with the DoD retaining the mineral rights to the entire property. MRI immediately purchased the surface rights to 750 acres of land encompassing what was previously the northwestern quadrant of Fort Watt.[6] The land MRI bought consists of a shallow valley approximately one mile long and part of the surrounding foothills. The New Tejas River flows along the western edge of the valley, travels west for another 30 miles and then crosses over the border where New Tejas and Newtonian meet. The two states border each other for 159 miles along New Tejas' northwestern edge and Newtonian's southeastern edge.

The DoD, on behalf of the United States, negotiated a lease with MRI involving the mineral interests for the 750 acres. The lease was executed on June 1, 2003. The terms allow MRI to lease the mineral rights for a period of 20 years and as long thereafter as production continued in paying quantities. Pursuant to the lease, the DoD retained a participating interest

[6] The remaining portions of the property were sold at fair market value to various interested buyers, but the only buyer of concern in this instance is MRI.

in the mineral rights and would receive a monthly royalty equal to one-fourth (1/4) of the gross proceeds of the sale of all oil and/or natural gas produced from the 750 acres. The lease also entitled the DoD to receive delay rental payments from MRI at the rate of $25.00 per acre, annually, beginning on the date of the lease and continuing thereafter until a well actually yielding royalties from oil and/or natural gas came into production on the property. The lease also allowed the DoD to conduct periodic site visits to review MRI's operations and gave the DoD limited veto power over the individuals or entities to whom MRI could sell the oil and/or natural gas, based on national security concerns.[7]

[7] Relevant portions of the lease are excerpted below:

> 3. **Royalties**. As royalty, Lessee covenants and agrees to pay monthly to Lessor one-quarter (1/4) of the gross proceeds received by Lessee from the sale of all oil, gas, condensate, and/or liquid hydrocarbons produced and saved by Lessee from the Leased Premises whether sold to an affiliate of Lessee or in an arms-length transaction to an unaffiliated third party.
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> (d) **Due Dates of Royalty**. All royalties that may become due hereunder shall commence to be paid on the well(s) completed on the Leased Premises within sixty (60) days after the first day of the month following the month during which any well commences production. Thereafter, all royalties shall be paid to Lessor on or before the last day of the month following the month of production.
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> (e) **Duty to Market**. Lessee shall place oil and gas produced from the Leased Premises in marketable condition and shall market same as agent for Lessor, at no cost to Lessor.
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> (g) **Veto Powers**. Lessor retains the right to veto the sale of any oil or gas produced from the Leased Premises to any unaffiliated third party should such sale be deemed a threat to the national security of the United States of America. Lessee shall provide the identity of any unaffiliated third party to Lessor in writing not less than thirty (30) days prior to any contemplated sale. In the event Lessor chooses to exercise its veto rights, Lessor must provide to Lessee in writing no later than twenty (20) days after being notified of the identity of the unaffiliated third party an explanation of Lessor's decision that includes a detailed description of the national security concern forming the basis for Lessor's decision.
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> 11. **Inspection**. At least once each quarter, Lessor may inspect all operations and facilities at the Leased Premises with the Lessee to determine compliance with the provisions of the Lease in connection with Lessee's operations at, and production from, the Leased Premises.
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> 14. **Compliance with Laws**. Lessee shall comply with all applicable federal, state, and local laws and regulations, including without limitation, those governing land use, conservation, pollution control, endangered or threatened species preservation, and irrigation. Moreover, Lessee covenants to comply with all applicable federal and state laws and regulations regarding safety, protection of the Leased Premises, protection of property, protection of wildlife (including, without limitation, endangered species), and protection of human life and health.

MRI began preliminary construction at the property in the months after the lease was signed. Two drilling sites were contemplated on the 750 acres, one at the southwest foot of the valley and one along the northern edge of the valley near the foothills. MRI named the drilling sites Watt 1 and Watt 2, respectively. During this same time period, MRI applied for and received all the necessary state and federal permits and regulatory approvals that it required to drill Watt 1 and Watt 2 – helped in no small part by the longstanding friendship between Dohan and Lytle. Dohan was openly supportive that MRI had finally succeeded in expanding its presence in New Tejas, and he did everything possible to expedite the permitting process for MRI. While the construction was underway, MRI timely paid the required delay rental payments to the DoD as outlined in the lease.

MRI ultimately decided to delay drilling for a number of years based on a new focus in the company on modern fracking procedures. During the past six years, MRI has invested heavily in such things as massive hydraulic fracturing technology, drilling equipment to complete horizontal wells, employee re-training, and advanced earth imaging equipment. MRI is in the process of reworking most of its wells to accommodate new horizontal drilling procedures.

With the DoD's blessing in 2010, MRI reconfigured Watt 1 and Watt 2 for fracking purposes. MRI sunk the vertical well at Watt 1 to 8,200 feet and branched out horizontally approximately 3,750 feet. The well at Watt 2 extended 12,175 feet deep and approximately 5,400 feet horizontally. MRI received updated drilling permits and was set to begin actively fracking Watt 1 and Watt 2 on February 1, 2011.

Before drilling could commence, this lawsuit ensued.

D. Friends of Newtonian File Suit

In November 2010, Pedro "Peter" Tierramante, Jr. was elected governor of Newtonian by a landslide. He was an incredibly popular "man of the people" candidate.[8] Tierramante campaigned heavily on an Earth-friendly platform that included environmental protection as one of the key components. Friends of Newtonian ("FON") endorsed Tierramante, contributing generously to his campaign.[9]

FON's stated purpose is to "build widespread citizen understanding and advocacy for policies and actions designed to manage and protect Newtonian's and the United States' environmental health." It has struggled for years to raise awareness of environmental issues in Newtonian. FON has sponsored informational commercials on television and radio, hosted benefits with big-name celebrity emcees like Johnny Moviestar and Jane Rocker, distributed bumper stickers by the hundreds, and filed dozens of lawsuits against entities it considers are threats to the environment.

Shortly after Tierramante took office in January 2011, FON filed suit for declaratory and injunctive relief under NEPA, 42 U.S.C. §4321 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §§701-706 ("APA") to enjoin the DoD and MRI from fracking at Watt 1 and Watt 2.[10] According to FON's lawsuit, the New Tejas river plays a vital role in recharging several reservoirs and fresh water aquifers in Newtonian. FON expressed concerns that fracking at Watt 1 and Watt 2 could irreparably damage the New Tejas River if the chemicals used in the fracking operations were to infiltrate the river.

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[8] It did not hurt his campaign in the least when the citizens of Newtonian learned that his opponent had cheated on his wife of 37 years with a political intern from the local college.

[9] Although he successfully downplayed the close connection during the campaign, Tierramante was instrumental in founding FON back in 1998. He is still listed as director emeritus on FON's website and donates his time and money to FON when he can.

[10] The DoD's pleadings in the district court alluded to the fact that Tierramante was the driving force behind FON's lawsuit, but no concrete evidence of such involvement was ever presented to the district court.

FON sought a preliminary injunction to prevent the fracking. FON argued that the DoD engaged in a "major federal action significantly affecting the quality of the human environment" when it signed the lease with MRI, kept a managing interest in the mineral rights, and sanctioned fracking at Watt 1 and Watt 2. These actions, FON argued in its brief, required the DoD to conduct a new EIS regarding the environmental effects of fracking, including how fracking at Watt 1 and Watt 2 would affect Newtonian. The DoD contended in its response that its only significant action was accepting royalty payments for the mineral rights, which did not amount to a major federal action as contemplated by NEPA nor did such an action significantly affect the quality of the human environment.

The district court denied FON's motion for preliminary injunction. FON appealed the district court's decision.

II. DISCUSSION

While we generally lack jurisdiction over interlocutory appeals, we do have jurisdiction over interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. §1292(a)(1). A party seeking a preliminary injunction must demonstrate "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008).

Our review of a district court's grant or denial of a preliminary injunction is "very deferential." *Nat'l Wildlife Fed'n v. National Marine Fisheries Serv.*, 422 F.3d 782, 793-94 (9th Cir. 2005); *Charlesbank Equity Fund II v. Blinds to Go, Inc.*, 370 F.3d 151, 158 (1st Cir. 2004). We will not reverse the district court unless it abused its discretion or based its decision on an erroneous legal standard or clearly erroneous finding of fact. *Stormans, Inc. v. Selecky*, 586 F.3d

1109, 1119 (9th Cir. 2009); *Waste Mgmt., Inc. v. Nashville & Davidson County*, 130 F.3d 731, 735 (6th Cir. 1997).

A. Matter Is Ripe for Adjudication

As a threshold matter, we must first determine whether FON has stated a claim that is ripe for adjudication.

Ripeness is a judicial doctrine designed to prevent the courts from becoming entangled in "abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way" by the parties to the case. *Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726, 732-33, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). "Ripeness 'requir[es] us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Texas v. United States*, 523 U.S. 296, 300-01, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998) (quoting *Abbott Laboratories*, 387 U.S. at 149); *see also Nat'l Park Hospitality Assn. v. Dept. of Interior*, 538 U.S. 803, 808, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003). Both aspects of the inquiry involve the exercise of judgment, not black-letter rule.

First, the issues in this matter are fit for judicial decision. NEPA does not authorize a private right of action, but judicial review is granted through the Administrative Procedure Act ("APA"). 5 U.S.C. §§701–706. To bring suit under the APA, there must be "final agency action for which there is no other adequate remedy in a court." *Id.* §704. Accordingly, a party must identify some final agency action that adversely affects them. In the NEPA context, the "final agency action" required by the APA must also be a "major federal action" under NEPA. *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1295-96 (D.C. Cir. 2007).

In determining what constitutes final agency action, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992). There is no doubt that the DoD reached a final agency action under NEPA that has the potential to adversely affect FON. The Commission completed a Record of Decision and recommended that the President and Congress approve the sale of Fort Watt. The DoD subsequently sold the property with full approval from the federal government. Both of these are definitively "final" actions under the APA subject to judicial review.

Numerous judicial decisions have established that allegations of injury to important environmental interests may constitute substantial harm deserving of judicial intervention. *See, e.g., United States v. SCRAP*, 412 U.S. 669, 686, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *Cady v. Morton*, 527 F.2d 786 (8th Cir. 1975); *Citizens Comm. for Hudson Valley v. Volpe*, 425 F.2d 97, 105 (2nd Cir. 1970). FON clearly indicated in its motion the importance of the New Tejas waterway to the people of Newtonian and has alleged potential injury to important environmental interests associated with the New Tejas River. The hardship that would result if judicial review were postponed or withheld is therefore sufficient to render FON's claims ripe for review.

In the view of the Court, judicial review of the claims asserted is warranted.

B. The National Environmental Policy Act

We now turn to whether FON's request for injunctive relief pursuant to NEPA has merit.

NEPA was established to ensure that environmental factors must be considered equally when compared with other factors in the decision-making process for major federal actions and projects undertaken by federal agencies: "The purposes of [NEPA] are: To declare national policy which will encourage productive and enjoyable harmony between man and his

environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man… ." Preamble, 42 U.S.C. §4321. At its core, NEPA requires federal agencies to pause before committing resources to a project so as to consider the likely environmental impacts of and potential alternatives to a preferred course of action and to keep the public informed of the environmental concerns that were considered in the agency's decision-making. *U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756-57, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989); *Baltimore Gas v. Natural Res. Def. Council*, 462 U.S. 87, 97, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983).

NEPA generally requires a federal agency to prepare an EIS according to certain procedural requirements for any major federal action in which the agency is involved that significantly affects the quality of the human environment. 42 U.S.C. §4332(2)(C). The military has its own NEPA regulations as well. *See ex.*, 32 C.F.R. §651 *et seq.* (Army). The EIS must assess the predicted impacts of the proposed action on all aspects of the environment, including indirect and cumulative impacts, and must consider possible alternatives to the proposed major federal action. 42 U.S.C. §4332(2)(C). NEPA does not mandate that the federal agencies achieve any particular substantive environmental results, only that they consider the environmental implications of their actions. *Public Citizen*, 541 U.S. at 756, 124 S.Ct. 2204 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-51, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989); *see also, Marsh*, 490 U.S. at 371, 109 S.Ct. 1851.

NEPA only applies to major federal actions, such as those that involve federal funding, work performed by the federal government or a similar level of federal involvement. 40 C.F.R. §1508.18(a). It does not apply to purely private or state actions. *Atlanta Coalition on Transp. Crisis, Inc. v. Atlanta Reg'l Comm'n*, 599 F.2d 1333, 1344 (5th Cir. 1979).

FON argued in the district court that the mineral rights lease between the DoD and MRI was a "final agency action" that created a *de facto* partnership between the parties – one in which the DoD had final approval – thereby transforming MRI's fracking activity into a "major federal action." FON based this argument on the line of reasoning presented in a number of cases in which non-federal parties were enjoined, pending completion of an EIS, where those non-federal entities had entered into a partnership or joint venture with a federal agency because they had received federal funding or the federal agency participated with the non-federal entity to complete the project. *See, e.g.*, *Sugarloaf Citizens Ass'n v. Federal Energy Regulatory Comm'n*, 959 F.2d 508, 513–14 (4th Cir. 1992) ("a non-federal project is considered a 'federal action' if [the project] cannot begin or continue without prior approval by a federal agency and the agency possesses authority to exercise discretion over the outcome.") (internal quotation marks and citations omitted); *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323, 1329 (4th Cir.), *cert. denied*, 409 U.S. 1000, 93 S.Ct. 312, 34 L.Ed.2d 261 (1972); *Proetta v. Dent*, 484 F.2d 1146, 1148 (2nd Cir. 1973); *see also*, *Maryland Conservation Council v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986) (a non-federal project may be considered a major federal action if the federal agency must provide prior approval before the project can begin or can continue).

However, we find the reasoning of the First and Ninth Circuits more persuasive and in line with current Fourteenth Circuit opinions on this issue. *See Scarborough Citizens Protecting Resources v. U.S. Fish and Wildlife Service*, 674 F.3d 97, 103 (1st Cir. 2012) (court held that no "partnership" existed between federal and non-federal entities establishing a major federal action because the federal government neither funded nor approved the grant of any easements and the power to withhold any subsequent funding was discretionary); *Mayaguezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 301-02 (1st Cir. 1999) (no major federal action found when the federal government's approval of the private party's action was not a prerequisite for

the private party to proceed with the project); *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1397-98 (9th Cir. 1992) (court held that no major federal action existed in part because Montana did not receive federal funds to hunt and kill bison nor had Montana received goods or services from a federal agency establishing a "partnership" with such an agency).

A partnership such as FON describes may be created in instances where the federal government funds a joint initiative or where federal and private components of a major project are interdependent. In this instance, however, the DoD did not provide any funds to MRI to purchase the Fort Watt property (to the contrary, MRI paid the DoD) or to finance the new construction or any of the fracking activity. None of the construction or fracking has been or apparently will be performed by any federal employees. Finally, any control the DoD may have regarding optional site visits or vetoing the sale of the oil or natural gas is discretionary. As such, the district court could properly conclude that the fracking is a purely private matter not subject to NEPA. FON has therefore failed to demonstrate that it is likely to succeed on the merits.

Finally, based on the facts articulated by the parties in their briefing to the district court (and repeated in a condensed form above), we do not find that FON satisfied the last element necessary for injunctive relief, namely that an injunction is in the public interest. *Winter*, 555 U.S. at 129, S.Ct. 365, 374. The citizens of New Tejas will arguably benefit greatly if fracking at Watt 1 and Watt 2 moves forward, from increased tax revenue, significant job creation and an influx of symbiotic businesses to the state, to name just a few. We do not find that FON's or Newtonian's interests should outweigh those of the people of New Tejas at this point.

Accordingly, the district court did not err in denying FON the injunctive relief sought.

III. CONCLUSION

FON's case is ripe for adjudication. However, FON has failed to show that it is likely to

succeed on the merits of its NEPA claim or that the public interests tip in its favor. Without these two elements, there is no justification for a preliminary injunction. We affirm the district court's denial of that relief.

AFFIRMED.

McBride, Circuit Judge, dissenting:

For the reasons discussed below, I respectfully dissent.

I. DISCUSSION

I believe the majority errs in deciding that this matter is ripe for adjudication because the majority bases its decision on the wrong federal action. Further, I conclude that the district court abused its discretion by denying a preliminary injunction to FON. The facts presented to the district court were sufficient to show that fracking at Watt 1 and Watt 2 would amount to a "major federal action" subject to the requirements of NEPA.

A. Ripeness

First, I disagree that the case is ripe for adjudication. The majority relies on language in the APA and NEPA when it contends that FON must identify a final, major federal agency action which adversely affects FON in order to bring its NEPA suit. 5 U.S.C. §704; 42 U.S.C. §4332(2)(C); *Karst*, 475 F.3d at 1297-98. I concur with the majority's interpretation of the statutes.

However, the majority identifies the *wrong* final federal action when it concludes that FON's case was ripe for adjudication. The final action on which the court should base its ripeness determination is the executed lease between the DoD and FON, not the Record of Decision from the Commission or the sale of Fort Watt. In its lawsuit, FON alleges concerns about potential contamination that may occur to the New Tejas River if fracking chemicals infiltrate the water. The action that adversely affects FON is therefore the mineral rights lease which allowed MRI to build and frack Watt 1 and Watt 2.

Since the majority subsequently concludes that executing the lease did not constitute a major federal action regarding Watt 1 and Watt 2, there is no final, federal action under 5 U.S.C. §704 and 42 U.S.C. §4332(2)(C) about which FON may complain. While FON may very well have a state action against MRI, that was not the controversy presented to the district court.

Judicial review under NEPA is therefore inappropriate.

B. The National Environmental Policy Act

Second, I disagree with the majority's determination that preliminary injunctive relief was not appropriate.

The majority concludes, relying on the reasoning from the First and Ninth Circuits, that there is no major federal action here because the terms of the lease were insufficient to create a partnership between the DoD and MRI and because the facts do not show that the DoD and MRI were interdependent on one another to complete the project. *Ante*, at 16-17.

We would be better served to adopt the arguments set forth by the Second and Fourth Circuits and on which FON relies. *Proetta*, 484 F.2d at 1148; *Volpe*, 458 F.2d at 1329; *Gilchrist*, 808 F.2d at 1042. The DoD retained the right to oversee MRI's operations during its periodic site visits. The DoD also has the power to control to whom MRI may sell the output from Watt 1 and Watt 2. The DoD thus has the ultimate authority to allow the project to continue or not.

Although unlikely, if the DoD were to disapprove of every potential customer proposed by MRI, the project would grind to a halt. These special terms of the lease inextricably connected the DoD and MRI and transformed fracking at Watt 1 and Watt 2 into a major federal action. The DoD must therefore comply with NEPA requirements and complete an EIS before the project may proceed. 42 U.S.C. §4332(2)(C). Given the course of the New Tejas River through the land being fracked, the EIS needs to fully explore the potential environmental impacts that fracking may have on New Tejas *and* Newtonian.

FON has thus demonstrated probable success on the merits of its claim that the DoD violated NEPA by failing to prepare an EIS discussing the potential environmental effects that fracking may have on Newtonian. Assuming the case is ripe for adjudication, the district court should be instructed to enter a preliminary injunction until the DoD completes an appropriate EIS.

II. CONCLUSION

Since this matter is not ripe for adjudication, it should be dismissed. Or, if the case is deemed ripe for adjudication, FON should be granted injunctive relief since it has a probable chance of success on the merits of its argument.